



**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R02-OAR-2017-0425, FRL-9967-04-Region 2]**

**Approval of Air Quality Implementation Plans;  
New York; Cross-State Air Pollution Rule; NO<sub>x</sub> Annual and SO<sub>2</sub> Group 1 Trading Programs**

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to conditionally approve a revision to the New York State Implementation Plan (SIP) addressing requirements of the Cross-State Air Pollution Rule (CSAPR). Under the CSAPR, large electricity generating units in New York are subject to Federal Implementation Plans (FIPs) requiring the units to participate in CSAPR federal trading programs for annual emissions of nitrogen oxides (NO<sub>x</sub>), ozone season emissions of NO<sub>x</sub>, and annual emissions of sulfur dioxide (SO<sub>2</sub>). This action proposes to conditionally approve into New York's SIP the State's regulations that replace the default allowance allocation provisions of the CSAPR federal trading programs for annual NO<sub>x</sub> and SO<sub>2</sub> emissions. At this time, EPA is not taking action on the portion of New York's SIP submittal addressing NO<sub>x</sub> ozone season emissions. EPA is proposing to conditionally approve New York's regulations for annual NO<sub>x</sub> and SO<sub>2</sub> emissions because, while the submitted rules do not fully conform to CSAPR, New York is in the process of making further revisions to its rules and has provided a commitment to finalize and submit them by December 29, 2017. Upon timely meeting of this commitment, EPA will propose to convert the conditional approval of the SIP revision to a full approval.

**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 number EPA-R02-OAR-2017-0425, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. 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, 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;**

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**SUPPLEMENTARY INFORMATION:**

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**I. What is EPA's Proposed Action?**

Pursuant to Section 110(k)(4) of the Clean Air Act (CAA), EPA is proposing to conditionally approve portions of New York's December 1, 2015 SIP submittal concerning CSAPR<sup>1</sup> trading programs for annual emissions of NO<sub>x</sub> and SO<sub>2</sub>. Large Electric Generating Units (EGUs) in New York are subject to CSAPR FIPs that require the units to participate in the federal CSAPR NO<sub>x</sub> Annual Trading Program and the federal CSAPR SO<sub>2</sub> Group 1 Trading Program. CSAPR provides a process for the submission and approval of SIP revisions to replace certain provisions of the CSAPR FIPs while the remaining FIP provisions continue to apply. This type of CSAPR SIP is termed an abbreviated SIP.

The New York State Department of Environmental Conservation (DEC) amended portions of Title 6 of the New York Codes, Rules and Regulations (6 NYCRR) in order to incorporate CSAPR requirements into the State's rules and allow the DEC to allocate CSAPR allowances to regulated entities in New York. 6 NYCRR Part 244, "CAIR NO<sub>x</sub> Annual Trading Program," has been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 244, "Transport Rule NO<sub>x</sub> Annual Trading Program." 6 NYCRR Part 245, "CAIR SO<sub>2</sub> Trading Program," has also been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 245, "Transport Rule SO<sub>2</sub> Group 1 Trading Program." Attendant revisions were made to 6 NYCRR Part 200, "General Provisions," to update the list of referenced materials that are cited in the amended New York regulations. EPA is proposing to conditionally approve into the SIP the revised versions of 6 NYCRR Parts 200, 244 and 245.

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<sup>1</sup> Federal Implementation Plans; Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 FR 48208 (August 8, 2011) (codified as amended at 40 CFR 52.38 and 52.39 and 40 CFR part 97).

This SIP revision is being proposed for conditional approval as opposed to a full approval because of several deficiencies that must be addressed as discussed in section IV of this notice. The proposed conditional approval of portions of New York's SIP submittal is conditioned on DEC meeting the commitment, articulated in its letters dated July 14, 2016, March 4, 2017, and July 6, 2017, to make the necessary revisions to 6 NYCRR Parts 200, 244, and 245 to meet the requirements of the CAA and EPA's regulations for approval of an abbreviated SIP revision to replace EPA's default allocations of CSAPR emission allowances with state-determined allocations. The July 6, 2017 letter from DEC committed to submitting a SIP revision by December 29, 2017. The date supersedes the dates identified in the July 14, 2016, and March 24, 2017 letters.<sup>2</sup> Once EPA determines that the DEC has satisfied these conditions and EPA approves the revisions (after EPA notice and comment), EPA shall remove the conditional approval and this SIP revision will at that time receive full approval status. The conditionally approved SIP submission will remain part of the SIP until EPA takes further action. If New York fails to meet its commitment to submit a revised SIP by December 29, 2017 [i.e., the date of commitment from the state's July 6, 2017 letter], the conditional approval is treated as a disapproval.

This action proposes to conditionally approve into New York's SIP state-determined allowance allocation procedures for annual NO<sub>x</sub> and SO<sub>2</sub> allowances that would replace EPA's default allocation procedures for the control periods in 2017 and beyond. The proposed approval of this SIP revision does not alter any provision of either the CSAPR NO<sub>x</sub> Annual Trading Program or the CSAPR SO<sub>2</sub> Group 1 Trading Program as applied to New York units other than the allowance allocation provisions, and the FIP provisions requiring those units to participate in the programs (as modified by this SIP revision) remain in place.

