0-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2020-0194; FRL-10017-11-Region 3]

Air Plan Approval; West Virginia; 1997 8-Hour Ozone National Ambient Air Quality Standard Second Maintenance Plan for the West Virginia Portion for the Charleston, West Virginia Area Comprising Kanawha and Putnam Counties

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the West Virginia Department of Environmental Protection (WVDEP) of the State of West Virginia. This revision pertains to West Virginia's plan for maintaining the 1997 8-hour ozone national ambient air quality standard (NAAQS) for the Charleston Area (comprising Kanawha and Putnam Counties). The EPA is approving these revisions to the West Virginia SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on [**insert date 30 days after date of publication in the Federal Register**].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2020-0194. All documents in the docket are listed on the https://www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through https://www.regulations.gov, or please contact the person identified in the **For Further Information Contact** section for additional availability

information.

FOR FURTHER INFORMATION CONTACT: Keila M. Pagán-Incle, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2926. Ms. Pagán-Incle can also be reached via electronic mail at pagan-incle.keila@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On June 29, 2020 (85 FR 38816), EPA published a notice of proposed rulemaking (NPRM) for the State of West Virginia. In the NPRM, EPA proposed approval of West Virginia's plan for maintaining the 1997 8-hour ozone NAAQS through August 10, 2026, in accordance with CAA section 175A. The formal SIP revision was submitted by WVDEP on December 10, 2019.

II. Summary of SIP Revision and EPA Analysis

On July 11, 2006 (71 FR 39001, effective August 10, 2006), EPA approved a redesignation request (and maintenance plan) from WVDEP for the Charleston Area. Per CAA section 175A(b), at the end of the eighth year after the effective date of the redesignation, the state must also submit a second maintenance plan to ensure ongoing maintenance of the standard for an additional 10 years, and in *South Coast Air Quality Management District v. EPA,*[1] the D.C. Circuit held that this requirement cannot be waived for areas, like the Charleston Area, that had been redesignated to attainment for the 1997 8-hour ozone NAAQS prior to revocation and that were designated attainment for the 2008 ozone NAAQS. CAA section 175A sets forth the criteria for adequate maintenance plans. In addition, EPA has published longstanding guidance that provides further insight on the content of an approvable maintenance plan, explaining that a maintenance plan should address five elements: (1) an attainment emissions inventory; (2) a

[1] 882 F.3d 1138 (D.C. Cir. 2018).

maintenance demonstration; (3) a commitment for continued air quality monitoring; (4) a process for verification of continued attainment; and (5) a contingency plan.[2] WVDEP's December 10, 2019 SIP submittal fulfills West Virginia's obligation to submit a second maintenance plan and addresses each of the five necessary elements.

As discussed in the June 29, 2020, NPRM, consistent with longstanding EPA's guidance,[3] areas that meet certain criteria may be eligible to submit a limited maintenance plan (LMP) to satisfy one of the requirements of CAA section 175A. Specifically, states may meet CAA section 175A's requirements to "provide for maintenance" by demonstrating that an area's design values[4] are well below the NAAQS and that it has had historical stability attaining the NAAQS. EPA evaluated WVDEP's December 10, 2019 submittal for consistency with all applicable EPA guidance and CAA requirements. EPA found that the submittal met CAA Section 175A and all CAA requirements, and proposed approval of the LMP for the Charleston Area (comprising Kanawha and Putnam Counties) as a revision to the West Virginia SIP. The effect of this action makes certain commitments related to the maintenance of the 1997 8-hour ozone NAAQS federally enforceable as part of the West Virginia SIP.

Other specific requirements of WVDEP's December 10, 2019 submittal and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here.

III. EPA's Response to Comments Received

EPA received three comments on the June 29, 2020 NPRM. All comments received are in the docket for this rulemaking action. A summary of the comments and EPA's responses is provided herein.

---

[2] "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (Calcagni Memo).

