

SIP Law & Rulemaking on State Implementation Plans



Marcia Spink
Associate Director for Policy & Science
EPA Region 3

with assistance by

Neil Bigioni
Sr. Assistant Regional Counsel
EPA Region 3

This Training is Not Legal Advice!

- For specific issues and legal interpretations associated with a specific State Implementation Plan (SIP) revision please consult your Regional Office.
- This training will provide the basic tenets of the rulemaking procedures used by EPA to take actions on SIP revisions.
- It is targeted to State/Local Agency Employees responsible for preparing SIPs for submittal to EPA.
- It is also targeted to new EPA employees responsible for implementing Section 110 and Part D of the CAA.

The Authority to Approve/Disapprove SIPs

- The authority to take action on formally submitted SIP revisions has been delegated by EPA's Administrator to the EPA Regional Offices – specifically to the Regional Administrators.
- There are caveats to this delegation.

Caveats to the EPA Regional Administrators' Delegated Authority

- If adverse comments are received during the Notice of Proposed Rulemaking's (NPR) public comment period, the portion of the Final Rulemaking Notice (FRN) that responds to those adverse comments must be reviewed by EPA's Office of General Counsel as well as the Office of Regional Counsel prior to RA signature and publication.

Caveats to the EPA Regional Administrators' Delegated Authority

- If the action taken by the Regional Office breaks new ground (i.e., is the first action taken by the Agency on a given SIP or SIP element)* or its rationale departs from previous Agency policy/guidance, the Region taking the action must invoke the SIP Consistency Process.
- The SIP Consistency Process is a pre-decisional internal EPA deliberative process.

* Not necessarily required if action is consistent with a rule or published guidance even if first.

The SIP Rulemaking Process



- EPA SIP rulemaking is done under the authority of the federal Administrative Procedure Act (APA), 5 U.S.C. §§ 511 – 599.
- It is not a rulemaking subject to the requirements of the 307(d) “rulemaking” provisions of the Act.
- State SIP rulemaking is done pursuant to the CAA, Title I and 40 CFR Parts 51 and 52, as well as state law.

The APA Rulemaking Process



- Under the APA, EPA must publish all proposed rules in the Federal Register (FR).
- Almost always provide a 30-day period for interested parties to comment on or object to the proposed rulemaking (some “good cause” exceptions).
- “Final rule” is published in the FR, and the approved SIP revision is codified in 40 CFR Part 52. Final rules almost always become effective 30 days after publication in the FR (some “good cause” exceptions).

Forms of Rulemaking



- **Sequential Rulemaking**
- **Direct Final Rulemaking**
- **Parallel-processing**
- **It is EPA's decision as to what form of rulemaking to use.**

Sequential Rulemaking

- Most common
- A NPR is published
- A 30-day public comment period is held
- A FRN is published



Direct Final Rulemaking

- To be used for actions on SIP revisions widely believed to be noncontroversial and where no public comments are anticipated.
- A Direct Final Rule is published along with a companion NPR in the same edition of the Federal Register.
- The Direct Final Rule is generally effective 60 days after publication...UNLESS...

Direct Final Rulemaking (continued)

- Unless public comments are received within the first 30 days.
- If public comments are received, EPA will publish a withdrawal of the Direct Final Rule before its effective date.
- The Direct Final Rulemaking becomes a sequential rulemaking and the companion NPR stands.
- A FRN will be published.

Parallel Processing



- A State may request parallel-processing but it is EPA's decision whether or not to conduct the Federal rulemaking process in parallel with the state adoption process.
- To request parallel-processing, the State official authorized to submit SIP revisions sends a letter to the EPA Regional Office with a copy of its proposed rule. Such a request should also include a copy of the public notice the State has or intends to publish announcing the availability of its proposed rule for public comment, the public hearing and informing the public that its rule will be submitted to EPA as a SIP revision.

Parallel Processing continued

- Used only when the State believes that there will be no changes made to its proposed rule at the time it is adopted as a final State rule.
- Why? Because when EPA publishes its NPR during the parallel processing of a SIP revision, it is the State's proposed rule that is in the federal docket and made available to the public for comment.
- If the State adopts a final rule that is different than its proposed rule, then EPA has to withdraw its NPR and publish a new NPR with the version of the rule the State actually adopted in the docket and available to the public for comment.

