

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[EPA-R04-OAR-2010-0691-201069, FRL-9244-6]

**Approval and Promulgation of Implementation Plans; Kentucky: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve a revision to the State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky's Energy and Environment Cabinet, through the Kentucky Division for Air Quality (KDAQ), to EPA on August 5, 2010, for parallel processing. KDAQ submitted the final version of this SIP revision on December 13, 2010. The SIP revision, which incorporates updates to KDAQ's air quality regulations, includes two significant changes impacting the regulation of greenhouse gas (GHG) under Kentucky's New Source Review (NSR) Prevention of Significant Deterioration (PSD) program. First, the revision provides the Commonwealth with authority to issue PSD permits governing GHGs. Second, the SIP revision establishes appropriate emission thresholds for determining which new stationary sources and modification projects become subject to Kentucky's PSD permitting requirements for their GHG emissions. The first change is necessary because the Commonwealth of Kentucky is required to apply its PSD program to GHG-emitting sources, and unless it does so (or unless EPA promulgates a Federal implementation plan (FIP) to do so), such sources will be unable to receive preconstruction permits and therefore may not be able to construct or modify. The second change is necessary because without it, on January 2, 2011, PSD requirements would apply at the 100 or 250 tons per year (tpy) levels otherwise provided under the Clean Air Act (CAA or Act), which would overwhelm Kentucky's permitting resources. EPA is approving the Commonwealth of Kentucky's December 13, 2010, SIP revision because the Agency has made the determination that this SIP revision is in accordance with the CAA and EPA regulations, including regulations pertaining to PSD permitting for GHGs. Additionally, EPA is responding to adverse comments

received on EPA's November 5, 2010, proposed approval of Kentucky's August 5, 2010, SIP revision.

**DATES:** *Effective Date:* This rule will be effective January 3, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2010-0691. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information 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 through <http://www.regulations.gov> or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for further information. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For information regarding the Kentucky SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Ms. Bradley's telephone number is (404) 562-9352; e-mail address: [bradley.twunjala@epa.gov](mailto:bradley.twunjala@epa.gov). For information regarding the Tailoring Rule, contact Ms. Heather Abrams, Air Permits Section, at the same address above. Ms. Abrams' telephone number is (404) 562-9185; e-mail address: [abrams.heather@epa.gov](mailto:abrams.heather@epa.gov).

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**I. What is the background for today's final action?**

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part distinct from one another, establish the overall framework for today's final action for the Kentucky SIP. The first four of these actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which EPA issued in a single final action,<sup>1</sup> the "Johnson Memo Reconsideration,"<sup>2</sup> the "Light-Duty Vehicle Rule,"<sup>3</sup> and the "Tailoring Rule."<sup>4</sup> Taken together, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they take effect on January 2, 2011, will subject GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. In a separate action, EPA called on the Commonwealth of Kentucky and 12 other States with SIPs that do not provide authority to issue PSD permits governing GHGs to revise their SIPs to provide such authority (the "GHG PSD SIP Call").<sup>5</sup> EPA established a deadline of March 31, 2011, for Kentucky (including the entire State, except for the Louisville Metro Air Pollution Control District) to submit its GHG PSD SIP. Finally, in the most recent action, EPA proposed to implement a FIP authorizing PSD permitting for GHGs for those States that are unable to revise their SIPs to provide that authority by the applicable deadline (the "GHG PSD FIP").<sup>6</sup> By a notice signed December 23, 2010, EPA finalized the FIP for seven States:

<sup>1</sup> "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

<sup>2</sup> "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010).

<sup>3</sup> "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

<sup>4</sup> "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

<sup>5</sup> "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call: Final Rule." 75 FR 77698 (December 13, 2010).

<sup>6</sup> "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan: Proposed Rule." 75 FR 53883 (September 2, 2010).

Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming.

