



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2017-0454; EPA-R04-OAR-2019-0638; EPA-R04-OAR-2020-0186; FRL-11971-01-R4]

Air Plan Approval; North Carolina; Permitting Provisions Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to correct the erroneous incorporation of cross-references into the North Carolina State Implementation Plan (SIP) using the Clean Air Act (CAA or Act) error correction provision. EPA has determined that portions of its May 23, 2019, July 17, 2020, and March 1, 2021, final SIP rulemaking actions were in error and that it is appropriate to correct those actions by removing specific cross-references in the permitting rules from the SIP.

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 No. EPA-R04-OAR-2017-0454 at www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit www.epa.gov/dockets/commenting-epa-dockets.

There are three dockets supporting this action, EPA-R04-OAR-2017-0454, EPA-R04-OAR-2019-0638, and EPA-R04-OAR-2020-0186. Docket No. EPA-R04-OAR-2017-0454 includes a March 24, 2006, SIP submittal from North Carolina and EPA's original approval of the cross-references to North Carolina General Statutes that are proposed for removal in this Notice of Proposed Rulemaking (NPRM). Docket Nos. EPA-R04-OAR-2019-0638 and EPA-R04-OAR-2020-0186 include a July 10, 2019, SIP submittal from North Carolina with additional ministerial and minor changes to the provisions at issue in this NPRM. All comments regarding information in any of these dockets are to be made in Docket No. EPA-R04-OAR-2017-0454. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epadockets>.

FOR FURTHER INFORMATION CONTACT: Steven Scofield, Multi-Air Pollutant Coordination Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9034. Mr. Scofield can also be reached via electronic mail at scofield.steve@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On May 23, 2019, July 17, 2020, and March 1, 2021,¹ EPA approved revisions to 15A North Carolina Administrative Code (NCAC) 02Q .0101, 02Q .0103, and 02Q .0301 into the

¹ See 84 FR 23725, 85 FR 43461, and 86 FR 11875.

North Carolina SIP.² These revisions include cross-references to North Carolina General Statutes 143-215.108 and 143-215.108A; however, these cross-referenced provisions are not incorporated into the SIP. EPA has determined these prior approvals of the cross-referenced provisions were in error and is proposing to remove these cross-references from 15A NCAC 02Q.0101, 02Q.0103 and 02Q.0301 of the SIP. Because the cross-referenced provisions are not incorporated into the SIP, changes to those provisions can change the SIP without the submission of a SIP revision and subsequent EPA action to approve such a change, which is inconsistent with the CAA. Specifically, CAA section 110(l) requires each SIP revision submitted by a state to undergo reasonable public notice and hearing and prevents EPA from approving a SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA.³ Changes to the statutory provisions cross-referenced in the SIP could change the SIP without fulfilling public notice and hearing requirements and without EPA evaluation of the revision pursuant to the requirements of section 7410(l) and any other CAA requirements applicable to the specific SIP provision at issue.

II. What is EPA's authority to correct errors in SIP rulemakings?

Section 110(k)(6) of the CAA authorizes EPA to revise a state's SIP when it "determines that [its] action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error." Once EPA has made the determination that it erred, it "may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State." *Ala. Envtl. Council v. EPA*, 711 F.3d 1277, 1286 (11th Cir. 2013). This determination and the basis must be provided to the state and

² The revisions were submitted by the North Carolina Division of Air Quality in submissions dated March 24, 2006, and July 10, 2019.

³ CAA sections 110(a)(1) and (2) also require each SIP submitted by a state to undergo reasonable public notice and hearing.

the public. Section 110(k)(6) of the CAA has been interpreted by courts as a “broad provision [that] was enacted to provide the EPA with an avenue to correct its own erroneous actions and grant the EPA the discretion to decide when to act pursuant to the provision.” *Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015). EPA can take action under section 110(k)(6) to correct an error only if the error existed at the time the SIP was originally approved. *See Texas v. EPA*, 726 F.3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

III. Which provisions are EPA proposing to remove?

A. Section 02Q .0101, Required Air Quality Permits

EPA approved changes to 15A North Carolina Administrative Code (NCAC) 02Q section .0101, *Required Air Quality Permits*, to include a cross-reference to a North Carolina General Statute that is not incorporated into the SIP. Specifically, on May 23, 2019, EPA approved revisions to subparagraph (b)(1) that added the phrase “With the exception allowed by G.S. 143-215.108A”.⁴ Subsequently, on July 17, 2020, EPA approved other changes to paragraph (b), including consolidating the subparagraphs into one paragraph .0101(b) and making other ministerial edits which do not otherwise change the meaning of the provision. This July 17, 2020, revision also included the same language cross-referencing G.S. 143-215.108A. EPA is proposing to correct both the May 23, 2019, and July 17, 2020, final actions by removing the phrase in paragraph .0101(b), “With the exception allowed by G.S. 143-215.108A.” The effect of this change, if finalized, would merely remove the cross-reference to the statute and would not modify specific exemptions from permitting and other changes otherwise approved in EPA’s May 23, 2019, and July 17, 2020, actions.

