



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R04-OAR-2010-0816; FRL-9931-63-Region 4]**

**Air Plan Disapproval; Georgia: Disapproval of Automatic Rescission Clause**

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to disapprove a portion of a revision to the Georgia State Implementation Plan (SIP), submitted through the Georgia's Department of Natural Resources Environmental Protection Division (EPD), on January 13, 2011, that would allow for the automatic rescission of federal permitting-related requirements in certain circumstances. EPA is proposing to disapprove Georgia's automatic rescission provision because the Agency has preliminarily determined that this provision is not consistent with the Clean Air Act (CAA or Act) or federal regulations related to SIPs.

**DATES:** Written comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2010-0816, by one of the following methods:

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

2. E-mail: [R4-ARMS@epa.gov](mailto:R4-ARMS@epa.gov).
3. Fax: (404) 562-9019.
4. Mail: “EPA-R04-OAR-2010-0816,” Air Regulatory Management Section (formerly Regulatory Development Section), Air Planning and Implementation 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: Lynorae Benjamin, Chief, Air Regulatory Management Section, Air Planning and Implementation 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 No. EPA-R04-OAR-2010-0816. 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 through [www.regulations.gov](http://www.regulations.gov) or e-mail, information that you consider to be CBI or otherwise protected. 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. 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](http://www.regulations.gov) index. Although listed in the index, some information may not be 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 at the Air Regulatory Management Section, Air Planning and Implementation 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 a.m. to 4:30 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation 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) 562-9043. Mr. Lakeman can be reached via electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background for EPA's Proposed Action**

On September 8, 2011, EPA took final action to approve portions of a requested revision to the Georgia SIP, submitted by EPD on January 13, 2011. *See* 76 FR 55572. Specifically, the portions of Georgia's January 13, 2011, SIP submittal that EPA approved incorporated two updates to the State's air quality regulations under Georgia's New Source Review (NSR) Prevention of Significant Deterioration (PSD) program. First, the SIP revision established appropriate emission thresholds for determining which new stationary sources and modification projects become subject to Georgia's PSD permitting requirements for their greenhouse gas (GHG) emissions. Second, the SIP revision incorporated provisions for implementing the PSD program for the fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standards (NAAQS). EPA noted in its September 8, 2011, final rule approving portions of Georgia's January 13, 2011, SIP submittal that the Agency was still evaluating the portion of the SIP submittal related to a provision (at 391-3-1-.02(7)(a)(2)(iv)) that would automatically rescind portions of Georgia's SIP in the wake of certain court decisions or other triggering events (the automatic rescission clause), and consequently was not taking action on that provision in that final action. *See* 76 FR at 55573. Today, EPA is proposing to disapprove the automatic rescission clause at 391-3-1-

.02(7)(a)(2)(iv) in Georgia's January 13, 2011, SIP submittal.<sup>1</sup> More detail on EPA's analysis of Georgia's automatic rescission clause is provided below.

## **II. EPA's Analysis of Georgia's Submission Related to the Automatic Rescission Clause**

As mentioned above, Georgia's January 13, 2011, SIP revision included a provision that allowed for the automatic rescission of federal permitting-related requirements under certain circumstances. Specifically, at 391-3-1-.02(7)(a)(2)(iv), Georgia's rules read as follows: "The definition and use of the term 'subject to regulation' in 40 CFR, Part 52.21, as amended June 3, 2010, is hereby incorporated by reference; provided, however, that in the event all or any portion of 40 CFR, Part 52.21 containing that term is: (I) declared or adjudged to be invalid or unconstitutional or stayed by the United States Court of Appeals for the Eleventh Circuit or for the District of Columbia Circuit; or (II) withdrawn, repealed, revoked or otherwise rendered of no force and effect by the United States Environmental Protection Agency, Congress, or Presidential Executive Order. Such action shall render the regulation as incorporated herein, or that portion thereof that may be affected by such action, as invalid, void, stayed, or otherwise without force and effect for purposes of this rule upon the date such action becomes final and effective; provided, further, that such declaration, adjudication, stay, or other action described herein shall not affect the remaining portions, if any, of the regulation as incorporated herein, which shall remain of full force and effect as if such portion so declared or adjudged invalid or unconstitutional or stayed or otherwise invalidated or effected were not originally a part of this

