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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2016-0526; FRL-9954-34-Region 4]

Air Plan Approval; KY; RACM Determination for the KY Portion of the Louisville Area

1997 Annual PM_{2.5}

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ) on August 9, 2016, that addresses reasonably available control measures (RACM) for the Kentucky portion of the Louisville, KY-IN, nonattainment area for the 1997 Annual fine particulate matter (PM_{2.5}) National Ambient Air Quality Standards (NAAQS) (hereinafter referred to as the “bi-state Louisville Area” or “Area”).

DATES: 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-2016-0526 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. EPA may publish

any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Madolyn Sanchez, 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. Ms. Sanchez can be reached by telephone at (404) 562-9644 or via electronic mail at sanchez.madolyn@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In 1997, EPA promulgated the first air quality standards for PM_{2.5}. EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) (based on a 3-year average of annual mean PM_{2.5} concentrations) and a 24-hour standard of 65 $\mu\text{g}/\text{m}^3$ (based on a 3-year average of the 98th percentile of 24-hour concentrations). *See* 62 FR 38652 (July 18, 1997). On

January 5, 2005 (70 FR 944), and supplemented on April 14, 2005 (70 FR 19844), EPA designated the bi-state Louisville Area as nonattainment for the 1997 Annual PM_{2.5} NAAQS. In that action, EPA defined the bi-state Louisville Area to include Bullitt and Jefferson Counties in Kentucky as well as Clark and Floyd Counties and a portion of Jefferson County (Madison Township) in Indiana. Designation of an area as nonattainment for PM_{2.5} starts the process for a state to develop and submit to EPA a SIP revision under title I, part D of the Clean Air Act (CAA or Act). This SIP revision must include, among other elements, a demonstration of how the NAAQS will be attained in the nonattainment area as expeditiously as practicable, but no later than the attainment date required by the CAA.

Originally, EPA designated all 1997 PM_{2.5} NAAQS areas under title I, part D, subpart 1 (hereinafter “Subpart 1”). Subpart 1, comprised of CAA sections 171-179B, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Section 172(c) contains the general SIP requirements for these areas, including RACM requirements under section 172(c)(1). On April 25, 2007 (72 FR 20586), EPA promulgated a rule, codified at 40 CFR part 51, subpart Z, to implement the 1997 PM_{2.5} NAAQS under Subpart 1 (hereinafter referred to as the “1997 PM_{2.5} Implementation Rule”).¹ On December 3, 2008, Kentucky submitted an attainment demonstration SIP revision for the Area that addressed RACM and certain other section 172(c) elements including a reasonable further progress (RFP) plan, base-year and attainment-year

¹ On January 4, 2013, in *Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013), the United State Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that EPA erred in implementing the 1997 PM_{2.5} NAAQS pursuant solely to the general implementation provisions of Subpart 1 rather than the particulate matter-specific provisions in title I, part D, subpart 4. The court remanded both the 1997 PM_{2.5} Implementation Rule and the final rule entitled “Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM_{2.5})” (73 FR 28321, May 16, 2008) to EPA to address this error. In 2014, EPA finalized a rule classifying areas previously designated nonattainment for the 1997 and/or 2006 fine particle pollution standards under Subpart 1, including the bi-state Louisville Area, as “Moderate” nonattainment areas under subpart 4 and setting deadlines for SIP submissions addressing the requirements of subpart 4. *See* 79 FR 31566 (June 2, 2014) [hereinafter 2014 Rule].

emissions inventories, and contingency measures for the Area. This SIP revision included a section 172(c)(1) RACM determination that there were no potential emissions control measures that, if considered collectively, would advance the attainment date by one year or more.

In 2011, EPA determined that the bi-state Louisville Area had attained the 1997 Annual PM_{2.5} NAAQS based upon complete, quality-assured, and certified ambient air monitoring data for the 2007-2009 period. *See* 76 FR 55544 (September 7, 2011); 40 CFR 52.929(b). As a result of this determination and in accordance with 40 CFR 51.1004(c), the requirements for the Area to submit attainment demonstrations and associated RACM, RFP plans, contingency measures, and other planning SIP revisions related to attainment of the 1997 Annual PM_{2.5} NAAQS are suspended for so long as: the area is redesignated to attainment, at which time the requirements no longer apply; or EPA determines that the area has violated the PM_{2.5} NAAQS, at which time the area is again required to submit such plans. Therefore, Kentucky withdrew the aforementioned PM_{2.5} attainment demonstration SIP revision except for the portion addressing emissions inventory requirements under section 172(c)(3). EPA later approved Kentucky's 2002 base-year emissions inventory for the Louisville Area pursuant to section 172(c)(3) on August 2, 2012 (77 FR 45956).

On March 5, 2012, Kentucky submitted a request to redesignate the Kentucky portion of the bi-state Louisville Area to attainment for the 1997 Annual PM_{2.5} NAAQS.² As the result of a 2015 decision from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Sierra Club v. EPA*, 793 F.3d 656 (6th Cir. 2015) requiring a SIP-approved Subpart 1 RACM determination prior to the redesignation of a 1997 Annual PM_{2.5} NAAQS nonattainment area,

² Kentucky submitted its redesignation request prior to the aforementioned ruling in *Natural Resources Defense Council v. EPA*. As discussed in the 2014 Rule, EPA's position is that this ruling does not apply retroactively. *See* 79 FR at 31568.

