



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2012-0388; FRL- 9738-2]

### Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Prevention of Significant Deterioration

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is granting full approval of revisions to the West Virginia State Implementation Plan (SIP), submitted by the State of West Virginia through the West Virginia Department of Environmental Protection (WVDEP) on August 31, 2011, with the exception of the narrow issue of the requirement to include condensable emissions of particulate matter (condensables) in the definition of “regulated NSR pollutant” in the State’s Prevention of Significant Deterioration (PSD) program. These revisions pertaining to West Virginia’s PSD program incorporate preconstruction permitting regulations for fine particulate matter (PM<sub>2.5</sub>) and Greenhouse Gases (GHGs) into the West Virginia SIP. In light of a comment received on the July 31, 2012 proposed rule, EPA is reviewing West Virginia State Rule 45CSR14 to determine the extent to which its definition of “regulated NSR pollutant” satisfies the corresponding Federal definition, and will address this issue in a separate action. In addition, EPA is granting full approval of the PSD portions of other related infrastructure submissions required by the Clean Air Act (CAA) which are necessary to implement, maintain, and enforce the 1997 PM<sub>2.5</sub> and ozone National Ambient Air Quality Standards (NAAQS), the 2006 PM<sub>2.5</sub> NAAQS, and the 2008 lead and ozone NAAQS, with the exception of the narrow issue of the requirement to include condensables in the definition of “regulated NSR pollutant.” EPA will

address this issue in a separate action. EPA is granting approval of these revisions in accordance with the requirements of the CAA.

**DATES:** This final rule is effective on [insert date 30 days from date of publication].

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number **EPA-R03-OAR-2012-0388**. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the electronic docket, some information is not publicly available, i.e., 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 either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Michael Gordon, (215) 814-2039, or by e-mail at [gordon.mike@epa.gov](mailto:gordon.mike@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On July 31, 2012 ( 77 FR 45302), EPA proposed approval of amendments to the PSD permitting regulations under West Virginia State Rule 45CSR14, Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant

Deterioration, submitted by the WVDEP as a SIP revision on August 31, 2011. The August 31, 2011 SIP revision submitted by West Virginia generally pertains to two Federal rulemaking actions. The first is the “Implementation of the New Source Review (NSR) Program for Particulate Matter less than 2.5 Micrometers (PM<sub>2.5</sub>)” (NSR PM<sub>2.5</sub> Rule), which was promulgated on May 16, 2008 (73 FR 28321). The second is the “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (Tailoring Rule), which was promulgated on June 3, 2010 (75 FR 31514). In addition to the August 31, 2011 SIP submission, EPA also proposed to approve those portions of previous SIP submissions from WVDEP which address the PSD-related requirements set forth in CAA section 110(a)(2)(D)(i)(II) for the 1997 PM<sub>2.5</sub> NAAQS, 1997 8-hour ozone NAAQS, 2006 PM<sub>2.5</sub> NAAQS, 2008 lead NAAQS, and 2008 ozone NAAQS, as well as CAA section 110(a)(2)(C) and (J) for the 2008 lead NAAQS and 2008 ozone NAAQS. These previous SIP submissions, submitted by West Virginia to satisfy the PSD-related provisions found in CAA section 110(a)(2) are referred to as infrastructure SIP submissions. All of these State submittals, as well as technical support documents (TSDs) in support of the proposed and final actions are included in the docket. The July 31, 2012 notice of proposed rulemaking (NPR) and its supporting TSD contain detailed discussions of the West Virginia SIP submissions, their relationship to the CAA and the Federal regulatory PSD SIP requirements of 40 CFR part 51.166 applicable as of the time of the August 31, 2011 submittal, as well as the PSD-related infrastructure requirements in CAA section 110(a)(2), and EPA’s rationale for its proposed action; therefore, those discussions will not be restated here. A summary of the comments received and EPA’s responses are provided in Section II of this document.

