



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2017-0215; FRL-9968-34-Region 3]

### Approval and Promulgation of Air Quality Implementation Plans; Virginia; Removal of Clean Air Interstate Rule (CAIR) Trading Programs

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

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to approve a state implementation plan (SIP) revision submitted by the Commonwealth of Virginia. The submitted revision requests EPA remove from the Virginia SIP regulations from the Virginia Administrative Code that established EPA-administered trading programs under the Clean Air Interstate Rule (CAIR), one of which also included requirements to address nitrogen oxide (NO<sub>x</sub>) reductions required under the NO<sub>x</sub> SIP Call. 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 Virginia. The SIP submittal seeks removal from the Virginia SIP of Virginia regulations that implemented the CAIR annual NO<sub>x</sub>, ozone season NO<sub>x</sub>, and sulfur dioxide (SO<sub>2</sub>) trading programs (as CSAPR has replaced CAIR). EPA is approving the SIP revision in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** This rule is effective on [insert date 60 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-2017-0215 at <https://www.regulations.gov>, or via email to [stahl.cynthia@epa.gov](mailto:stahl.cynthia@epa.gov). For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from 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:** Sara Calcinore, (215) 814-2043, or by e-mail at [calcinore.sara@epa.gov](mailto:calcinore.sara@epa.gov).

**SUPPLEMENTARY INFORMATION:** On January 5, 2017, the Commonwealth of Virginia,

through the Virginia Department of Environmental Quality (VADEQ), submitted a SIP revision (Revision D16) that requests removal from its SIP of Virginia Administrative Code regulations including 9 VAC 5 Chapter 140: Part II-NO<sub>x</sub> Annual Trading Program; Part III-NO<sub>x</sub> Ozone Season Trading Program; and Part IV-SO<sub>2</sub> Annual Trading Program (Sections 5-140-1010 through 5-140-3880).

## **I. Background**

EPA promulgated CAIR (70 FR 25162, May 12, 2005) to address transported emissions that significantly contributed to downwind states' nonattainment and maintenance of the 1997 ozone and fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standards (NAAQS). CAIR required 28 states, including Virginia, to reduce emissions of NO<sub>x</sub> and SO<sub>2</sub>, precursors to the formation of ambient ozone and PM<sub>2.5</sub>. Under CAIR, EPA established federal implementation plans (FIPs) comprised of separate cap and trade programs for annual NO<sub>x</sub>, ozone season NO<sub>x</sub>, and annual SO<sub>2</sub>. 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-EGUs<sup>1</sup> that formerly traded in the NO<sub>x</sub> Budget Trading Program under the NO<sub>x</sub> SIP Call.<sup>2</sup> On December 28, 2007 (72 FR 73602), EPA approved a SIP revision submitted by Virginia that allowed the Commonwealth to participate in the EPA-administered CAIR regional cap and trade programs for NO<sub>x</sub> annual, NO<sub>x</sub> ozone season, and SO<sub>2</sub> annual emissions. Virginia's NO<sub>x</sub> ozone season trading program under CAIR included non-EGUs that were previously trading in the NO<sub>x</sub> budget trading program under the

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<sup>1</sup> These non-EGUs are defined in the NO<sub>x</sub> SIP Call as stationary, fossil fuel-fired boilers, combustion turbines, or combined cycle systems with a maximum design heat input greater than 250 million British thermal units per hour (MMBtu/hr).

<sup>2</sup> 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<sub>x</sub> SIP Call. *See* 63 FR 57356 (October 27, 1998).

NO<sub>x</sub> SIP Call, which satisfied Virginia's obligations under the NO<sub>x</sub> SIP Call.

After EPA promulgated CAIR, litigation ensued. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR in 2008,<sup>3</sup> but ultimately remanded the rule to EPA without *vacatur* to preserve the environmental benefits provided by CAIR.<sup>4</sup> The ruling allowed CAIR to remain in effect temporarily until a replacement rule consistent with the D.C. Circuit's opinion was developed. While EPA worked on developing a replacement rule, the CAIR program continued as planned with the NO<sub>x</sub> annual and ozone season programs beginning in 2009 and the SO<sub>2</sub> annual program beginning in 2010.

