

The EPA Administrator, Michael S. Regan, signed the following notice on 9/21/2023, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2021-0668. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 97

[EPA-HQ-OAR-2021-0668; FRL-8670.3-03-OAR]

Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards; Response to Additional Judicial Stays of SIP Disapproval Action for Certain States

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule; request for comment.

SUMMARY: The Environmental Protection Agency (EPA) is taking interim final action to stay, for emissions sources in Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia only, the effectiveness of the Federal Implementation Plan (FIP) requirements established to address the obligations of these and other States to mitigate interstate air pollution with respect to the 2015 national ambient air quality standards (NAAQS) for ozone (the Good Neighbor Plan). The EPA is also revising certain other regulations to ensure the continued implementation of previously established requirements to mitigate interstate air pollution with respect to other ozone NAAQS while the Good Neighbor Plan’s requirements are stayed. The stay and the associated revisions to other regulations are being issued in response to judicial orders that partially stay, pending judicial review, a separate EPA action which disapproved certain State Implementation Plan (SIP) revisions submitted by these and other States.

DATES: This interim final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments on this rule must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OAR-2021-0668, by any of the following methods:

- Federal eRulemaking portal: <https://www.regulations.gov> (our preferred method). Follow the online instructions for submitting comments.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Air and Radiation Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand delivery or courier: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal holidays).

Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Lifland, Clean Air Markets Division, Office of Atmospheric Protection, Office of Air and Radiation, U.S. Environmental Protection Agency, Mail Code 6204A, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone: 202-343-9151; email: lifland.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General

A. Public Participation

Submit your written comments, identified by Docket ID No. EPA-HQ-OAR-2021-0668, at <https://www.regulations.gov> (our preferred method), or by the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to the EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), 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. The 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). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

B. Potentially Affected Entities

This action revises on an interim basis the Good Neighbor Plan, which applies to electric generating units (EGUs) and non-EGU industrial sources. This action also revises other allowance trading program regulations that apply to EGUs but not to non-EGU industrial sources. The affected emissions sources are generally in the following industry groups:

Industry Group	North American Industry Classification System (NAICS) Code
Fossil Fuel Electric Power Generation	221112
Pipeline Transportation of Natural Gas	4862
Cement and Concrete Product Manufacturing	3273
Iron and Steel Mills and Ferroalloy Manufacturing	3311
Glass and Glass Product Manufacturing	3272
Basic Chemical Manufacturing	3251
Petroleum and Coal Products Manufacturing	3241
Pulp, Paper, and Paperboard Mills	3221
Metal Ore Mining	2122
Solid Waste Combustors and Incinerators	562213

As signed in March 2023, the Good Neighbor Plan applies to emissions sources in Alabama, Arkansas, California, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, West Virginia, and Wisconsin. The Good Neighbor Plan's requirements for emissions sources in Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas were stayed in a previous action. This action stays the Good Neighbor Plan's requirements for emissions sources in Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia.

The information provided in this section on potentially affected entities is not intended to be exhaustive. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

C. Statutory Authority

Statutory authority to issue the amendments finalized in this action is provided by the same Clean Air Act (CAA) provisions that provided authority to issue the regulations being amended: CAA section 110(a) and (c), 42 U.S.C. 7410(a) and (c) (SIP and FIP requirements, including requirements for mitigation of interstate air pollution), and CAA section 301, 42 U.S.C. 7601 (general rulemaking authority). Statutory authority for the rulemaking procedures

followed in this action is provided by Administrative Procedure Act (APA) section 553, 5 U.S.C. 553.