[3] See "Limited Maintenance Plan Option for Nonclassifiable Ozone Nonattainment Areas" from Sally L. Shaver, Office of Air Quality Planning and Standards (OAQPS), dated November 16, 1994; "Limited Maintenance Plan Option for Nonclassifiable CO Nonattainment Areas" from Joseph Paisie, OAQPS, dated October 6, 1995; and "Limited Maintenance Plan Option for Moderate PM10 Nonattainment Areas" from Lydia Wegman, OAQPS, dated August 9, 2001.

[4] The ozone design value for a monitoring site is the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations. The design value for an ozone nonattainment area is the highest design value of any monitoring site in the area.

Comment 1:

The commenter asserts that the LMP should not be approved because of EPA's reliance on the Air Quality Modeling Technical Support Document (TSD) that was developed for EPA's regional transport rulemaking. The commenter contends that: (1) the TSD shows maintenance of the area for three years and not 10 years; (2) the modeling was performed for transport purposes across state lines and not to show maintenance of the NAAQS; (3) the modeling was performed for the 2008 and 2015 ozone NAAQS and not the 1997 ozone NAAQS; (4) the TSD has been "highly contested" by environmental groups and that "other states contend EPA's modeling as flawed;" and (5) the TSD does not address a recent court decision that threw out EPA's modeling "because it modeled to the wrong attainment year…." The commenter asserts that the four specific issues it raises with respect to the modeling means that the TSD is "flawed, illegal, [and] is being used improperly for the wrong purpose…." The commenter states that "EPA must retract its reliance on the modeling for the purposes of this maintenance plan and must find some other way of showing continued maintenance of the 1997 ozone NAAQS."

Response 1:

EPA does not agree with the commenter that the approval of West Virginia's second maintenance plan is not appropriate. The commenter raises concerns about West Virginia and EPA's citation of air quality modeling, but the commenter ignores that EPA's primary basis for finding that West Virginia has provided for maintenance of the 1997 8-hour ozone NAAQS in the Charleston Area is the State's demonstration that the criteria for a limited maintenance plan has been met. See 85 FR 38816, June 29, 2020. Specifically, as stated in the NPRM, for decades EPA has interpreted the provision in CAA section 175A that requires states to "provide for maintenance" of the NAAQS to be satisfied where areas demonstrate that design values are and have been stable and well below the NAAQS—e.g., at 85% of the standard, or in this case at or below 0.071 ppm. EPA calls such demonstration a "limited maintenance plan."

The modeling cited by the commenter was referenced in West Virginia's submission and

as part of EPA's proposed approval as supplementary supporting information, and we do not agree that the commenter's concerns about relying on that modeling are warranted. The commenter contends that the modeling only goes out three years (to 2023) and it needs to go out to 10 years, and therefore may not be relied upon. However, the air quality modeling was only relied upon by EPA to provide additional support to indicate that the area is expected to continue to attain the NAAQS during the relevant period. As noted above, West Virginia primarily met the requirement to demonstrate maintenance of the NAAQS by showing that they met the criteria for a limited maintenance plan, rather than by modeling or projecting emissions inventories out to a future year. We also do not agree that the State is required to demonstrate maintenance for 10 years; CAA section 175A requires the State to demonstrate maintenance through the 20th year after the area is redesignated, which in this case is 2026.

We also disagree with the commenter's contention that because the air quality modeling was performed to analyze the transport of pollution across state lines with respect to other ozone NAAQS, it cannot be relied upon in this action. We acknowledge that the air quality modeling at issue was performed as part of EPA's efforts to address interstate transport pollution under CAA section 110(a)(2)(D)(i)(I). However, the purpose of the air quality modeling is fully in keeping with the question of whether West Virginia is expected to maintain the NAAQS. The air quality modeling identifies which air quality monitors in the United States are projected to have problems attaining or maintaining the 2008 and 2015 NAAQS for ozone in 2023. Because the air quality modeling results simply provide projected ozone concentration design values, which are expressed as three-year averages of the annual fourth high 8-hour daily maximum ozone concentrations, the modeling results are useful for analyzing attainment and maintenance of any of the ozone NAAQS that are measured using this averaging time; in this case, the 1997, 2008 and 2015 ozone NAAQS. The only difference between the three standards is stringency. Taking the Charleston Area's most recent certified design value as of the proposal (i.e., for the years 2016-2018), the area's design value was 0.067 parts per million (ppm). What we can