On August 8, 2011 (76 FR 48208), acting on the D.C. Circuit's remand, EPA promulgated 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<sub>2.5</sub> 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, 2011, the D.C. Circuit stayed CSAPR prior to its implementation and ordered EPA to continue administering CAIR on an interim basis.<sup>5</sup> On August 21, 2012, the D.C. Circuit 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

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

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

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

*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 to toll, by three years, 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,<sup>6</sup> 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 tolled 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<sub>x</sub>, ozone season NO<sub>x</sub>, and annual SO<sub>2</sub> were applicable in Virginia. Thus, since January 1, 2015, Virginia regulations implementing the CAIR annual trading programs, including the NO<sub>x</sub> ozone season trading program addressing Virginia's obligations under the NO<sub>x</sub> SIP Call, have been obsolete and moot and none of these programs contribute to emission reductions in Virginia.

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

On October 26, 2016 (81 FR 74504), EPA finalized the CSAPR Update Rule to address interstate transport of ozone pollution with respect to the 2008 ozone NAAQS, and issued FIPs that updated the ozone season NO<sub>x</sub> budgets for 22 states, including Virginia. Starting in January 2017, the CSAPR Update budgets were implemented via modifications to the CSAPR NO<sub>x</sub> ozone season allowance trading program that was established under the original CSAPR.

## **II. Summary of SIP Revision and EPA Analysis**

VADEQ submitted a SIP revision on January 5, 2017 requesting the removal of regulations from the Virginia SIP under 9 VAC 5 Chapter 140: Part II-NO<sub>x</sub> Annual Trading Program, Part III-NO<sub>x</sub> Ozone Season Trading Program, and Part IV-SO<sub>2</sub> Annual Trading Program (Sections 5-140-1010 through 5-140-3880), which implemented the CAIR annual NO<sub>x</sub>, ozone season NO<sub>x</sub>, and annual SO<sub>2</sub> trading programs. These regulations have been moot since January 1, 2015, when CSAPR replaced CAIR, and have been repealed in their entirety from the Virginia Administrative Code. The amendments removing these regulations were adopted by the State Air Pollution Control Board on September 9, 2016 and were effective as of November 16, 2016.

As noted previously, on January 1, 2015, the CAIR annual NO<sub>x</sub>, ozone season NO<sub>x</sub>, and annual SO<sub>2</sub> trading programs were replaced by the trading programs under the CSAPR FIP. Therefore, regulations in the Virginia SIP that implemented the CAIR annual trading programs have been obsolete and moot since January 1, 2015. None of the provisions in 9 VAC 5 Chapter 140 which Virginia seeks to remove from the SIP presently reduce NO<sub>x</sub> or SO<sub>2</sub> emissions from EGUs or certain non-EGUs after December 31, 2014 as CAIR was replaced by CSAPR.

These obsolete regulations include provisions under 9 VAC 5 Chapter 140: Part III-NO<sub>x</sub> Ozone

Season Trading Program Article 1 – CAIR NO<sub>x</sub> Ozone Season Trading Program General Provisions and Article 5 – CAIR NO<sub>x</sub> Ozone Season Allowance Allocations, which addressed Virginia’s obligations under the NO<sub>x</sub> SIP Call by including EGUs and certain large non-EGUs that had formerly traded under the NO<sub>x</sub> SIP Call trading program as CAIR trading sources. Unlike the CAIR trading program, CSAPR’s trading program for ozone season NO<sub>x</sub> as promulgated in 2011 does not provide for non-EGUs to participate in trading. Therefore, since January 1, 2015, when CSAPR replaced CAIR and the CSAPR FIP became effective in Virginia, the Virginia SIP has not contained an effective regulation addressing Virginia’s obligation under the NO<sub>x</sub> SIP Call to reduce NO<sub>x</sub> emissions from non-EGUs such as stationary, fossil fuel-fired boilers, combustion turbines, or combined cycle systems with a maximum design heat input greater than 250 MMBtu/hr. The absence of an effective regulation in the Virginia SIP to reduce NO<sub>x</sub> emissions from these non-EGUs that formerly participated in the CAIR trading program resulted from the sunset of CAIR and EPA’s implementation of CSAPR starting January 1, 2015. Because CSAPR did not provide for trading by non-EGUs, Virginia’s SIP no longer meets the Virginia NO<sub>x</sub> SIP Call obligation with respect to these non-EGUs that formerly traded in CAIR. However, Virginia’s request in its January 5, 2017 SIP seeking removal from its SIP of 9 VAC 5 Chapter 140: Part III-NO<sub>x</sub> Ozone Season Trading Program and EPA’s action to approve the January 5, 2017 submittal did not create this gap in coverage under the Virginia SIP. According to Virginia, the Commonwealth is in the process of drafting a regulation to address the Commonwealth’s obligations under the NO<sub>x</sub> SIP Call (including its obligation to address these non-EGUs which formerly traded in CAIR). In remedying its provisions to address the NO<sub>x</sub> SIP Call, Virginia must satisfy the requirements of 40 CFR 51.121(f) which lists requirements such as control measures to be included in SIP revisions to meet NO<sub>x</sub> budgets assigned under the NO<sub>x</sub>

