



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R06-OAR-2011-0695; FRL-9957-41-Region 6]**

**Approval and Promulgation of Implementation Plans; New Mexico; Albuquerque/Bernalillo County; Inspection and Maintenance Program Error Correction**

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

**ACTION:** Direct final rule.

**SUMMARY:** Pursuant to the Federal Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is taking direct final action to correct a previously approved diesel inspection and maintenance (I/M) program provision in Albuquerque/Bernalillo County's State Implementation Plan (SIP). This action is based on our determination that at the time EPA approved the diesel I/M Program the State did not have the legal authority to expand its program to require the testing of 1998 and newer diesel motor vehicles greater than 1,000 and less than 10,001 pounds.

**DATES:** This rule is effective on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** without further notice, unless the EPA receives relevant adverse comment by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If the EPA receives such comment, the EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2011-0695, at <http://www.regulations.gov> or via email to [walser.john@epa.gov](mailto:walser.john@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from

Regulations.gov. The 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. The 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, please contact Mr. John Walser, 214-665-7128, [walser.john@epa.gov](mailto:walser.john@epa.gov). For 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>.

*Docket:* The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Mr. John Walser, 214-665-7128, [walser.john@epa.gov](mailto:walser.john@epa.gov). To inspect the hard copy materials, please schedule an appointment with Mr. John Walser or Mr. Bill Deese at 214-665-7253.

**SUPPLEMENTARY INFORMATION:** Throughout this document “we,” “us,” and “our” means the EPA.

## **I. Background**

### *A. Requirements for SIP Submittals and EPA Action on SIP Submittals*

Congress enacted the National Ambient Air Quality Standards (NAAQS) and SIP requirements in the 1970 CAA Amendments. CAA section 110(a)(1) requires that states adopt and submit to EPA for approval SIPs that implement the NAAQS. CAA section 110(a)(2) contains a detailed list of requirements that all SIPs must include to be approvable by EPA. Of particular relevance to this action is subparagraph (E)(i) of CAA section 110(a)(2) which provides that SIPs must provide “necessary assurances that the state... will have adequate ... authority under State (and as appropriate, local) law to carry out such [an] implementation plan.” As applicable to inspection and maintenance programs, this provision means that EPA may approve the submitted I/M provisions as part of the SIP only if EPA is satisfied that the state will have adequate legal authority under state law to implement the program.

*B. Authority for EPA to Revise Previous Action on SIPs*

EPA has authority to revise its previous actions taken on SIP submittals. Two mechanisms are available to EPA: The error correction mechanism provided under CAA section 110(k)(6), and EPA’s general administrative authority to reconsider its own actions under CAA sections 110 and 301(a), in light of case law. CAA section 110(k)(6) provides as follows:

Whenever the Administrator determines that the Administrator’s action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

Therefore, the Administrator has the authority to “determine[]” when a SIP approval was “in error,” and may then revise the SIP approval “as appropriate,” in the same manner as the approval, and without requiring any further submission from the state.<sup>1</sup>

### *C. Albuquerque/Bernalillo County Submission*

On August 1, 2012, EPA proposed to approve revisions to the SIP for Air Quality submitted by the City of Albuquerque/Bernalillo County (the County) area on July 28, 2011 pursuant to the Clean Air Act. (77 FR 45530). These revisions included provisions that expanded the County’s I/M program to include 1998 and newer diesel motor vehicles greater than 1,000 and less than 10,001 pounds. The County submitted a SIP Completeness Checklist pursuant to 40 CFR 51, Appendix V in which it certified that it had the necessary legal authority to include compression ignition powered (diesel) engine testing in its I/M program. We received no comments on this proposal and finalized our approval on October 31, 2012. (77 FR 65821).