II. Regulatory Revisions

In a previous action (referred to here as the First Interim Final Rule),¹ the EPA stayed on an interim basis, for EGUs and non-EGU industrial sources in Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas, the effectiveness of the FIP requirements established to address the obligations of these and other States to mitigate interstate air pollution with respect to the 2015 ozone NAAQS (referred to here as the Good Neighbor Plan).² To ensure the continued implementation of previously established requirements to mitigate interstate air pollution with respect to other ozone NAAQS, the First Interim Final Rule also required EGUs in these States to participate in the Cross-State Air Pollution Rule (CSAPR) NO_x Ozone Season “Group 2” Trading Program while the Good Neighbor Plan’s requirements for these EGUs to participate in the CSAPR NO_x Ozone Season “Group 3” Trading Program are stayed. The stay and the associated revisions to other regulations were issued in response to judicial orders that partially stay, pending judicial review, a separate EPA action which disapproved certain SIP revisions submitted by these and other States (the SIP Disapproval action).³

Since the EPA submitted the First Interim Final Rule for publication in the *Federal Register*, courts have issued orders granting partial stays of the SIP Disapproval action as to

¹ Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stays of SIP Disapproval Action for Certain States, 88 FR 49295 (July 31, 2023).

² Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards, 88 FR 36654 (June 5, 2023).

³ Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 FR 9336 (February 13, 2023).

several additional States. The U.S. Courts of Appeals for the Eighth, Ninth, and Eleventh Circuits granted judicial stays pending review on the merits as to Minnesota,⁴ Nevada,⁵ and Alabama,⁶ respectively, and the U.S. Court of Appeals for the Tenth Circuit did the same as to Oklahoma and Utah.⁷ In addition, the U.S. Court of Appeals for the Fourth Circuit issued an administrative stay as to West Virginia pending oral argument on West Virginia's motion to stay and the EPA's motion to transfer venue or dismiss.⁸ Finally, the U.S. Court of Appeals for the Sixth Circuit granted a judicial stay pending review on the merits as to Kentucky which supersedes the administrative stay previously in effect as to that State.⁹

To respond to the stay orders as to the additional States, in this action the EPA is modifying and supplementing the regulatory revisions adopted in the First Interim Final Rule. The effect of this action is that emissions sources in Alabama, Minnesota, Nevada, Oklahoma, Utah,¹⁰ and West Virginia (and Indian country within the borders of the States) will not be

⁴ Order, *Allete, Inc. v. EPA*, No. 23-1776 (8th Cir. July 5, 2023), available in the docket.

⁵ Order, *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. July 3, 2023), available in the docket.

⁶ Order, *Alabama v. EPA*, No. 23-11173, and *Alabama Power Co. v. EPA*, No. 11196 (11th Cir. August 17, 2023), available in the docket.

⁷ Order, *Utah v. EPA*, No. 23-9509, *PacifiCorp v. EPA*, No. 23-9512, *Utah Associated Municipal Power Systems v. EPA*, No. 23-9520, *Oklahoma v. EPA*, No. 23-9514, *Oklahoma Gas & Electric Co. v. EPA*, No. 23-9521, *Tulsa Cement LLC v. EPA*, No. 23-9533, and *Western Farmers Electric Cooperative v. EPA*, No. 23-9534 (10th Cir. July 27, 2023), available in the docket.

⁸ Order, *West Virginia v. EPA*, No. 23-1418 (4th Cir. August 10, 2023), available in the docket. Oral argument on the motions is scheduled for October 27, 2023.

⁹ Order, *Kentucky v. EPA*, No. 23-3216, and *Kentucky Energy and Environment Cabinet v. EPA*, No. 23-3225 (6th Cir. July 25, 2023) (judicial stay order); *see also* Order, *Kentucky v. EPA*, No. 23-3216 (6th Cir. May 31, 2023) (administrative stay order). (Both orders are available in the docket.) The EPA's response to the administrative stay order in the First Interim Final Rule also serves as a complete response to the more recent judicial stay order, with the consequence that no additional response to the judicial stay order as to Kentucky is necessary in this action.

