

The EPA Deputy Administrator, Janet McCabe, signed the following notice on 1/4/2022, 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-2021-0863. 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 PART 52

[EPA-HQ-OAR-2021-0863; FRL-9250-01-OAR]

Findings of Failure to Submit State Implementation Plan Revisions in Response to the 2015 Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to find that 12 states and local air pollution control agencies failed to submit State Implementation Plan (SIP) revisions required by the Clean Air Act (CAA) in a timely manner to address EPA's 2015 findings of substantial inadequacy and "SIP calls" for provisions applying to excess emissions during periods of startup, shutdown, and malfunction (SSM). This action triggers certain CAA deadlines for the EPA to impose sanctions if a state does not submit a complete SIP revision addressing the outstanding requirements and to promulgate a Federal Implementation Plan (FIP) if the EPA does not approve the state's submission as a SIP revision.

EFFECTIVE DATE: This action is effective on **[INSERT DATE 30 DAYS AFTER THE PUBLICATION DATE IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: General questions concerning this notice should be addressed to, Erin Lowder, Office of Air Quality Planning and Standards, Air Quality

Policy Division, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711; by telephone (919) 541-5421; or by email at lowder.erin@epa.gov.

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I. General Information

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B. Notice and Comment under the Administrative Procedure Act (APA)

Section 553(b)(3)(B) of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for making this final agency action without prior proposal and opportunity for comment because no significant EPA judgment is involved in making findings of failure to submit SIPs, or elements of SIPs, required by the Clean Air Act (CAA), where states have made no submissions to meet the requirement. As is discussed in further detail later, pursuant to CAA section 110(k)(1)(B), the EPA “shall determine” no later than 6 months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established pursuant to CAA section 110(k)(1)(A). EPA exercises no significant judgment in making a determination that a state failed to make a submission and subsequently issuing a finding of failure to submit. Thus, notice and public procedures are unnecessary to take this action. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

C. How can I get copies of this document and other related information?

The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2021-0863. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA Docket Center, EPA/DC, William Jefferson Clinton Building, Room 3334, 1301 Constitution Avenue NW, Washington, D.C. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. The telephone number for the Public Reading Room is (202) 566-1744 and the telephone number for the Office of Air and Radiation Docket and Information Center is (202) 566-1742. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

D. Where do I go if I have specific air agency questions?

For questions related to specific air agencies mentioned in this notice, please contact the appropriate EPA Regional Office:

Regional Offices	Air Agencies
EPA Region 1: Mr. John Rogan, Chief, Air Program Branch, EPA Region 1, 5 Post Office Square, Boston, MA 02109. rogan.john@epa.gov	Rhode Island
EPA Region 3: Mr. Mike Gordon, Chief, Planning and Implementation Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103. gordon.mike@epa.gov	District of Columbia
EPA Region 4: Ms. Lynorae Benjamin, Chief, Air Planning and Implementation Branch, EPA Region 4, 61 Forsyth Street SW, Atlanta, GA 30303.	Alabama; North Carolina - Forsyth; Tennessee - Shelby (Memphis)

<i>benjamin.lynoriae@epa.gov</i>	
EPA Region 5: Mr. Doug Aburano, Manager, Air Program Branch, EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. <i>aburano.douglas@epa.gov</i>	Illinois; Ohio
EPA Region 6: Mr. Guy Donaldson, Chief, Air Program Branch, EPA Region 6, 1201 Elm Street, Dallas, TX 75270. <i>donaldson.guy@epa.gov</i>	Arkansas
EPA Region 8: Mr. Scott Jackson, Chief, Air Quality Planning Branch, EPA Region 8, Mailcode 8ARD-QP, 1595 Wynkoop Street, Denver, CO 80202. <i>jackson.scott@epa.gov</i>	South Dakota
EPA Region 9: Ms. Doris Lo, Manager, Rules Office, Air and Radiation Division, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105. <i>lo.doris@epa.gov</i>	California - San Joaquin Valley Air Pollution Control District (APCD)
EPA Region 10: Ms. Debra Suzuki, Chief, Air Program Branch, EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101. <i>suzuki.debra@epa.gov</i>	Washington - Energy Facility Site Evaluation Council (EFSEC); Washington - Southwest Clean Air Agency (SWCAA)

II. Background

On June 12, 2015, the EPA finalized an action (2015 SSM SIP Action), which clarified, restated, and updated EPA’s national policy regarding SSM provisions in SIPs (2015 Policy).¹ The 2015 Policy explained the EPA’s interpretation of certain CAA requirements, affirming that SSM exemption provisions (*e.g.*, automatic exemptions, discretionary exemptions, and overly broad enforcement discretion provisions) and affirmative defense SIP provisions are generally

¹ State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, 80 FR 33840 (June 12, 2015).