## **II. EPA’s Analysis**

Federal law does not require, nor did it require at the time the SIP revision was submitted, a diesel I/M program. However, under the CAA an agency is free to submit for approval as part of the SIP regulations that are more stringent than federal requirements should it choose to. On August 19, 2016, we received a letter from the Albuquerque Bernalillo County Air Quality Control Board indicating that the County did not have the necessary legal authority to require testing of diesel engines at the time the SIP was submitted to EPA. The County requested that EPA perform an error correction under CAA section 110(k)(6).<sup>2</sup> New Mexico statute states that

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<sup>1</sup> Please see the “Legal Support” document in the docket for a more in depth explanations of the EPA’s authority to revise previous SIP actions.

<sup>2</sup> See, “Request for administrative error correction under 40 U.S.C. 7601(k)(6) to provisions of the New Mexico State Implementation Plan regarding emissions testing of certain diesel fuel motor vehicles” dated August 19, 2016.

the County may only require testing for vehicles powered by spark ignited combustion engines.<sup>3</sup> Diesel engines are not spark ignited but instead rely on compression ignition. Further, the State's law provides that the County cannot enact any rule that is more stringent than what is federally required; every rule enacted by the County must be at least as stringent, but no more stringent than what is federally required.<sup>4</sup>

As explained above, EPA has the authority to correct approvals of SIPs should we find that the approval was made in error. Since the County did not have the necessary authority to require testing of diesel engines at the time the SIP revision was submitted, our approval of this diesel I/M provision was made in error. As such, we are taking final action to remove this provision from the County's SIP.

### **III. What Action is EPA Taking?**

EPA is removing the following provisions related to testing diesel vehicles from the County's SIP: NMAC 20.11.100.5(B), 20.11.100.17(E)(2), and the reference to compression ignition engines in 20.11.100.7 (LL)(1), as adopted by the Air Board on May 11, 2011.

### **IV. Incorporation by Reference**

In this rule, we are finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the revisions to the New Mexico regulations as described in the Final Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or in hard copy at the EPA Region 6 office.

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<sup>3</sup> "Any local authority that is located within a transportation-related pollutant nonattainment area or maintenance area may provide for a vehicle emission inspection and maintenance program for vehicles under twenty-six thousand pounds gross vehicle weight powered by a spark-ignited internal combustion engine, which program shall be no more stringent than that required under the federal act or under federal air quality standards." NMSA 74-2-4(E)

<sup>4</sup> NMSA 74-2-5(C).

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

### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:*

#### *Improving Regulation and Regulatory Review*

This final action is not a “significant regulatory action” and was therefore not submitted to the Office of Management and Budget for review.

### *B. Paperwork Reduction Act (PRA)*

This final action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

### *C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action merely approves or disapproves a SIP submission as not meeting the CAA.

### *D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

### *E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

### *F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where EPA or an Indian

tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely approves or disapproves a SIP submission as not meeting the CAA.

*H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action merely approves or disapproves a SIP submission as not meeting the CAA requirements.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the

rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon Monoxide, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Samuel Coleman was designated the Acting Regional Administrator on March 13, 2017, through the order of succession outlined in Regional Order R6-1110.1, a copy of which is included in the docket for this action.

Dated: March 13, 2017.

**Samuel Coleman,**  
*Acting Regional Administrator, Region 6.*

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 GG – New Mexico**

2. In §52.1620(c), the second table titled “EPA APPROVED ALBUQUERQUE /BERNALILLO COUNTY, NM REGULATIONS” is amended by revising the entry for “Part 100 (20.11.100 NMAC)” to read as follows:

**§ 52.1620 Identification of plan.**

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(c) \* \* \*

EPA-APPROVED ALBUQUERQUE/BERNALILLO COUNTY, NM REGULATIONS

State Citation	Title/Subject	State approval/ effective date	EPA approval date	Explanation
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Part 100 (20.11.100 NMAC)	Motor Vehicle Inspection – Decentralized	08/16/2016	<b><u>[Insert the date of publication in the Federal Register]</u></b> <b><u>[Insert Federal Register Citation]</u></b>	20.11.100.5(B), 20.11.100.7(LL)(I) and 20.11.100.17(E)(2) are NOT part of the SIP
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