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6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2019-0553; FRL-10005-49-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; 2019 Amendments to West Virginia's Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the State of West Virginia. This revision updates the effective date of the national ambient air quality standards (NAAQS) and the associated monitoring reference and equivalent methods for those NAAQS which West Virginia incorporates into its State regulations and the SIP. EPA is approving this revision to the West Virginia SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2019-0553. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not

placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Joseph Schulingkamp, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2021. Mr. Schulingkamp can also be reached via electronic mail at schulingkamp.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On December 23, 2019 (84 FR 64243), EPA published a notice of proposed rulemaking (NPRM) for the State of West Virginia. In the NPRM, EPA proposed approval of a formal SIP revision submitted on May 6, 2019. The formal SIP revision updates the version of the NAAQS and the associated monitoring reference and equivalent methods for those NAAQS that West Virginia incorporates by reference into the State's legislative rules and the SIP.

II. Summary of SIP Revision and EPA Analysis

This SIP revision was submitted by the West Virginia Department of Environmental Protection (WVDEP) in order to update the State's incorporation by reference of the primary and secondary NAAQS and the ambient air monitoring reference and equivalent methods, found in 40 CFR parts 50 and 53, respectively. Currently, West Virginia's EPA-approved SIP includes the older version of West Virginia regulation 45CSR8 which incorporates by reference 40 CFR parts 50

and 53 as these Federal regulations existed on June 1, 2017. West Virginia has since adopted at the State level a revision to 45CSR8 which now incorporates by reference the Federal regulations at 40 CFR parts 50 and 53 as these regulations existed on June 1, 2018. Following EPA approval of this SIP revision, the EPA-approved West Virginia SIP will reflect that 40 CFR parts 50 and 53, as they existed on June 1, 2018, are part of the EPA-approved West Virginia SIP. EPA notes that since June 1, 2017, EPA reviewed the primary standards for oxides of nitrogen (NO_X), as required by CAA section 109(d), but chose to retain the 1-hour and annual nitrogen dioxide (NO₂) standards without revision. *See* 83 FR 17226. Thus, EPA has not made any changes to the ambient air quality standards, ambient air monitoring reference methods, or any ambient air monitoring equivalent methods in 40 CFR parts 50 and 53 since West Virginia last incorporated by reference into 45CSR8 the NAAQS and monitoring methods in 40 CFR parts 50 and 53 as they existed on June 1, 2017. Other specific requirements and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here.

III. Response to Comments

EPA received five sets of anonymous comments in response to the NPRM. Three of the commenters supported West Virginia's updating of its incorporation by reference of the NAAQS. EPA thanks these commenters but will otherwise only respond to the question contained in one of these comments. Two of the comments were difficult to interpret but did not appear to support the rulemaking. EPA's best effort to interpret and respond to these two comments is represented in this section of this rulemaking action.

Comment 1: The first commenter was generally supportive of the action but also asked when the revision of the effective date in this rulemaking would take place.

Response 1: The provisions of West Virginia’s amended regulation, 45CSR8, became effective at the State level on June 1, 2019. EPA’s approval of this revision into the SIP will become effective 30 days after this final rule is published in the Federal Register. For the specific effective date of EPA’s approval, see the **DATES** section of this document.

Comment 2: One commenter asked why EPA was requiring rules about the NAAQS and asked why EPA requires the NAAQS. The commenter suggested that EPA stop requiring states like West Virginia to adopt rules like this and allow West Virginia to remove these rules. The commenter also generally expressed opinions irrelevant to this rulemaking.

Response 2: The Clean Air Act is a Federal law (statute) adopted by Congress and approved by the President. Section 109 of the CAA *requires* that the Administrator adopt NAAQS for certain air pollutants which, in the judgment of the Administrator, are necessary to protect the public health and welfare, with an adequate margin of safety. CAA section 109(a), (b); 42 U.S.C. 7409(a), (b). While the Administrator has some discretion in setting the safe level for these pollutants in the ambient air, the CAA *requires* that the Administrator set and review these levels every five years. CAA section 109; 42 U.S.C. 7409. Section 107 of the CAA gives states the primary responsibility for assuring air quality within each state by submitting an implementation plan for the state (a “SIP”) that specifies how the NAAQS will be achieved and maintained in the state. 42 U.S.C. 7407. Thus, Federal law requires NAAQS in order to protect public health and the environment, and the Administrator must implement this law. Also, although the CAA allows states some discretion in how to attain and maintain compliance with the ambient air quality standards, states are required by section 110(a) of the CAA to submit implementation plans for achieving and maintaining the ambient air quality standards. 42 U.S.C. 7410(a).