On August 5, 2010,<sup>7</sup> in response to the Tailoring Rule and earlier GHG-related EPA rules, and in anticipation of the GHG PSD SIP Call rulemaking, KDAQ submitted a draft revision to EPA for approval into the Kentucky SIP to: (1) Provide the Commonwealth with the authority to regulate GHGs under its PSD program; and (2) establish appropriate emission thresholds for determining which new or modified stationary sources become subject to Kentucky's PSD permitting requirements for GHG emissions.<sup>8</sup> Subsequently, on November 5, 2010, EPA published a proposed rulemaking to approve a portion of Kentucky's August 5, 2010, SIP revision under parallel processing. 75 FR 68272. Specifically, Kentucky's August 5, 2010, draft SIP revision includes changes to Kentucky's Air Quality Regulations, 401 KAR 51:001—Definitions for 401 KAR Chapter 51.<sup>9</sup> The changes include incorporating by reference the Federal definition for "subject to regulation" (as amended in the Tailoring Rule at 51.166(b)(48)) and revising the definition for "regulated NSR pollutant" to provide authority for the Commonwealth to regulate GHG and apply the Tailoring Rule's thresholds for GHG permitting applicability. Detailed background information and EPA's rationale for the proposed approval are provided in EPA's November 5, 2010, **Federal Register** notice.

EPA's November 5, 2010, proposed approval was contingent upon the Commonwealth of Kentucky providing a final SIP revision that was substantively the same as the revision proposed for approval by EPA in the November 5,

2010, proposed rulemaking. 75 FR 68272. Kentucky provided its final SIP revision on December 13, 2010. While there are minor differences between the draft and final regulations, EPA has determined that these differences do not warrant re-proposal of this action. Kentucky's draft regulations proposed some changes to certain definitions; however, Kentucky decided not to proceed with those changes and instead chose to retain the definitions set forth in Kentucky's regulations. The definitions retained from the prior version of Kentucky's regulations had previously been approved by EPA and incorporated into Kentucky's SIP. Kentucky's decision does not alter the portions of the SIP revision authorizing Kentucky to issue PSD permits governing GHGs and to implement the Tailoring Rule thresholds. Thus, EPA concludes that Kentucky's decision to retain certain definitions provided in its regulations does not warrant a new public comment period prior to EPA's final approval of the SIP revision.<sup>10</sup>

## II. What is EPA's response to comments received on this action?

EPA received two sets of comments on the November 5, 2010, proposed rulemaking to approve revisions to Kentucky's SIP. One set of comments, provided by the Sierra Club, was in favor of EPA's November 5, 2010, proposed action. The other set of comments, provided by the Air Permitting Forum, raised concerns with final action on EPA's November 5, 2010, proposed action. A full set of the comments provided by both the Sierra Club and Air Permitting Forum (hereinafter referred to as "the Commenter") is provided in the docket for today's final action. A summary of the adverse comments and EPA's responses are provided below.

Generally, the adverse comments fall into six categories. First, the Commenter asserts that PSD requirements cannot be triggered by GHGs. Second, the Commenter objects to EPA's interpretation of the Act that Kentucky will face a construction ban absent this SIP revision. Third, the Commenter

asserts that EPA's notice does not provide sufficient information on which particular regulatory provisions are proposed for approval in EPA's November 5, 2010, proposed action. Fourth, the Commenter expresses concerns regarding a footnote in the November 5, 2010, proposal describing EPA's previously announced intention to narrow its prior approval of some SIPs to ensure that sources with GHG emissions that are less than the Tailoring Rule's thresholds will not be obligated under Federal law to obtain PSD permits prior to a SIP revision incorporating those thresholds. The Commenter explains that the planned SIP approval narrowing action is "inapplicable to this action and, if applicable, is illegal." Fifth, the Commenter states that EPA has failed to meet applicable statutory and executive order review requirements. Lastly, the Commenter states: "EPA should explicitly state in any final rule that the continued enforceability of these provisions in the Kentucky SIP is limited to the extent to which the Federal requirements remain enforceable." EPA's response to these six categories of comments is provided below.

