



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2010-0696-201202(a); FRL-9636-8]

**Approval and Promulgation of Implementation Plans; Tennessee: Prevention of Significant Deterioration; Greenhouse Gases—
Automatic Rescission Provisions**

AGENCY: Environmental Protection Agency (EPA)

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve the State Implementation Plan (SIP) revision submitted by the State of Tennessee, through the Tennessee Department of Environmental Conservation (TDEC), Air Pollution Control Division, to EPA on January 11, 2012, for the purpose of amending the State's New Source Review (NSR) Prevention of Significant Deterioration (PSD) regulations as they relate to greenhouse gases (GHGs). Specifically, Tennessee amended its PSD regulations to add automatic rescission provisions. These provisions provide that in the event that the U.S. Court of Appeals for the D.C. Circuit or the U.S. Supreme Court issues an order which would render GHGs not subject to regulation under the Clean Air Act's PSD permitting program, then GHGs shall not be subject to regulation under Tennessee's PSD regulations as of the effective date of EPA's Federal Register notice of vacatur. Further, the provisions provide that in the event that there is a change to Federal law that supersedes regulation of GHGs under the Clean Air Act's PSD permitting program, then GHGs shall not be subject to regulation under Tennessee's PSD regulations as of the effective

date of the change in federal law. EPA took action to approve the GHG Tailoring Rule PSD provisions into the Tennessee SIP in a separate rulemaking. EPA is approving Tennessee's January 11, 2012, SIP revision because the Agency has made the determination that this SIP revision is not contrary to section 110 and part C of the Clean Air Act (CAA or Act) or EPA regulations regarding PSD permitting for GHGs.

DATES: This direct final rule is effective [Insert date 60 days after publication in the Federal Register] without further notice, unless EPA receives adverse comment by [Insert date 30 days after publication in the Federal Register]. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the Federal Register and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number, "EPA-R04-OAR-2010-0696," by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: benjamin.lynorae@epa.gov.
3. Fax: 404-562-9019.
4. Mail: "EPA-R04-OAR-2010-0696," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia

30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

Instructions: Direct your comments to Docket ID Number, "EPA-R04-OAR-2010-0696."

EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through www.regulations.gov or e-mail, information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., 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 either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the FOR FURTHER INFORMATION CONTACT section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9352. Ms. Bradley can be reached via electronic mail at bradley.twunjala@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents:

- I. Background**
- II. EPA's Analysis of the Approvability of Tennessee's Automatic Rescission Provisions**

III. Final Action

IV. Statutory and Executive Order Reviews

I. Background

On January 11, 2012, in response to EPA's GHG Tailoring Rule¹ and earlier GHG-related EPA rules,² TDEC submitted a final revision to EPA for approval into the Tennessee SIP to establish appropriate emission thresholds for determining which new or modified stationary sources become subject to Tennessee's PSD permitting requirements for GHG emissions.³ Specifically, Tennessee's January 11, 2012, SIP revision included changes to TDEC's Air Quality Regulations, Chapter 1200-03-09-.01(4) - *Construction and Operating Permits, Prevention of Significant Deterioration*, which became state-effective February 8, 2011. The changes to Chapter 1200-03-09-.01(4) addressed the thresholds for GHG permitting applicability. In a rulemaking separate from today's rulemaking, EPA took final action to approve TDEC's air quality regulations impacting the regulation of GHG under Tennessee's PSD program. Detailed background information and EPA's rationale for the proposed approval of Tennessee's GHG regulations under the State's PSD program are provided in EPA's November 5, 2010, Federal Register notice. *See* 75 FR 68265.

Also on January 11, 2012, TDEC submitted a SIP revision (the subject of today's

¹ "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

² "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009); "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010); and "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

³ Tennessee's submittal also amends the State's title V regulations at Chapter 1200-03-09-.02, to add rescission provisions, however, title V regulations are not part of a state's federally approved SIP. EPA is not taking action to approve Tennessee's title V regulations at this time.

rulemaking) to include changes to TDEC's air quality regulations at Chapter 1200-03-09-.01(4)(b)46(i) to add automatic rescission provisions related to EPA's GHG permitting requirements (state effective November 27, 2011). EPA's analysis of the approvability of Tennessee's automatic rescission provisions is provided in section II of this rulemaking.

II. EPA's Analysis of the Approvability of Tennessee's Automatic Rescission Provisions

Tennessee's January 11, 2012, SIP submittal adds automatic rescission provisions to the State's PSD regulations at Chapter 1200-03-09. The automatic rescission provisions at Chapter 1200-03-09-.01(4)(b)46(i) provide that in the event that the D.C. Circuit or the U.S. Supreme Court issues an order which would render GHG emissions not subject to regulation under the Clean Air Act's PSD permitting program, then GHGs shall not be subject to regulation under Tennessee's PSD regulations as of the effective date of the Federal Register notice of vacatur. Further, the provisions provide that in the event that there is a change to federal law that supersedes regulation of GHGs under the Clean Air Act's PSD permitting program, then GHGs shall not be subject to regulation under Tennessee's PSD regulations as of the effective date of the change in federal law.