## II. Public Comments and EPA's Responses

EPA received comments on the July 31, 2012 proposal to approve West Virginia's revisions to its SIP's PSD permitting requirements and to approve portions of infrastructure submissions relating to West Virginia's PSD permit program. The portions of the infrastructure submittals at issue relate to the PSD requirements of CAA sections 110(a)(2)(C), (D)(i)(II) and (J) for the 2008 lead NAAQS and the 2008 ozone NAAQS, and CAA sections 110(a)(2)(D)(i)(II) for the 1997 PM<sub>2.5</sub> NAAQS, 1997 ozone NAAQS, and the 2006 PM<sub>2.5</sub> NAAQS. A summary of those comments and EPA's responses are as follows:

**Comment:** A commenter raises issues regarding the current economy in the State of West Virginia and contends that Federal air pollution requirements imposed since the 1970s have resulted in the economic decline in the Northern Panhandle.

**Response:** EPA thanks the commenter for the submittal. For purposes of background, EPA is acting on SIP submissions that reflect State law in effect at the time of the submittals. The commenter has not raised any specific issue relating to the proposed approval of West Virginia's SIP submittals at issue in this rulemaking process. Nor has the commenter given any indication of what action they would prefer EPA to take on West Virginia's SIP submittals. Therefore, EPA views this comment as being not relevant to EPA's proposed action and EPA does not have any obligation to respond to this general and unrelated comment. *See Sherley v. Sebellius*, 776 F. Supp. 2d 1, 53-54 (D.D.C. 2011) (stating Federal agency must only respond to significant comments relevant to an agency's decision); *Conference of State Bank Supervisors v. Office of Thrift Supervision*, 792 F. Supp. 837, 846 (D.D.C. 1992) (finding agencies need only respond to significant comments under the Administrative Procedure Act).

**Comment:** EPA cannot approve the infrastructure SIPs because the significant emissions rates in the SIP and other de minimis exceptions are arbitrary and capricious with regard to the 2008 ozone and lead NAAQS.

**EPA's Response:** EPA disagrees with the commenter that we cannot approve the infrastructure SIPs because the significant emissions rates and other de minimis exceptions are arbitrary and capricious. The purpose of this rulemaking is to take action on West Virginia's SIP revision submittals based upon their consistency with Federal regulations. The significant emissions applicability levels of 0.6 tons per year (TPY) for lead and 40 tons TPY for VOCs and for NO<sub>x</sub> required by West Virginia's PSD permitting regulations mirror the Federal requirements found at 40 CFR 51.166(b)(23)(i) and 40 CFR 52.21(b)(23)(i). West Virginia's proposed SIP revision satisfies the obligation that its SIP's PSD regulation meet 40 CFR 51.166(b)(23)(i). In fact, West Virginia's regulatory language mirrors the Federal counterpart language. Therefore, EPA has no basis to disapprove West Virginia's regulatory language and require West Virginia to meet an alternative standard which EPA has not established through the required administrative rulemaking process. West Virginia is not required to revise the significant emissions rates in question unless and until EPA revises the Federal requirements at 40 CFR 51.166(b)(23)(i) and 40 CFR 52.21(b)(23)(i). For these reasons, EPA disagrees with the commenter's assertion that the significant emissions applicability thresholds in the West Virginia SIP's PSD regulation are arbitrary and capricious with regard to the 2008 ozone and lead NAAQS.

**Comment:** One commenter objects to the EPA's proposed approval of the State's infrastructure SIP submissions for the 1997 and 2006 PM<sub>2.5</sub> and the 1997 and 2008 8-hour ozone and the 2008 lead NAAQS on the grounds that "EPA has promulgated increments for PM<sub>2.5</sub>. See

75 Fed. Reg. 64,864 (Oct. 20, 2010). However, the proposed West Virginia SIP does not include these increments even though the increments became applicable on October 12, 2011 . . .

Therefore EPA cannot approve the West Virginia Infrastructure SIP regarding the PSD elements for PM<sub>2.5</sub>.<sup>1</sup> The commenter argues that “(s)tates are required to include these increments in their SIPs before EPA can fully-approve an infrastructure submission.” However, the commenter also acknowledges that the States had until July 20, 2012 to amend their SIPs to address the PM<sub>2.5</sub> increments required by the requirements of the 2010 PM<sub>2.5</sub> NSR/PSD Rule.

With respect to this July 20, 2012 deadline, the commenter asserts that because the proposed rule at issue was published in the Federal Register on July 31, 2012, the proposed rule was published after the deadline by which States were required to submit SIP revisions in compliance with the 2010 PM<sub>2.5</sub> NSR/PSD Rule. Therefore, as of the date that the proposed rule was published in the Federal Register (July 31, 2012), the PM<sub>2.5</sub> increments were required to be included in West Virginia’s SIP in order for West Virginia to meet the PSD requirements of sections 110(a)(2)(C), (D)(i)(II) and (J) of the CAA.