*Comment 1:* The Commenter asserts that PSD requirements cannot be triggered by GHGs. In its letter, the Commenter reiterates EPA's statement that without the Tailoring Rule thresholds, PSD will apply as of January 2, 2011, to all stationary sources that emit or have the potential to emit, depending on the source category, either 100 or 250 tons of GHG per year. The Commenter also reiterates EPA's statement that beginning January 2, 2011, a source owner proposing to construct any new major source that emits at or higher than the GHG applicability levels, or modify any existing major source in a way that would increase GHG emissions, would need to obtain a PSD permit that addresses these emissions before construction could begin. In raising concerns with the two aforementioned statements, the Commenter states: "[n]o area in the Commonwealth of Kentucky has been designated attainment or unclassifiable for greenhouse gases (GHGs), as there is no national ambient air quality standard (NAAQS) for GHGs. Therefore, GHGs cannot trigger PSD permitting." The Commenter notes that it made this argument in detail in comments submitted to EPA on the Tailoring Rule and other related GHG rulemakings. The Commenter attached those previously submitted comments to its comments on the proposed

<sup>7</sup> While the transmittal letter for Kentucky's submission (the subject of this action) is dated July 15, 2010, EPA did not officially receive Kentucky's request for parallel processing until August 5, 2010.

<sup>8</sup> Although Kentucky's August 5, 2010, draft SIP revision included provisions (*i.e.*, 401 KAR 51:001 Section 1(80)(b) and (c)) to incorporate changes pursuant to EPA's Fugitive Emissions Rule (73 FR 77882, December 19, 2008), the Commonwealth's final submission did not include these provisions. Kentucky's December 14, 2010, final SIP revision did include changes to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the major NSR source permitting program (*i.e.*, 401 KAR 51:001 Section 1 (118)). However, in today's final rulemaking, EPA is not taking any action on Kentucky's provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the major NSR permitting program.

<sup>9</sup> Kentucky's submittal also revises definitions for 401 KAR 52:001—Definitions for 401 KAR Chapter 52; however, these definitions relate to title V and are not included in the SIP. As such, EPA is not taking final action to approve Kentucky's update to these definitions in this rulemaking.

<sup>10</sup> Kentucky's final rule also eliminates the draft provisions (at 401 KAR 51:001 Section 1(80)(b) and (c) of the draft rule) that would have incorporated changes pursuant to EPA's Fugitive Emissions Rule, 73 FR 77882 (December 19, 2008). As explained in the proposal, 75 FR 68273, EPA did not propose to take action on those provisions because EPA has stayed the Fugitive Emissions Rule (and the associated amendments to 40 CFR part 51 and part 52) until October 3, 2011, to allow the Agency time to propose, take comment and issue a final action regarding the inclusion of fugitive emissions in NSR applicability determinations. Therefore, Kentucky's decision not to include those provisions in its final submittal has no impact on this action.

rulemaking related to this action. Finally, the Commenter states that “EPA should immediately provide notice that it is now interpreting the Act not to require that GHGs trigger PSD and allow Kentucky to rescind that portion of its rules that would allow GHGs to trigger PSD.”

*Response 1:* EPA established the requirement that PSD applies to all pollutants newly subject to regulation, including non-NAAQS pollutants, in earlier national rulemakings concerning the PSD program, and EPA has not reopened that issue in this rulemaking. In an August 7, 1980, rulemaking at 45 FR 52676, 45 FR 52710–52712, and 45 FR 52735, EPA stated that a “major stationary source” was one which emitted “any air pollutant subject to regulation under the Act” at or above the specified numerical thresholds; and defined a “major modification,” in general, as a physical or operational change that increased emissions of “any pollutant subject to regulation under the Act” by more than an amount that EPA variously termed as *de minimis* or significant. In addition, in EPA’s NSR Reform rule at 67 FR 80186 and 67 FR 80240 (December 31, 2002), EPA added to the PSD regulations the new definition of “regulated NSR pollutant” (currently codified at 40 CFR 52.21(b)(50) and 40 CFR 51.166(a)(49)); noted that EPA added this term based on a request from a commenter to “clarify which pollutants are covered under the PSD program;” and explained that in addition to criteria pollutants for which a NAAQS has been established, “[t]he PSD program applies automatically to newly regulated NSR pollutants, which would include final promulgation of an NSPS [new source performance standard] applicable to a previously unregulated pollutant.” *Id.* at 67 FR 80240 and 67 FR 80264. Among other things, the definition of “regulated NSR pollutant” includes “[a]ny pollutant that otherwise is subject to regulation under the Act.” See 40 CFR 52.21(b)(50)(d)(iv); see also *id.* 40 CFR 51.166(a)(49)(iv).

