



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2011-0809; FRL-9705-2]

Approval and Promulgation of Implementation Plans; Florida; Sections 128 and 110(a)(1) and (2) Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve in part, and disapprove in part, the State Implementation Plan (SIP) submissions, submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP) on December 13, 2007, and supplemented on April 18, 2008 and May 24, 2012, to demonstrate that the State meets the requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA or Act) for the 1997 8-hour ozone national ambient air quality standards (NAAQS). Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. FDEP certified that the Florida SIP contains provisions that ensure the 1997 8-hour ozone NAAQS are implemented, enforced, and maintained in Florida (hereafter referred to as “infrastructure submission”). EPA is now taking three related actions on FDEP’s infrastructure submissions for Florida. First, EPA is taking final action to disapprove in part portions of sections 110(a)(2)(C) and 110(a)(2)(J) of the December 13, 2007, submittal as it relates to the regulation of greenhouse gas (GHG) emissions. Second, EPA is taking final action to approve FDEP’s May 24, 2012,

submission, which addresses the substantive requirements of section 128 relating to State board requirements as applicable to the infrastructure SIP pursuant to section 110(a)(2)(E)(ii), and the substantive requirements of section 110(a)(2)(G), which relates to the authority to implement emergency powers under section 303 of the CAA. Third, and with the exception of the aforementioned portions of sections 110(a)(2)(C) and (J), EPA is finalizing its determination that Florida's infrastructure submission, provided to EPA on December 13, 2007, supplemented on April 18, 2008, addresses all other required infrastructure elements for the 1997 8-hour ozone NAAQS.

EFFECTIVE DATE: This rule will be effective [insert 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2011-0809. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information 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 through 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: Nacosta C. Ward, 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) 562-9140. Ms. Ward can be reached via electronic mail at ward.nacosta@epa.gov.

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I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS.

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous ozone NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for "infrastructure" SIP requirements related to a newly established or revised NAAQS. As already mentioned, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this final rulemaking are listed below¹ and in EPA's October

¹ Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's final rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or (C). In a March 14, 2012, final rulemaking, EPA addressed the section 110(a)(2)(C) requirements for Tennessee. *See* 77 FR 14976.

2, 2007, memorandum entitled “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards.”

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.²
- 110(a)(2)(D): Interstate transport.³
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.⁴
- 110(a)(2)(J): Consultation with government officials; public notification; and Prevention of Significant Deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.

² This rulemaking only addresses requirements for this element as they relate to attainment areas.

³ Today’s final rule does not address element 110(a)(2)(D)(i) (Interstate Transport) for the 1997 8-hour ozone NAAQS. Interstate transport requirements were formerly addressed by Florida consistent with the Clean Air Interstate Rule (CAIR). On December 23, 2008, CAIR was remanded by the D.C. Circuit Court of Appeals, without vacatur, back to EPA. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). Prior to this remand, EPA took final action to approve Florida’s SIP revision, which was submitted to comply with CAIR. *See* 72 FR 58016 (October 12, 2007). In so doing, Florida’s CAIR SIP revision addressed the interstate transport provisions in section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS. In response to the remand of CAIR, EPA has recently finalized a new rule to address the interstate transport of nitrogen oxides (NO_x) and sulfur oxides (SO_x) in the eastern United States. *See* 76 FR 48208 (August 8, 2011) Transport Rule). EPA’s action on element 110(a)(2)(D)(i) will be addressed in a separate action.

⁴ This requirement was inadvertently omitted from EPA’s October 2, 2007, memorandum entitled “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards,” but as mentioned above is not relevant to today’s rulemaking.

- 110(a)(2)(M): Consultation/participation by affected local entities.

On July 18, 1997, EPA promulgated a new NAAQS for ozone based on 8-hour average concentrations, thus states were required to provide submissions to address sections 110(a)(1) and (2) of the CAA for this new NAAQS. Florida provided its infrastructure submission for the 1997 8-hour ozone NAAQS on December 13, 2007. On March 27, 2008, Florida was among other states that received a finding of failure to submit because its infrastructure submission was deemed incomplete for element 110(a)(2)(G) for the 1997 8-hour ozone NAAQS by March 1, 2008. *See* 73 FR 16205. Section 110(a)(2)(G) relates to the requirement for states to provide “emergency power” authority comparable to that in section 303 of the CAA and adequate contingency plans to implement such authority.