Therefore, it is a Federal law, the CAA, which requires NAAQS and not a requirement created by EPA.

EPA disagrees with the commenter with regards to the Agency “requiring rules about the NAAQS.” When a state incorporates into its state regulations a Federal rule or standard by reference to that Federal rule, the state is formally adopting the standard or rule into its own state rules without having to rewrite the entirety of the referenced rule or standard. States typically incorporate Federal rules by reference to maintain consistency between state and Federal requirements and for ease of adoption, implementation, and enforcement by the state. While nothing in the CAA or EPA’s regulations requires that West Virginia incorporate by reference the Federal regulations setting forth the NAAQS in order to adopt the NAAQS into the State’s SIP, West Virginia has made the choice to incorporate by reference the NAAQS into its SIP. West Virginia is exercising its discretion to adopt State regulations incorporating the NAAQS. Because West Virginia chooses to incorporate by reference the NAAQS, and because West Virginia incorporates by reference the NAAQS in its State regulations by referring to Federal regulations as published on a certain date, West Virginia periodically updates its State regulations to refer to the most up-to-date NAAQS in current Federal regulations.

The SIP revision in this rulemaking was submitted by West Virginia because the State’s rule, 45CSR8 – Ambient Air Quality Standards, incorporated the NAAQS and the ambient air monitoring reference and equivalent methods found in 40 CFR parts 50 and 53, respectively, as of June 1, 2017. Because West Virginia wants to ensure the most recent ambient air quality standards and air monitoring methods are enforceable at the State level, West Virginia routinely revises 45CSR8 to update the date by which the rule incorporates the Federal standards by reference. In this case, West Virginia revised the date of incorporation by reference from June 1,

2017 to June 1, 2018. By revising this date, West Virginia’s ambient air quality standards and air monitoring methods would match the NAAQS and air monitoring methods in 40 CFR parts 50 and 53 as of June 1, 2018.

Comment 3: Another commenter also asked why EPA was requiring rules about the NAAQS and suggested that these rules “are to be voluntary, in order to reduce undue administrative burdens on states to make the NAAQS optional.”

Response 3: As stated in response to comment 2 of this preamble, the purpose of the NAAQS is to protect human health and the environment, and Federal law (the CAA) requires that the Administrator establish the NAAQS and requires that states adopt plans to ensure the NAAQS are achieved and maintained. It is not within EPA’s authority to make the NAAQS voluntary. EPA also notes that West Virginia has voluntarily chosen to use the method of incorporation by reference to adopt the NAAQS into its State regulations and the SIP. West Virginia could have directly adopted the NAAQS standards into West Virginia’s regulations without using the incorporation by reference method. As stated previously, states often choose to incorporate the Federal regulations by reference in order to ensure the state’s regulations (and therefore the SIP) are identical to Federal standards for implementation and enforcement purposes.

IV. Final Action

EPA is approving the West Virginia SIP revision updating the date of incorporation by reference as a revision to the West Virginia SIP. The SIP revision was submitted on May 6, 2019.

V. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In

accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of 45CSR8, as effective on June 1, 2019. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.¹

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because

¹ 62 FR 27968 (May 22, 1997).

SIP approvals are exempted under Executive Order 12866.

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country

located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, approving the West Virginia SIP revision incorporation by reference the NAAQS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: February 7, 2020.

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR Part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart XX—West Virginia

2. In § 52.2520, the table in paragraph (c) entitled “EPA-Approved Regulations in the West Virginia SIP” is amended by revising entries under the heading “[45 CSR] Series 8 Ambient Air Quality Standards” to read as follows:

§ 52.2520 Identification of plan.

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(c) ***

EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP

State citation [Chapter 16-20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
*	*	*	*	*
[45 CSR] Series 8 Ambient Air Quality Standards				
Section 45-8-1	General	6/1/19	<u>Insert date of publication in the Federal Register,</u> <u>Insert Federal Register citation</u>	Docket #2019-0553. Filing and effective dates are revised; Sunset provision added.
Section 45-8-2	Definitions	6/1/19	<u>Insert date of publication in the Federal Register,</u> <u>Insert Federal Register citation</u>	Docket #2019-0553. Previous Approval 10/5/18
Section 45-8-3	Adoption of Standards	6/1/19	<u>Insert date of</u>	Docket #2019-

State citation [Chapter 16-20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
			<u>publication in the Federal Register, [Insert Federal Register citation]</u>	0553. Effective date is revised.
Section 45-8-4	Inconsistency Between Rules	6/1/19	<u>Insert date of publication in the Federal Register, [Insert Federal Register citation]</u>	Docket #2019- 0553. Previous Approval 10/5/18
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