viewed as inconsistent with CAA requirements. At the same time, pursuant to CAA section 110(k)(5), the EPA issued findings of substantial inadequacy for SIP provisions applying to excess emissions during SSM periods for 36 states that were applicable in 45 statewide and local jurisdictions (air agencies).² As part of the 2015 SSM SIP Action, the EPA also issued a “SIP call” (2015 SIP Call) to each of those 45 air agencies. The 2015 SIP Call required air agencies to adopt and submit revisions to the EPA to correct identified SSM-related deficiencies in their SIPs by November 22, 2016. The 2015 SSM SIP Action also responded to a petition for rulemaking alleging specific deficiencies related to SSM provisions in existing SIPs. On July 27, 2015, the 2015 SSM SIP Action was challenged in the United States Court of Appeals for the District of Columbia Circuit.³

In 2017, the EPA requested that the pending litigation on the final 2015 SSM SIP Action be held in abeyance to allow the new administration time to review the action. In 2020, Regions 4, 6, and 7 took final actions that were inconsistent with the 2015 Policy and the EPA withdrew the corresponding SIP calls previously issued to Texas, North Carolina, and Iowa. These state-specific actions are the subject of pending litigation.⁴ Moreover, in alignment with the SIP call withdrawals for Texas, North Carolina, and Iowa, the EPA issued a Memorandum in October

² For convenience, the EPA refers to “air agencies” in this action collectively when meaning to refer in general to states, the District of Columbia, and local air permitting authorities that are currently administering, or may in the future administer, EPA-approved implementation plans.

³ *Environ. Comm. Fl. Elec. Power v. EPA, et al*, No. 15-1239 (D.C. Cir.) (and consolidated cases).

⁴ *Sierra Club, et al v. EPA, et al*, No. 20-1115 (D.C. Cir. Apr. 7, 2020); *Sierra Club, et al v. EPA, et al*, No. 20-1229 (D.C. Cir. June 29, 2020); *Sierra Club, et al v. EPA, et al*, No. 21-1022 (D.C. Cir. January 2021).

2020 (2020 Memorandum), which established a new national policy that permitted the inclusion of certain provisions governing SSM periods in SIPs, including those related to exemptions and affirmative defenses. Importantly, the 2020 Memorandum was not a regulatory action and did not alter or withdraw the 2015 SIP Call for any of the 45 air agencies identified in the 2015 SSM SIP Action. The 2020 Memorandum did, however, indicate the EPA's intent at the time to review the remaining SIP calls that were issued in the 2015 SSM SIP Action to determine whether the EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, the EPA issued a Memorandum (2021 Memorandum) that announced a withdrawal of the 2020 Memorandum and EPA's intent to return to the 2015 Policy and implement it fully. As previously articulated in the 2015 Policy, the 2021 Memorandum states that SSM exemption provisions and affirmative defense provisions included in SIPs will generally be viewed as inconsistent with CAA requirements.

As part of the reinstatement of the 2015 Policy, the EPA intends to implement the pending SIP calls, which remain in place from the 2015 SSM SIP Action. Pursuant to CAA section 110(k)(1)(B), the EPA must determine no later than 6 months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established pursuant to CAA section 110(k)(1)(A). These criteria are set forth at 40 CFR part 51, appendix V. The EPA refers to the determination that a state has not submitted a SIP submission that meets the minimum completeness criteria, or has not submitted a SIP at all, as a "finding of failure to submit."

For the 2015 SIP Call, as previously discussed, SIP submissions were due by November 22, 2016. The EPA's determinations of whether air agencies made submittals were therefore due on May 22, 2017. The EPA has neither made such determinations nor issued findings of failure to submit. Accordingly, the EPA is now issuing findings of failure to submit to the 12 air agencies that, as of the date of this action, had not submitted SIPs responding to the SIP call: Alabama, Arkansas, California – San Joaquin Valley Air Pollution Control District (APCD), District of Columbia, Illinois, Ohio, North Carolina – Forsyth County, Rhode Island, South Dakota, Tennessee – Shelby County, Washington – Energy Facility Site Evaluation Council (EFSEC), and Washington – Southwest Clean Air Agency (SWCAA). The EPA also notes that on September 8, 2021, a group of non-governmental organizations filed suit in the Northern District of California alleging that the EPA is in violation of its mandatory duty to issue findings of failure to submit for those states that have not yet responded to the 2015 SIP Call.⁵

III. Consequences of Findings of Failure to Submit

If the EPA finds that a state has failed to make the required SIP submittal or that a submitted SIP is incomplete, then CAA section 179(a) establishes specific consequences, after a period of time, including the imposition of mandatory sanctions under CAA section 179(b) for the affected areas or states. The two applicable sanctions enumerated in CAA section 179(b) are: (1) the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment NSR program, and (2) restrictions on highway funding. Additionally, a finding that a state has failed to submit a complete SIP triggers an obligation under CAA section 110(c)

⁵ *Sierra Club et al v. Regan et al*, No. 4:21-cv-06956 (N.D. Cal. Sept 8, 2021).

for the EPA to promulgate a FIP no later than 2 years after issuance of the finding of failure to submit if the affected state has not submitted, and the EPA has not approved, the required SIP submittal.