Parallel Processing (continued)

- If the State adopts its rule as proposed then EPA may proceed to final rulemaking after the State makes a formal submittal of its SIP revision including the final adopted rule.
- The formal SIP revision submittal made to EPA of the fully adopted State rule must satisfy the completeness requirements of 40 CFR Part 51 Appendix v.

EPA's Public Comment Process

- When EPA publishes a NPR, it provides a variety of ways for the public to comment including electronically.
- EPA does not hold public hearings on its proposed rulemaking actions to approve to disapprove SIP revisions.

Comments Received During the Comment Period

- All comments received in accordance with the NPR's instructions go into EPA's rulemaking dockets (both the paper and the E-Docket).
- Records of phone calls/e-mail/meetings with the State/Third Parties that occur during the comment period go into the docket if the final rule promulgation directly or indirectly depends on that information.
- If a State's call/comment during comment period relates to the substance of its SIP revision, the State should submit written comments as directed in proposal notice.

Comments Before EPA's Comment Period

- Comments from States, Stakeholders, or other third parties provided to EPA prior to submission of a SIP revision are not placed in the federal docket and are not considered by EPA in its rulemaking.
- The EPA proposed rulemaking is based on the formal SIP submittal it receives from the State and should not be based directly or indirectly on pre-submittal information.
- Third parties wishing to comment on EPA's proposed action on a SIP revision should follow the instructions in the NPR for doing so.

Comments after Close of EPA's Comment Period

- EPA has a “long-standing general practice of accepting late comment(s)” See Sierra Club v. Costle, 657 F.2d n. 487 at 398.
- It is within EPA discretion to accept late comments. If EPA exercises this discretion, the late comments are placed in the docket as soon as possible.
- There may be instances where EPA makes it clear in the NPR that late comments and/or extensions to the comment period will not be considered.

Extensions to the Comment Period on an EPA Proposed Rule

- Timely requests for an extension to the comment are generally granted. EPA publishes the extension to the original NPR by a notice in the FR with a new date for submittal of comments.
- This notice's Title is the same as the original NPR.
- EPA has the discretion to extend a comment period. It is EPA's decision.
- Requests for an extension to a public comment period that come late in the original 30-day comment period require that EPA actually re-open the comment period.

Re-opening the Comment Period

- EPA publishes another NPR in the FR to re-open the comment period.
- The NPR's Title is the same as the original NPR.
- The NPR provides a date by which comments must be submitted.
- The NPR generally states that comments submitted between the close of the original comment period and the re-opening of the comment period will be accepted and considered.

Kinds of Things in EPA's Dockets

- The complete State submittal (see Part 51 App v)
- Major legal interpretations and policy considerations.
- A Technical Support Document (TSD) generated by EPA after the formal submittal which elaborates on the rationale for the action taken by EPA on the SIP revision.
- The public comments received on the NPR.
- The above list is not comprehensive.

EPA's Docket & the State Submittal

- EPA is going to place the State submittal in its paper docket and E-Docket.
- Therefore, the State submittal should not include Confidential Business Information (CBI).
- If the State submittal does include copyrighted material, EPA will not put that material in the E-Docket. State should label any copyrighted materials in its submittal.

Be Careful Not to Include CBI

- The person at the State responsible for preparing a SIP submittal to EPA must be careful not to submit CBI info even accidentally.
- Watch out especially for CBI in source-specific SIP revisions.
- Watch out for CBI materials in information provided by affected sources during the state rulemaking process.

The State's Public Notice/Hearing for SIP Revisions

- See Section 110 of the CAA and Part 51.102 and Part 51 Appendix v
- For purposes of satisfying Section 110 of the Clean Air Act, the purpose of the public notice and hearing is to inform the public that the State is requesting that the SIP be revised.
- Must allow the public to view and comment upon everything the State will submit to EPA as part of the SIP revision including all data and technical information in support of the revision.