In addition to the above assertions, the commenter sets forth three reasons why EPA should not approve the specific CAA 110(a)(2) SIPs without first ensuring that West Virginia’s SIP includes the PM<sub>2.5</sub> increments set forth at 40 CFR § 51.166(c): 1) EPA should not allow proposed major sources in West Virginia “to avoid PSD requirements like PM<sub>2.5</sub> increments, while proposed major sources in other states . . . have to comply with this requirement”; 2) because EPA has proposed approval of the PSD requirements of CAA 110(a)(2) for the 2008 ozone and

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1 The commenter is referring to a separate rulemaking action by EPA: “Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC),” 75 FR 64864 (Oct. 20, 2010). This collateral rulemaking concerned various issues relevant to PM<sub>2.5</sub> and PSD, including increments, significant impact levels, and a significant monitoring concentration. This rule will be referred to herein as the “2010 PM<sub>2.5</sub> NSR/PSD Rule.”

lead NAAQS, EPA will not have another opportunity to “revisit this issue of lack of PM<sub>2.5</sub> increments”; and 3) because emissions of PM<sub>2.5</sub> and its precursors have negative effects on public health and welfare, EPA’s full approval of West Virginia’s infrastructure SIPs “would cause innocent people to be killed by illegal PM<sub>2.5</sub> emissions.” The commenter concludes by stating that: “EPA must disapprove the PSD elements of the Infrastructure SIPs for failure to include the PM<sub>2.5</sub> increments. In the alternative, EPA could grant a conditional approval if West Virginia agrees to adopt the PM<sub>2.5</sub> increments into its SIP within one year.”

**Response:** EPA disagrees with the commenter that we cannot approve this SIP submission without inclusion of increments. The commenter asserts that the EPA should now disapprove the West Virginia infrastructure SIP because, since the date of EPA’s proposal, the deadline for the submission of a SIP revision addressing the PM<sub>2.5</sub> increments has passed. However, pursuant to the 2010 PM<sub>2.5</sub> NSR/PSD Rule and CAA section 166(b), States were not required to submit a revised SIP addressing the PM<sub>2.5</sub> increments until July 20, 2012. EPA proposed action on the West Virginia infrastructure SIP in a notice signed on July 18, 2012.<sup>2</sup> Therefore, on the date that the proposed rule was signed by the Regional Administrator, the PM<sub>2.5</sub> increments were not required to be included in the West Virginia SIP in order for West Virginia to meet the PSD requirements of CAA sections 110(a)(2)(C), (D)(i)(II) and (J) of the Act.<sup>3</sup>

The commenter’s concerns relate to the timing of EPA action on collateral, yet related, SIP

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<sup>2</sup> Although the notice was published by the Federal Register on July 31, 2012, the notice was signed by the Regional Administrator on July 18, 2012, before the statutory deadline for submission of the SIP revision addressing the PM<sub>2.5</sub> increments.

<sup>3</sup> The commenter cites to a rulemaking in Region 5 wherein EPA proposed to narrowly disapprove a Michigan SIP to the extent that it failed to address the requirement to account for PM<sub>2.5</sub> precursors in the State’s PSD program. That rulemaking, however, addressed requirements from the 2008 PM<sub>2.5</sub> NSR Implementation Rule for which the deadline for States to revise their SIPs had passed more than a year prior at the time of proposal. *See* 77 Fed. Reg. 45,992 (Aug. 2, 2012). In this case, the deadline for West Virginia to revise its SIP to address PM<sub>2.5</sub> increments had not passed at the time of proposal.

submissions. These concerns highlight an important overarching question that the EPA has to confront when assessing the various infrastructure SIP submittals addressed in the proposed rule: how to proceed when the timing and sequencing of multiple related SIP submissions impact the ability of the State and the EPA to address certain substantive issues in the infrastructure SIP submission in a reasonable fashion.

