



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2012-0784; FRL-9770-4]**

**Approval and Promulgation of Air Quality Implementation Plans;  
West Virginia; Requirements for Determining General Conformity of Federal Actions to  
Applicable State Implementation Plans**

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to approve a revision to the West Virginia State Implementation Plan (SIP). The SIP revision consists of a legislative rule adopted by West Virginia to amend its prior general conformity rule for the purpose of incorporating revisions to Federal general conformity requirements established under rules promulgated by EPA in July of 2006 and in April of 2010. EPA is approving West Virginia's SIP revision to amend its general conformity SIP to comply with recent changes in Federal general conformity requirements. This rulemaking action is in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** This rule is effective on [insert date 60 days after publication in the Federal Register] without further notice, unless EPA receives adverse written 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-R03-OAR-2012-0784** by one of the following methods:

- A. [www.regulations.gov](http://www.regulations.gov). Follow the on-line instructions for submitting comments.

B. E-mail: [mastro.donna@epa.gov](mailto:mastro.donna@epa.gov).

C. Mail: EPA-R03-OAR-2012-0784, Donna Mastro, Acting Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. **EPA-R03-OAR-2012-0784**. 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](http://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 information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://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](http://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.

**Docket:** All documents in the electronic docket are listed in the [www.regulations.gov](http://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](http://www.regulations.gov) or in hard copy 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:** Brian Rehn, (215) 814-2176, or by e-mail at [rehn.brian@epa.gov](mailto:rehn.brian@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

The following outline is provided to aid in locating information in this preamble.

#### **I. General Conformity Requirements and Affect on Air Quality**

#### **II. West Virginia's General Conformity SIP Revision**

#### **III. EPA Action**

#### **IV. Statutory and Executive Order Reviews**

##### **A. General Requirements**

##### **B. Submission to Congress and the Comptroller General**

## **C. Petitions for Judicial Review**

### **I. General Conformity Requirements and Affect on Air Quality**

The intent of the general conformity requirement is to prevent the air quality impacts of Federal actions from causing or contributing to a violation of a National Ambient Air Quality Standard (NAAQS) or interfering with the purpose of a SIP. Under the CAA as amended in 1990, Congress recognized that actions taken by Federal agencies could affect states' and local agencies' abilities to attain and maintain the NAAQS. Section 176(c) of the CAA requires Federal agencies to assure that their actions conform to the applicable SIP for attaining and maintaining compliance with the NAAQS. General conformity is defined to apply to NAAQS established pursuant to section 109 of the CAA, including NAAQS for carbon monoxide (CO), nitrogen dioxide (NO<sub>2</sub>), ozone, particulate matter, and sulfur dioxide (SO<sub>2</sub>). Because certain provisions of section 176(c) of the CAA apply only to highway and mass transit funding and approval actions, EPA published two sets of regulations to implement section 176(c) of the CAA – one set for transportation conformity and one set for general conformity. The Federal General Conformity Requirements Rule was published in the November 30, 1993 edition of the Federal Register (58 FR 63214) and codified in the Code of Federal Regulations at 40 CFR 93.150.

EPA revised the Federal General Conformity Requirements Rule via a final rule issued in the April 5, 2006 edition of the Federal Register (71 FR 17003). EPA had promulgated a new NAAQS July 18, 1997 (62 FR 38652) that established a separate NAAQS for fine particulate matter smaller than 2.5 micrometers in diameter (PM<sub>2.5</sub>). The prior coarse particulate matter NAAQS promulgated in 1997 pertains to particulate matter smaller than 10 micrometers in

diameter (PM<sub>10</sub>). EPA's 2006 revision to the Federal General Conformity Requirements Rule added requirements for PM<sub>2.5</sub> for the first time, including annual emission limits of PM<sub>2.5</sub> above which covered Federal actions in NAAQS nonattainment or maintenance areas would be subject to general conformity applicability.

On April 5, 2010, EPA revisited the Federal General Conformity Requirements Rule to clarify the conformity process, authorize innovative and flexible compliance approaches, remove outdated or unnecessary requirements, reduce the paperwork burden, provide transition tools for implementing new standards, address issues raised by Federal agencies affected by the rules, and provide a better explanation of conformity regulations and policies. EPA's April 2010 revised rule simplified state SIP requirements for general conformity, eliminating duplicative general conformity provisions codified at 40 CFR Part 93, Subpart B and 40 CFR Part 51, Subpart W. Finally, the April 2010 revision updated the Federal General Conformity Requirements Rule to reflect changes to governing laws passed by Congress since EPA's 1993 rule. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) passed by Congress in 1995 contains a provision eliminating the CAA requirement for states to adopt general conformity SIPs. As a result of SAFETEA-LU, EPA's April 2010 rule eliminated the Federal regulatory requirement for states to adopt and submit general conformity SIPs, instead making submission of a general conformity SIP a state option.

