

Dated: August 10, 2022.

**Jonathan D. Theel,**

*Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2017-0290; FRL-10115-02-R3]

#### **Air Plan Partial Disapproval; Commonwealth of Pennsylvania; Reasonably Available Control Technology Regulations for the 1997 and 2008 Ozone National Ambient Air Quality Standards**

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to disapprove a specific part of a state implementation plan (SIP) revision that was previously approved by EPA. On May 19, 2019, EPA fully approved certain parts of a SIP revision submitted by the Commonwealth of Pennsylvania to address reasonably available control technology (RACT) for the 1997 and 2008 ozone national ambient air quality standards (NAAQS), and conditionally approved other parts of that submission. The U.S. Court of Appeals for the Third Circuit vacated EPA's approval of a portion of the SIP revision, as discussed below. EPA is now disapproving the portion of the SIP submission addressed by the court's decision. This action is being taken under the Clean Air Act (CAA).

**DATES:** This final rule is effective on September 15, 2022.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2017-0290. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER**

**INFORMATION CONTACT** section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:**

Sean Silverman, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-5511. Mr. Silverman can also be reached via electronic mail at [silverman.sean@epa.gov](mailto:silverman.sean@epa.gov).

**SUPPLEMENTARY INFORMATION:**

#### **I. Background**

On May 9, 2019, EPA published a final action fully approving certain provisions of Pennsylvania's May 16, 2016 SIP revision submission to implement RACT for both the 1997 and 2008 ozone NAAQS (hereafter the "RACT II rule"), and conditionally approving other provisions of the SIP revision. 84 FR 20274 (May 9, 2019). Specifically, EPA's action fully approved "25 Pa. Code [Pennsylvania Code] sections 121.1, 129.96, 129.97, and 129.100 as meeting certain aspects of major stationary source RACT in CAA section 172, 182, and 184 for the 1997 and 2008 ozone NAAQS submitted May 16, 2016" and conditionally approved "25 Pa. Code sections 129.98 and 129.99 based on the commitment provided by Pennsylvania to submit additional SIP revisions to address the deficiencies identified by EPA in the May 16, 2016 SIP revision." *Id.* at 20290. The May 16, 2016 SIP submittal was intended to satisfy CAA sections 182(b)(2)(C), 182(f), and 184 for the 1997 and 2008 8-hour ozone NAAQS for all major sources of nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs) in Pennsylvania not subject to control techniques guidelines (CTG), with a few exceptions not relevant to this action.

The Sierra Club filed a petition for review with the U.S. Third Circuit Court of Appeals. The petition challenged EPA's approval of the portion of the RACT II rule applicable to coal-fired electricity generating units (EGUs) equipped with selective catalytic reduction (SCR) for control of NO<sub>x</sub>. For these EGUs, the petition challenged EPA's approval of the presumptive RACT NO<sub>x</sub> limit of 0.12 pounds of NO<sub>x</sub> per Million British Thermal Units (MMBtu) of heat input (lbs/MMBtu) when the inlet temperature to the SCR was 600 degrees Fahrenheit or above, the less stringent NO<sub>x</sub> limits of 25 Pa. Code 129.97(g)(1)(vii) when the SCR inlet temperature is below 600 degrees Fahrenheit, and the failure of the rule to specifically require EGUs to keep inlet

temperature data and report it to the Pennsylvania Department of Environmental Protection (PADEP).

*In Sierra Club v. U.S. EPA*, No. 19-2562 (3rd Cir. 2020), on August 27, 2020, the Third Circuit ruled in favor of the Sierra Club and vacated the Agency's approval of the SIP submission on all three challenged portions of Pennsylvania's plan. On September 15, 2021, EPA proposed to disapprove the specific SIP provisions for which the court had vacated EPA's prior approval. See 86 FR 51315.

