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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[MA-67-7202a; A-1-FRL-6346-6]

#### Approval and Promulgation of Air Quality Implementation Plans; Massachusetts and Rhode Island; Nitrogen Oxides Budget and Allowance Trading Program

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is approving State Implementation Plan (SIP) revisions submitted by the States of Rhode Island (RI) and Massachusetts (MA). This action consists of approving regulations in RI and MA which are part of a regional nitrogen oxide (NO<sub>x</sub>) reduction program designed to reduce stationary source NO<sub>x</sub> emissions during the ozone season in the Ozone Transport Region (OTR) of the northeastern United States. (Section 184(a) of the Clean Air Act defines an ozone transport region in the northeastern United States comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated metropolitan Statistical Area that includes the District of Columbia.) Additionally, this action involves the approval of a source specific order which establishes alternative NO<sub>x</sub> reasonably available control technology (RACT) requirements for four boilers at the Rhode Island Economic Development Corporation (RIEDC). These SIP revisions were submitted pursuant to section 110 of the Clean Air Act (CAA).

**DATES:** This direct final rule is effective on August 2, 1999 without further notice, unless EPA receives adverse comment by July 2, 1999. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Comments may be mailed to Susan Studlien, Deputy Director, Office of Ecosystem Protection (mail code CAA), U.S. Environmental Protection Agency, Region I, One Congress Street, Suite 1100, Boston, MA 02114-2023. Copies of the documents relevant to this action are available for public inspection during normal business hours, by appointment at the Office

Ecosystem Protection, U.S. Environmental Protection Agency, Region I, One Congress Street, 11th floor, Boston, MA; at the Division of Air and Hazardous Materials, Rhode Island Department of Environmental Management, 291 Promenade Street, Providence, RI 02908-5767, and at the Massachusetts Division of Air Quality Control, Department of Environmental Protection, One Winter Street, 8th Floor, Boston, MA 02108.

**FOR FURTHER INFORMATION CONTACT:** Steven A. Rapp, (617) 918-1048 or at Rapp.Steve@EPAMAIL.EPA.GOV.

**SUPPLEMENTARY INFORMATION:** On December 19, 1997, the Massachusetts (MA) Department of Environmental Protection (DEP) submitted to EPA a request to revise its State Implementation Plan (SIP). The request proposes to add 310 CMR 7.27, "NO<sub>x</sub> Allowance Program" to the SIP. Similarly, on January 20, 1999, the Rhode Island (RI) Department of Environmental Management (DEM) submitted Regulation No. 38, "Nitrogen Oxides Allowance Program," and Consent Agreement No. 96-04-AP for the Rhode Island Economic Development Corporation (RIEDC) as revisions to the Rhode Island SIP. The two regulations are part of a regional NO<sub>x</sub> reduction program designed to reduce stationary source NO<sub>x</sub> emissions during the ozone season in the OTR. The consent agreement no. 96-04-AP establishes alternative NO<sub>x</sub> reasonably available control technology (RACT) requirements for four boilers at the RIEDC facility in North Kingstown, RI.

#### I. Summary of SIP Revisions

##### *NO<sub>x</sub> RACT Consent Agreement No. 96-04-AP for RIEDC*

On September 2, 1997, EPA approved Regulation No. 27, "Control of Nitrogen Oxides Emissions" as meeting the NO<sub>x</sub> RACT requirements of sections 182(b) and (c) of the Clean Air Act and revised the Rhode Island SIP accordingly (see 62 FR 46202). Section 27.4.8 allows RI DEM to relax the RACT requirements on a case-by-case basis, upon approval by EPA. The NO<sub>x</sub> RACT Consent Agreement No. 96-04-AP for RIEDC represents a case-specific alternative RACT determination as provided for under section 27.4.8.

##### *Ozone Transport Region Nitrogen Oxides Allowance Program in Massachusetts and Rhode Island*

Sections 182(b)(1)(A) and 182(c)(2)(A) of the CAA require States with areas classified as "moderate," "serious," and "severe" ozone nonattainment to submit revisions to their applicable SIPs to

provide for specific annual reductions in emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO<sub>x</sub>) as necessary to attain the national primary ambient air quality standard for ozone. Additionally, section 110 of the Act requires that such plans be subject to public notice, comment, and hearing procedures and that the States adopt and submit the plans to EPA.