## **II. West Virginia's General Conformity SIP Revision**

On June 6, 2012, West Virginia submitted a formal revision to its SIP. The SIP revision submittal consists of an amendment to West Virginia's legislative rule (Title 45 of the

Consolidated Statute of Regulations Series 35, entitled “Determining Conformity of General Federal Actions to Applicable Implementation Plans”) that establishes criteria and procedures for use by Federal agencies in determining whether a planned Federal action conforms to the applicable SIP (also referred to as “general conformity.” The purpose of the SIP revision is to amend West Virginia’s general conformity requirements through a legislative rule adopted by West Virginia for purposes of incorporating recent changes made to Federal general conformity requirements, which are at 40 CFR Part 93, Subpart B (effective July 6, 2010).

The SIP revision submittal includes a revision of West Virginia’s 1995 legislative rule under Title 45, Series 35 of the Code of State Rules (45CSR35). The revised State rule 45CSR35, now titled “Determining Conformity of General Federal Actions to Applicable Implementation Plans (General Conformity)” with a State effective date of June 1, 2012, has been updated to incorporate by reference the most recent Federal general conformity rules at 40 CFR Part 93, Subpart B that were effective June 1, 2011.

West Virginia’s legislative rule has also been updated to slightly revise several definitions, including “Applicable implementation plan” and “Applicable SIP.” Several terms no longer used in 45CSR35 were deleted, including “Director,” “Division of Environmental Protection,” “State Governor,” “State and Local Air Agencies,” and “State Agency.” Definitions were added for the terms “Clean Air Act” and “Secretary.” The legislative rule amending 45CSR35 also adds requirements that require a Federal agency to make a determination that a Federal action conforms to the applicable SIP before the action is taken. In the event an action would result in emissions that originate in more than one nonattainment or maintenance area, conformity must

be evaluated for each area separately. Finally, a conformity determination under 40 CFR Part 93, Subpart B does not exempt the action from any other requirements of the applicable SIP, the CAA, or the National Environmental Policy Act (NEPA).

A prior version of West Virginia's general conformity rule (45CSR35), which became State effective May 1, 1995, was approved by EPA as part of the West Virginia SIP via a final rule published on September 5, 1995 (60 FR 46029). West Virginia's June 6, 2012 SIP revision submittal, which is the subject of this rulemaking action, supersedes the prior approved West Virginia general conformity SIP.

### **III. EPA Action**

EPA has reviewed West Virginia's June 6, 2012 SIP revision submittal and found this revision to be in compliance with section 176(c) of the CAA and with the related requirements of the Federal General Conformity Requirements Rule, codified at 40 CFR Part 93, Subpart B. West Virginia's SIP revision serves to reduce the impact of Federal actions (not otherwise subject to transportation conformity, which is addressed under a separate provision in the West Virginia SIP), and will prevent subject Federal actions from causing or contributing to a new violation of a NAAQS, interfering with attainment or maintenance of a NAAQS, or otherwise interfering with the West Virginia SIP.

West Virginia's June 6, 2012 SIP revision meets the requirements set forth in section 110 of the CAA with respect to adoption and submission of SIP revisions. The approval of West Virginia's general conformity SIP revision will strengthen the West Virginia SIP and will assist the state in

complying with Federal NAAQS.

Therefore, EPA is approving West Virginia's revision to its general conformity SIP to comply with the most recent Federal General Conformity Requirements Rule. EPA is publishing this rule without prior proposal because it constitutes a noncontroversial amendment and EPA anticipates no adverse comment. However, in the "Proposed Rules" section of today's Federal Register, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on [insert date 60 days from date of publication in the Federal Register] without further notice unless EPA receives adverse comment by [insert date 30 days from date of publication in the Federal Register]. If EPA receives adverse comment, EPA will publish a timely withdrawal in the Federal Register informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this rulemaking action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

#### **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 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 to approve West Virginia’s general conformity rule 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. 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 to approve West Virginia's general conformity SIP revision 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.

Dated: December 19, 2012

W. C. Early, Acting  
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) is amended by revising the heading of 45 CSR Series 35 and by:

- a. Revising the entries for 45-35-1 through 45-35-4; and
- b. Adding a new entry in numerical order for 45-35-5.

The revised and added text reads as follows:

§ 52.2520                      Identification of plan.

\*       \*       \*       \*       \*

(c) \*\*\*

EPA-Approved Regulations in the West Virginia SIP

State citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.2565
*       *       *	*       *       *       *			
<b>[45 CSR] Series 35</b>	<b>Determining Conformity of General Federal Actions to Applicable Implementation Plans (General Conformity)</b>			
Section 45-35-1	General	6/1/12	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-35-2	Definitions	6/1/12	[Insert Federal Register publication date] [Insert page number where the document	

State citation	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
			<u>begins]</u>	
Section 45-35-3	Requirements	6/1/12	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-35-4	Adoption of Requirements	6/1/12	[Insert Federal Register publication date] [Insert page number where the document begins]	
Section 45-35-5	Inconsistency Between Rules	6/1/12	[Insert Federal Register publication date] [Insert page number where the document begins]	

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[FR Doc. 2013-00710 Filed 01/18/2013 at 8:45 am; Publication Date: 01/22/2013]