#### **II. Summary of SIP Revisions Being Disapproved**

The purpose of this action is to partially disapprove those portions of Pennsylvania's RACT II SIP for which the Third Circuit vacated EPA's approval. The specific section of Pennsylvania's regulation in the SIP that is at issue here is 25 Pa. Code 129.97(g)(1)(viii), which set a "presumptive" RACT limit for coal-fired combustion units equipped with SCR at 0.12 lbs NO<sub>x</sub>/MMBtu. The court held that the selected limit was arbitrary and capricious, in light of evidence submitted which demonstrated that EGUs covered by 25 Pa. Code 129.97(g)(1)(viii) had achieved much lower emission rates in the past and that other states had adopted lower RACT NO<sub>x</sub> limits for similar coal fired sources. *Sierra Club* at 299-303. The court also held that the 600-degree Fahrenheit "exemption" to the 0.12 lbs NO<sub>x</sub>/MMBtu was arbitrary and capricious as the record failed to support why the exemption was needed or why the threshold was set at 600 degrees. *Id.* at 303-307. Thus, the court vacated EPA's approval of these two provisions, both of which are only found in 25 Pa. Code 129.97(g)(1)(viii). See *Id.* at 309.

The court also took issue with the recordkeeping and reporting requirements of 25 Pa. Code 129.100(d), stating "[b]ecause the SIP's 600-degree threshold necessarily depends upon accurate temperature reporting, the EPA's approval of such inadequate requirements on this record was arbitrary and capricious." *Id.* at 309. The court agreed with the Sierra Club that language in 25 Pa. Code 129.97(g)(1)(viii) was too vague to be enforceable and would not ensure that subject sources keep specific SCR temperature inlet data, report that data to PADEP, and make it available to the public. Further, the court explained that "[t]he combination of this lack of mandatory reporting and the temperature waiver created a potent loophole for polluters to walk through."

Id. at 297. For these reasons, EPA now finds that the previously approved recordkeeping and reporting provisions are inadequate in this specific context. Other specifics and the rationale for EPA's proposed action are explained in the notice of proposed rulemaking (NPRM) and will not be restated here.

### III. EPA's Response to Comments Received

EPA only received comments on this proposed disapproval from the Sierra Club. Sierra Club's comments were supportive of EPA's proposal to disapprove those elements of PA's RACT II SIP for which EPA's prior approval was vacated and remanded to EPA by the U.S. Third Circuit Court of Appeals. Many, if not most, of the Sierra Club's comments focus on providing support for a lower RACT emission limit at these sources in any future SIP submitted by Pennsylvania or FIP issued by EPA. Therefore the comments are outside the scope of this rule, which merely disapproves those portions of Pennsylvania's NO<sub>x</sub> RACT SIP setting limits for five EGUs equipped with SCR.

### IV. Final Action

Consistent with the Third Circuit's decision, and based on the reasoning contained therein, EPA is finalizing a disapproval under CAA section 110(k)(3) for certain provisions of the Pennsylvania RACT II rule for which EPA's prior approval was vacated and remanded to EPA by the court. EPA's partial disapproval of this previously-approved SIP revision is limited to the regulatory provision related to presumptive RACT requirements for coal-fired combustion units at EGUs equipped with SCR, specifically 25 Pa. Code 129.97(g)(1)(viii). Because we are now disapproving 25 Pa. Code 129.97(g)(1)(viii), and the 600-degree temperature threshold and 0.12 lbs NO<sub>x</sub>/MMBtu limit are contained entirely within this section, no additional Federal regulatory revisions are necessary to address the court's holding that EPA's approval of the record-keeping requirement was arbitrary and capricious.

Section 110(c)(1) of the CAA requires the Administrator to promulgate a FIP at any time within two years after the Administrator finds that a state has failed to make a required SIP submission, finds a SIP submission to be incomplete, or disapproves a SIP submission, unless the state corrects the deficiency, and the Administrator approves the SIP revision, before the Administrator promulgates a FIP. Therefore, EPA will be obligated under CAA section 110(c)(1) to promulgate a

