



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2016-0574; FRL-9968-15-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Removal of Clean Air Interstate Rule Trading Programs Replaced by Cross-State Air Pollution Rule Trading Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve two state implementation plan (SIP) revisions submitted by the State of West Virginia. These revisions pertain to two West Virginia regulations that established trading programs under the Clean Air Interstate Rule (CAIR). The EPA-administered trading programs under CAIR were discontinued on December 31, 2014 upon the implementation of the Cross-State Air Pollution Rule (CSAPR), which was promulgated by EPA to replace CAIR. CSAPR established federal implementation plans (FIPs) for 23 states, including West Virginia. The submitted SIP revisions request removal of regulations that implemented the CAIR annual nitrogen oxide (NO_x) and annual sulfur dioxide (SO₂) trading programs from the West Virginia SIP (as CSAPR has supplanted CAIR). West Virginia's SIP revision submittal requesting removal of a regulation that implemented the CAIR ozone season trading program will be addressed in a separate action. EPA is approving these SIP revisions in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on [insert date 90 days after date of publication in the Federal

Register] without further notice, unless EPA receives adverse written comment by **[insert date 30 days after date of publication in the Federal Register]**. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2016-0574 at <https://www.regulations.gov>, or via email to stahl.cynthia@epa.gov. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). For either manner of submission, 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, please contact the person identified in the “For Further Information Contact” section. 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>.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814-2308, or by e-mail at powers.marilyn@epa.gov.

SUPPLEMENTARY INFORMATION: On July 13, 2016, the State of West Virginia, through the West Virginia Department of Environmental Protection (WVDEP), submitted three SIP revisions requesting EPA remove from its SIP three regulations that implemented the CAIR (70 FR 25162, May 12, 2005) trading programs: Regulation 45CSR39 – *Control of Annual Nitrogen Oxides Emissions*, Regulation 45CSR40 – *Control of Ozone Season Nitrogen Oxides Emissions*, and Regulation 45CSR41 – *Control of Annual Sulfur Dioxide Emissions*. This action pertains to the two submittals that remove 45CSR39 and 45CSR41, the CAIR annual NO_x and annual SO₂ trading programs, respectively, from the West Virginia SIP. The submittal pertaining to removal of the CAIR ozone season NO_x trading program is not a part of this action and will be addressed in a separate action.

I. Background

In 2005, EPA promulgated CAIR (70 FR 25162, May 12, 2005) to address transported emissions that significantly contributed to downwind states' nonattainment and interfered with maintenance of the 1997 ozone and fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS). CAIR required 28 states, including West Virginia, to reduce emissions of NO_x and SO₂, precursors to the formation of ambient ozone and PM_{2.5}. Under CAIR, EPA established federal implementation plans (FIPs) comprised of separate cap and trade programs for annual NO_x, ozone season NO_x, and annual SO₂. States could comply with the requirements of CAIR by remaining on the FIP, which applied only to electric generating units (EGUs), or by submitting a CAIR SIP revision that included as trading sources EGUs and certain non-EGUs¹

¹ These non-EGUs are defined in the NO_x SIP Call as stationary, fossil fuel-fired boilers, combustion turbines, or combined cycle systems with a maximum design heat input great than 250 million British thermal units per hour (MMBtu/hr).

that formerly traded in the NO_x Budget Trading Program under the NO_x SIP Call.² West Virginia submitted, and EPA approved, a CAIR SIP revision that included EGUs and certain non-EGUs as part of the State's regulation for the CAIR ozone season trading program as well as EGUs in the CAIR annual trading program for NO_x and SO₂. *See* 74 FR 38536 (August 4, 2009).

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR in 2008,³ but ultimately remanded the rule to EPA without *vacatur* to preserve the environmental benefits provided by CAIR.⁴ The ruling allowed CAIR to remain in effect temporarily until a replacement rule consistent with the Court's opinion was developed. While EPA worked on developing a replacement rule, the CAIR program continued as planned with the NO_x annual and ozone season programs beginning in 2009 and the SO₂ annual program beginning in 2010.

On August 8, 2011 (76 FR 48208), acting on the D.C. Circuit's remand, EPA promulgated the CSAPR to replace CAIR to address the interstate transport of emissions contributing to nonattainment and interfering with maintenance of the two air quality standards covered by CAIR as well as the 2006 PM_{2.5} NAAQS. The rule also contained provisions that would sunset CAIR-related obligations on a schedule coordinated with the implementation of CSAPR compliance requirements. CSAPR was to become effective January 1, 2012; however, the timing of CSAPR's implementation was impacted by a number of court actions.

Numerous parties filed petitions for review of CSAPR in the D.C. Circuit, and on December 30,

² In October 1998, EPA finalized the "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone"--commonly called the NO_x SIP Call. *See* 63 FR 57356 (October 27, 1998).

³ *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

⁴ *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).