In FDEP’s December 13, 2007, submission, and in a letter dated April 18, 2008, FDEP cited State statutes as evidence that Florida has the authority to implement emergency powers for the 1997 8-hour ozone NAAQS as required by section 110(a)(2)(G). EPA, however, proposed a Federal Implementation Plan (FIP) with respect to this element of the infrastructure SIP because the statutes cited by FDEP had not been approved into the Florida SIP. *See* 77 FR 23181 (April 18, 2012).⁵ On April 19, 2012, FDEP submitted, for parallel processing, draft changes to address the deficiencies of the Florida SIP regarding the substantive requirements of section 110(a)(2)(G). EPA published a supplemental proposed rulemaking action on this draft revision on May 18, 2012, to 1) incorporate provisions to address Florida’s authority for emergency

⁵ On March 23, 2012, FDEP sent a letter to EPA requesting conditional approval of section 110(a)(2)(G). In this letter, Florida committed to submit a SIP revision to address the substantive requirements of section 110(a)(2)(G) by June 2012. The letter Florida submitted to EPA can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2011-0809. EPA notes that a conditional approval cannot satisfy an obligation for the Agency to implement a FIP.

powers and adequate contingency plans to implement such authority; and 2) propose approval for element 110(a)(2)(G) of Florida's infrastructure SIP. *See* 77 FR 29581. On May 24, 2012, FDEP submitted a final submission to EPA to satisfy to CAA section 110(a)(2)(G). Therefore, in today's rulemaking, EPA will not finalize the FIP for section 110(a)(2)(G) as it is no longer necessary and is instead finalizing full approval of this substantive SIP revision to address the section 110(a)(2)(G) requirements. As a result of this substantive revision to the SIP, EPA is also finalizing its approval of section 110(a)(2)(G) of Florida's infrastructure SIP among the other infrastructure elements approved today.

With respect to section 110(a)(2)(E)(ii), EPA's April 18, 2012, proposed rulemaking described EPA's intention to conditionally approve FDEP's December 13, 2007, infrastructure submission regarding this sub-element. EPA proposed conditional approval of this sub-element because the State's implementation plan did not contain provisions to address the requirements of CAA section 128. However, on March 13, 2012, FDEP submitted a letter to EPA that included a commitment to submit a SIP revision to address the CAA section 128 requirements. *See* 77 FR 23181. The letter Florida submitted to EPA can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2011-0809. On April 19, 2012, FDEP submitted, for parallel processing, a draft SIP revision to fully address the deficiencies within the Florida SIP to address CAA section 128 requirements. EPA proposed action on this draft revision on May 18, 2012, which included both a proposed substantive revision to the Florida SIP to incorporate rules satisfying section 128 of the CAA, and a proposed approval for sub-element 110(a)(2)(E)(ii) of Florida's infrastructure SIP. *See* 77 FR 29581. On May 24, 2012, FDEP submitted a final submission to EPA to satisfy the requirements of CAA section 128.

With respect to sections 110(a)(2)(C) and (J), EPA has issued two regulatory revisions – the 1997 8-Hour Ozone NAAQS Implementation Rule New Source Review (NSR) Update - Phase 2 final rule (hereafter referred to as the “Ozone Implementation NSR Update” or “Phase 2 Rule”) (70 FR 71612 (November 29, 2005)); and the Greenhouse Gas Tailoring Rule (hereafter referred to as the “GHG Tailoring Rule”) (75 FR 31514 (EPA’s June 3, 2010)) – that necessitated updates to Florida’s SIP in order for EPA to approve these infrastructure elements for purposes of the 1997 8-hour Ozone NAAQS.⁶

Regarding the Phase 2 Rule, on October 19, 2007, and July 1, 2011, FDEP submitted revisions to EPA, for approval into the Florida SIP, to adopt federal requirements for NSR permitting promulgated in the Phase 2 Rule. These revisions also modified provisions of Florida’s SIP at Chapter 62-210 and 62-212 to recognize NO_x as an ozone precursor. EPA finalized approval of these revisions into the SIP on June 15, 2012. *See* 77 FR 35862.

Regarding the GHG Tailoring Rule, EPA has identified errors in Florida’s federally-approved SIP that result in the State’s failure to address, or provide adequate legal authority for, the implementation of a GHG PSD program in Florida. Approval of a revision to address GHGs is required to meet sections 110(a)(2)(C) and 110(a)(2)(J). On December 30, 2010, EPA promulgated a FIP⁷ because Florida failed to submit, by its December 22, 2010, deadline, the corrective SIP revision to apply its PSD program to sources of GHGs consistent with the

⁶ Florida’s authority to regulate new and modified sources of the ozone precursors, volatile organic compounds (VOCs) and nitrogen oxides (NO_x), to assist in the protection of air quality in nonattainment, attainment or unclassifiable areas is established in Chapters 62-210, *Stationary Sources – General Requirements, Section 200 – Definitions*, and 62-212, *Stationary Sources – Preconstruction Review, Section 400 - Prevention of Significant Deterioration* of the Florida SIP.

⁷ Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Final Rule, 75 FR 82246 (December 30, 2010).

thresholds described in the GHG Tailoring rule. Since Florida currently does not have adequate legal authority to address the new GHG PSD permitting requirements at or above the levels of emissions set in the GHG Tailoring Rule, or at other appropriate levels, its SIP does not satisfy portions of section 110(a)(2)(C) and section 110(a)(2)(J) of the infrastructure SIP requirements. As a result, on April 18, 2012, EPA proposed to disapprove FDEP's submission for sections 110(a)(2)(C) and 110(a)(2)(J) as they relate to GHG PSD permitting requirements. *See* 77 FR 23181.