In any event, EPA disagrees with the Commenter’s underlying premise that PSD requirements are not triggered for GHGs when GHGs become subject to regulation as of January 2, 2011. As just noted, this has been well established and discussed in connection with prior EPA actions, including, most recently, the Johnson Reconsideration and the Tailoring Rule. In addition, EPA’s November 5, 2010, proposed rulemaking notice provides the general basis for the Agency’s rationale that GHGs (while not a NAAQS pollutant) can trigger PSD permitting requirements. The November

5, 2010, notice also refers the reader to the preamble to the Tailoring Rule for further information on this rationale. In that rulemaking, EPA addressed at length the comment that PSD can be triggered only by pollutants subject to the NAAQS, and concluded such an interpretation of the Act would contravene Congress’ unambiguous intent. See 75 FR 31560–31562. Further discussion of EPA’s rationale for concluding that PSD requirements are triggered by non-NAAQS pollutants such as GHGs appears in the Tailoring Rule Response-to-Comments document (“Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA’s Response to Public Comments”), pp. 34–41; and in EPA’s response to motions for a stay filed in the litigation concerning those rules (“EPA’s Response to Motions for Stay,” *Coalition for Responsible Regulation v. EPA*, D. C. Cir. No. 09–1322 (and consolidated cases)), at pp. 47–59, and are incorporated by reference here. These documents have been placed in the docket for today’s action.

*Comment 2:* The Commenter raised concerns regarding EPA’s interpretation of the Act that Kentucky will face a construction ban absent this SIP revision. In its letter, the Commenter mentions that it provided comments on EPA’s GHG PSD SIP Call and GHG PSD FIP rulemakings expressing that “EPA’s interpretation of the Act to impose a construction ban based on Section 165(a) is incorrect.” Further, the Commenter states: “No statutory language addressing implementation plan requirements can be construed to produce self-executing changes to SIPs or FIPs approved or promulgated under section 110 of the Act unless Congress enacts statutory provisions explicitly amending those SIPs or FIPs to incorporate new requirements, thereby obviating the need for rulemaking under section 110(a) or (c) of the Act to effect revisions to those implementation plans.” The Commenter also contends that there is no support for EPA’s “permit moratorium” interpretation because (in the Commenter’s opinion) CAA section 165(a) is not self-executing and approved SIPs and promulgated FIPs can only be changed through section 110 rulemakings to revise those plans. In support of its position, Commenter cites to *United States v. Cinergy Corp.*, No. 09–3344 (7th Cir. October 12, 2010). The Commenter further states that Kentucky would be able to issue PSD permits after January 2, 2011, even without GHG limits, because its current SIP is approved and it would be acting consistent with that

approved SIP. Further, the Commenter states that “EPA’s rule contemplated that states have 3 years to revise their SIPs when an NSR-related change occurs and, assuming without conceding that EPA could impose PSD on GHGs, EPA should have followed that procedure in this case.”

*Response 2:* EPA notes that the Agency provided an extensive response in the final GHG SIP Call rulemaking to comments nearly identical to comments received on this rulemaking, 75 FR 77698, and EPA incorporates by reference those responses, as contained in the preamble and the Tailoring Rule Response to Comment document, into this rulemaking. The following gives examples of references in the GHG SIP Call rulemaking preamble and record in which EPA responded to these, or substantially similar, comments:

With respect to the comments that (i) “EPA’s interpretation of the Act to impose a construction ban based on Section 165(a) is incorrect;” (ii) “No statutory language addressing implementation plan requirements can be construed to produce self-executing changes to SIPs or FIPs approved or promulgated under section 110 of the Act unless Congress enacts statutory provisions explicitly amending those SIPs or FIPs to incorporate new requirements, thereby obviating the need for rulemaking under section 110(a) or (c) of the Act to effect revisions to those implementation plans;” and (iii) there is no support for EPA’s “permit moratorium” interpretation because (in the Commenter’s opinion) CAA section 165(a) is not self-executing and approved SIPs and promulgated FIPs can only be changed through section 110 rulemakings to revise those plans, see, for example, 75 FR 77705 in footnote 16, and 75 FR 77710–77711. EPA notes further that the requirement of CAA section 165(a)(1) that stationary sources that emit the requisite quantity of pollutants subject to regulation obtain a pre-construction permit is mandated by the CAA and is automatically updated to apply to any pollutant newly subject to regulation; thus, contrary to the commenter’s statement, EPA is not construing the CAA to “produce self-executing changes to SIPs \* \* \*.” In addition, today’s action does not create what the Commenter calls a “permit moratorium”; in fact today’s rule puts in place a permitting authority for GHG-emitting sources for Kentucky only one day after GHG PSD permitting requirements go into effect. Further, no “self-executing changes” to Kentucky’s SIP are made in today’s action; EPA is simply approving Kentucky’s submitted

December 13, 2010, SIP revision according to the proper process.

With respect to the comment that a decision by Judge Posner (*i.e.*, *United States v. Cinergy Corp.*, No. 09–3344 (7th Cir. October 12, 2010)) directly addresses this issue, *see* 75 FR 77705 in footnote 16.

With respect to the comment that Kentucky would be able to issue PSD permits after January 2, 2011, even without GHG limits, because its current SIP is approved and it would be acting consistent with that approved SIP, EPA notes that it is true that Kentucky could issue such a permit to cover the non-GHG pollutants emitted by a source. If the source emits GHGs in at least the specified amount, however, then the source would need a PSD permit for its GHG emissions. Kentucky, absent an approved SIP revision applying the State's PSD program to GHGs, would not have the authority to issue such a permit.

With respect to the comment that "EPA's rule contemplated that States have 3 years to revise their SIPs when an NSR-related change occurs and, assuming without conceding that EPA could impose PSD on GHGs, EPA should have followed that procedure in this case," *see* 75 FR 77707–77708. In any event, the proper length of time EPA must provide States to act is also irrelevant to this rule because this action deals with a SIP revision actually submitted by Kentucky to EPA for approval.

*Comment 3:* The Commenter indicates that EPA's proposed action on Kentucky's draft rules is inconsistent with CAA section 110 because it does not provide for Federal notice and comment on the final State action.

*Response 3:* EPA disagrees with the Commenter's assertion that EPA's proposed action is inconsistent with section 110 of the CAA because EPA's proposed approval was based on a draft form of the Commonwealth's regulations. As explained in our proposal at 75 FR 68273, EPA utilized a "parallel processing" procedure for this SIP revision. Under this procedure, EPA proposes rulemaking action concurrently with the State's procedures for approving a SIP submittal and amending its regulations (40 CFR part 51, appendix V, 2.3). EPA reviews that SIP submittal, even though the regulation is not yet adopted in final form by the State, as if it were a final, adopted regulation. In doing so, EPA evaluates the draft regulation against the same approvability criteria as any other SIP submittal. Thus, we have not used the "parallel processing" procedure to avoid any statutory requirements. In this

case, as explained earlier in this notice, EPA has determined that the minor differences between the draft and final regulations are not significant and do not warrant re-proposal of this action. Accordingly, the proposal gave the public the appropriate opportunity to comment on the substance of the August 5, 2010, SIP revision for which EPA is today issuing a final approval.

*Comment 4:* The Commenter states that EPA's proposed rulemaking does not provide sufficient information on which particular revisions are included in the November 5, 2010, proposed action. Specifically, the Commenter mentions that EPA does not provide citations or other explicit reference to what EPA is actually approving. The Commenter states that "this failure makes it impossible for the public to meaningfully assess and comment regarding the provisions on which EPA proposes to act." Further, the Commenter explains that the docket contained over 100 pages of underline/strikeout regulatory text, much of which is already in the Kentucky SIP.