SIP Call. EPA expects Virginia will submit such provisions to EPA to be included in Virginia's SIP, and EPA will review and act on any such SIP submittal from Virginia addressing the Commonwealth's NO<sub>x</sub> SIP Call obligations in a separate rulemaking.

Since the regulations implementing the CAIR annual NO<sub>x</sub>, ozone season NO<sub>x</sub>, and annual SO<sub>2</sub> trading programs have been moot and non-operational since CAIR was replaced by CSAPR on January 1, 2015, removing these regulations from the Virginia SIP will not interfere with reduction of NO<sub>x</sub> or SO<sub>2</sub> emissions in Virginia and will not interfere with Virginia's attainment of any NAAQS, reasonable further progress, or any other applicable CAA requirement. In addition, as Virginia's SIP has not effectively addressed non-EGUs that formerly traded in CAIR for NO<sub>x</sub> SIP Call obligations since CAIR sunset, removing 9 VAC 5 Chapter 140: Part III-NO<sub>x</sub> Ozone Season Trading Program from the Virginia SIP will also not interfere with attainment of NAAQS, reasonable further progress, or any CAA requirement as the CAIR's sunset removed the non-EGUs from the ozone season NO<sub>x</sub> trading program. Thus, EPA finds the January 5, 2017 SIP revision approvable in accordance with section 110 of the CAA, including specifically with section 110(l) of the CAA.

### **III. Final Action**

EPA is approving the January 5, 2017 SIP revision submission from the Commonwealth of Virginia, which sought removal from the Virginia SIP of moot regulations under 9 VAC 5 Chapter 140 that implemented the CAIR annual NO<sub>x</sub>, ozone season NO<sub>x</sub>, and annual SO<sub>2</sub> trading programs at Part II-NO<sub>x</sub> Annual Trading Program; Part III-NO<sub>x</sub> Ozone Season Trading Program; and Part IV-SO<sub>2</sub> Annual Trading Program (Sections 5-140-1010 through 5-140-3880). 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 today’s **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 60 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. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia**

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia’s legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that

protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.” Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the

criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

## **V. 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).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 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 and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

## **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(2).

## **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 today’s **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 removing from the Virginia SIP regulations under Sections 5-140-1010 through 5-140-3880 of 9 VAC 5 Chapter 140 that implemented the CAIR annual NO<sub>x</sub>, ozone season NO<sub>x</sub>, and annual SO<sub>2</sub> trading programs 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, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 8, 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 VV—Virginia**

**§ 52.2420 [Amended]**

2. In § 52.2420, the table in paragraph (c) is amended by:

- a. Removing the section entitled “Part II NO<sub>x</sub> Annual Trading Program”, including “Article 1” through “Article 9” including entries “5-140-1010” through “5-140-1880”;
- b. Removing the section entitled “Part III NO<sub>x</sub> Ozone Season Trading Program”, including “Article 1” through “Article 9” including entries “5-140-2010” through “5-140-2880”; and;
- c. Removing the section entitled “Part IV SO<sub>2</sub> Annual Trading Program”, including “Article 1” through “Article 9” including entries “5-140-3010” through “5-140-3880”.

[FR Doc. 2017-20724 Filed: 9/27/2017 8:45 am; Publication Date: 9/28/2017]