

Dated: November 30, 2007.

John C. Rood,

Acting Under Secretary for Arms Control and International Security, Department of State.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 97

[EPA-R03-OAR-2007-0448; FRL-8506-4]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Clean Air Interstate Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a revision to the West Virginia State Implementation Plan (SIP) submitted on June 8, 2007. This revision incorporates provisions related to the implementation of EPA's Clean Air Interstate Rule (CAIR), promulgated on May 12, 2005 and subsequently revised on April 28, 2006 and December 13, 2006, and the CAIR Federal Implementation Plan (CAIR FIP) concerning sulfur dioxide (SO₂), nitrogen oxides (NO_x) annual, and NO_x ozone season emissions for the State of West Virginia, promulgated on April 28, 2006 and subsequently revised on December 13, 2006. West Virginia is subject to the CAIR FIP that implements the CAIR requirements by requiring certain EGUs to participate in the EPA-administered Federal CAIR SO₂, NO_x annual, and NO_x ozone season cap-and-trade programs. In accordance with the Clean Air Act, EPA is approving this West Virginia SIP revision as an abbreviated SIP revision which addresses the methodology to be used to allocate annual and ozone season NO_x allowances under the CAIR FIPs. In this action, EPA is not making any changes to the CAIR FIP, but is amending the appropriate appendices in the CAIR FIP trading rules simply to note that approval.

EFFECTIVE DATE: The final rule is effective on December 18, 2007.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2007-0448. All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, i.e., 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 either electronically in <http://www.regulations.gov> or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street, SE., Charleston, West Virginia 25304.

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

SUPPLEMENTARY INFORMATION:

I. Background

On June 1, 2006, West Virginia submitted a full SIP revision to meet the requirements of CAIR as promulgated on May 12, 2005. The SIP revision is comprised of three regulations: 45CSR39 (NO_x annual trading program); 45CSR40 (NO_x ozone season trading program); and 45CSR41 (SO₂ annual trading program). The regulations adopted the 40 CFR part 96 model rules as set forth in the May 12, 2005 rulemaking, however, because revisions to 40 CFR part 96 were finalized after the State had started its rulemaking process, did not include the changes to the model rules that were made as part of the April 28, 2006 CAIR FIP. Consistent with the provisions of the CAIR, West Virginia submitted a letter on June 8, 2007, requesting that portions of its June 1, 2006 SIP revision be considered as an abbreviated SIP revision. The June 8, 2007 letter designated the NO_x allocation methodology provisions applicable to EGUs under the CAIR FIP and originally submitted as part of its June 1, 2006 CAIR SIP revision as replacing the corresponding provisions of the CAIR FIPs. Consistent with this request, EPA is treating the following provisions of West Virginia's CAIR rules as an abbreviated SIP revision: §§ 45-39-40, 45-39-41, and 45-39-42; and §§ 45-40-40, 45-40-41, and 45-40-42, except for paragraphs 40.3, 42.2.c, 42.2.d, 42.2.e, 42.3.a.2, and 42.4.b. The NO_x allowance allocation methodology in these provisions of West Virginia's June 1, 2006 SIP revision is consistent with the methodology in part 96 and the FIP.

On September 13, 2007 (72 FR 52289), EPA published a direct final rulemaking notice (DFRN) to approve the June 8, 2007 revision to West Virginia's SIP. The DFRN approved, as an abbreviated SIP, West Virginia's methodology for

allocating NO_x allowances for the NO_x annual and NO_x ozone season trading programs, which will be used to allocate NO_x allowances to sources in West Virginia, instead of the federal allocation methodology otherwise provided in the FIP. A detailed discussion of the CAIR requirements, West Virginia's CAIR submittals, and EPA's rationale for approval of the West Virginia's abbreviated SIP may be found in the DFRN and will not be repeated here. In the DFRN, EPA stated that if adverse comment was received, it would publish a timely withdrawal in the Federal Register informing the public that the rule would not take effect. On October 12, 2007, EPA received an adverse comment from the State of Connecticut Department of Environmental Protection. EPA therefore withdrew the DFRN on November 7, 2007 (72 FR 62788).

II. Public Comments and EPA Responses

Comment: On October 12, 2007, the Connecticut Department of Environmental Protection (CTDEP) submitted adverse comments on EPA's DFR notice approving West Virginia's abbreviated CAIR SIP. CTDEP encourages EPA to approve state programs adopted to meet the emission reduction requirements of CAIR. However, it argues that before approving state CAIR plans, EPA should evaluate individually and in the aggregate each state's clean air programs. They argue such evaluation is necessary to ensure that each state's emissions do not significantly contribute to downwind nonattainment. CTDEP asserts its belief that the CAIR program does not ensure that the CAA section 110(a)(2)(D)(i) requirements to prohibit transported emissions that significantly contribute to nonattainment in Connecticut and other states will be met. CTDEP expresses concern that EPA is determining through this and other similar rulemakings that CAIR programs are sufficient to meet States' section 110(a)(2)(D)(i) obligations. CTDEP asserts, based on EPA and State modeling for CAIR, that the levels of transported pollution remaining after CAIR implementation are large enough that, even with local controls, it may be difficult for Connecticut to attain the 8-hour ozone NAAQS by 2010. Finally, CTDEP questions EPA's determination that highly cost effective controls are adequate to address States' section 110(a)(2)(D)(i) obligations as compared to "reasonable cost" controls that could be achieved to effect more stringent NO_x reductions.