¹⁰ The EPA's authority to implement the Good Neighbor Plan's FIP requirements as to emissions sources in Utah has two independent statutory bases: first, the Agency's finding of the state's failure to submit a good neighbor SIP for the 2015 ozone NAAQS, 84 FR 66612 (December 5,

subject to the Good Neighbor Plan’s requirements promulgated to address the States’ good neighbor obligations with respect to the 2015 ozone NAAQS while the stay orders covering the States remain in place (i.e., at least for the 2023 ozone season and possibly longer). After the courts have reached final determinations on the merits in these proceedings (or possibly in the case of West Virginia, a final determination to deny the stay motion or to grant the motion to transfer venue or dismiss), the EPA will take further action consistent with the final determinations. At the time of this rulemaking, the EPA cannot predict how the Agency’s future action may affect the amendments being finalized in this action. However, for these States, as well as the States covered by the First Interim Final Rule, the EPA generally anticipates that any future action bringing the Good Neighbor Plan’s requirements into effect after a stay would phase in the requirements so as to provide lead times to implement the Good Neighbor Plan’s identified emissions control strategies comparable to the lead times that the Good Neighbor Plan would have provided in the absence of the stay, thereby giving parties sufficient time to prepare for implementation.

The remainder of this section describes the specific regulatory revisions being adopted in this action.¹¹ For further background and discussion of the basis for the regulatory revisions, see the First Interim Final Rule at 88 FR 49296–97.

2019), and second, the Agency’s disapproval of the state’s subsequently submitted SIP in the SIP Disapproval action. *See* CAA section 110(c)(1). However, the order staying the SIP Disapproval action as to Utah includes the statement that “EPA may not enforce its Federal Good Neighbor Plan for the 2015 ozone NAAQS against ... Utah while the stay remains in place.” Order, *supra* note 7, at 4. To comply with the order, the EPA is therefore staying the effectiveness of the Good Neighbor Plan’s requirements as to emissions sources in Utah notwithstanding the Agency’s independent basis for FIP authority arising from the finding of Utah’s failure to submit a good neighbor SIP.

¹¹ The EPA has included a document in the docket that shows all the regulatory revisions being adopted in this action in redline-strikeout format.

To implement the stay orders with respect to non-EGU industrial sources in Nevada, Oklahoma, Utah, and West Virginia (and Indian country within the borders of the States), the EPA is adding these States to the list of States covered by the stay provision for non-EGU industrial sources adopted in the First Interim Final Rule at 40 CFR 52.40(c)(4) and is adding parallel text in the State-specific subpart of 40 CFR part 52 for each of the States.¹² No equivalent stay provisions are necessary for Alabama or Minnesota because the Good Neighbor Plan’s requirements for non-EGU industrial sources do not apply to emissions sources in Alabama or Minnesota.

To implement the stay orders with respect to EGUs in Alabama, Oklahoma, and West Virginia (and Indian country within the borders of the States), the EPA is adding these States to the lists of States covered by the stay provisions for EGUs adopted in the First Interim Final Rule at 40 CFR 52.38(b)(2)(iii)(D)(1) (West Virginia) and 40 CFR 52.38(b)(2)(iii)(D)(2) (Alabama and Oklahoma) and is adding parallel text in the state-specific subparts of 40 CFR part 52 for each of the States.¹³ In combination with other provisions adopted in the First Interim Final Rule at 40 CFR 52.38(b)(2)(ii)(D), the revisions will require the EGUs in each of these States to participate in the Group 2 trading program instead of the Group 3 trading program while a stay for the State remains in effect.¹⁴ The EPA is also revising the Group 2 trading program

¹² See §§ 52.1492(b)(2) (Nevada), 52.1930(b)(2) (Oklahoma), 52.2356(b)(2) (Utah), 52.2540(c)(2) (West Virginia).

¹³ See §§ 52.54(b)(6) (Alabama), 52.1930(a)(6) (Oklahoma), 52.2540(b)(6) (West Virginia).

¹⁴ Like EGUs in Arkansas, Mississippi, Missouri, and Texas, EGUs in Alabama and Oklahoma were covered by the Group 2 trading program before the Good Neighbor Plan and therefore will use “Original Group 2” allowances for compliance. Like EGUs in Kentucky and Louisiana, EGUs in West Virginia were already covered by the Group 3 trading program before the Good Neighbor Plan and therefore will use “Expanded Group 2” allowances for compliance. For further discussion of the regulatory provisions relating to Original Group 2 and Expanded Group 2 allowances, see the First Interim Final Rule at 88 FR 49297–98.

regulations at 40 CFR 97.810 and 97.821 and the Group 3 trading program regulations at 40 CFR 97.1026 to continue to provide the same amounts for State emissions budgets, variability limits, unit-level allowance allocations, and banked allowance holdings that would have applied for these States in the absence of the Good Neighbor Plan.