The State's Public Notice/ Hearing for SIP Revisions continued

- The public notice and hearing may also serve as the notice/hearing required by the State rule adoption process.
- But that is not the purpose required by section 110 of the CAA.
- A public notice that fails to inform the public that the SIP is being revised fails to satisfy Section 110.

Issues Associated with EPA's Rulemaking & the State Public Comment Period

- EPA finds a SIP submittal incomplete or proposes to disapprove a SIP revision because the required Emission Inventory or other technical information is incorrect (e.g., some sources were excluded in the EI available during the State notice and hearing or the data is incorrect).
 - Can State supply missing material to EPA to get its SIP submittal declared complete or can the State supply the missing material during EPA's comment period, so that EPA can proceed to approve the SIP revision?

Issues Associated with EPA's Rulemaking & the State Public Comment Period continued

- No.
- It's required material that needs to go through the state notice & hearing process so the public can review and comment upon it.
- Furthermore EPA cannot proceed to take final action to approve a SIP revision for which there is a pending proposed action to disapprove.

So What Should Happen?

- Ideally, EPA would have informed the State that the SIP revision was incomplete and returned it versus publishing the proposed disapproval.
- The State would formally withdraw its SIP revision. The State would then take the entire SIP revision back out for public notice and comment with a complete EI and then resubmit the complete SIP revision.
- If the re-submitted SIP revision is complete and approvable EPA would withdraw its proposal to disapprove and initiate the rulemaking process on the re-submitted SIP revision.

What Happens When EPA Gets Adverse Comments on a NPR

- All comments are in EPA's rulemaking docket (both the paper and E-Docket).
- When EPA prepares its FRN, it must consider all relevant comments. EPA SIP project officers are to confer with EPA attorneys to determine if a comment is adverse or relevant.
- The preamble of the FRN includes a section wherein EPA summarizes the public comments received and the Agency's response to those comments.

What Happens When EPA Gets Adverse Comments on a NPR continued

- EPA attorneys both from the Office of Regional Counsel and the Office of General Counsel review the section of the FRN that summarizes and responds to public comments.
- The reason that EPA must do a a thorough job in the FRN responding to comments, is that in the event of litigation, judicial review is limited to what is in the record – i.e. the docket of the final rule.
- So if in preparing a response to comment, EPA relies upon or references something that was not in the docket at the time of the NPR, EPA must add it to the docket of the FRN prior to signature.

Material Must be in the Docket for Purposes of Judicial Review

- The record (docket) consists of material available to the decision maker (Regional Administrator) prior to his/her decision (signature). See Public Citizen v. Heckler, 653 F. Supp. 1229 (D.D.C. 1986). EPA will not add to the docket after signature.
- APA judicial review is based (with very rare exceptions) exclusively on of the administrative record as it existed on the date of signature. EPA's job is to develop a record (docket) to support our action (approval, disapproval, etc.)

Judicial Review – Must be Comment on the Record

Failure to raise the comment during the comment period generally waives Court's authority to consider it. See, e.g., National Elec. Mfrs. Ass'n v. EPA, 99 F.3d 1170 (D.C. Cir. 1996); 1000 Friends of Maryland v. EPA, 265 F.3d 216 (4th Cir. 2001).

What Does That Mean?

- It means that if anyone wishes to legally challenge the final action EPA took on a SIP revision:
 - The challenger must have commented on the record during EPA's public comment period.
 - The challenger is limited to challenging EPA final action based upon the comments they submitted to the record.

Judicial Review -- APA



- **Suit is in Court of Appeals**
- **Under the APA the court must hold unlawful and set aside agency actions, findings, and conclusions if they are:**
 - **arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;**
 - **contrary to constitutional right, power, privilege, or immunity;**
 - **in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;**
 - **without observance of procedure required by law; or**
 - **unsupported by substantial evidence on the record**

The Kinds of Actions EPA May Take on SIP Revisions

- Number of options under the CAA:
 - EPA may approve SIP/revision in full or part (EPA guidance is that a partial approvals should have a parallel partial disapproval which would trigger FIP and/or sanction clocks). 110(k)(3)
 - Judicial limits on partial approval/disapproval: Bethlehem Steel v. Gorsuch, 742 F.2d 1028 (7th Cir.1984) (EPA cannot approve part of a state's proposed SIP while disapproving another in a way that makes the regulation incorporated into the SIP more stringent than the underlying state regulation).