*Response 4:* EPA disagrees that the November 5, 2010, proposed rulemaking does not provide sufficient information on which particular regulatory provisions EPA was proposing for approval. To the contrary, in the section entitled "*V. What is EPA's Analysis of Kentucky's Proposed SIP Revision?*" of the November 5, 2010, proposal, EPA explains that the proposed rulemaking would approve changes to Kentucky's regulations, at 401 KAR 51:001—*Definitions for 401 KAR Chapter 51*, including an update to the definition of "subject to regulation" that provides the Commonwealth with authority to issue PSD permits governing GHGs and establishes appropriate GHG emission thresholds for PSD applicability. 75 FR 68278. Additionally, EPA's November 5, 2010, notice identifies those portions of Kentucky's submittal that are not being acted upon in this proceeding. *See* 75 FR 68273 and 68278 n.10. Finally, as the Commenter notes, the docket for this action includes a marked up version of 401 KAR 51:001—*Definitions for 401 KAR Chapter 51* showing the revisions under consideration. Thus, EPA sufficiently identified the particular SIP revisions at issue in this action.

*Comment 5:* The Commenter expresses concerns regarding a footnote in which EPA describes its previously announced intention to narrow its prior approval of some SIPs to ensure that sources with GHG emissions that are less than the Tailoring Rule's thresholds will not be obligated under Federal law to obtain PSD permits during any gap between when GHG permitting

requirements go into effect and when the SIP is revised to incorporate the Tailoring Rule thresholds. The Commenter explains that narrowing is "inapplicable to this action and, if applicable, is illegal."

*Response 5:* While EPA does not agree with the Commenter's assertion that the narrowing approach discussed in EPA's Tailoring Rule is illegal, EPA does acknowledge that the narrowing approach is inapplicable to the action that EPA is today taking for Kentucky's December 13, 2010, SIP revision. In today's final action, EPA is acting to approve a SIP revision submitted by Kentucky, and is not otherwise narrowing its approval of prior submitted and approved provisions in the Kentucky SIP. Accordingly, the legality of the narrowing approach is not at issue in this rulemaking.

*Comment 6:* The Commenter states that EPA has failed to meet applicable statutory and executive order review requirements. Specifically, the Commenter refers to the statutory and executive orders for the Paperwork Reduction Act, the Regulatory Flexibility Act (RFA), Unfunded Mandates Reform Act, and Executive Order 13132 (Federalism). Additionally, the Commenter mentions that EPA has never analyzed the costs and benefits associated with triggering PSD for stationary sources in Kentucky, much less nationwide.

*Response 6:* EPA disagrees with the Commenter's statement that EPA has failed to meet applicable statutory and executive order review requirements. As stated in EPA's proposed approval of Kentucky's December 13, 2010, SIP revision, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. Accordingly, EPA approval, in and of itself, does not impose any new information collection burden, as defined in 5 CFR 1320.3(b) and (c), that would require additional review under the Paperwork Reduction Act. In addition, this SIP approval will not have a significant economic impact on a substantial number of small entities, beyond that which would be required by the State law requirements, so a regulatory flexibility analysis is not required under the RFA. Accordingly, this rule is appropriately certified under section 605(b) of the RFA. Moreover, as this action 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 mandates or significantly or uniquely affect small governments, such that it

would be subject to the Unfunded Mandates Reform Act. Finally, this action does not have federalism implications that would make Executive Order 13132 applicable because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

In sum, today's rule is a routine approval of a SIP revision, approving State law, and does not impose any requirements beyond those imposed by State law. To the extent these comments are directed more generally to the application of the statutory and executive order reviews to the required regulation of GHGs under PSD programs, these comments are irrelevant to the approval of State law in today's action. However, EPA provided an extensive response to similar comments in promulgating the Tailoring Rule. EPA refers the Commenter to the sections in the Tailoring Rule entitled "VII. Comments on Statutory and Executive Order Reviews," 75 FR 31601–31603, and "VI. What are the economic impacts of the final rule?," 75 FR 31595–31601. EPA also notes that today's action does not in-and-of itself trigger the regulation of GHGs. To the contrary, by putting in place higher PSD applicability thresholds for GHGs than would otherwise be in effect under the Act, this rulemaking, as well as EPA's Tailoring Rule, provides relief to smaller GHG-emitting sources that would otherwise be subject to PSD permitting requirements for their GHG emissions.