To implement the stay orders with respect to EGUs in Minnesota, Nevada, and Utah (and Indian country within the borders of the States), the EPA is adding a new stay provision for EGUs in these States at 40 CFR 52.38(b)(2)(iii)(D)(3) and is adding parallel text in the state-specific subparts of 40 CFR part 52 for each of the States.¹⁵ Unlike the stay provisions adopted in the First Interim Final Rule for EGUs in Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas and extended in this action to EGUs in Alabama, Oklahoma, and West Virginia, the stay provision for EGUs in Minnesota, Nevada, and Utah is not accompanied by requirements under 40 CFR 52.38(b)(2)(ii)(D) to participate in the Group 2 trading program while the stay for a State is in effect, because EGUs in Minnesota, Nevada, and Utah are not subject to previously established requirements to mitigate interstate air pollution with respect to other ozone NAAQS.

Finally, the EPA is making stay-related revisions to two cross-references in the Group 2 and Group 3 trading program regulations. First, a revision at 40 CFR 97.826(e)(1) clarifies that, like EGUs in other States covered by stay orders, EGUs in Minnesota, Nevada, and Utah will be excluded from the one-time procedures converting Group 2 allowances into an initial bank of Group 3 allowances. Second, a revision at 40 CFR 97.1026(d)(2)(ii) clarifies that emissions

¹⁵ See §§ 52.1240(d)(3) (Minnesota), 52.1492(a)(3) (Nevada), 52.2356(a)(3) (Utah).

budgets for States covered by stay orders will be excluded from calculations of the allowance bank target amounts used in the Group 3 trading program's annual bank recalibration procedure.

III. Rulemaking Procedures and Findings of Good Cause

As noted in section I.C of this document, the EPA's authority for the rulemaking procedures followed in this action is provided by APA section 553.¹⁶ In general, an agency issuing a rule under the procedures in APA section 553 must provide prior notice and an opportunity for public comment, but APA section 553(b)(B) includes an exemption from notice-and-comment requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This action is being issued as an interim final rule without prior notice or opportunity for public comment because the EPA finds that the APA "good cause" exemption from notice-and-comment requirements applies here.

The basis for the finding of good cause is that following notice-and-comment procedures is unnecessary for this action. The EPA has no discretion as to whether to stay the effectiveness of the Good Neighbor Plan's requirements for emissions sources in the States covered by the additional stay orders. While some superficial discretion exists concerning the specific design of the regulatory revisions that provide an alternate mechanism for EGUs in States covered by the stay orders to continue to address the States' good neighbor obligations with respect to other

¹⁶ Under CAA section 307(d)(1)(B), the EPA's revision of a FIP under CAA section 110(c) would normally be subject to the rulemaking procedural requirements of CAA section 307(d), including notice-and-comment procedures, but CAA section 307(d) does not apply "in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of [APA section 553(b)]." CAA section 307(d)(1).

ozone NAAQS, no discretion exists as to the function of that design, which is to maintain the status quo by implementing requirements that are substantively identical to the pre-existing requirements that would have continued to apply in the absence of the Good Neighbor Plan. The EPA's design for the regulatory revisions in this action accomplishes this function. Taking comment so as to allow the public to advocate for not staying the Good Neighbor Plan's requirements, not adopting regulatory revisions needed to implement requirements that are substantively identical to the requirements that would have applied in the absence of the Good Neighbor Plan, or adopting superficially different regulatory revisions to accomplish the same function would serve no purpose and is therefore unnecessary.