The Kinds of Actions EPA May Take on SIP Revisions continued

- Conditional approval (commitment from the State must be for specific measures to be fulfilled within up to 1 year or convert to disapproval, triggering FIP and/or sanctions clocks via FR notice). 110(k)(4).
- The commitment itself need not undergo State notice & hearing process. The specific measures to be formally submitted to EPA to supplement the original submittal must undergo State notice & hearing process.

The Kinds of Actions EPA May Take on SIP Revisions continued

- Limited Approval (where SIP/revision strengthens SIP but not fully approvable; EPA guidance suggests limited approval should be coupled with a “limited disapproval” to start the FIP and/or sanctions clocks).
- Full approval of a Enforceable Commitment in SIP – State commits in the SIP submission that has undergone state notice & hearing process to submit additional measures for a *de minimis* amount of emissions reductions by an expeditious deadline. Starts no clocks. BCCA Appeals Group v. EPA, 355 F.3d 817 (5th Cir. 2003).

The SIP is Federal Law!

- Once approved the contents of the SIP are federal law, and can only be changed by approval of a SIP revision. Safe Air for Everyone v. EPA, 475 F.3d 1096 (9th Cir. 2007).
- A state's interpretation of the regulations incorporated into SIP, even if binding as a matter of state law, is not directly dispositive of the meaning of the SIP. Id.
- A plaintiff (EPA/citizen) may enforce the plain meaning of a SIP provision even if the state interpretation is to the contrary. Id.

Enforcement

- When EPA approves a State rule/ regulation, its rulemaking amends 40 CFR Part 52 (each State has a subpart) to make the State rule/regulation a Federal Rule (incorporation by reference).
- EPA is a legally responsible to enforce a SIP approved rule as the State.
- Even the portions of a SIP approved rule that are more stringent than were necessary for approval.

Lawsuits



- If EPA acts on a SIP revision, the EPA rulemaking is subject to challenge under the APA as a “final action.”
 - This suit is in Federal Court of Appeals.
- If EPA fails to act on a SIP revision within 12 months of the SIP being determined to be complete by the Administrator (or delegatee) or deemed complete by operation of law (110(k)(2)), then EPA is subject to challenge under citizen suit provision of 304(a)(2) (failure to perform a nondiscretionary act or duty).
 - This suit is in Federal District Court.

What a Court Can Do?

- Court may:
 - Vacate rule and remand (i.e., rule no longer in effect, EPA's action are void)
 - Remand without vacating rule (rule remains in effect, but EPA will need either to re-propose rule or at least recommence final action).
 - Remand with a partial vacatur (if defective part of rule can be severed from the rest of the rule).
 - Uphold the rule!

Citizen Suits



- Under 304(a)(2) to compel EPA to perform a nondiscretionary duty.
- Plaintiff has to send 60 day notice letter to the Administrator.
- Suit is in Federal district court.
- 304(a)(2) also confers citizen suit authority to compel EPA to make findings and eventually promulgate a FIP for required SIPs/revisions that have not been submitted.

Citizen Suit to Enforce the SIP



- 304(a)(1) may be used to enforce standards and limits (304(f)(4)) in the current SIP, even if there is a pending SIP revision submitted to EPA. See General Motors v. EPA, 496 U.S. 530, 540 (1990)
- Plaintiff has to send 60 day notice letter to the Administrator and alleged violator

Resources

For general questions regarding the SIP Rulemaking Process please contact:

- Region 1: Don Cooke
- Region 2: Paul Truchan
- Region 3: Harold Frankford
- Region 4: Nacosta Ward, Lynorae Benjamin
- Region 5: Chris Panos
- Region 6: Bill Deese
- Region 7: Jan Simpson
- Region 8: Kathy Dolan
- Region 9: Cynthia Allen
- Region 10: Donna Deneen, Claudia Vaupel