2011, the D.C. Circuit stayed CSAPR prior to its implementation and ordered EPA to continue administering CAIR on an interim basis.⁵ On August 21, 2012, the court issued its ruling, vacating and remanding CSAPR to EPA and ordering continued implementation of CAIR. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 38 (D.C. Cir. 2012). The D.C. Circuit's *vacatur* of CSAPR was reversed by the United States Supreme Court on April 29, 2014, and the case was remanded to the D.C. Circuit to resolve remaining issues in accordance with the Supreme Court's ruling. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). On remand, the D.C. Circuit affirmed CSAPR in most respects.

Throughout the initial round of D.C. Circuit proceedings and the ensuing Supreme Court proceedings, the stay on CSAPR remained in place, and EPA continued to implement CAIR. Following the April 2014 Supreme Court decision, EPA filed a motion asking the D.C. Circuit to lift the stay in order to allow CSAPR to replace CAIR in an equitable and orderly manner while further D.C. Circuit proceedings were held to resolve remaining claims from petitioners. Additionally, EPA's motion requested delay, by three years, of all CSAPR compliance deadlines that had not passed as of the approval date of the stay. On October 23, 2014, the D.C. Circuit granted EPA's request,⁶ and on December 3, 2014 (79 FR 71663), in an interim final rule, EPA set the updated effective date of CSAPR as January 1, 2015 and delayed the implementation of CSAPR Phase I to 2015 and CSAPR Phase 2 to 2017. In accordance with the interim final rule, the sunset date for CAIR was December 31, 2014, and EPA began implementing CSAPR on January 1, 2015.

Starting in January 2015, the CSAPR FIP trading programs for annual NO_x, ozone season NO_x

⁵ Order of Dec.30, 2011, in *EME Homer City Generation, L.P. v. EPA*, D.C. Cir. No. 11-1302.

⁶ Order, Document #1518738, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. issued Oct. 23, 2014).

and annual SO₂ were applicable in West Virginia. Thus, since January 1, 2015, the West Virginia regulations, 45CSR39 and 45CSR41, that implemented the CAIR trading programs became obsolete with none of these obsolete programs providing any emission reductions.⁷

II. Summary of SIP Revisions and EPA analysis

WVDEP submitted two SIP revisions on July 13, 2016 that requested the removal from the West Virginia SIP of the State's regulations (45CSR39 and 45CSR41) which implemented respectively the CAIR annual NO_x and annual SO₂ trading programs. As noted previously, the annual NO_x and SO₂ reduction programs to address interstate transport of emissions from EGUs for the 1997 and 2006 PM_{2.5} NAAQS have been replaced by the CSAPR FIP. Because the removal of 45CSR39 and 41 remove moot CAIR provisions which have been replaced by CSAPR which is at least as stringent as CAIR, the removal of 45 CSR39 and 41 from the West Virginia SIP has no expected emissions impact on any pollutant and thus is not expected to interfere with reasonable further progress, any NAAQS or any other CAA requirement. The removal of 45 CSR39 and 41 from the West Virginia SIP is in accordance with section 110(l) of the CAA. Therefore, EPA determines it is appropriate for these two regulations to be removed in their entirety from the West Virginia SIP as the regulations contain obsolete provisions which no longer provide any emission limitations on, or reductions of, any pollutant.

III. Final Action

EPA is approving the two July 13, 2016 West Virginia SIP revision submissions which seek removal from the West Virginia SIP of Regulation 45CSR39 that implemented the CAIR annual NO_x trading program and Regulation 45CSR41 that implemented the CAIR annual SO₂ trading

⁷ EPA notes that 45CSR40 – *Control of Ozone Season Nitrogen Oxides Emissions* is also obsolete and not affecting emission reductions. However, EPA will act on West Virginia's request to remove 45CSR40 from the SIP in a separate action.

program. Removal of these two regulations from the West Virginia SIP is in accordance with section 110 of the CAA. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the “Proposed Rules” section of this issue of the **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on **[insert date 90 days after date of publication in the Federal Register]** without further notice unless EPA receives adverse comment by **[insert date 30 days after date of publication in the Federal Register]**. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive 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).

In addition, this rule removing West Virginia regulations 45CSR39 and 45CSR41 from the West Virginia SIP does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804

C. Petitions for Judicial Review

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 date of 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of

proposed rulemaking for this action published in the proposed rules section of this issue of the **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action.

This action approving West Virginia SIP revision submittals to remove obsolete CAIR annual trading program provisions 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, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: September 11, 2017.

Cecil Rodrigues,
Acting Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

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

Subpart XX--West Virginia

§ 52.2520 [Amended]

2. In §52.2520, the first table in paragraph (c) is amended by:

a. Removing the table heading and the entries for “[45 CSR] Series 39”.

b. Removing the table heading and the entries for “[45 CSR] Series 41”.

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