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<sup>1</sup> On November 12, 2014, EPD submitted a SIP package that included, among other things, an additional change to Georgia's PSD rules at 391-3-1-.02(7)(a)(2)(iv), which is the provision at issue in this notice. The revised version of Georgia Rule 391-3-1-.02(7)(a)(2)(iv) continues to include the automatic rescission clause at issue in today's notice. However, in its cover letter and subsequent explanations of revisions, EPD did not address the change made to 391-3-1-.02(7)(a)(2)(iv), nor did EPD ask the EPA to approve any revision to this provision. Therefore, EPA does not consider the change to 391-3-1-.02(7)(a)(2)(iv) included in the November 12, 2014, submittal to be part of an official SIP revision package.

rule. The Board declares that it would [not] have incorporated the remaining parts of the federal regulation if it had known that such portion thereof would be declared or adjudged invalid or unconstitutional or stayed or otherwise rendered of no force and effect.”

EPA is proposing to disapprove the portion of Georgia’s January 13, 2011, SIP submittal that would add the automatic rescission clause at Georgia Rule 391-3-1-.02(7)(a)(2)(iv) to the SIP. In assessing the approvability of this clause, 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 clause; and (2) whether any future change to the SIP that occurs as a result of the automatic rescission clause would be consistent with EPA’s interpretation of the effect of the triggering action (e.g., the extent of an administrative or judicial stay) on federal permitting requirements at 40 CFR 52.21. 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.” *See* 42 U.S.C. 7410(l). Under Georgia’s proposed automatic rescission clause, the SIP would automatically be revised as a result of a triggering action without public notice. To the extent that there is any ambiguity regarding how a court order or other triggering action impacts the federal permitting requirements at 40 CFR 52.21, that ambiguity will lead to ambiguity regarding the extent to which the triggering action results in a SIP revision (and indeed, whether a particular court ruling or other action in fact triggers an automatic SIP revision under Georgia’s automatic rescission clause). EPA preliminarily concludes that Georgia’s proposed automatic rescission clause would not provide reasonable public notice of a SIP revision as required by CAA 110(l), 42 U.S.C. 7410(l).

EPA's consideration of whether any SIP change resulting from the proposed automatic rescission clause would be consistent with EPA's interpretation of the effect of the triggering action on federal permitting requirements at 40 CFR 52.21 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." However, the Georgia rescission clause takes effect immediately upon certain triggering actions without any EPA intervention. The effect of this is that EPA is not given the opportunity to determine the effect and extent of the triggering court order or federal law change on the federal permitting requirements at 40 CFR 52.21; instead, the SIP is modified without EPA's approval. EPA preliminarily concludes that Georgia's proposed automatic rescission clause is inconsistent with 40 CFR 51.105.

### **III. Proposed Action**

EPA is proposing to disapprove the provision in Georgia's January 13, 2011, SIP submittal (at Georgia Rule 391-3-1-.02(7)(a)(2)(iv)) that would automatically rescind permitting-related federal requirements in certain circumstances. Previously, EPA approved the remainder of Georgia's January 13, 2011, SIP revision, which related to PSD requirements for GHG-emitting sources and for the PM<sub>2.5</sub> NAAQS. *See* 76 FR 55572 (September, 8, 2011). Today's action does not change what EPA previously approved. EPA notes that the State has the option to withdraw the portion of the January 13, 2011, SIP submittal that is the subject of this disapproval action prior to EPA taking final action. Also, EPA notes that this disapproval action does not trigger a requirement for a Federal Implementation Plan because this provision is not a necessary or required element for the SIP.

#### **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. *See* 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 proposed action merely disapproves a state law as not meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

## List of Subjects in 40 CFR Part 52

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

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

Dated: July 22, 2015.

Heather McTeer Toney  
Regional Administrator,  
Region 4.

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