New York also repealed 6 NYCRR Part 243, "CAIR NO<sub>x</sub> Ozone Season Trading Program," and replaced it in its entirety with a new rule, 6 NYCRR Part 243, "Transport Rule NO<sub>x</sub> Ozone Season

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<sup>2</sup> In their July 6, 2017 letter, the DEC indicated they needed additional time to complete their rulemaking

Trading Program,” which was included in New York’s December 1, 2015 SIP submittal. EPA is not proposing to act at this time on the portion of New York’s SIP submittal addressing 6 NYCRR Part 243. Since New York’s December 1, 2015 submission, EPA has finalized the CSAPR Update rule<sup>3</sup> to address Eastern states’ interstate air pollution mitigation obligations with regard to the 2008 Ozone National Ambient Air Quality Standard (NAAQS). Among other things, starting in 2017 the CSAPR Update requires New York EGUs to participate in the new CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program instead of the earlier CSAPR NO<sub>x</sub> Ozone Season Trading Program (now renamed the “Group 1” program) and replaces the ozone season budget for New York with a lower budget developed to address the revised and more stringent 2008 Ozone NAAQS. In DEC’s July 14, 2016 commitment letter to EPA, New York indicated that the State would revise 6 NYCRR Part 243 to conform with the final CSAPR Update. For this reason, EPA is proposing to act at this time only on 6 NYCRR Parts 200, 244 and 245.

Section II of this document summarizes relevant aspects of the CSAPR federal trading programs and FIPs as well as the range of opportunities states have to submit SIP revisions to modify or replace the FIP requirements while continuing to rely on CSAPR’s trading programs to address the states’ obligations to mitigate interstate air pollution. Section III describes the specific criteria for approval of such SIP revisions. Section IV contains EPA’s analysis of New York’s SIP submittal, and Section V sets forth EPA’s action on the submittal.

## **II. Background on CSAPR and CSAPR-related SIP revisions**

EPA issued CSAPR in July 2011 to address the requirements of CAA section 110(a)(2)(D)(i)(I) concerning interstate transport of air pollution. As amended (including the 2016 CSAPR Update),

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<sup>3</sup> 81 FR 74504 (October 26, 2016).

CSAPR requires 27 Eastern states to limit their statewide emissions of SO<sub>2</sub> and/or NO<sub>x</sub> in order to mitigate transported air pollution unlawfully impacting other states' ability to attain or maintain four NAAQS: the 1997 annual PM<sub>2.5</sub> NAAQS, the 2006 24-hour PM<sub>2.5</sub> NAAQS, the 1997 Ozone NAAQS, and the 2008 Ozone NAAQS. The CSAPR emissions limitations are defined in terms of maximum statewide "budgets" for emissions of annual SO<sub>2</sub>, annual NO<sub>x</sub>, and/or ozone-season NO<sub>x</sub> by each covered state's large EGUs. The CSAPR state budgets are implemented in two phases of generally increasing stringency, with the Phase 1 budgets applying to emissions in 2015 and 2016 and the Phase 2 (and CSAPR Update) budgets applying to emissions in 2017 and later years. As a mechanism for achieving compliance with the emissions limitations, CSAPR establishes five federal emissions trading programs: a program for annual NO<sub>x</sub> emissions, two geographically separate programs for annual SO<sub>2</sub> emissions, and two geographically separate programs for ozone-season NO<sub>x</sub> emissions. CSAPR also establishes FIP requirements applicable to the large EGUs in each covered state. The CSAPR FIP provisions require each state's EGUs to participate in up to three of the five CSAPR trading programs.

CSAPR includes provisions under which states may submit and EPA will approve SIP revisions to modify or replace the CSAPR FIP requirements while allowing states to continue to meet their transport-related obligations using either CSAPR's federal emissions trading programs or state emissions trading programs integrated with the federal programs.<sup>4</sup> Through such a SIP revision, a state may replace EPA's default provisions for allocating emission allowances among the state's units, employing any state-selected methodology to allocate or auction the allowances, subject to timing criteria and limits on overall allowance quantities. In the case of CSAPR's federal trading programs for ozone-season NO<sub>x</sub> emissions (or integrated state trading programs), a state may also expand trading

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<sup>4</sup> See 40 CFR 52.38, 52.39. States also retain the ability to submit SIP revisions to meet their transport-related obligations using mechanisms other than the CSAPR federal trading programs or integrated state trading programs.

program applicability to include certain smaller EGUs.<sup>5</sup> If a state wants to replace CSAPR FIP requirements with SIP requirements under which the state's units participate in a state trading program that is integrated with and identical to the federal trading program even as to the allocation and applicability provisions, the state may submit a SIP revision for that purpose as well. However, no emissions budget increases or other substantive changes to the trading program provisions are allowed. A state whose units are subject to multiple CSAPR FIPs and federal trading programs may submit SIP revisions to modify or replace either some or all of those FIP requirements.

States can submit two basic forms of CSAPR-related SIP revisions effective for emissions control periods in 2017 or later years.<sup>6</sup> Specific criteria for approval of each form of SIP revision are set forth in the CSAPR regulations, as described in section III below. Under the first alternative – an “abbreviated” SIP revision – a state may submit a SIP revision that upon approval replaces the default allowance allocation and/or applicability provisions of a CSAPR federal trading program for the state.<sup>7</sup> Approval of an abbreviated SIP revision leaves the corresponding CSAPR FIP and all other provisions of the relevant federal trading program in place for the state's units.

Under the second alternative – a “full” SIP revision – a state may submit a SIP revision that upon approval replaces a CSAPR federal trading program for the state with a state trading program integrated with the federal trading program, so long as the state trading program is substantively identical to the federal trading program or does not substantively differ from the federal trading program except as

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<sup>5</sup> States covered by both the CSAPR Update and the NO<sub>x</sub> SIP Call have the additional option to expand applicability under the CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program to include non-EGUs that would have participated in the former NO<sub>x</sub> Budget Trading Program.