Kentucky submitted a SIP revision on August 9, 2016, to address the section 172(c)(1) RACM requirements and to support the Commonwealth's March 5, 2012, redesignation request. In that SIP revision, the Commonwealth determined that no additional control measures are necessary in the Area to satisfy the CAA section 172(c)(1) RACM requirements. Kentucky's determination and the Sixth Circuit's decision are discussed in further detail below.

II. What Action is EPA Proposing to Take?

EPA is proposing to determine that Kentucky's Subpart 1 RACM determination meets the requirements of section 172(c)(1) of the CAA and is proposing to approve this RACM determination into the SIP for the reasons discussed in Section III below.

III. What is EPA's Analysis of the Commonwealth's RACM Submittal?

A. Relationship Between Subpart I RACM and Redesignation Criteria

EPA does not believe that Subpart 1 nonattainment planning requirements designed to provide for attainment, including RACM, are "applicable" for purposes of CAA section 107(d)(3)(E)(ii) once an area is attaining the NAAQS and, therefore, does not believe that these planning requirements must be approved before EPA can redesignate an area to attainment. *See, e.g.,* 57 FR 13498, 13564 (April 16, 1992); "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division (September 4, 1992). However, the aforementioned Sixth Circuit decision in *Sierra Club v. EPA* is inconsistent with this longstanding interpretation regarding section 107(d)(3)(E)(ii). In its decision, the Court vacated EPA's redesignation of the Indiana and Ohio portions of the Cincinnati-Hamilton nonattainment area to attainment for the 1997 PM_{2.5} NAAQS because EPA had not yet approved Subpart 1 RACM for the Cincinnati Area into the

Indiana and Ohio SIPs. The Court concluded that “a State seeking redesignation ‘shall provide for the implementation’ of RACM/RACT [reasonably available control technology], even if those measures are not strictly necessary to demonstrate attainment with the PM_{2.5} NAAQS.... If the State has not done so, EPA cannot ‘fully approve’ the area’s SIP, and redesignation to attainment status is improper.” *Sierra Club*, 793 F.3d at 670.

EPA is bound by the Sixth Circuit’s decision in *Sierra Club v. EPA* within the Court’s jurisdiction.³ Although EPA continues to believe that Subpart 1 RACM is not an applicable requirement under section 107(d)(3)(E) for an area that has already attained the 1997 Annual PM_{2.5} NAAQS, EPA is proposing to approve Kentucky’s RACM determination into the SIP pursuant to the Court’s decision.⁴

B. Subpart 1 RACM Requirements

Subpart 1 requires that each attainment plan “provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emission from the existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards.” *See* CAA section 172(c)(1). EPA has consistently interpreted this provision to require only implementation of potential RACM

³ The states of Kentucky, Michigan, Ohio, and Tennessee are located within the Sixth Circuit’s jurisdiction.

⁴ The EPA Region 4 Regional Administrator signed a memorandum on July 20, 2015, seeking concurrence from the Director of EPA’s Air Quality Policy Division (AQPD) in the Office of Air Quality Planning and Standards to act inconsistent with EPA’s interpretation of CAA sections 107(d)(3)(E) and 172(c)(1) when taking action on pending and future redesignation requests in Kentucky and Tennessee because the Region is bound by the Sixth Circuit’s decision in *Sierra Club v. EPA*. The AQPD Director issued her concurrence on July 22, 2015. This memorandum is not required to satisfy EPA’s regional consistency regulations. *See* 40 CFR 56.5(b)(1); 81 FR 51102 (August 3, 2016).

measures that could advance attainment.⁵ Thus, when an area is already attaining the standard, no additional RACM measures are required. EPA's interpretation that Subpart 1 requires only the implementation of RACM measures that would advance attainment was upheld by the United States Court of Appeals in the Fifth Circuit⁶ and by the United States Court of Appeals for the D.C. Circuit.⁷

C. Proposed Action

In its August 9, 2016, SIP submission, the Commonwealth determined that no additional control measures are necessary in the Area to satisfy the CAA section 172(c)(1) RACM requirement because the Area has attained the 1997 Annual PM_{2.5} NAAQS. As noted above, EPA has determined that the Area attained the standard by the April 5, 2010, attainment date and that no additional measures are required to satisfy Subpart 1 RACM when an area is attaining the standard. Therefore, EPA proposes to agree with the Commonwealth's analysis, to approve Kentucky's SIP revision, and to incorporate the section 172(c)(1) RACM determination into 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

⁵ This interpretation was adopted in the General Preamble, see 57 FR 13498 (April 16, 1992), and has been upheld as applied to the Clean Data Policy, as well as to nonattainment SIP submissions. *See NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009); *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002).

⁶ *Sierra Club v. EPA*, 314 F.3d 735, 743-745 (5th Cir. 2002).

⁷ *Sierra Club v. EPA*, 294 F.3d 155, 162-163 (D.C. Cir. 2002); *NRDC v. EPA*, 571 F.3d 1245, 1252 (D.C. Cir. 2009).

proposes to approve state law as 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: October 11, 2016.

Heather McTeer Toney
Regional Administrator,
Region 4.

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