With respect to mandatory sanctions, if the EPA has not affirmatively determined that a state has made the required complete SIP submittal within 18 months⁶ of the effective date of this final action, then, pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b)(2) will apply in the affected nonattainment area or state. If the EPA has not affirmatively determined that the state has made the required complete SIP submittal within 6 months after the offset sanction is imposed, then the highway funding sanction will apply in the affected nonattainment area(s), in accordance with CAA section 179(b)(1) and 40 CFR 52.31.⁷ The sanctions will not take effect if, within 18 months after the effective date of these findings, the EPA affirmatively determines that the state has made a complete SIP submittal addressing the deficiency for which the finding was made. Additionally, if the state makes the required SIP submittal and the EPA takes final action to approve the submittal within 2 years of the effective date of these findings, the EPA is not required to promulgate a FIP.

IV. Findings of Failure to Submit for Air Agencies that Failed to Make a SIP Submittal in Response to EPA's 2015 SIP Call for Provisions Applying to Excess Emissions During SSM

⁶ C.A.A. 110(k)(5).

⁷ Such highway sanctions would only apply in nonattainment areas. If a state jurisdictional area does not contain any nonattainment areas, then the highway sanctions would not apply in that state.

Periods

Based on a review of SIP submittals received and deemed complete as of the date of signature of this action, the EPA finds that 12 air agencies have failed to submit SIP revisions in response to the 2015 SSM SIP Call that were statutorily due no later than November 22, 2016. These affected air agencies are Alabama, Arkansas, California – San Joaquin Valley APCD, District of Columbia, Illinois, Ohio, North Carolina – Forsyth County, Rhode Island, South Dakota, Tennessee – Shelby County, Washington – EFSEC, and Washington – SWCAA.

V. Environmental Justice Considerations

The purpose of this action is to make findings that the named air agencies failed to provide the identified SIP submissions to the EPA that are required under the CAA. As such, this action, in and of itself, does not adversely affect the level of protection provided for human health or the environment. Moreover, it is intended that the actions and deadlines resulting from this notice will promote greater protection for U.S. citizens, including minority, low-income, or indigenous populations, by ensuring that air agencies meet their statutory obligation to develop and submit SIPs to ensure that areas make progress toward reducing excess emissions during periods of SSM.

VI. Statutory and Executive Order Reviews

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

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA. This final action does not establish any new information collection requirement apart from what is already required by law. This action relates to the requirement in the CAA for states to submit SIPs in response to findings of substantial inadequacy under section 110(k)(5).

D. 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. The action is a finding that the named air agencies have not made the necessary SIP submission in response to findings of substantial inadequacy under section 110(k)(5) of the CAA.

E. Unfunded Mandates Reform Act of 1995 (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. The action imposes no enforceable duty on any state, local or tribal governments, or the private sector.

F. 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.

G. 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 finds that several air agencies have failed to submit SIP revisions in response to findings of substantial inadequacy under section 110(k)(5) of the CAA. No tribe is subject to the requirement to submit an implementation plan under the findings of inadequacy relevant to this action. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern 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 it is a finding that several air agencies failed to submit SIP revisions in response to findings of substantial inadequacy under section 110(k)(5) of the CAA and does not directly or disproportionately affect children.

I. 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.

J. National Technology Transfer and Advancement Act (NTTAA)

This final action does not involve technical standards.

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

The EPA believes this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. In finding that several air agencies have failed to submit SIP revisions in response to findings of substantial inadequacy under section 110(k)(5) of the CAA, this action does not directly affect the level of protection provided to human health or the environment.

L. 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).

M. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia 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 the EPA complete discretion whether to invoke the exception in (ii).

This final action is “nationally applicable” within the meaning of CAA section 307(b)(1). In the alternative, to the extent a court finds this final 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).⁸ This final action consists of findings of failure to submit required SIPs from areas within 10 states and the District of Columbia, located in 8 of the 10 EPA regions, and in 8 different federal judicial circuits.⁹ This final action is also based on a common core of factual findings concerning the receipt and completeness of the relevant SIP submittals. 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 hereby 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 hereby publishing that finding in the *Federal Register*.

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 District of Columbia Circuit within 60 days from the date this final action is published in the *Federal Register*. Filing a petition for

⁸ In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit’s authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources.

⁹ In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator’s determination that the “nationwide scope or effect” exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03.

reconsideration by the Administrator of this final action does not affect the finality of the action for the purposes of judicial review, nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such rule or action.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedures, Air pollution control, Approval and promulgation of implementation plans, Intergovernmental relations, and Reporting and recordkeeping requirements.

Janet G. McCabe,
Deputy Administrator.