As part of MA's and RI's efforts to meet these requirements, the States have submitted regulations which impose statewide caps on NO<sub>x</sub> emissions from certain industrial sectors (e.g., electric utility boilers, industrial boilers, combustion turbines, etc.). RI's Regulation No. 38 and MA's Regulation 310 CMR 7.27 are based closely on a model rule which was developed using the EPA's economic incentive program rules (67 FR 16690, April 7, 1994) as the general regulatory framework. This model rule was developed by the Northeast States for Coordinated Air Use Management (NESCAUM) and the Mid-Atlantic Regional Air Management Association (MARAMA) and is entitled, "NESCAUM/MARAMA NO<sub>x</sub> Budget Model Rule," issued on May 1, 1996. The basis for the model rule was a memorandum of understanding entitled, "Memorandum of Understanding Among the States of the Ozone Transport Commission on Development of a Regional Strategy Concerning the Control of Stationary Source Nitrogen Oxide Emissions," dated September 27, 1994, otherwise known as the OTC MOU.

RI's and MA's NO<sub>x</sub> budget regulations set statewide, five month (May 1 through September 30) NO<sub>x</sub> "budgets," or mass emission limits in tons, to reduce the aggregate emissions from large fossil fuel fired combustion equipment by as much as 75% from a 1990 baseline. In order to achieve the aggregate NO<sub>x</sub> reductions, the regulations proportion NO<sub>x</sub> "allowances" (in tons) to the facilities with emission units subject to the program. The regulations require each owner or operator of each unit to hold, by December 31 of each year, at least as many NO<sub>x</sub> allowances in their compliance account as total tons of NO<sub>x</sub> emitted during the previous five month ozone season. Under these regulations, NO<sub>x</sub> allowances may be bought or sold and unused allowances may be banked from one year to another in a central registry administered by EPA. The program requires NO<sub>x</sub> emissions to be monitored by either a continuous emission monitoring system (CEMS) or equivalent, although the use of alternatives is allowed where approved

by the State and EPA. The program will begin on May 1, 1999. Starting in 2002 and occurring every three years after, an audit of the program will be conducted to ensure that the program is providing the expected reductions.

Additional information concerning EPA's evaluation of the RI and MA NO<sub>x</sub> allowance program regulations is detailed in two memoranda: "Technical Support Document for Massachusetts" Regulation 310 CMR 7.27, "NO<sub>x</sub> Allowance Program," dated December 16, 1998, and "Technical Support Document for Rhode Island's Regulation No. 38, "Nitrogen Oxides Allowance Program" and NO<sub>x</sub> RACT Consent Agreement No. 96-04-AP for Rhode Island Economic Development Corporation," dated February 2, 1999. Copies of those documents are available, upon request, from the EPA Regional Office listed in the ADDRESSES section of this document.

## II. Issues

An issue associated with the approval of the Rhode Island and Massachusetts regulations is that the regulations currently contain NO<sub>x</sub> emissions budget and allocation schemes only for 1999 through the ozone season of 2002, i.e., "phase II" of the OTC NO<sub>x</sub> Budget program. However, the OTC MOU obliges Massachusetts and Rhode Island to require its allowance program sources to make specific additional NO<sub>x</sub> reductions by May 1, 2003 and continuing thereafter, i.e., "phase III." Additionally, in May 1998, Massachusetts proposed an attainment demonstration for the western MA nonattainment area which relies on the NO<sub>x</sub> reductions associated with the OTC program in 2003 and beyond to achieve attainment with the one hour ozone standard.

Section 7.27 (3)(b) of the MA regulation and section 38.2.1(b) of the RI regulation are currently reserved for the purpose of setting the statewide allocation for 2003 and beyond. In their current form, Regulation No. 38 and 310 CMR 7.27 are approvable for 1999, 2000, 2001, and 2002. However, in order to meet the interstate MOU and for MA to have a credible attainment demonstration, both MA and RI will need to amend their regulations to establish the NO<sub>x</sub> caps in those States during 2003 and beyond.

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the

proposal to approve the SIP revision should adverse comments be filed. This action will be effective August 2, 1999 without further notice unless the Agency receives adverse comments by July 2, 1999.

If the EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on August 2, 1999, and no further action will be taken on the proposed rule.

## III. Final Action

EPA is approving Massachusetts' regulation 310 CMR 7.27, "NO<sub>x</sub> Allowance Program," Rhode Island's Regulation No. 38, "Nitrogen oxides Allowance Program," and Rhode Island's Consent Agreement No. 96-04-AP. Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any State implementation plan. Each request for revision to the State implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

## IV. Administrative Requirements

### A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, entitled "Regulatory Planning and Review."

### B. Executive Order 12875

Under E.O. 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected state, local, and tribal governments, the nature of their concerns, copies of written communications from the governments, and a statement supporting the need to

issue the regulation. In addition, E.O. 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

### C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks and is not economically significant under E.O. 12866.

### D. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other

representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

#### E. Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

#### F. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome

alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

#### G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 2, 1999. 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).) EPA encourages interested parties to comment in response to the proposed rule rather than petition for judicial review, unless the objection arises after the comment period allowed for in the proposal.