Response: EPA does not agree that it is appropriate or necessary for EPA to conduct additional analysis before approving the West Virginia abbreviated CAIR SIP for NO_x allowances and NO_x allowance methodology. West Virginia has chosen an abbreviated SIP for NO_x allowances and NO_x allocation methodology, one of four SIP elements for which states may request an abbreviated SIP. With an abbreviated SIP, the CAIR FIP remains in place for West Virginia. EPA's proposed approval of West Virginia's abbreviated SIP would therefore only have the effect of replacing, as provided for in the CAIR FIP, the corresponding FIP provisions with the State's preferred allocations and methodology. EPA has evaluated this abbreviated SIP revision and determined that it complies with the requirements of the CAIR FIP provisions regarding abbreviated SIPs. CTDEP does not challenge this determination. Thus, CTDEP's comments do not specifically pertain to any aspect of EPA's proposed action to approve the West Virginia CAIR SIP revision. Rather, the comments appear to be directed broadly at EPA's decisions with regard to states' section 110(a)(2)(D)(i) obligations. These decisions were made by EPA in the context of the CAIR rulemaking, which was promulgated on May 12, 2005 (70 FR 25162), not in the proposed action to approve West Virginia's abbreviated CAIR SIP revision. Therefore, CTDEP's comments are not relevant to the proposed action. CTDEP had ample opportunity to submit comments both during the comment period for the proposed CAIR rulemaking of January 30, 2004 (69 FR 4566) and during the comment period for the proposed CAIR FIP of August 24, 2005 (70 FR 49708). EPA's proposal to approve West Virginia's abbreviated CAIR SIP did not reopen either the CAIR or CAIR FIP rulemakings. Consequently, CTDEP's comments are not relevant to this rulemaking, or timely with respect to the CAIR and CAIR FIP rulemakings. Thus, EPA does not believe it is necessary to conduct additional analysis on whether West Virginia or any other state satisfies the requirements of 110(a)(2)(D)(i) before approving the West Virginia's abbreviated CAIR SIP submission.

III. Final Action

EPA is approving West Virginia's abbreviated CAIR SIP revision submitted on June 8, 2007, as discussed above. West Virginia is subject to the CAIR FIPs, which require participation in the EPA-administered SO₂, NO_x annual, and NO_x ozone season cap-and-trade programs. Under this abbreviated

SIP revision and, consistent with the flexibility given to States in the FIPs, West Virginia has adopted provisions for allocating allowances under the CAIR FIP NO_x annual and ozone season trading programs. As provided for in the CAIR FIPs, these provisions in the abbreviated SIP revision will replace or supplement the corresponding provisions of the CAIR FIPs in West Virginia. The abbreviated SIP revision meets the applicable requirements in 40 CFR 51.123(p) and (ee), with regard to NO_x annual and NO_x ozone season emissions. In this final action, EPA is not making any changes to the CAIR FIP, but is amending the appropriate appendices in the CAIR FIP trading rules simply to note approval of West Virginia's abbreviated CAIR SIP.

EPA is today taking action only on this request for an abbreviated SIP revision and not the full CAIR SIP revision originally submitted, which will be the subject of a separate rulemaking action. In the June 8, 2007 letter, West Virginia states that it will revise and promulgate its CAIR rules 45CSR39, 45CSR40, and 45CSR41 to incorporate the revisions to part 96 and indicates that it plans to submit an amended CAIR SIP revision to EPA in 2008.

IV. Effective Date

EPA finds that there is good cause for this approval to become effective on the date of publication because a delayed effective date is unnecessary due to the nature of the approval, which allows the Commonwealth to make allocations under its CAIR rules. The expedited effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rule actions may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction" and section 5 U.S.C. 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule."

CAIR SIP approvals relieve states and CAIR sources within states from being subject to allowance allocation provisions in the CAIR FIPs that otherwise would apply to it, allowing States to make their own allowance allocations based on their SIP-approved State rule. The relief from these obligations is sufficient reason to allow an expedited effective date of this rule under 5 U.S.C. 553(d)(1).

V. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it 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). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the

State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 rule 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. This rule 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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 19, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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 to approve West Virginia's abbreviated CAIR SIP revision may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 97

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements.

Dated: December 6, 2007.

Donald S. Welsh,
Regional Administrator, Region III.