B. Section 02Q .0103, Definitions

⁴ The full text of 15A NCAC 02Q .0101(b)(1) (now renumbered to 02Q .0101(b)) in the SIP reads: “Stationary Source Construction and Operation Permit: With the exception allowed by G.S. 143-215.108A, the owner or operator of a new, modified, or existing facility or source shall not begin construction or operation without first obtaining a construction and operation permit pursuant to 15A NCAC 02Q .0300. Title V facilities are subject to the Title V procedures pursuant to 15A NCAC 02Q .0500 including the acid rain procedures pursuant to 15A NCAC 02Q .0400. A facility may also be subject to the air toxic procedures pursuant to 15A NCAC 2Q .0700.”

EPA approved changes to 15A NCAC 02Q .0103, *Definitions*, that include a cross-reference to a North Carolina General Statute that is not incorporated into the SIP. Specifically, on July 18, 2017, EPA approved revisions to the definition of “construction” at paragraph (9) that added subparagraphs (a) through (d). Newly added subparagraph (9)(d) included the phrase “for which a permit is required by G.S. 143-215.108.”⁵ Subsequently, on July 17, 2020, EPA approved a change to this phrase to read “for which a permit is required pursuant to G.S. 143-215.108.” EPA also approved changes to paragraph .0103(9) in the July 17, 2020, action which do not alter the meaning of the definition. EPA is proposing to correct both the July 18, 2017, and July 17, 2020, final actions by removing the phrase in subparagraph (9)(d), “pursuant to G.S. 143-215.108.” The effect of this change, if finalized, would merely remove the cross-reference to the statute and would not modify specific exemptions from permitting and other changes otherwise approved in EPA’s May 23, 2019, and July 17, 2020, actions.⁶

C. *Section 02Q .0301, Applicability*

EPA approved changes to 15A NCAC 02Q .0301, *Applicability*, that include a cross-reference to a North Carolina General Statute that is not incorporated into the SIP. Specifically, on May 23, 2019, EPA approved a revision to 15A NCAC 02Q .0301(a) that added the phrase “or as allowed under G.S. 143-215.108A”.⁷ Subsequently, on March 1, 2021, EPA approved a change to this phrase to read “or as allowed pursuant to G.S. 143-215.108A.” EPA also approved changes to paragraph .0301(a) with the March 1, 2021, action which are ministerial and do not alter the meaning of the provision. EPA is proposing to correct both the May 23,

⁵ The full text of 15A NCAC 02Q .0103(9)(d) in the SIP currently reads: “building ancillary structures, including fences and office buildings that are not a necessary component of an air contaminant source, equipment or associated air cleaning device for which a permit is required pursuant to G.S. 143-215.108” and is one of four items listed in the definition of “construction” that shall not be considered part of construction activity.

⁶ In the May 23, 2019, action, EPA approved changes to definition of “construction” in 15A NCAC 02Q .0103, *Definitions*, that identified certain activities excluded from the term “construction” and those exclusions remain in the SIP.

⁷ The full text of 15A NCAC 02Q .0301(a) of the SIP currently reads: “Except for the permit exemptions allowed pursuant to 15A NCAC 02Q .0102 and 15A NCAC 02Q .0900, or as allowed pursuant G.S. 143-215 108A, the owner or operator of a new, modified, or existing facility or source shall not begin construction or operation without first obtaining a construction and operation permit pursuant to 15A NCAC 02Q .0300; however, Title V facilities shall be subject to the Title V procedures pursuant to 15A NCAC 02Q .0500 including the acid rain procedures pursuant to 15A NCAC 02Q .0400 for Title IV sources.”

2019, and March 1, 2021, final actions by removing the phrase in paragraph (a), “or as allowed pursuant to G.S. 143-215.108A.” The removal of the cross-reference at 02Q .0301 would merely remove the cross-reference to the statute and would not modify specific exemptions from permitting and other changes otherwise approved in EPA’s May 23, 2019, and March 1, 2021, actions.

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, and as discussed in Sections I and III of this preamble, EPA is proposing to incorporate by reference 15A NCAC Section 02Q Rule .0101, *Required Air Quality Permits*, except for the phrase “With the exception allowed by G.S. 143-215.108A” in subparagraph (b); Rule .0103, *Definitions*, except for the phrase “pursuant to G.S. 143-215.108” in subparagraph (9)(d); and Rule .0301, *Applicability*, except for the phrase “or as allowed pursuant G.S. 143-215.108A” in paragraph (a), all state effective April 1, 2018.⁸ EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 office (please contact the person identified in the “FOR FURTHER INFORMATION CONTACT” section of this preamble for more information).

V. Proposed Action

Pursuant to the error correction provision of section 110(k)(6) of the CAA, EPA is proposing to remove portions of 15A NCAC section 02Q .0101, *Required Air Quality Permits*, section 02Q .0103, *Definitions*, and section 02Q .0301, *Applicability*, with the cross-references to North Carolina General Statutes as described above because the inclusion of these cross-references in the SIP is inconsistent with the CAA.

VI. Statutory and Executive Order Reviews

⁸ If EPA finalizes this proposed action, the “Explanation” column for these rules under 40 CFR 52.1770(c) will be revised to exclude these cross-references to the statutory provisions.

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. *See* 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 proposed action merely proposes to approve 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 Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- 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 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- 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.

In addition, the SIP is not approved to apply on any Indian reservation land 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 rulemaking 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).

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”

EPA did not perform an EJ analysis and did not consider EJ in this proposed action. Consideration of EJ is not required as part of this proposed action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous peoples.

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.

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

Dated: May 20, 2024.

Jeananne Gettle,
Acting Regional Administrator,
Region 4.

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