<sup>6</sup> CSAPR also provides for a third, more streamlined form of SIP revision that is effective only for control periods in 2016 and is not relevant here. *See* § 52.38(a)(3), (b)(3), (b)(7); § 52.39(d), (g).

<sup>7</sup> § 52.38(a)(4), (b)(4), (b)(8); § 52.39(e), (h).

discussed above with regard to the allowance allocation and/or applicability provisions.<sup>8</sup> For purposes of a full SIP revision, a state may either adopt state rules with complete trading program language, incorporate the federal trading program language into its state rules by reference (with appropriate conforming changes), or employ a combination of these approaches.

The CSAPR regulations identify several important consequences and limitations associated with approval of a full SIP revision. First, upon EPA's approval of a full SIP revision as correcting the deficiency in the state's SIP that was the basis for a particular set of CSAPR FIP requirements, the obligation to participate in the corresponding CSAPR federal trading program is automatically eliminated for units subject to the state's jurisdiction without the need for a separate EPA withdrawal action, so long as EPA's approval of the SIP is full and unconditional.<sup>9</sup> Second, approval of a full SIP revision does not terminate the obligation to participate in the corresponding CSAPR federal trading program for any units located in any Indian country within the borders of the state, and if and when a unit is located in Indian country within a state's borders, EPA may modify the SIP approval to exclude from the SIP, and include in the surviving CSAPR FIP instead, certain trading program provisions that apply jointly to units in the state and to units in Indian country within the state's borders.<sup>10</sup> Finally, if at the time a full SIP revision is approved EPA has already started recording allocations of allowances for a given control period to a state's units, the federal trading program provisions authorizing EPA to complete the process of allocating and recording allowances for that control period to those units will continue to apply, unless EPA's approval of the SIP revision provides otherwise.<sup>11</sup>

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<sup>8</sup> § 52.38(a)(5), (b)(5), (b)(9); § 52.39(f), (i).

<sup>9</sup> § 52.38(a)(6), (b)(10)(i); § 52.39(j).

<sup>10</sup> § 52.38(a)(5)(iv)-(v), (a)(6), (b)(5)(v)-(vi), (b)(9)(vi)-(vii), (b)(10)(i); § 52.39(f)(4)-(5), (i)(4)-(5), (j).

<sup>11</sup> § 52.38(a)(7), (b)(11)(i); § 52.39(k).

### III. Criteria for approval of CSAPR-related SIP revisions

Each CSAPR-related abbreviated or full SIP revision must meet the following general submittal criteria:

- *Timeliness and completeness of SIP submittal.* If a state wants to replace the default allowance allocation or applicability provisions of a CSAPR federal trading program, the complete SIP revision must be submitted to EPA by December 1 of the year before the deadlines described below for submitting allocation or auction amounts to EPA for the first control period for which the state wants to replace the default allocation and/or applicability provisions.<sup>12</sup> This SIP submission deadline is inoperative in the case of a SIP revision that seeks only to replace a CSAPR FIP and federal trading program with a SIP and a substantively identical state trading program integrated with the federal trading program. The SIP submittal completeness criteria in section 2.1 of appendix V to 40 CFR part 51 also apply.

In addition to the general submittal criteria, a CSAPR-related abbreviated or full SIP seeking to address the allocation or auction of emission allowances must meet the following further criteria:

- *Methodology covering all allowances potentially requiring allocation.* For each federal trading program addressed by a SIP revision, the SIP revision's allowance allocation or auction methodology must replace both the federal program's default allocations to existing units<sup>13</sup> at 40 CFR 97.411(a), 97.511(a), 97.611(a), 97.711(a), or 97.811(a) as applicable, and the federal trading program's provisions for allocating allowances from the new unit set-aside (NUSA) for the state at 40 CFR 97.411(b)(1) and 97.412(a), 97.511(b)(1) and 97.512(a), 97.611(b)(1) and

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<sup>12</sup> 40 CFR 52.38(a)(4)(ii), (a)(5)(vi), (b)(4)(iii), (b)(5)(vii), (b)(8)(iv), (b)(9)(viii); § 52.39(e)(2), (f)(6), (h)(2), (i)(6).

<sup>13</sup> In the context of the approval criteria for CSAPR-related SIP revisions, an "existing unit" is a unit for which EPA has determined default allowance allocations (which could be allocations of zero allowances) in the rulemakings establishing and amending CSAPR. A spreadsheet showing EPA's default allocations to existing units is posted at [www.epa.gov/crossstaterule/techinfo.html](http://www.epa.gov/crossstaterule/techinfo.html).