*Comment 7:* The Commenter states that "[i]f EPA proceeds with this action, it must condition approval on the continued validity of its determination that PSD can be triggered by or is applicable to GHGs." Further, the Commenter remarks on the ongoing litigation in the U.S. Court of Appeals for the DC Circuit. Specifically, regarding EPA's determination that PSD can be triggered by GHGs or is applicable to GHGs, the Commenter mentions that "EPA should explicitly state in any final rule that continued enforceability of these provisions in the Kentucky SIP is limited to the extent to which the Federal requirements remain enforceable." The Commenter notes that if a stay is issued, these requirements should also be stayed.

*Response 7:* EPA believes that it is most appropriate to take actions that are consistent with the Federal regulations that are in place at the time the action is being taken. To the extent that any changes to Federal regulations related to today's action result from pending legal challenges or other actions, EPA will

process appropriate SIP revisions in accordance with the procedures provided in the Act and EPA's regulations. EPA notes that in an order dated December 10, 2010, the United States Court of Appeals for the DC Circuit denied motions to stay EPA's regulatory actions related to GHGs. *Coalition for Responsible Regulation, Inc. v. EPA*, Nos. 09–1322, 10–1073, 10–1092 (and consolidated cases), Slip Op. at 3 (DC Cir. December 10, 2010) (order denying stay motions).

### III. What is the effect of today's final action?

Final approval of Kentucky's December 13, 2010, SIP revision will make Kentucky's SIP adequate with respect to PSD requirements for GHG-emitting sources, thereby negating the need for a GHG PSD FIP. Furthermore, final approval of Kentucky's SIP revision will put in place the GHG emission thresholds for PSD applicability set forth in EPA's Tailoring Rule (75 FR 31514, June 3, 2010), ensuring that smaller GHG sources emitting less than these thresholds will not be subject to permitting requirements when these requirements begin applying to GHGs on January 2, 2011. Pursuant to section 110 of the CAA, EPA is approving a portion of the changes made in Kentucky's December 13, 2010, proposed SIP revision into the Commonwealth's SIP.

The changes to Kentucky's SIP-approved PSD program that EPA is approving today are to Kentucky's rules which have been formatted to conform to 401 KAR 51:001—*Definitions for 401 KAR Chapter 51*, but in substantive content the rules that address the Tailoring Rule provisions are the same as the Federal rules. As part of its review of the Kentucky submittal, EPA performed a line-by-line review of Kentucky's proposed SIP changes and has determined that the provisions that EPA is approving today are consistent with the Tailoring Rule. Furthermore, EPA has determined that the December 13, 2010, revision to Kentucky's SIP is consistent with section 110 of the CAA. See, e.g., Tailoring Rule, at 75 FR 31561.

### IV. When is today's action effective?

EPA is making the effective date of today's final action the same day as the Commonwealth's effective date for its rulemaking. In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective on January 3, 2011. This is because a delayed effective date is unnecessary due to the nature of the Commonwealth's changes to its PSD

regulations, which provide the Commonwealth with the needed authority to regulate GHG-emitting sources for permitting purposes. Additionally, Kentucky's changes to its PSD regulations to establish appropriate emissions thresholds for determining PSD applicability with respect to new or modified GHG-emitting sources in accordance with EPA's Tailoring Rule, thereby relieving the Commonwealth from certain CAA requirements that would otherwise apply to it. The January 3, 2011, effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction," and section 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." The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule provides sources emitting GHGs at or above the higher emissions thresholds with a permitting authority from which it can seek the permits which, prior to this rule, Federal and State law already required them to seek, and relieves the sources within the Commonwealth from considering the lower emissions thresholds for GHG permitting purposes. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective January 3, 2011.

### V. Final Action

EPA is taking final action to approve the Commonwealth of Kentucky's December 13, 2010, SIP revision, which includes updates to Kentucky's air quality regulations, 401 KAR 51:001—*Definitions for 401 KAR Chapter 51*, relating to PSD requirements for GHG-emitting sources. Significantly, Kentucky's December 13, 2010, SIP revision: (1) Provides the Commonwealth with the authority to regulate GHGs under its PSD program, and (2) establishes appropriate emissions thresholds for determining PSD applicability with respect to new or modified GHG-emitting sources in accordance with EPA's Tailoring Rule. EPA has made the determination that the December 13, 2010, SIP revision is

approvable because it is in accordance with the CAA and EPA regulations, including regulations pertaining to PSD permitting for GHGs.