The regulatory revisions made in this action will take effect immediately upon publication of the action in the *Federal Register*. In general, an agency issuing a rule under APA section 553 must provide for a period of at least 30 days between the rule's dates of publication and effectiveness, but APA section 553(d) includes several exceptions. Under APA section 553(d)(1), an exception applies to a rule that "grants or recognizes an exemption or relieves a restriction." Because the portions of this action that stay the effectiveness of the Good Neighbor Plan's requirements for emissions sources in certain States grant an exemption (on an interim basis while the stay remains in place), the normal 30-day minimum period between this action's dates of publication and effectiveness is not required. The EPA is making these portions of the action effective as of the action's publication date to comply with the stay orders in a timely manner.

Under APA section 553(d)(3), the normal 30-day minimum period between a rule's dates of publication and effectiveness does not apply "as otherwise provided by the agency for good cause found and published with the rule." With respect to the portions of this action that provide

an alternate mechanism for EGUs in the States covered by the stay orders to continue to address the States' good neighbor obligations under rules issued before the Good Neighbor Plan, the EPA finds good cause to make the regulatory revisions effective as of the action's publication date for the following reasons. First, these regulatory revisions benefit the public by avoiding the possibility that interruption of the previously established requirements would cause air quality degradation. Second, these regulatory revisions benefit the regulated community by clarifying the regulatory requirements that apply in light of the stay orders. Finally, making these regulatory revisions effective less than 30 days after this action's publication date does not violate the purpose of the normal requirement for a 30-day minimum period, which is "to give affected parties a reasonable time to adjust their behavior before the final rule takes effect."¹⁷

The regulatory revisions in this action facilitating continued implementation of previously established requirements impose no requirements on any emissions source that differ substantively from the requirements that would have applied to that source in the absence of the Good Neighbor Plan. Thus, no affected party needs time to adjust its behavior in preparation for these regulatory revisions.

IV. Request for Comment

As explained in section III of this document, the EPA finds good cause to take this interim final action without prior notice or opportunity for public comment. However, the EPA is providing an opportunity for comment on the content of the amendments. The EPA requests comment on this rule. The EPA is not reopening for comment any provisions of the Good

¹⁷ *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996).

Neighbor Plan, 40 CFR part 52, or 40 CFR part 97 other than the specific provisions that are expressly added or amended in this rule.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at www.epa.gov/laws-regulations/laws-and-executive-orders.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* The Office of Management and Budget (OMB) has previously approved the information collection activities that will apply to the EGUs affected by this action and has assigned OMB control numbers 2060–0258 and 2060–0667. Additional information collection activities that will apply to EGUs and non-EGU industrial sources under the Good Neighbor Plan have been submitted to OMB for approval in conjunction with that rulemaking. This action makes no changes to the information collection activities under the previously approved information collection requests (ICRs) or the additional information collection activities for which approval has been requested in the Good Neighbor Plan’s ICRs.

C. Regulatory Flexibility Act (RFA)

This action is not subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under APA

section 553 or any other statute. This rule is not subject to notice-and-comment requirements because the Agency has invoked the APA “good cause” exemption under 5 U.S.C. 553(b).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any State, local, or Tribal governments or the private sector. This action simply stays the effectiveness of certain regulatory requirements for certain emissions sources on an interim basis in response to procedural court orders while ensuring that previously applicable regulatory requirements remain in effect.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will 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.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175. This action simply stays the effectiveness of certain regulatory requirements for certain emissions sources on an interim basis in response to procedural court orders while ensuring that previously applicable regulatory requirements remain in effect. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may

disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action responds to court orders issued by several U.S. Courts of Appeals and the EPA lacks discretion to deviate from those orders. The EPA’s assessment of health and safety risks for the action establishing the requirements that are being stayed is discussed in Chapter 5 of the regulatory impact analysis for the Good Neighbor Plan.¹⁸

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations. This action responds to court orders issued by several U.S. Courts of Appeals and the EPA lacks discretion to deviate from those orders. The EPA’s assessment of environmental justice

¹⁸ See Regulatory Impact Analysis for the Final Federal Good Neighbor Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard (March 2023) at 197–257, available in the docket.

considerations for the action establishing the requirements that are being stayed is discussed in section VII of the Good Neighbor Plan preamble.¹⁹

K. Congressional Review Act (CRA)

This action is subject to the Congressional Review Act (CRA), 5 U.S.C. 801–808, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in section III of this document, including the basis for that finding.