■ 40 CFR parts 52 and 97 are amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

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

Subpart XX—West Virginia

- 2. Section 52.2520 is amended as follows:
 - a. The table in paragraph (c) by adding entries for 45 CSR 39 and 45 CSR 40 at the end of the table.
 - b. The table in paragraph (e) by adding the entry for Article 3, Chapter 64 of the Code of West Virginia at the end of the table.

§ 52.2520 Identification of plan.

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(c) * * *

EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP

| State citation [Chapter 16–20 or 45 CSR] | Title/subject | State effective date | EPA approval date | Additional explanation/citation at 40 CFR § 52.2565 |
|--|--|----------------------|--|--|
| [45 CSR] Series 39 Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides | | | | |
| Section 45–39–40 | CAIR NO _x Annual Trading Budget | 5/1/06 | 12/18/07 [Insert page number where the document begins]. | Only Phase I (2009–2014). |
| Section 45–39–41 | Timing Requirements for CAIR NO _x Annual Allowance Allocations. | 5/1/06 | 12/18/07 [Insert page number where the document begins]. | Only Phase I (2009–2014). |
| Section 45–39–42 | CAIR NO _x Annual Allowance Allocations. | 5/1/06 | 12/18/07 [Insert page number where the document begins]. | Only for Phase I (2009–2014). |
| [45 CSR] Series 40 Control of Ozone Season Nitrogen Oxide Emissions to Mitigate Interstate Transport of Ozone and Nitrogen Oxides | | | | |
| Section 45–40–40 | CAIR NO _x Ozone Season Trading Budget. | 5/1/06 | 12/18/07 [Insert page number where the document begins]. | 1. Except for subsection 40.3, and non-EGUs in subsection 40.1 table 2. Only Phase I (2009–2014). |
| Section 45–40–41 | Timing Requirements for CAIR NO _x Ozone Season Allowance Allocations. | 5/1/06 | 12/18/07 [Insert page number where the document begins]. | Only Phase I (2009–2014). |

EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP—Continued

| State citation [Chapter 16–20 or 45 CSR] | Title/subject | State effective date | EPA approval date | Additional explanation/citation at 40 CFR § 52.2565 |
|--|--|----------------------|--|---|
| Section 45–40–42 | CAIR NO _x Ozone Season Allowance Allocations. | 5/1/06 | 12/18/07 [Insert page number where the document begins]. | 1. Except for subsections 42.2.d, 42.2.e, 42.3.a.2, and 42.4.b. 2. Only Phase I (2009–2014). |

* * * * * (e) * * * *

| Name of non-regulatory SIP revision | Applicable geographic area | State submittal date | EPA approval date | Additional explanation |
|---|----------------------------|----------------------|--|-----------------------------------|
| Article 3, Chapter 64 of the Code of West Virginia, 1931. | Statewide | 5/1/06 | 12/18/07 [Insert page number where the document begins]. | Effective date of March 11, 2006. |

PART 97—[AMENDED]

■ 3. The authority citation for 40 CFR part 97 continues to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7426, 7601, and 7651, *et seq.*

■ 4. Appendix A to Subpart EE is amended by adding the entry for “West Virginia” in alphabetical order under paragraph 1. to read as follows:

Appendix A to Subpart EE of Part 97—States With Approved State Implementation Plan Revisions Concerning Allocations

1. * * * * *
West Virginia (for control periods 2009–2014)

■ 5. Appendix A to Subpart EEEE is amended by adding the entry for West Virginia in alphabetical order to read as follows:

Appendix A to Subpart EEEE of Part 97—States With Approved State Implementation Plan Revisions Concerning Allocations

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West Virginia (for control periods 2009–2014)

[FR Doc. E7–24367 Filed 12–17–07; 8:45 am]
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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 488

[CMS–2278–IFC2]

RIN 0938–AP22

Revisit User Fee Program for Medicare Survey and Certification Activities

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.
ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period implements the continuation of the revisit user fee program for Medicare Survey and Certification activities, in accordance with the statutory authority in the Further Continuing Appropriations, 2008 Resolution (“Continuing Resolution”) budget legislation passed by the Congress and signed by the President on November 13, 2007. On September 19, 2007, we published a final rule that established a system of revisit user fees applicable to health care facilities that have been cited for deficiencies during initial certification, recertification or substantiated complaint surveys and require a revisit to confirm that previously-identified deficiencies have been corrected.

DATES: *Effective date:* These regulations are effective December 14, 2007, and applicable beginning November 17, 2007.

Comment date: To be assured consideration, comments must be

received at one of the addresses provided below, no later than 5 p.m. on February 19, 2008.

ADDRESSES: In commenting, please refer to file code CMS–2278–IFC2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on specific issues in this regulation to <http://www.cms.hhs.gov/eRulemaking>. Click on the link “Submit electronic comments on CMS regulations with an open comment period.” (Attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word.)

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2278–IFC2, P.O. Box 8010, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2278–IFC2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the