EPA has determined that Tennessee's automatic rescission provisions are approvable. In assessing the approvability of these provisions, EPA considered two key factors: (1) whether the public will be given reasonable notice of any change to the SIP that occurs as a result of the automatic rescission provisions, and (2) whether any future change to the SIP that occurs as a result of the automatic rescission provisions would be consistent with EPA's interpretation of the effect of the triggering action on federal GHG permitting requirements. These criteria are

derived from the SIP revision procedures set forth in the CAA and federal regulations.

Regarding public notice, CAA section 110(l) provides that any revision to a SIP submitted by a State to EPA for approval “shall be adopted by such State after reasonable notice and public hearing.” In accordance with CAA section 110(l), TDEC followed applicable notice-and-comment procedures prior to adopting the automatic rescission provisions. Thus, the public is on notice that the automatic rescission provisions approved into Tennessee’s SIP by today’s action will enable the SIP to update automatically to reflect any order by the D.C. Circuit or the U.S. Supreme Court or any change in federal law that renders GHGs not subject to regulation under the Clean Air Act’s PSD permitting program. In addition, the automatic rescission provisions provide that no change to the SIP as a result of an order by the D.C. Circuit or the U.S. Supreme Court will occur until EPA publishes a Federal Register notice of vacatur. Likewise, a change to federal law that supersedes regulation of GHGs under the federal PSD program would not affect Tennessee’s SIP until the effective date of the federal law change. Thus, the timing and extent of any future SIP change resulting from Tennessee’s automatic rescission provisions will be clear to both the regulated community and the general public.

EPA’s consideration of whether any SIP change resulting from Tennessee’s automatic rescission provisions would be consistent with EPA’s interpretation of the effect of the triggering action on federal GHG permitting requirements is based on 40 CFR 51.105. Under 40 CFR 51.105, “[r]evisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.” 40 CFR 51.105. To be consistent with 40 CFR 51.105, any automatic SIP change resulting from a court order or federal law change must be consistent with EPA’s interpretation of the effect of such order or federal law change on GHG permitting requirements. EPA concludes that

Tennessee’s rescission provisions include sufficient safeguards to ensure that any resulting SIP change will be consistent with EPA’s interpretation of the effect of the triggering action on federal GHG permitting requirements. Specifically, any automatic SIP change resulting from a court order pursuant to Chapter 1200-03-09-.01(4)(b)46(i)(I) would occur only after EPA’s publication of a Federal Register notice of vacatur. Likewise, with respect to the revocation of GHG permitting requirements pursuant to Chapter 1200-03-09-.01(4)(b)46(i)(II) following “a change to federal law that supersedes regulation of GHGs” under the CAA, EPA reads this provision to mean that Tennessee will wait for and follow EPA’s interpretation as to the impact of any federal law change on federal GHG permitting requirements before changing its own application of Tennessee’s SIP. In the event of a court decision or federal law change that triggers (or likely triggers) application of Tennessee’s automatic rescission provisions, EPA intends to promptly describe the impact of the court decision or federal law change on the enforceability of its GHG permitting regulations.

III. Final Action

EPA is taking direct final action to approve Tennessee’s January 11, 2012, SIP revision to amend Tennessee’s SIP-approved regulations to adopt automatic rescission provisions at Chapter 1200-03-09-.01(4)(b)46(i). Specifically, the provisions establish that GHGs would not be subject to regulation under TDEC’s PSD program in the event that an order by the D.C. Circuit or the U.S. Supreme Court or a change in federal law renders GHGs not subject to regulation under the CAA’s PSD permitting program. EPA has made the determination that Tennessee’s January 11, 2012, SIP revision is approvable because it is not contrary to section 110 and part C of the CAA or EPA regulations regarding PSD permitting for GHGs.

EPA is publishing this rule without prior proposal because the Agency views this as a non-controversial amendment and anticipates no adverse comments. However, in the proposed rules section of this Federal Register publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comment be filed. This rule will be effective on [Insert date 60 days from date of publication] without further notice unless the Agency receives adverse comment by [Insert date 30 days from date of publication].

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. If no such comments are received, the public is advised this rule will be effective on [Insert date 60 days from date of publication] and no further action will be taken on the proposed rule.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act 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 Order 12866 (58 FR 51735, October 4, 1993);

- 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, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal

law.

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).

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 [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's Federal Register, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. *See* CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 10, 2012

A. Stanley Meiburg

Acting Regional Administrator,
Region 4.

40 CFR part 52 is amended as follows:

PART 52-[AMENDED]

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

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

Subpart RR – Tennessee

2. Section 52.2220 (c) is amended under Table 1, Chapter 1200-3-9 by revising the entry for “Section 1200-3-9-.01” to read as follows:

§52.2220 Identification of plan

* * * * *

(c) * * *

Table 1- EPA Approved Tennessee Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
**	**	*	*	*
Chapter 1200-3-9 Construction and Operating Permits				

Section 1200-3-9-.01	Construction Permits	11/27/2011	[Insert date of publication in Federal Register] [Insert citation of publication]	EPA is approving Tennessee's May 28, 2009 SIP revisions to Chapter 1200-3-9-.01 with the exception of the "baseline actual emissions" calculation revision found at 1200-3-9-.01 (4)(b)45(i)(III), (4)(b)45(ii)(IV), (5)(b)1(xlvii)(I)(III) and (5)(b)1(xlvii)(II)(IV) of the submittal.
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[FR Doc. 2012-4892 Filed 02/29/2012 at 8:45 am; Publication Date: 03/01/2012]