97.612(a), 97.711(b)(1) and 97.712(a), or 97.811(b)(1) and 97.812(a), as applicable.<sup>14</sup> In the case of a state with Indian country within its borders, while the SIP revision may neither alter nor assume the federal program's provisions for administering the Indian country NUSA for the state, the SIP revision must include procedures addressing the disposition of any otherwise unallocated allowances from an Indian country NUSA that may be made available for allocation by the state after EPA has carried out the Indian country NUSA allocation procedures.<sup>15</sup>

- *Assurance that total allocations will not exceed the state budget.* For each federal trading program addressed by a SIP revision, the total amount of allowances auctioned or allocated for each control period under the SIP revision (prior to the addition by EPA of any unallocated allowances from any Indian country NUSA for the state) generally may not exceed the state's emissions budget for the control period less the sum of the amount of any Indian country NUSA for the state for the control period and any allowances already allocated to the state's units for the control period and recorded by EPA.<sup>16</sup> Under its SIP revision, a state is free to not allocate allowances to some or all potentially affected units, to allocate or auction allowances to entities other than potentially affected units, or to allocate or auction fewer than the maximum permissible quantity of allowances and retire the remainder. Under the CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program only, additional allowances may be allocated if the state elects to expand applicability to non-EGUs that would have been subject to the former NO<sub>x</sub> Budget Trading Program established for compliance with the NO<sub>x</sub> SIP Call.<sup>17</sup>

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<sup>14</sup> § 52.38(a)(4)(i), (a)(5)(i), (b)(4)(ii), (b)(5)(ii), (b)(8)(iii), (b)(9)(iii); § 52.39(e)(1), (f)(1), (h)(1), (i)(1).

<sup>15</sup> See §§ 97.412(b)(10)(ii), 97.512(b)(10)(ii), 97.612(b)(10)(ii), 97.712(b)(10)(ii), 97.812(b)(10)(ii).

<sup>16</sup> § 52.38(a)(4)(i)(A), (a)(5)(i)(A), (b)(4)(ii)(A), (b)(5)(ii)(A), (b)(8)(iii)(A), (b)(9)(iii)(A); § 52.39(e)(1)(i), (f)(1)(i), (h)(1)(i), (i)(1)(i).

<sup>17</sup> § 52.38(b)(8)(iii)(A), (b)(9)(iii)(A).

- *Timely submission of state-determined allocations to EPA.* The SIP revision must require the state to submit to EPA the amounts of any allowances allocated or auctioned to each unit for each control period (other than allowances initially set aside in the state’s allocation or auction process and later allocated or auctioned to such units from the set-aside amount) by the following deadlines.<sup>18</sup> Note that the submission deadlines differ for amounts allocated or auctioned to units considered existing units for CSAPR purposes and amounts allocated or auctioned to other units.

<b>CSAPR NO<sub>x</sub> Annual, CSAPR NO<sub>x</sub> Ozone Season Group 1, CSAPR SO<sub>2</sub> Group 1, and CSAPR SO<sub>2</sub> Group 2 Trading Programs:</b>		
<b>Units</b>	<b>Year of the Control Period</b>	<b>Deadline for Submission to EPA of Allocations or Auction Results</b>
Existing	2017 and 2018	June 1, 2016
	2019 and 2020	June 1, 2017
	2021 and 2022	June 1, 2018
	2023 and later years	June 1 of the fourth year before the year of the control period
Other	All years	July 1 of the year of the control period

<b>CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program:</b>		
<b>Units</b>	<b>Year of the Control Period</b>	<b>Deadline for Submission to EPA of Allocations or Auction Results</b>
Existing	2019 and 2020	June 1, 2018
	2021 and 2022	June 1, 2019
	2023 and 2024	June 1, 2020
	2025 and later years	June 1 of the fourth year before the year of the control period
Other	All years	July 1 of the year of the control period

- *No changes to allocations already submitted to EPA or recorded.* The SIP revision must not provide for any change to the amounts of allowances allocated or auctioned to any unit after

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<sup>18</sup> § 52.38(a)(4)(i)(B)-(C), (a)(5)(i)(B)-(C), (b)(4)(ii)(B)-(C), (b)(5)(ii)(B)-(C), (b)(8)(iii)(B)-(C), (b)(9)(iii)(B)-(C); § 52.39(e)(1)(ii)-(iii), (f)(1)(ii)-(iii), (h)(1)(ii)-(iii), (i)(1)(ii)-(iii).

those amounts are submitted to EPA or any change to any allowance allocation determined and recorded by EPA under the federal trading program regulations.<sup>19</sup>

- *No other substantive changes to federal trading program provisions.* The SIP revision may not substantively change any other trading program provisions, except in the case of a SIP revision that also expands program applicability as described below.<sup>20</sup> Any new definitions adopted in the SIP revision (in addition to the federal trading program's definitions) may apply only for purposes of the SIP revision's allocation or auction provisions.<sup>21</sup>

In addition to the general submittal criteria, a CSAPR-related abbreviated or full SIP revision seeking to expand applicability under their integrated state trading programs (which is allowed for CSAPR's NO<sub>x</sub> ozone season programs only) must meet the following further criteria:

- *Only EGUs with nameplate capacity of at least 15 MWe.* The SIP revision may expand applicability only to additional fossil fuel-fired boilers or combustion turbines serving generators producing electricity for sale, and only by lowering the generator nameplate capacity threshold used to determine whether a particular boiler or combustion turbine serving a particular generator is a potentially affected unit. The nameplate capacity threshold adopted in the SIP revision may not be less than 15 MWe.<sup>22</sup> In addition or alternatively, applicability may be

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<sup>19</sup> § 52.38(a)(4)(i)(D), (a)(5)(i)(D), (b)(4)(ii)(D), (b)(5)(ii)(D), (b)(8)(iii)(D), (b)(9)(iii)(D); § 52.39(e)(1)(iv), (f)(1)(iv), (h)(1)(iv), (i)(1)(iv).

<sup>20</sup> § 52.38(a)(4), (a)(5), (b)(4), (b)(5), (b)(8), (b)(9); § 52.39(e), (f), (h), (i).