It is appropriate for the EPA to take into consideration the timing and sequence of related SIP submissions as part of determining what it is reasonable to expect a State to have addressed in an infrastructure SIP submission for a NAAQS at the time when the EPA acts on such submission. The EPA has historically interpreted section 110(a)(2)(C), section 110(a)(2)(D)(i)(II), and section 110(a)(2)(J) to require the EPA to assess a State's infrastructure SIP submission with respect to the then-applicable and Federally enforceable PSD regulations required to be included in a State's SIP at the time EPA takes action on the SIP. However, the EPA does not consider it reasonable to interpret section 110(a)(2)(C), section 110(a)(2)(D)(i)(II), and section 110(a)(2)(J) to require the EPA to propose to disapprove a State's infrastructure SIP submissions because the State had not yet, at the time of proposal, made a submission that was not yet due for the 2010 PM<sub>2.5</sub> NSR/PSD Rule. To adopt a different approach by which the EPA could not act on an infrastructure SIP, or at least could not approve an infrastructure SIP, whenever there was any impending revision to the SIP required by another collateral rulemaking action would result in regulatory gridlock and make it impracticable or impossible for EPA to act on infrastructure SIPs if EPA is in the process of revising collateral PSD regulations. The EPA believes that such an outcome would be an unreasonable reading of the statutory process for the infrastructure SIPs contemplated in section 110(a)(1) and (2).

The EPA acknowledges that it is important that these additional PSD program revisions be evaluated and approved into the State's SIP in accordance with the CAA. In fact, West Virginia made the submission required by the 2010 PM<sub>2.5</sub> NSR/PSD Rule on June 12, 2010, and the EPA therefore intends to address the PM<sub>2.5</sub> increments in a subsequent rulemaking. EPA also acknowledges the commenter's concern about the potential for sources not being evaluated with respect to increments during the interim period while new PSD program revisions are being evaluated. However, EPA notes that it is implicit in the SIP processing procedures under CAA section 110(k) and the timing of notice and comment rulemaking that there will often be interim periods during which a State has adopted and submitted a new State law requirement in order to meet a CAA requirement, but the EPA will not yet have acted upon it to make it a Federally enforceable part of the State's SIP.

Moreover, major sources in West Virginia are subject to the PM<sub>2.5</sub> increments pursuant to the version of the regulation, 45CSR14, currently in effect in West Virginia. Because the regulations relating to PM<sub>2.5</sub> increments are currently effective and enforceable as a matter of State law, as of June 1, 2012, the EPA in the interim believes that proposed major sources in West Virginia are being required as a matter of State law to comply with the PSD requirements like PM<sub>2.5</sub> increments and thus that these sources are not being treated differently under State law than similar sources in other States that have approved SIP revisions that include the increments. The only distinction between West Virginia and the other States identified by the commenter is that those other States submitted their SIP revisions addressing the PM<sub>2.5</sub> increments far enough in advance of EPA's action on the States' infrastructure SIPs to begin the administrative rulemaking process for such SIP revisions. Thus, the EPA does not believe that approving the State's infrastructure SIP submissions at this time will lead to major sources in West Virginia

being treated differently than similar sources in the other States as a factual matter. If the commenter determines that sources are not being evaluated in accordance with applicable State law requirements during the interim before EPA acts on a later SIP submission, those concerns can be addressed in the State's permitting process.

The EPA shares the commenter's concerns that emissions of PM<sub>2.5</sub> and its precursors have negative effects on public health and welfare. However, EPA has no basis on which to find that EPA's approval of West Virginia's infrastructure SIPs "would cause innocent people to be killed by illegal PM<sub>2.5</sub> emissions." As explained above, the State is addressing PM<sub>2.5</sub> increments in the version of 45CSR14 currently adopted pursuant to State regulatory requirements. West Virginia made the SIP submission required by the 2010 PM<sub>2.5</sub> NSR/PSD Rule to reflect that its PSD permitting program now includes PM<sub>2.5</sub> increments as required by the 2010 PM<sub>2.5</sub> NSR/PSD Rule. EPA will be acting on that submission in a separate rulemaking action in accordance with section 110(k). Until such time as EPA evaluates West Virginia's submission and takes the necessary rulemaking actions, EPA notes the fact that the revisions have been made and are currently enforceable for purposes of State law.

Finally, EPA has considered the suggestion that, rather than approving the State's infrastructure SIPs, the EPA "could grant a conditional approval" of the infrastructure SIPs if West Virginia agrees to adopt the PM<sub>2.5</sub> increments as required by the 2010 PM<sub>2.5</sub> NSR/PSD Rule into its SIP within one year.