discern from this is that the area is meeting the 1997 ozone NAAQS of 0.080 ppm, the 2008 ozone NAAQS of 0.075 ppm, and the 2015 ozone NAAQS of 0.070 ppm. The same principle applies to projected design values from the air quality modeling. In this case, the interstate transport modeling indicated that in 2023, the Charleston Area's design value is projected to be 0.060 ppm, which is again, well below all three standards. The fact that the air quality modeling was performed to indicate whether the area will have problems attaining or maintaining the 2015 ozone NAAQS (i.e., 0.070 ppm) does not make the modeling less useful for determining whether the area will also meet the less stringent revoked 1997 standard (i.e., 0.080 ppm).

The commenter asserts that many groups have criticized EPA's transport modeling, alleging that the agency used improper emissions inventories, incorrect contribution thresholds, wrong modeling years, or that EPA has not accounted for local situations or reductions that occurred after the inventories were established. The commenter also alleges that EPA should not rely on its modeling because it "fails to stand up to the recent court decisions," citing the *Wisconsin v. EPA* D.C. Circuit decision.[5] EPA disagrees that the existence of criticisms of the agency's air quality modeling render it unreliable, and we also do not agree that anything in recent court decisions, including *Wisconsin v. EPA*, suggests that EPA's air quality modeling is technically flawed. We acknowledge that the source apportionment air quality modeling runs cited by the commenter have been at issue in various legal challenges to EPA actions, including the *Wisconsin v. EPA* case. However, in that case, the *only* flaw in EPA's air quality modeling identified by the D.C. Circuit was the fact that its analytic year did not align with the attainment date found in CAA section 181.[6] Contrary to the commenter's suggestion, the D.C. Circuit *upheld* EPA's air quality modeling with respect to the many technical challenges raised by petitioners in the *Wisconsin* case.[7] We therefore think reliance on the interstate transport air quality modeling as supplemental support for showing that the Charleston Area will maintain the

[5] Wisconsin, 938 F.3d 303 (D.C. Cir. 2019).
[6] Wisconsin, 938 F.3d at 313.
[7] Wisconsin, 938 F.3d at 323-331.

1997 8-hour ozone NAAQS through the end of its 20th-year maintenance period is appropriate.

Comment 2:

The commenter asserts that EPA should disapprove this maintenance plan because EPA should not allow states to rely on emission programs such as the Cross-State Air Pollution rule (CSAPR) to demonstrate maintenance for the 1997 ozone NAAQS. The commenter alleges that "the CSAPR and CSAPR Update and CSAPR Close-out rules were vacated entirely" by multiple courts and "are now illegal programs providing no legally enforceable emission reductions to any states formerly covered by the rules." The commenter also asserts that nothing restricts "big coal and gas power plants from emitting way beyond there (sic) restricted amounts." The commenter does allow that "If EPA can show that continued maintenance without these rules is possible for the next 10 years then that would be OK but as the plan stands it relies on these reductions and must be disapproved."

Response 2:

The commenter has misapprehended the factual circumstances regarding these interstate transport rules. Every rule cited by the commenter that achieves emission reductions from electric generating units (EGUs or power plants)—i.e., the Cross-State Air Pollution Rule and the CSAPR Update—remains in place and continues to ensure emission reductions of nitrogen oxides (NO_x) and sulfur dioxide (SO_2). CSAPR began implementation in 2015 (after it was largely upheld by the Supreme Court) and the CSAPR Update began implementation in 2017. The latter rule was remanded to EPA to address the analytic year issues discussed in the prior comment and response, but the rule remains fully in effect. The commenter is correct that the D.C. Circuit vacated the CSAPR close-out, but we note that that rule was only a determination that no further emission reductions were required to address interstate transport obligations for the 2008 ozone NAAQS; the rule did not itself establish any emission reductions. We therefore disagree that the legal status of these rules presents any obstacle to EPA's approval of West

Virginia's submission.