<sup>21</sup> § 52.38(a)(4)(i), (a)(5)(ii), (b)(4)(ii), (b)(5)(iii), (b)(8)(iv), (b)(9)(iv); § 52.39(e)(1), (f)(2), (h)(1), (i)(2).

<sup>22</sup> § 52.38(b)(4)(i), (b)(5)(i), (b)(8)(i), (b)(9)(i).

extended to non-EGUs that would have been subject to the former NO<sub>x</sub> Budget Trading Program established for compliance with the NO<sub>x</sub> SIP Call.<sup>23</sup>

- *No other substantive changes to federal trading program provisions.* The SIP revision may not substantively change any other trading program provisions, except in the case of a SIP revision that also addresses the allocation or auction of emission allowances as described above.<sup>24</sup>

In addition to the general submittal criteria and the other applicable criteria described above, a CSAPR-related full SIP revision must meet the following further criteria:

- *Complete, substantively identical trading program provisions.* The SIP revision must adopt complete state trading program regulations substantively identical to the complete federal trading program regulations at 40 CFR 97.402 through 97.435, 97.502 through 97.535, 97.602 through 97.635, 97.702 through 97.735, or 97.802 through 97.835, as applicable, except as described above in the case of a SIP revision that seeks to replace the default allowance allocation and/or applicability provisions.<sup>25</sup>
- *Only non-substantive substitutions for the term “State.”* The SIP revision may substitute the name of the state for the term “State” as used in the federal trading program regulations, but only to the extent that EPA determines that the substitutions do not substantively change the trading program regulations.<sup>26</sup>

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<sup>23</sup> § 52.38(b)(8)(ii), (b)(9)(ii).

<sup>24</sup> § 52.38(b)(4), (b)(5), (b)(8), (b)(9).

<sup>25</sup> § 52.38(a)(5), (b)(5), (b)(9); § 52.39(f), (i).

<sup>26</sup> §§ 52.38(a)(5)(iii), (b)(5)(iv), (b)(9)(v); 52.39(f)(3), (i)(3).

- *Exclusion of provisions addressing units in Indian country.* The SIP revision may not impose requirements on any unit in any Indian country within the state's borders and must not include the federal trading program provisions governing allocation of allowances from any Indian country NUSA for the state.<sup>27</sup>

#### **IV. New York's submittal and EPA's analysis**

##### *A. New York's SIP submittal*

On December 1, 2015, New York submitted to EPA an abbreviated SIP revision that, if approved, would replace the default allowance allocation provisions of the CSAPR SO<sub>2</sub> Group 1, CSAPR NO<sub>x</sub> Annual, and CSAPR NO<sub>x</sub> Ozone Season Trading Programs for the state's EGUs for the control periods in 2017 and beyond with provisions establishing state-determined allocations for those control periods but would leave the corresponding CSAPR FIPs and all other provisions of the trading programs in place.

The SIP submittal includes the following adopted state rules: 6 NYCRR Part 243, "Transport Rule NO<sub>x</sub> Ozone Season Trading Program," 6 NYCRR Part 244, "Transport Rule NO<sub>x</sub> Annual Trading Program," and 6 NYCRR Part 245, "Transport Rule SO<sub>2</sub> Trading Program." Previous versions of the rules developed for state participation in the Clean Air Interstate Rule<sup>28</sup> (CAIR), i.e., 6 NYCRR Part 243, "CAIR NO<sub>x</sub> Ozone Season Trading Program," 6 NYCRR Part 244, "CAIR NO<sub>x</sub> Annual Trading Program," and 6 NYCRR Part 245, "CAIR SO<sub>2</sub> Trading Program," have been repealed and replaced in their entirety with the new rules. Attendant revisions were made to 6 NYCRR Part 200, "General

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<sup>27</sup> §§ 52.38(a)(5)(iv), (b)(5)(v), (b)(9)(vi); 52.39(f)(4), (i)(4).

<sup>28</sup> 70 FR 25162 (May 12, 2005).

Provisions,” to update the list of referenced material that are cited in the amended New York regulations. The regulations were adopted on November 10, 2015, and effective on December 12, 2015.

As discussed in section I, EPA is not acting at this time on the portion of New York's SIP submittal addressing 6 NYCRR Part 243, which will be addressed in another rulemaking at a later date.

In this rulemaking, EPA is addressing NYCRR Parts 244, 245, and 200.

New York’s Parts 244 and Part 245 allow the State to replace the provisions of the CSAPR NO<sub>x</sub> Annual and SO<sub>2</sub> Group 1 trading program allocation methodology with its own methodology. Parts 244 and 245 apply to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sell any amount of electricity. The control periods for Parts 244 and 245 run from January 1 to December 31. DEC would allocate allowances for control periods beginning on or after January 1, 2017.

For existing units, New York’s allocation methodology is based on the average of recent emissions (i.e., the average of the 3 last years for which data is available) from all New York Transport Rule units. Five percent of the statewide budgets for annual emissions of SO<sub>2</sub> and NO<sub>x</sub> would be set aside for new units, and the remainder of the statewide budgets, but at least ten percent, will be allocated to the Energy Efficiency and Renewable Energy Technology (EERET) account. If the allocation to the EERET account would be less than the prescribed minimum after allocations to existing units based on the 3-year average of emissions and an allocation of five percent to the new unit set-aside, allocations to existing units would be reduced proportionally by the amounts necessary to ensure that ten percent of the budget is allocated to the EERET account.