L. Judicial Review

CAA section 307(b)(1) governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit): (i) when the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, but “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion to decide whether to invoke the exception in (ii).²⁰

¹⁹ See 88 FR 36844–46.

²⁰ *Sierra Club v. EPA*, 47 F.4th 738, 745 (D.C. Cir. 2022) (“EPA’s decision whether to make and publish a finding of nationwide scope or effect is committed to the agency’s discretion and thus is unreviewable”); *Texas v. EPA*, 983 F.3d 826, 834–35 (5th Cir. 2020).

This rulemaking is “nationally applicable” within the meaning of CAA section 307(b)(1). In this action, in response to court orders, the EPA is amending on an interim basis the Good Neighbor Plan,²¹ which the EPA developed by applying a uniform legal interpretation and common, nationwide analytical methods to address the requirements of CAA section 110(a)(2)(D)(i)(I) concerning interstate transport of pollution (i.e., “good neighbor” requirements) for the 2015 ozone NAAQS. Based on that nationwide analysis, the Good Neighbor Plan established FIP requirements for emissions sources in 23 States located across eight EPA Regions and ten Federal judicial circuits. Given that this action amends an action implementing the good neighbor requirements of CAA section 110(a)(2)(D)(i)(I) in a large number of States located across the country and given the interdependent nature of interstate pollution transport and the common core of knowledge and analysis involved in promulgating the FIP requirements, this is a “nationally applicable” action within the meaning of CAA section 307(b)(1).

In the alternative, to the extent a court finds this action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1). In this action, in response to court orders, the EPA is amending on an interim basis the Good Neighbor Plan, an action in which the EPA interpreted and applied section 110(a)(2)(D)(i)(I) of the CAA for the 2015 ozone NAAQS based on a common core of nationwide policy judgments and technical analysis concerning the interstate transport of pollutants throughout the continental United States. Based on that

²¹ The Good Neighbor Plan is nationally applicable or based on a determination of nationwide scope or effect found and published by the EPA. *See* 88 FR 36859–60.

nationwide analysis, the Good Neighbor Plan established FIP requirements for emissions sources in 23 States located across eight EPA Regions and ten Federal judicial circuits. This action adjusts temporarily the scope and operation of the Good Neighbor Plan for six States in response to court orders, and also implements necessary measures to ensure the status quo is maintained with respect to existing obligations under previously issued regulations (that were themselves nationally applicable or based on a determination of nationwide scope or effect found and published by the EPA²²).

The Administrator finds that, like the Good Neighbor Plan which it amends, this action is a matter on which national uniformity in judicial resolution of any petitions for review is desirable, to take advantage of the D.C. Circuit's administrative law expertise, and to facilitate the orderly development of the basic law under the Act. The Administrator also finds that consolidated review of this action in the D.C. Circuit will avoid piecemeal litigation in the regional circuits, further judicial economy, and eliminate the risk of inconsistent results for different States, and that a nationally consistent approach to the CAA's mandate concerning interstate transport of ozone pollution constitutes the best use of Agency resources.

For these reasons, this final action is nationally applicable or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is publishing that finding in the *Federal Register*. Under CAA section 307(b)(1), petitions for judicial review of this action must be filed in the D.C. Circuit by

²² See 86 FR 23163–64; 81 FR 74585–86.

[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

List of Subjects

40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Sulfur dioxide.