**VI. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- 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 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.

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).

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 February 28, 2011. 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 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, Greenhouse gases, Incorporation by reference, Intergovernmental relations, and Reporting and recordkeeping requirements.

Dated: December 20, 2010.

**Gwendolyn Keyes Fleming**,  
Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

**PART 52—[AMENDED]**

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

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

**Subpart S—Kentucky**

■ 2. In § 52.920(c) table 1 is amended by revising the entry for "401 KAR 51:001" to read as follows:

**§ 52.920 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

TABLE 1—EPA—APPROVED KENTUCKY REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
<b>Chapter 51 Attainment and Maintenance of the National Ambient Air Quality Standards</b>				
401 KAR 51:001 .....	Definitions for 401 KAR Chapter 51.	01/03/2011	12/29/2010 [Insert citation of publication].	Except the phrase "except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification System (NAICS) codes 325193 or 312140," in 401 KAR 51:001 Section 1 (118)(a)(2)(a) and the phrase "except ethanol production facilities producing ethanol by natural fermentation under NAICS codes 325193 or 312140," in 401 KAR 51:001 Section 1 (118)(3)(b)(20).
*	*	*	*	*

\* \* \* \* \*  
 [FR Doc. 2010-32664 Filed 12-28-10; 8:45 am]  
 BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-HQ-OAR-2010-0107; FRL-9244-7]

**Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases**

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is making a finding that seven states have failed to submit revisions to their EPA-approved state implementation plans (SIPs) to satisfy requirements of the Clean Air Act (CAA) to apply Prevention of Significant Deterioration (PSD) requirements to greenhouse gas (GHG)-emitting sources.

By notice dated December 13, 2010, EPA issued a “SIP call” for these seven, and six other, states, requiring each state to revise its SIP as necessary to correct the SIP’s failure to apply PSD to such sources and establishing a SIP submittal deadline for each state. EPA established December 22, 2010, as the deadline for these seven states. By this action, EPA is making a finding that the seven states failed to submit the required SIP revisions by that date. This finding requires EPA to promulgate a Federal implementation plan (FIP) for these seven states applying PSD to GHG-emitting sources, and EPA is taking a separate action to promulgate the FIP immediately. The seven states are Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming.

**DATES:** This action is effective on December 29, 2010.

**ADDRESSES:** EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2010-0107. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lisa Sutton, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541-3450; *fax number:* (919) 541-5509; *e-mail address:* [sutton.lisa@epa.gov](mailto:sutton.lisa@epa.gov).

For information related to a specific state, local, or tribal permitting authority, please contact the appropriate EPA regional office:

EPA regional office	Contact for regional office (person, mailing address, telephone number)	Permitting authority
I .....	Dave Conroy, Chief, Air Programs Branch, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109-3912, (617) 918-1661.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.
II .....	Raymond Werner, Chief, Air Programs Branch, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007-1866, (212) 637-3706.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III .....	Kathleen Cox, Chief, Permits and Technical Assessment Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103-2029, (215) 814-2173.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV .....	Lynorae Benjamin, Chief, Regulatory Development Section, Air, Pesticides and Toxics Management Division, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303-3104, (404) 562-9033.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V .....	J. Elmer Bortzer, Chief, Air Programs Branch (AR-18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604-3507, (312) 886-1430.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI .....	Jeff Robinson, Chief, Air Permits Section, EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202-2733, (214) 665-6435.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII .....	Mark Smith, Chief, Air Permitting and Compliance Branch, EPA Region 7, 901 North 5th Street, Kansas City, KS 66101, (913) 551-7876.	Iowa, Kansas, Missouri, and Nebraska.
VIII .....	Carl Daly, Unit Leader, Air Permitting, Monitoring & Modeling Unit, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129, (303) 312-6416.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX .....	Gerardo Rios, Chief, Permits Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972-3974.	Arizona; California; Hawaii and the Pacific Islands; Indian Country within Region 9 and Navajo Nation; and Nevada.
X .....	Nancy Helm, Manager, Federal and Delegated Air Programs Unit, EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553-6908.	Alaska, Idaho, Oregon, and Washington.