The DEC will distribute all allowances at no cost with the exception of allowances held in the EERET account, which will be administered by the New York State Energy Research and Development Authority (NYSERDA). The sale of allowances by NYSERDA will be used to fund energy efficiency projects, renewable energy, or clean energy technology. Any EERET allowances that are not sold or

distributed by NYSERDA within 12 months of the initial allocation to the EERET account will be returned to the DEC for retirement or reallocation.

As discussed more fully below, in a July 14, 2016 letter to EPA, DEC committed to revising 6 NYCRR Parts 244 and 245, and submitting a revised SIP submittal no later than July 14, 2017 to address EPA comments provided to the DEC via email on June 2, 2016. In the July 14, 2016 letter to EPA, DEC committed to revising the regulations in accordance with an enclosed document entitled “NYSDEC Responses to EPA Comments on New York’s Annual CSAPR Rules.” In a November 28, 2016 email to DEC, EPA identified additional deficiencies. In a March 24, 2017 letter to EPA, DEC indicated that the State had commenced the regulatory process to correct additional deficiencies identified by EPA and committed to complete that process and submit a SIP revision by September 15, 2017. In a July 6, 2017 letter, DEC revised the date for correcting deficiencies and submitting a SIP revision to December 29, 2017.

New York’s December 1, 2015 SIP submission, and July 14, 2016, March 24, 2017, and July 6, 2017 commitment letters to EPA, as well as EPA’s comments provided to the DEC on June 2, 2016, and November 28, 2016 can be found in the electronic docket for this proposed action at [www.regulations.gov](http://www.regulations.gov).

#### *B. EPA’s Analysis of New York’s Submittal*

##### 1. Timeliness and Completeness of New York’s SIP Submittal

New York’s SIP revision seeks to establish state-determined allocations of CSAPR NO<sub>x</sub> Annual and SO<sub>2</sub> Group 1 allowances, starting with the control periods in 2017. Under 40 CFR 52.38(a)(4)(i)(B) and 52.39(e)(1)(ii), the deadline for submission of state-determined allocations for the 2017 and 2018 control periods is June 1, 2016, which under 52.38(a)(4)(ii) and 52.39(e)(2) makes December 1, 2015, the deadline for submission to EPA of a complete SIP revision establishing state-determined allocations

for those control periods. New York submitted its SIP revision to EPA by letter dated and delivered electronically on December 1, 2015, and EPA has determined that the submittal complies with the applicable minimum completeness criteria of 40 CFR part 51, Appendix V, Section 2.1. Because the New York SIP revision was timely submitted and meets the applicable completeness criteria, it meets the criteria under 40 CFR 52.38(a)(4)(ii) and 52.39(e)(2).

2. Methodology covering all allowances potentially requiring allocation

Sections 244.3 through 244.6, and 245.3 through 245.6 of the New York rules provide the allocation methodology adopted by New York in the SIP revision. Sections 244.3 through 244.6 replace the provisions of 40 CFR 97.411(a), 97.411(b)(1), and 97.412(a) for allocations of NO<sub>x</sub> Annual allowances; §§ 245.3 through 245.6 replace the provisions of 40 CFR 97.611(a), 97.611(b)(1), and 97.612(a) for allocations of SO<sub>2</sub> Group 1 allowances. New York's methodology addresses allocation of allowances that under the default allocation provisions for the Federal trading programs would be allocated to existing units as well as allowances that would be allocated to new units from the new unit set-asides established for New York under the Federal trading programs.

Several provisions of New York's allocation methodology are inconsistent with the CSAPR SIP approval criteria, including as follows:

- Sections 244.4(b) and 245.4(b) indicate that if the DEC fails to submit allowance allocations, EPA will, for the applicable control period, allocate the allowances based on EGUs' proportional shares of the allocations for the previous control period. CSAPR rules do not allow a SIP revision under which EPA would be required to compute new allocations on a state's behalf.
- New York's rules do not include provisions for the disposition of any otherwise unallocated Indian country new unit set-aside allowances made available to the State for reallocation.

- EPA believes there is a lack of clarity regarding when EGUs would be considered “existing” or “new” units for purposes of determining whether they would receive allocations under §§ 244.3 and 245.3 or under §§ 244.5 and 245.5, respectively, and also which years of emissions data would be used to determine their allocations. For example, given EPA’s understanding that New York generally intends for covered EGUs to be eligible to receive allowance allocations for each year of the programs either as existing units or as new units, the provisions in §§ 244.3(b)(2) and 245.3(b)(2) basing allowance allocations to existing units on three years of historical emissions data, combined with the requirements under 40 CFR 52.38(a)(4)(i)(B) and 52.39(e)(1)(ii) for New York to submit its allocations for existing units to EPA up to four years in advance, are inconsistent with the provisions in §§ 244.5(a)(3) and 245.5(a)(3) stating that EGUs may receive allocations from the new unit set-asides for no more than four years. In addition, §§ 244.5(a) and 245.5(a) describe EGUs commencing operation after May 1, 2010 as eligible to receive allocations from the new unit set-asides, but that date appears to be irrelevant under the procedures set forth in the other rule provisions.

3. Assurance that total allocations will not exceed the state budget

Sections 244.3, Transport Rule NO<sub>x</sub> Annual Trading Program budgets, and 245.3, Transport Rule SO<sub>2</sub> Group 1 Trading Program budgets, set forth the total amounts of CSAPR NO<sub>x</sub> Annual allowances and CSAPR SO<sub>2</sub> Group 1 allowances to be allocated to New York units for each control period under the state trading programs.