The EPA interprets the commenter's suggestion that EPA grant "conditional approval" of the State's infrastructure SIP submissions to be a reference to the concept of conditional approval under section 110(k)(4). The EPA considered the commenter's suggestion as a means of

addressing the SIP submission timing issue, but EPA is constrained by the provisions of the statute. Section 110(k)(4), under the rubric of “conditional approval,” explicitly authorizes EPA to approve a SIP submission “based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision.” Courts have confirmed that conditional approvals are an available course of action under section 110(k), but only if the statutory conditions for such conditional approvals can be met.

Based on the specific language of section 110(k)(4), EPA concludes that it would not be appropriate to use the mechanism of a conditional approval in this action on the West Virginia PSD-related infrastructure SIP submissions. The statute clearly contemplates use of this approach when a State has made a commitment to make a submission in the future that meets the statutory criteria. In this instance, however, on June 12, 2012, West Virginia submitted the SIP revision required by the 2010 PM<sub>2.5</sub> NSR/PSD Rule. Therefore, the EPA does not believe that it is appropriate to use the mechanism of a conditional approval in these circumstances.

**Comment:** EPA cannot approve the infrastructure SIPs because West Virginia’s SIP does not clearly regulate condensable direct PM<sub>2.5</sub>.

**Response:** The 2008 NSR PM<sub>2.5</sub> Rule changed the Federal definition of “regulated NSR pollutant,” found at 40 CFR section 51.166(b)(49)(vi) to require that States account for condensable emissions of particulate matter (condensables) in issuing NSR permits. In light of this comment, EPA is reviewing West Virginia State Rule 45CSR14 to determine the extent to which its definition of “regulated NSR pollutant” satisfies the requirements of section 51.166(b)(49)(vi) insofar as it applies to particulate matter. For this reason, EPA is deferring

taking action on the definition of “regulated NSR pollutant” in section 2.66 of West Virginia State Rule 45CSR14 with regard to the requirement to account for condensables. EPA will address this issue in a separate rulemaking action.

### **III. Final Actions**

EPA is fully approving WVDEP’s August 31, 2011 submittal, except for the narrow issue of the requirement to include condensable emissions of particulate matter in the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. Except for this narrow issue, EPA is approving all other portions of the submittal, including but not limited to, the remainder of section 2.66. In approving West Virginia State Rule 45CSR14 with regard to all other CAA and Federal regulatory SIP requirements for PSD applicable as of the August 31, 2011 SIP revision submission date, EPA is acknowledging that it meets the “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (Tailoring Rule), which was promulgated on June 3, 2010 (75 FR 31514). EPA is also approving those portions of West Virginia’s SIP submissions dated December 3, 2007, December 11, 2007, April 3, 2008, October 1, 2009, October 26, 2011, and February 17, 2012 which address the PSD-related requirements set forth in CAA section 110(a)(2)(D)(i)(II) for the 1997 PM<sub>2.5</sub> NAAQS, 1997 8-hour ozone NAAQS, 2006 PM<sub>2.5</sub> NAAQS, 2008 lead NAAQS, and 2008 ozone NAAQS, as well as CAA section 110(a)(2)(C) and (J) for the 2008 lead NAAQS and 2008 ozone NAAQS, except for the narrow issue of the requirement to include condensable emissions of particulate matter in the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66.

EPA is not finalizing its proposed approval of WVDEP’s August 31, 2011 submittal with respect to the narrow issue of the requirement to include condensable emissions of particulate matter in

the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. Additionally, EPA is not finalizing its proposed approval of WVDEP’s SIP submissions dated December 3, 2007, December 11, 2007, April 3, 2008, October 1, 2009, October 26, 2011, and February 17, 2012 submitted to meet the PSD-related infrastructure SIP obligations set forth at CAA sections 110(a)(2)(C), (D)(i)(II) and (J) with respect to the narrow issue of the requirement to include condensable emissions of particulate matter in the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. EPA will address these issues in a separate action.

#### **IV. 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, except as noted in this document, 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.

## **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 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 on the West Virginia SIP PSD provisions 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, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

September 27, 2012.