40 CFR Part 97

Environmental protection, Administrative practice and procedure, Air pollution control, Electric power plants, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, parts 52 and 97 of title 40 of the *Code of Federal Regulations* are 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 A—General Provisions

2. Amend § 52.38 by:

a. In paragraph (b)(2)(iii)(D)(1), removing “Kentucky and Louisiana” and adding in its place “Kentucky, Louisiana, and West Virginia”;

b. In paragraph (b)(2)(iii)(D)(2), removing “Arkansas, Mississippi, Missouri, and Texas” and adding in its place “Alabama, Arkansas, Mississippi, Missouri, Oklahoma, and Texas”; and

c. Adding paragraph (b)(2)(iii)(D)(3).

The addition reads as follows:

§ 52.38 What are the requirements of the Federal Implementation Plans (FIPs) for the Cross-State Air Pollution Rule (CSAPR) relating to emissions of nitrogen oxides?

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(D) * * *

(3) The effectiveness of paragraph (b)(2)(iii)(C) of this section is stayed for sources in Minnesota, Nevada, and Utah and Indian country located within the borders of such States with regard to emissions occurring in 2023 and thereafter. While a stay under this paragraph

(b)(2)(iii)(D)(3) is in effect for a State, such State shall be deemed not to be listed in paragraph (b)(2)(iii)(C) of this section for purposes of part 97 of this chapter.

* * * * *

§ 52.40 [Amended]

3. Amend § 52.40(c)(4) by removing “Missouri, and Texas” and adding in its place “Missouri, Nevada, Oklahoma, Texas, Utah, and West Virginia”.

Subpart B—Alabama

4. Amend § 52.54 by adding paragraph (b)(6) to read as follows:

§ 52.54 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(b) * * *

(6) Notwithstanding any other provision of this part, the effectiveness of paragraph (b)(3) of this section is stayed with regard to emissions occurring in 2023 and thereafter, provided that while such stay remains in effect, the provisions of paragraph (b)(2) of this section shall apply with regard to such emissions.

Subpart Y—Minnesota

5. Amend § 52.1240 by adding paragraph (d)(3) to read as follows:

§ 52.1240 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(d) * * *

(3) Notwithstanding any other provision of this part, the effectiveness of paragraph (d)(1) of this section is stayed with regard to emissions occurring in 2023 and thereafter.

Subpart DD—Nevada

6. Amend § 52.1492 by:

- a. Adding paragraph (a)(3); and
- b. Redesignating paragraph (b) as paragraph (b)(1) and adding paragraph (b)(2).

The additions read as follows:

§ 52.1492 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

(a) * * *

(3) Notwithstanding any other provision of this part, the effectiveness of paragraph (a)(1) of this section is stayed with regard to emissions occurring in 2023 and thereafter.

(b) * * *

(2) Notwithstanding any other provision of this part, the effectiveness of paragraph (b)(1) of this section is stayed.

Subpart LL—Oklahoma

7. Amend § 52.1930 by:

- a. Adding paragraph (a)(6); and
- b. Redesignating paragraph (b) as paragraph (b)(1) and adding paragraph (b)(2).

The additions read as follows:

§ 52.1930 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

(a) * * *

(6) Notwithstanding any other provision of this part, the effectiveness of paragraph (a)(3) of this section is stayed with regard to emissions occurring in 2023 and thereafter, provided that while such stay remains in effect, the provisions of paragraph (a)(2) of this section shall apply with regard to such emissions.

(b) * * *

(2) Notwithstanding any other provision of this part, the effectiveness of paragraph (b)(1) of this section is stayed.

Subpart TT—Utah

8. Amend § 52.2356 by:

- a. Adding paragraph (a)(3); and
- b. Redesignating paragraph (b) as paragraph (b)(1) and adding paragraph (b)(2).

The additions read as follows:

§ 52.2356 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

(a) * * *

(3) Notwithstanding any other provision of this part, the effectiveness of paragraph (a)(1) of this section is stayed with regard to emissions occurring in 2023 and thereafter.

(b) * * *

(2) Notwithstanding any other provision of this part, the effectiveness of paragraph (b)(1) of this section is stayed.

Subpart XX—West Virginia

9. Amend § 52.2540 by:

- a. Adding paragraph (b)(6); and

b. Redesignating paragraph (c) as paragraph (c)(1) and adding paragraph (c)(2).