Sections 244.3 and 245.3 provide incorrect citations, and therefore incorrect CSAPR Phase 2 state budgets, for New York. Part 244 cites the North Carolina NO<sub>x</sub> Annual budget at 40 CFR 97.410(a)(15), which is 41,553 tons, instead of the New York NO<sub>x</sub> Annual budget at 40 CFR 97.410(a)(14), which is 21,722 tons. Part 245 cites the West Virginia SO<sub>2</sub> Group 1 budget at 40 CFR 97.610(a)(15), which is

75,688 tons, instead of the New York SO<sub>2</sub> Group 1 budget at 40 CFR 610(a)(9), which is 27,556 tons. In addition, New York's rules do not exclude the amounts of the Indian country new unit set-asides for New York (22 tons under the NO<sub>x</sub> Annual Trading Program and 28 tons under the SO<sub>2</sub> Group 1 Trading Program) from the total amounts of allowances to be allocated by the State. As such, New York's rules do not currently provide assurance that total allocations will not exceed the amounts of New York's budgets under the Federal trading program rules. However, as noted below, on November 30, 2015, New York submitted allocations for existing units to EPA for the 2017 and 2018 control periods in accordance with the intent of its rules. Those allocation amounts were based on the correct New York budget amounts, not the higher budget amounts indicated by the incorrect CFR references in the state rules. Further, in response to EPA's comments on the SIP submission, New York subsequently submitted slightly revised allocations that properly exclude the amounts of the Indian country new unit set-asides from the total amounts allocated. On July 27, 2017, New York also submitted allocations for existing units to EPA for the 2019 and 2020 control periods that were based on the correct budget amounts. In light of the fact that the actual allocations submitted do not exceed the amounts of New York's budgets, EPA believes that the incorrect rule provisions do not preclude conditional approval of the SIP submission while New York works to correct the errors.

#### 4. Timely submission of state-determined allocations to EPA

Sections 244.4 and 245.4 provide for allowance allocations for existing units to be submitted to EPA for the 2017 and 2018 control periods by December 1, 2015. New York in fact submitted such allocations to EPA on November 30, 2015 (and later adjusted the allocations slightly in order to address EPA's comments on the SIP submission). Sections 244.5(a)(7), and 245.5(a)(7) indicate that the DEC will submit State-determined NUSA allocations to the EPA by October 31 of the control period.

The submission deadline of December 1, 2015 precedes the June 1, 2016 deadline discussed in section III above for existing units for the 2017 and 2018 control periods. New York, however, has not addressed intended deadlines to submit allocations to existing units for future control periods beyond 2018. New York's SIP revision meets the criteria under 40 CFR 52.38(a)(4)(i)(B) and 52.39(e)(1)(ii) for the 2017 and 2018 control periods only. EPA notes that New York's revised rules must conform with the requirements in 40 CFR 52.38(a)(4)(i)(B) and 52.39(e)(1)(ii), which require allocations to be submitted up to four years in advance of the control period for future years.

In sections 244.5(a)(7), and 245.5(a)(7) New York has included an annual deadline of October 31st of the year of the control period for submission of NUSA allocations to EPA. The October 31st date is beyond the July 1st annual submission deadline for amounts allocated or auctioned to units other than existing units (also discussed in section III of this notice). New York's SIP revision therefore does not meet the timing requirements for annual submission of NUSA allocations under 40 CFR 52.38(a)(4)(i)(C) and 52.39(e)(1)(iii).

5. No changes to allocations already submitted to EPA or recorded

The New York rules include no provisions allowing alteration of allocations after the allocation amounts have been provided to EPA and no provisions allowing alteration of any allocations made and recorded by EPA under the federal trading program regulations, thereby meeting the condition under 40 CFR 52.38(a)(4)(i)(D) and 52.39(e)(1)(iv).

6. No other substantive changes to federal trading program provisions

It is apparent from the overall design of New York's rules that they are intended only to establish State-determined allowance allocation procedures and otherwise to coordinate with the federal trading

program rules. However, in their current form the rules contain a number of provisions that require revision in order to not substantively modify the federal trading program provisions, including:

- As mentioned previously in section II of this notice, under an “abbreviated” SIP revision, a state may replace only the allowance allocation and/or applicability provisions of a CSAPR federal trading program. However, the applicability sections of the New York’s NO<sub>x</sub> Annual and SO<sub>2</sub> Group 1 rules, specifically §§ 244.1(a) and 245.1(a), incorporate almost the entire CSAPR NO<sub>x</sub> Annual and SO<sub>2</sub> Group 1 regulations, not just the provisions related to allocations. New York’s 244.1(a) incorporates 40 CFR Sections 97.401 through 97.410 and 97.413 through 97.435. New York’s 245.1(a) incorporates 40 CFR Sections 97.601 through 97.610 and 97.613 through 97.635. Similarly, in §§ 244.2 and 245.2, certain terms used throughout the trading programs, including “Administrator” and “Designated representative,” are defined only with reference to New York’s rules when they should be defined with reference to the federal regulations.
- New York’s 6 NYCRR §§ 244.1(d)(2) and 245.1(d)(2), include provisions for DEC to respond to petitions for determinations of applicability. Under 40 CFR 97.404 and 97.604, responding to petitions for determinations of applicability is an EPA responsibility.
- New York’s rules use the term “Transport Rule” in Parts 244 and 245 instead of the term “TR” used in the CSAPR regulations as originally promulgated (i.e., “Transport Rule NO<sub>x</sub> annual allowances” instead of “TR NO<sub>x</sub> Annual allowances”). In the CSAPR Update, EPA changed “TR” to “CSAPR” throughout the regulations for all the CSAPR trading programs. New York should update its rules to replace “Transport Rule” with “TR”, or preferably with “CSAPR” to reflect the nomenclature changes from the CSAPR Update.<sup>29</sup>

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<sup>29</sup> 81 FR 74504 (October 26, 2016).