W. C. Early,  
Acting Regional Administrator,  
Region III.

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 XX--West Virginia

2. In § 52.2520,

a. The table in paragraph (c) is amended by revising the entries for [45 CSR] Series 14 regarding Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration.

b. The table in paragraph (e) is amended by:

i. Revising the entries regarding the Section 110(a)(2) PSD-related Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS, the 1997 PM2.5 NAAQS, the 2006 PM2.5 NAAQS, the 2008 Lead NAAQS, and the 2008 ozone NAAQS.

ii. Adding at the end of the table an entry regarding the Section 110(a)(2) PSD-related Infrastructure Requirements 110(a)(2)(C), (D)(i)(II), and (J) for the 2008 8-Hour Ozone NAAQS.

The revisions and addition read as follows:

§ 52.2520 Identification of plan.

\* \* \* \* \*

(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
* * *	* * * *			
[45CSR] Series 14	<b>Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration</b>			

State citation [Chapter 16-20 or 45 CSR ]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
Section 45-14-1	General	6/16/11	[ <u>Insert Federal Register publication date</u> ] [ <u>Insert page number where the document begins</u> ]	
Section 45-14-2	Definitions	6/16/11	[ <u>Insert Federal Register publication date</u> ] [ <u>Insert page number where the document begins</u> ]	<p>1. Inclusion of PM<sub>2.5</sub> significant emissions rates and precursors and GHG provisions.</p> <p>2. Taking no action on the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. only as it relates to the requirement to include condensable emissions of particulate matter in that definition. See § 52.2522(i).</p>
Section 45-14-3	Applicability	6/16/11	[ <u>Insert Federal Register publication</u> ]	

State citation [Chapter 16-20 or 45 CSR ]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
			date] [Insert page number where the document begins]	
Section 45-14-4	Ambient Air Quality Increments and Ceilings	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-14-5	Area Classification	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-14-6	Prohibition of Dispersion Enhancement Techniques	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-14-7	Registration, Report and Permit Requirements for Major Stationary Sources and Major Modifications	6/16/11	[Insert Federal Register publication date] [Insert page	

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>number where the document begins]</u>	
Section 45-14-8	Requirements Relating to Control Technology	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the document begins]</u>	
Section 45-14-9	Requirements Relating to the Source's Impact on Air Quality	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the document begins]</u>	
Section 45-14- 10	Modeling Requirements	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the document begins]</u>	
Section 45-14- 11	Air Quality Monitoring Requirements	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the</u>	

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>document begins]</u>	
Section 45-14-12	Additional Impacts Analysis Requirements	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the document begins]</u>	
Section 45-14-13	Additional Requirements and Variances for Source Impacting Federal Class 1 Areas	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the document begins]</u>	
Section 45-14-14	Procedures for Sources Employing Innovative Control Technology	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the document begins]</u>	
Section 45-14-15	Exclusions From Increment Consumption	6/16/11	[ <u>Insert Federal Register publication date]</u> [ <u>Insert page number where the document begins]</u>	

State citation [Chapter 16-20 or 45 CSR ]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
Section 45-14-16	Specific Exemptions	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-14-17	Public Review Procedures	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-14-18	Public Meetings	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-14-19	Permit Transfer, Cancellation and Responsibility	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-14-20	Disposition of Permits	6/16/11	[Insert Federal	

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>Register publication date]</u> <u>[Insert page number where the document begins]</u>	
Section 45-14-21	Conflict with Other Permitting Rules	6/16/11	<u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u>	
Section 45-14-25	Actual PALs	6/16/11	<u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u>	
Section 45-14-26	Inconsistency Between Rules	6/16/11	<u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u>	
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Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * *				
Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS.	Statewide	12/3/07, 5/21/08	8/4/11 76 FR 47062	This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
		12/3/07, 12/11/07, 8/31/11	[Insert Federal Register publication date] [Insert page number where the document begins]	Approval of the following PSD-related elements or portions thereof: 110(a)(2)(D)(i)(II), except taking no action on the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66 only as it relates to the requirement to include condensable emissions of particulate matter in that definition. See § 52.2522(i).
Section 110(a)(2) Infrastructure Requirements for the 1997 PM2.5 NAAQS.	Statewide	4/3/08, 5/21/08, 7/9/08, 3/18/10	8/4/11 76 FR 47062	This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
		12/11/07,	[Insert	Approval of the