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

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

**Note:** Incorporation by reference of the State Implementation Plan for the State of Massachusetts and Rhode Island was approved by the Director of the **Federal Register** on July 1, 1982.

Dated: May 6, 1999.

**John P. DeVillars,**

*Regional Administrator, Region I.*

Part 52 of chapter I, title 40 of the Code of Federal Regulations 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 W—Massachusetts

2. Section 52.1120 is amended by adding paragraph (c)(118) to read as follows:

#### § 52.1120 Identification of plan

\* \* \* \* \*

(c) \* \* \*

(118) Revisions to the State Implementation Plan submitted by the Massachusetts Department of Environmental Protection on December 19, 1997.

(i) Incorporation by reference.

(A) Letter from the Massachusetts Department of Environmental Protection dated December 19, 1997 submitting a revision to the Massachusetts State Implementation Plan.

(B) Regulation 310 CMR 7.27, NO<sub>x</sub> Allowance Program, effective on June 27, 1997.

(ii) Additional materials.

(A) Letter from the Massachusetts Department of Environmental Protection dated March 9, 1998 clarifying the program implementation process.

3. In § 52.1167 Table 52.1167 is amended by adding a new state citation for regulation 310 CMR 7.27, "NO<sub>x</sub> Allowance Program" to read as follows:

#### § 52.1167—EPA-approved Massachusetts State regulations.

\* \* \* \* \*

**Table 52.1167. EPA-Approved Massachusetts Regulations**

State citation	Title/Subject	Date submitted by State	Date approved by EPA	Federal Register citation	52.1120(c)	Comments/unapproved sections
* 310 CMR 7.27.	* NO <sub>x</sub> Allowance Program.	* 12/19/97	* 6/2/99 .....	* [Insert FR citation from published date].	* (c)(118) ....	* Approval of NO <sub>x</sub> cap and allowance trading regulations
* .....	* .....	* .....	* .....	* .....	* .....	* .....

**Subpart OO—Rhode Island**

4. Section 52.2070 is amended by adding paragraph (c)(55) to read as follows:

**§ 52.2070 Identification of plan**

\* \* \* \* \*

(c) \* \* \*

(55) Revisions to the State Implementation Plan submitted by the Rhode Island Department of Environmental Management on February 13, 1998 and January 20, 1999 which define alternative NO<sub>x</sub> RACT requirements and impose seasonal

limitations on the emissions of nitrogen oxides at certain major stationary sources in Rhode Island.

(i) Incorporation by reference.

(A) Letters from the Rhode Island Department of Environmental Management, dated February 13, 1998 and January 20, 1999 submitting revisions to the Rhode Island State Implementation Plan.

(B) Regulation number 38, "Nitrogen Oxides Allowance Program," as adopted on May 21, 1998, submitted on effective on June 10, 1998.

(C) An administrative consent agreement between Rhode Island

Department of Environmental Management and Rhode Island Economic Development Corporation, file no. 96-04-AP, adopted and effective on September 2, 1997.

5. In § 52.2081, Table 52.2081 is amended by revising the state citation for Regulation No. 27 and by adding a new state citation for Regulation No. 38, "Nitrogen Oxides Allowance Program" to read as follows:

**§ 52.2081—EPA—approved Rhode Island state regulations.**

\* \* \* \* \*

TABLE 52.2081.—EPA-APPROVED RULES AND REGULATIONS

State citation	Title/subject	Date adopted by State	Date approved by EPA	FR citation	52.2070	Comments/Unapproved sections
* No. 27 .....	* Control of Nitrogen Oxides Emissions.	* 9/2/97	* 6/2/99 .....	* [Insert FR citation from published date].	* (c)(55) .....	* Establishes alternative NO <sub>x</sub> RACT for Rhode Island Economic Development Corporation in North Kingstown, RI
* No. 38 .....	* Nitrogen Oxides Allowance Program.	* 5/21/98	* 6/2/99 .....	* [Insert FR citation from published date].	* (c)(55) .....	* Adds ozone season NO <sub>x</sub> emission limitations at certain stationary sources.
* .....	* .....	* .....	* .....	* .....	* .....	* .....

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[TX 107-1-7407; FRL-6349-3]

**Finding of Failure To Submit Required State Implementation Plans for Ozone; Texas; Dallas/Fort Worth Ozone Nonattainment Area**

AGENCY: Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** We, the EPA, are taking final action to find that the State of Texas failed to submit the required State Implementation Plan (SIP) for the Dallas/Fort Worth (DFW) ozone nonattainment area, as required by the Federal Clean Air Act (Act). The required submittal is the serious area plan requirements for attainment of the ozone National Ambient Air Quality Standards (NAAQS). The deadline for the State to make the submittal was