Comment 3:

EPA also received a third comment, which included some contradictory statements, and much of which is beyond the scope of this action. However, we summarize a few germane points raised by the commenter and respond to them herein. The commenter states that EPA must disapprove the maintenance plan for the Charleston Area because "this plan does not adequately limit or prevent the harmful effects of ozone formation." The commenter also suggests that approving the maintenance plan would allow for more ozone pollution. The commenter raises concerns about the scope of EPA's authority, alleging that EPA's authority is not unlimited, that EPA must take into account health effects from harmful ozone, and that EPA is perhaps not using an "acceptable methodology" or the "best available science."

Response 3:

The NAAQS are standards required by the CAA to be established by EPA. The CAA identifies two types of NAAQS, primary and secondary. Primary NAAQS are air quality standards that "based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health," and secondary NAAQS specify a level of air quality that "is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." CAA 109(b)(1) and (2). In lay terms, primary NAAQS "provide public health protection, including protecting the health of 'sensitive' populations such as asthmatics, children, and the elderly," and secondary NAAQS "provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings."[8] As stated in the NPRM, on July 18, 1997 (62 FR 38856), EPA revised both the primary and secondary NAAQS for ozone to set the acceptable level of ozone in the ambient air at 0.08 ppm, averaged over an 8-hour period. EPA set the

[8] https://www.epa.gov/criteria-air-pollutants/naaqs-table

primary 8-hour ozone NAAQS based on scientific evidence demonstrating that ozone causes adverse health effects at lower concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone NAAQS was set. Thus, the primary 1997 8-hour ozone NAAQS sets a threshold that at the time, EPA believed to be protective of public health allowing for an adequate margin of safety.[9] The Charleston Area is meeting every ozone NAAQS, and EPA's approval of West Virginia's plan to continue to maintain the 1997 8-hour ozone NAAQS (as it has since it was redesignated to attainment in 2006) is based on EPA's judgment that the emission limitations in West Virginia's SIP and other federally enforceable measures have been effective at ensuring that the Charleston Area will continue to attain the NAAQS. EPA does not agree that it has exceeded its statutory authority. We also believe that we articulated our methodology for evaluating West Virginia's submission in the proposal, and that we have followed that methodology here in the final action.

IV. Final Action

EPA is approving the 1997 8-hour ozone NAAQS limited maintenance plan for the Charleston Area (comprising Kanawha and Putnam Counties) as a revision to the West Virginia SIP.

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:

---

[9] The Primary ozone NAAQS has been revised twice since 1997, most recently on October 26, 2015. 80 FR 65292

- 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);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because it is not a significant regulatory action under Executive Order 12866;
- 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 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(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. This action pertaining to West Virginia's limited maintenance plan for the Charleston Area (comprising Kanawha and Putnam Counties) 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, Volatile organic compounds.

Dated: February 3, 2021

Diana Esher,
Acting Regional Administrator,
Region III.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 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

2. In § 52.2520, the table in paragraph (e) is amended by adding an entry for "1997 8-Hour Ozone National Ambient Air Quality Standard Second Maintenance Plan for the West Virginia Portion of the Charleston, West Virginia Area Comprising Kanawha and Putnam Counties" at the end of the table to read as follows:

§ 52.2520 Identification of plan.

* * * * *

(e)* * *

Name of non-regulatory SIP revision	**Applicable geographic area**	**State submittal date**	**EPA approval date**	**Additional explanation**
* * * * * * *				
1997 8-Hour Ozone National Ambient Air Quality Standard Second Maintenance Plan for the West Virginia Portion of the Charleston, West Virginia Area Comprising Kanawha and Putnam Counties	Charleston, West Virginia Area Comprising Kanawha and Putnam Counties	12/10/2019	**[insert date of publication in the Federal Register]**, **[insert Federal Register citation]**	

[FR Doc. 2021-02623 Filed: 2/22/2021 8:45 am; Publication Date: 2/23/2021]