FIP within two years after the effective date of this partial disapproval, unless the state submits and the EPA approves SIP revisions to correct the identified deficiencies in the RACT II rule before EPA promulgates the FIP. EPA proposed such a FIP on May 25, 2022. See 87 FR 31798. Notwithstanding this timeframe established under CAA section 110(c)(1) for EPA's promulgation of a FIP, the Third Circuit has ordered the EPA to promulgate a FIP within two years of the date of its decision if the Agency has not approved a SIP correcting the identified deficiencies in the RACT II rule within this timeframe.<sup>1</sup> Sierra Club, 972 F.3d 290, 309. In addition, this final partial disapproval would trigger mandatory sanctions in accordance with the timelines and provisions of CAA section 179 and 40 CFR 52.31 unless the state submits, and EPA approves, SIP revisions that correct the identified deficiencies in the RACT II rule within 18 months of the effective date of the final partial disapproval action.

### V. Incorporation by Reference

In this document, EPA is finalizing revisions to a prior incorporation by reference. See 84 FR 20274 (May 9, 2019). In accordance with requirements of 1 CFR 51.5, EPA is finalizing the removal of the incorporation by reference of 25 Pa. Code 129.97(g)(1)(viii) into the EPA-approved Pennsylvania SIP, as described in section IV of this preamble. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rule of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.<sup>2</sup>

### VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders (E.O.) can

<sup>1</sup> On May 26, 2022 and June 9, 2022, PADEP submitted case-by-case RACT determinations for the affected facilities that are still in operation as revisions to the Pennsylvania SIP. EPA has not yet evaluated those submittals and they are outside of the scope of this action. Any action on those proposed SIP revisions will be at a later date, and under a separate action.

<sup>2</sup> 62 FR 27968 (May 22, 1997).

be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

#### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action as defined by E.O. 12866 and was therefore not submitted to the Office of Management and Budget (OMB) for review.

#### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA, because this SIP partial approval and partial disapproval does not in-and-of itself create any new information collection burdens, but simply partially approves and partially disapproves certain State requirements for inclusion in the SIP.

#### C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This SIP partial approval and partial disapproval does not in-and-of itself create any new requirements but simply partially approves and partially disapproves certain pre-existing State requirements for inclusion in the SIP.

#### D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

#### 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: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP EPA is disapproving would not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe

has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. 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 is not subject to Executive Order 13045 because this SIP partial approval and partial disapproval does not in-and-of itself create any new regulations, but simply partially approves and partially disapproves certain pre-existing State requirements for inclusion in the SIP.

*H. Executive Order 13211: Actions 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)*

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus

standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

As described in the NPRM for this action, the EPA lacks the discretionary authority to address environmental justice in this rulemaking.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

*L. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 17, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of

such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

**List of Subjects in 40 CFR Part 52**

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

**Adam Ortiz,**  
*Regional Administrator, Region III.*

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

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

**Subpart NN—Pennsylvania**

■ 2. In § 52.2020, the table in paragraph (c)(1) is amended by revising the entry for “Section 129.97” to read as follows:

**§ 52.2020 Identification of plan.**

*	*	*	*	*
(c)	*	*	*	*
(1)	*	*	*	*

State citation	Title/subject	State effective date	EPA approval date	Additional explanation/ § 52.2063 citation
<b>Title 25—Environmental Protection Article III—Air Resources</b>				
*	*	*	*	*
<b>Chapter 129—Standards for Sources</b>				
*	*	*	*	*
<b>Additional RACT Requirements for Major Sources of NO<sub>x</sub> and VOCs</b>				
*	*	*	*	*
Section 129.97 .....	Presumptive RACT requirements, RACT emission limitations, and petition for alternative compliance schedule.	4/23/16	8/16/2022, [INSERT <b>Federal Register Citation</b> ].	Partial Disapproval. See 40 CFR 52.2023(o).
*	*	*	*	*

■ 3. Section 52.2023 is amended by adding paragraph (o) to read as follows:

**§ 52.2023 Approval status.**  
\* \* \* \* \*  
(o) EPA disapproves 25 Pa. Code 129.97(g)(1)(viii), submitted on May 16, 2016 to address the RACT requirements

under CAA sections 182(b)(2)(C), 182(f), and 184 under the 1997 and 2008 ozone NAAQS.  
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