The additions read as follows:

§ 52.2540 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(b) * * *

(6) Notwithstanding any other provision of this part, the effectiveness of paragraph (b)(3) of this section is stayed with regard to emissions occurring in 2023 and thereafter, provided that while such stay remains in effect, the provisions of paragraph (b)(2) of this section shall apply with regard to such emissions.

(c) * * *

(2) Notwithstanding any other provision of this part, the effectiveness of paragraph (c)(1) of this section is stayed.

PART 97—FEDERAL NO_x BUDGET TRADING PROGRAM, CAIR NO_x AND SO₂ TRADING PROGRAMS, CSAPR NO_x AND SO₂ TRADING PROGRAMS, AND TEXAS SO₂ TRADING PROGRAM

10. The authority citation for part 97 continues to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7426, 7491, 7601, and 7651, *et seq.*

Subpart EEEEE—CSAPR NO_x Ozone Season Group 2 Trading Program

11. Amend § 97.810 by:

- a. Revising paragraphs (a)(1)(i) through (iii) and (a)(17)(i) through (iii);
- b. Adding paragraphs (a)(22)(iv) through (vi);
- c. Revising paragraphs (b)(1) and (17); and

d. Redesignating paragraph (b)(22) as paragraph (b)(22)(i) and adding paragraph (b)(22)(ii).

The revisions and additions read as follows:

§ 97.810 State NO_x Ozone Season Group 2 trading budgets, new unit set-asides, Indian country new unit set-asides, and variability limits.

(a) * * *

(1) * * *

(i) The NO_x Ozone Season Group 2 trading budget for 2017 and thereafter is 13,211 tons.

(ii) The new unit set-aside for 2017 and thereafter is 255 tons.

(iii) The Indian country new unit set-aside for 2017 and thereafter is 13 tons.

* * * * *

(17) * * *

(i) The NO_x Ozone Season Group 2 trading budget for 2017 and thereafter is 11,641 tons.

(ii) The new unit set-aside for 2017 and thereafter is 221 tons.

(iii) The Indian country new unit set-aside for 2017 and thereafter is 12 tons.

* * * * *

(22) * * *

(iv) The NO_x Ozone Season Group 2 trading budget for 2023 and thereafter is 12,884 tons.

(v) The new unit set-aside for 2023 and thereafter is 261 tons.

(vi) [Reserved]

* * * * *

(b) * * *

(1) The variability limit for Alabama for 2017 and thereafter is 2,774 tons.

* * * * *

(17) The variability limit for Oklahoma for 2017 and thereafter is 2,445 tons.

* * * * *

(22) * * *

(ii) The variability limit for West Virginia for 2023 and thereafter is 2,706 tons.

* * * * *

§ 97.821 [Amended]

12. Amend § 97.821(e)(2) by removing “By September 5, 2023, the Administrator” and adding in its place “By September 5, 2023, or, with regard to sources in West Virginia, as soon as practicable on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the Administrator”.

§ 97.824 [Amended]

13. Amend § 97.824(a)(2) by removing the period at the end of the paragraph and adding in its place a semicolon.

§ 97.825 [Amended]

14. Amend § 97.825(a)(2) by removing the period at the end of the paragraph and adding in its place a semicolon.

§ 97.826 [Amended]

15. Amend § 97.826(e)(1) introductory text by removing “§ 52.38(b)(2)(ii)(A) or (D)” and adding in its place “§ 52.38(b)(2)(ii)(A) or (b)(2)(iii)(D)”.

Subpart GGGGG—CSAPR NO_x Ozone Season Group 3 Trading Program

§ 97.1026 [Amended]

16. Amend § 97.1026 by:

a. In paragraph (d)(2)(ii) introductory text, removing “§ 52.38(b)(2)(iii)” and adding in its place “§ 52.38(b)(2)(iii)(A) through (C)”; and

b. In paragraph (e) introductory text, removing “by September 18, 2023, the Administrator” and adding in its place “by September 18, 2023, or, with regard to sources in West Virginia, as soon as practicable on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the Administrator”.