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
		4/3/08, 8/31/11	<u>Federal Register publication date]</u> <u>[Insert page number where the document begins]</u>	following PSD-related elements or portions thereof: 110(a)(2)(D)(i)(II), except taking no action on the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66 only as it relates to the requirement to include condensable emissions of particulate matter in that definition. See § 52.2522(i).
Section 110(a)(2) Infrastructure Requirements for the 2006 PM2.5 NAAQS.	Statewide	10/1/09, 3/18/10	8/4/11 76 FR 47062	This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
		10/1/09, 8/31/11	<u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u>	Approval of the following PSD-related elements or portions thereof: 110(a)(2)(D)(i)(II), except taking no action on the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66 only as it relates to the requirement to include

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
				condensable emissions of particulate matter in that definition. See § 52.2522(i).
* * * * *				
Section 110(a)(2) Infrastructure Requirements for the 2008 Lead NAAQS	Statewide	10/26/11	9/10/12 77 FR 55417	This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof.
		8/31/11, 10/26/11	[Insert Federal Register publication date] [Insert page number where the document begins]	Approval of the following elements or portions thereof: 110(a)(2)(C), (D)(i)(II), and (J), except taking no action on the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66 only as it relates to the requirement to include condensable emissions of particulate matter in that definition. See § 52.2522(i).
Section 110(a)(2) Infrastructure Requirements for the 2008 8-Hour Ozone NAAQS	Statewide	8/31/11, 2/17/12	[Insert Federal Register publication date] [Insert page number where the	Approval of the following PSD-related elements or portions thereof: 110(a)(2)(C), (D)(i)(II), and (J), except taking no action on the

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
			<u>document begins]</u>	definition of “regulated NSR pollutant” found at 45CSR14 section 2.66 only as it relates to the requirement to include condensable emissions of particulate matter in that definition. See § 52.2522(i).

3. In § 52.2522, paragraph (i) is added to read as follows.

§ 52.2522 Approval status.

\* \* \* \* \*

(i)(1) EPA is fully approving WVDEP’s August 31, 2011 submittal, except for the narrow issue of the requirement to include condensable emissions of particulate matter in the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. Except for this narrow issue, EPA is approving all other portions of the submittal, including but not limited to, the remainder of section 2.66. In approving West Virginia State Rule 45CSR14 with regard to all other CAA and Federal regulatory SIP requirements for PSD applicable as of the August 31, 2011 SIP revision submission date, EPA is acknowledging that it is consistent with the “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (Tailoring Rule), which was promulgated on June 3, 2010 (75 FR 31514). EPA is not finalizing its proposed approval of WVDEP’s August 31, 2011 submittal with respect to the narrow issue of the requirement to include condensable emissions of particulate matter in the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. In light of a comment received on its July 31, 2012

proposed rule (77 FR 45302), EPA is reviewing West Virginia State Rule 45CSR14 to determine the extent to which its definition of “regulated NSR pollutant” satisfies the corresponding Federal definition, and will address this issue in a separate action.

(2) EPA is also approving those portions of West Virginia’s SIP submissions dated December 3, 2007, December 11, 2007, April 3, 2008, October 1, 2009, October 26, 2011, and February 17, 2012 which address the PSD-related requirements set forth in CAA section 110(a)(2)(D)(i)(II) for the 1997 PM<sub>2.5</sub> NAAQS, 1997 8-hour ozone NAAQS, 2006 PM<sub>2.5</sub> NAAQS, 2008 lead NAAQS, and 2008 ozone NAAQS, as well as CAA Section 110(a)(2)(C) and (J) for the 2008 lead NAAQS and 2008 ozone NAAQS, except for the narrow issue of the requirement to include condensable emissions of particulate matter in the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. EPA is not finalizing its July 31, 2012 proposed approval (77 FR 45302) of WVDEP’s SIP submissions dated December 3, 2007, December 11, 2007, April 3, 2008, October 1, 2009, October 26, 2011, and February 17, 2012 submitted to meet the PSD-related infrastructure SIP obligations set forth at CAA sections 110(a)(2)(C), (D)(i)(II) and (J) with respect to the narrow issue of the requirement to include condensable emissions of particulate matter in the definition of “regulated NSR pollutant” found at 45CSR14 section 2.66. EPA will address this issue in a separate action.

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