- EPA has identified several additional instances of incorrect cross-references in Parts 244, 245, and 200, as well as technical corrections needed to Parts 244, and 245, and 200 to reflect the changes from the CSAPR Update. The specific instances are identified in EPA’s comments, which are available in the docket.

Except as noted above, EPA has determined that the SIP revision meets the requirements of 40 CFR 52.38(a)(4) and 52.39(e) by making no substantive changes to the Federal trading program regulations beyond the provisions addressing allowance allocations.

#### **V. EPA’s Proposed Action on New York’s Submittal**

The EPA is proposing to conditionally approve the New York SIP revision submitted on December 1, 2015 concerning allocations to New York units of CSAPR NO<sub>x</sub> Annual allowances and CSAPR SO<sub>2</sub> Group 1 allowances for the control periods in 2017 and 2018, and future control periods beyond 2018. This rule proposes to conditionally approve into the New York SIP amendments to 6 NYCRR Parts 244 and 245 that incorporate CSAPR requirements into the State rules, and allows the DEC to allocate CSAPR allowances to regulated entities in New York. EPA is also proposing to conditionally approve the attendant revisions to 6 NYCRR Part 200 to update the list of referenced materials cited in the amended New York regulations.

The proposed conditional approval of Parts 200, 244, and 245 is based upon DEC’s commitment to make the necessary changes, identified in the July 14, 2016, March 4, 2017, and July 6, 2017 commitment letters, to New York’s 6 NYCRR Part 244, “Transport Rule NO<sub>x</sub> Annual Trading Program,” Part 245, “Transport Rule SO<sub>2</sub> Group 1 Trading Program,” and Part 200, “General Provisions.” See section IV B. of this notice concerning New York’s budget, allowance allocation methodology, timing of submission of allocations, replaceable provisions of a CSAPR federal trading

program under an abbreviated SIP, applicability determinations, and other substantive changes to the CSAPR Federal trading program regulations.

Following the conditional approval of Part 200, Part 244, and Part 245, allocations of CSAPR NO<sub>x</sub> Annual allowances and CSAPR SO<sub>2</sub> Group 1 allowances will be made according to the provisions of New York's SIP (as modified by the DEC's July 14, 2016, March 24, 2017, and July 6, 2017 commitment letters to EPA) instead of 40 CFR 97.411(a), 97.411(b)(1), 97.412(a), 97.611(a), 97.611(b)(1), and 97.612(a). EPA's action on this SIP revision does not alter any provisions of the Federal CSAPR NO<sub>x</sub> Annual Trading Program and the Federal CSAPR SO<sub>2</sub> Group 1 Trading Program as applied to New York units other than the allowance allocation provisions, and the FIPs requiring the units to participate in the programs (as modified by this SIP revision) remain in place. EPA is proposing to conditionally approve Part 200, Part 244 and Part 245 because New York's rules (when modified by the DEC as indicated in its July 14, 2016, March 24, 2017, and July 6, 2017 commitment letters to EPA) will meet the requirements of the CAA and EPA's regulations for an abbreviated SIP revision and will replace EPA's default allocations of CSAPR emission allowances with state-determined allocations, as discussed in section IV.B above.

Under CAA section 110(k)(4), the EPA may approve a SIP revision based on a commitment by a State to adopt specific enforceable measures by a date certain, but not later than one year after the date of final conditional approval. If the State fails to meet its commitment to submit a revised SIP by December 29, 2017 [i.e., the date of commitment from the state's July 6, 2017 letter], or if the EPA finds the State's revisions to be incomplete, or the EPA disapproves the State's revisions, the conditional approval will, by operation of law, become a disapproval. EPA would notify the State by letter that such action has occurred. At that time, the SIP revisions in question would not be part of the approved SIP. If that were to occur, EPA would subsequently publish a document in the Federal Register notifying the

public that the conditional approval automatically converts to a disapproval.<sup>30</sup> If, however, the State meets its commitment within the applicable timeframe, EPA would subsequently publish in the Federal Register a document notifying the public that EPA intends to convert the conditional approval to a full approval.

Because a FIP already in place satisfies New York's obligations to mitigate interstate transport air pollution, should a disapproval become finalized as noted above, the EPA will not be required to take further action. Additionally, since the SIP submission is not required in response to a SIP call under CAA section 110(k)(5), mandatory sanctions under CAA section 179 would not apply because the deficiencies are not with respect to a submission that is required under CAA title I part D.

## **VI. Incorporation By Reference**

In this rule, the EPA is proposing action that will involve adoption of regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference revisions to 6 NYCRR Parts 200, 244, and 245 as previously discussed. The EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov), and/or at the EPA Region 2 Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information).

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

Under the Clean Air Act, 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,

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<sup>30</sup> In the event the conditional approval automatically reverts to a disapproval, the validity of allocations made pursuant to the SIP revision before the date of such reversion would not be affected.

provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed 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 proposed 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 Clean Air Act; 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, 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. Thus Executive Order 13175 does not apply to this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen Dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

AUTHORITY: 42 U.S.C. 7401 et seq.

Dated: August 18, 2017.

Catherine R. McCabe,  
Acting Regional Administrator,  
Region 2.

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