II. This Action

EPA is taking final action to approve in part, and disapprove in part, Florida's infrastructure submissions as demonstrating that the State meets the applicable requirements of sections 110(a)(1) and (2) of the CAA for the 1997 8-hour ozone NAAQS. Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an "infrastructure" SIP. Florida, through FDEP, certified that the Florida SIP contains provisions that ensure the 1997 8-hour ozone NAAQS is implemented, enforced, and maintained in Florida. EPA received no adverse comments on its April 18, 2012, and May 18, 2012, proposed rulemakings of Florida's December 13, 2007, infrastructure submission and April 19, 2012, draft SIP revision regarding the substantive requirements of CAA sections 128 and 110(a)(2)(G).

Today's disapprovals of Florida's infrastructure submissions are limited to the portions of section 110(a)(2)(C) and section 110(a)(2)(J) related to GHG PSD permitting as proposed on April 18, 2012. *See* 77 FR 23181. EPA's disapproval of this portion of these elements does not result in any further obligation on the part of Florida because EPA has already promulgated a FIP

for the Florida PSD program to address permitting GHGs at or above the GHG Tailoring Rule thresholds (76 FR 25178). Thus, today's final action to disapprove FDEP's submission for elements related to the GHG PSD permitting portion of sections 110(a)(2)(C) and 110(a)(2)(J) will not require any further action by either FDEP or EPA. The FIP that is currently in place to address GHG requirements in Florida will remain unless and until Florida submits a final submission to EPA for federal approval and EPA takes final action on that submission.

In addition to the above-described infrastructure submission final actions, EPA is also today finalizing two substantive SIP actions related to infrastructure elements 110(a)(2)(E)(ii) and (G) proposed in EPA's May 18, 2012, supplemental proposed rule. *See* 77 FR 29581. EPA is also announcing that it does not intend to finalize the proposed FIP for section 110(a)(2)(G) as it is no longer necessary due to the substantive SIP revisions for this element finalized today. The substantive revisions were submitted by Florida to EPA on May 24, 2012. *See* 77 FR 29581.

Based upon the aforementioned, EPA has determined that Florida's infrastructure submission, provided to EPA on December 13, 2007, and supplemented on April 18, 2008, addresses all the required infrastructure elements for the 1997 8-hour ozone NAAQS, with the exception of CAA section 110(a)(2)(E)(ii), pertaining to CAA section 128 requirements and section 110(a)(2)(G). Florida's May 24, 2012, submission addresses the substantive requirements of CAA sections 128, 110(a)(2)(E)(ii), and 110(a)(2)(G). EPA has determined that the remaining infrastructure elements addressed in Florida's December 13, 2007, submission, supplemented on April 18, 2008, and May 24, 2012, with the exception of the portions of sections 110(a)(2)(C) and (J) related to GHG PSD permitting, are consistent with section 110 of the CAA.

III. Final Action

EPA is taking final action to approve in part, and disapprove in part, the December 13, 2007, submission, supplemented on April 18, 2008, and the May 24, 2012, submission, for the 1997 8-hour ozone NAAQS because these submissions are consistent with section 110 of the CAA. FDEP has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to EPA's October 2, 2007, guidance to ensure that the 1997 8-hour ozone NAAQS are implemented, enforced, and maintained in Florida. EPA is also taking final action to approve a substantive SIP revision submitted by Florida on May 24, 2012, to address requirements related to sections 128, 110(a)(2)(E)(ii) and (G) of the CAA because these revisions are consistent with the Act.

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 located in the state, 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. This action 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 16, 2012

A. Stanley Meiburg
Acting Regional Administrator,
Region 4.

Therefore, 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.*

2. Section 52.520 in paragraph (e) is amended by adding three new entries for “110(a)(1) and (2) Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards,” “Section 128 Requirements,” and “Sections 110(a)(2)(E)(ii) and (G) Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards” at the end of the table to read as follows:

§ 52.520 Identification of plan.

* * * * *

(e) * * *

EPA-Approved Florida Non-regulatory Provisions

Provision	State effective date	EPA approval date	Federal Register notice	Explanation
**	**	*	*	*
110(a)(1) and (2) Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards	12/13/2007	[Insert date of publication in <u>Federal Register</u>]	[Insert citation of publication]	
Section 128	5/24/2012	[Insert	[Insert citation of	

Requirements		date of publication in <u>Federal Register</u>]	publication]	
Sections 110(a)(2)(E)(ii) and (G) Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards	5/24/2012	[Insert date of publication in <u>Federal Register</u>]	[Insert citation of publication]	

3. Section 52.523 is added to read as follows:

§ 52.523 Control strategy: Ozone

(a) Disapproval. EPA is disapproving portions of Florida’s infrastructure SIP for the 1997 8-hour ozone NAAQS regarding the State’s ability to provide adequate legal authority for the implementation of a Greenhouse Gas Prevention of Significant Deterioration program, specifically with respect to sections 110(a)(2)(C) and 110(a)(2)(J). A FIP is currently in place and approved for Florida at 40 CFR 52.37 for these requirements.

(b) [Reserved]

[FR Doc. 2012-18316 Filed 07/27/2012 at 8:45 am; Publication Date: 07/30/2012]