

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 62

[OAR-; FRL-]

Notice of Finding that Certain States Did Not Submit Clean
Air Mercury Rule (CAMR) State Plans for New and Existing
Electric Utility Steam Generating Units and Status of
Submission of Such Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, EPA is making a finding on the status of submission of State Plans in response to the Clean Air Mercury Rule (CAMR). CAMR requires States to develop plans for implementing a phased cap on mercury emissions from new and existing large, coal-fired electric generating units leading to nationwide reductions in mercury emissions from such units and establishes November 17, 2006 as the deadline for submitting those plans. At present, some States have submitted plans, others are still in the process of developing plans, and some are choosing not to submit plans but instead to allow a Federal Plan addressing such emissions to go into effect in that State. In this action, EPA is making specific findings that certain States did not submit CAMR State Plans by the

November 17, 2006 deadline and is otherwise providing notice of the status of State Plan submissions. In conjunction with this rule, EPA is also providing letters to each State regarding this action.

EFFECTIVE DATE: The effective date of this rule is [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Mr. Murat Kavlak, U.S. Environmental Protection Agency, (202) 343-9634.

SUPPLEMENTARY INFORMATION: For questions related to a specific State, please contact the appropriate regional office:

Regional Offices	States and Tribes
Dave Conroy, Acting Branch Chief, Air Programs Branch, EPA New England, I Congress Street, Suite 1100, Boston, MA 02114-2023, (617) 918-1661.	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.
Raymond Werner, Chief, Air Programs Branch, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007-1866, (212) 637-4249.	New Jersey, New York, Puerto Rico, and Virgin Islands.
Dave Campbell, Chief, Permits and Technical Assessment Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103-2187, (215) 814-2196.	Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia.
Dr. Kenneth Mitchell, Chief, Air Toxics Assessment and Implementation Section, EPA Region 4, Sam Nun Atlanta Federal Center, 61 Forsyth Street, SW, 12th Floor, Atlanta, GA 30303-8960, (404) 562-9065.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
Carl Nash, Chief, Integrated Air Toxics Section, EPA Region 5, 77 West Jackson Street, Chicago, IL 60604, (312) 886-6030.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Rebecca Weber, Branch Chief, EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202, (214) 665-6656.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
Michael Jay, Air Programs Branch, EPA Region 7, 901 North 5th Street, Kansas City, Kansas 66101-2907, (913) 551-7460.	Iowa, Kansas, Missouri, and Nebraska.
Richard R. Long, Director, Air and Radiation Program, EPA Region 8, 999 18th Street, Suite 300, Denver, CO 80202, (303) 312-6005.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
Andrew Steckel, Chief, Rules Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 947-4115.	Arizona, California, Guam, Hawaii, and Nevada.
Mahbubul Islam, Manager, State and Tribal Air Programs, EPA Region 10, Office of Air, Waste, and Toxics, Mail Code OAQ-107, 1200 Sixth Avenue, Seattle, WA 98101, (206) 553-6985.	Alaska, Idaho, Oregon, and Washington.

Table of Contents:

- I. Background
- II. This Action
- III. Statutory and Executive Order Reviews
 - A. Notice and Comment under the Administrative Procedures Act
 - B. Executive Order 12866: Regulatory Planning and Review
 - C. Paperwork Reduction Act
 - D. Regulatory Flexibility Act
 - E. Unfunded Mandates Reform Act
 - F. Executive Order 13132: Federalism
 - G. Executive Order 13175: Consultation and Coordination

with Indian Tribal Governments

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

I. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

J. National Technology Transfer Advancement Act

K. Congressional Review Act

L. Judicial Review

I. Background

On March 15, 2005, EPA finalized CAMR and established standards of performance for reducing mercury emissions from new and existing coal-fired electric generating units (EGUs) (70 FR 28606, May 18, 2005). CAMR was revised on June 9, 2006 (71 FR 33388, June 9, 2006). CAMR affects 53 jurisdictions, including the 50 States, the District of Columbia, and 2 Tribes, and requires State Plan submissions by these jurisdictions, except for the 2 Tribes. (The States and the District of Columbia are generally referred to in this notice as "States".) CAMR requires each State to submit a State Plan containing provisions that ensure that the State's applicable annual EGU mercury emissions budget is not exceeded. In choosing a mechanism for meeting the applicable State budget, States are free to choose the mechanism that best suits the particular State's needs, so

long as that mechanism ensures that the State budget is not exceeded. CAMR also established a nationwide, EPA-administered cap-and-trade program that affected jurisdictions may choose to adopt in order to achieve the required reductions.

The mercury reductions are required under CAMR in two phases. The first phase will cap nationwide annual EGU mercury emissions at 38 tons beginning in 2010. The first phase cap reflects "co-benefit" reductions, i.e., mercury reductions that will result from reductions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x) emissions under the Clean Air Interstate Rule (CAIR), issued on May 12, 2005 and revised on April 28, 2006. Because of incentives for early emission reductions under CAMR, mercury emissions are projected to be below the cap level in 2010. The second phase commences in 2018 and will limit nationwide annual EGU mercury emissions to 15 tons upon full implementation. Under CAMR, coal-fired EGUs that commence construction starting on or after January 30, 2004 will have to meet new source performance standards, in addition to being subject to the CAMR emission caps.

CAMR requires States to submit State Plans to EPA by November 17, 2006 (40 CFR 60.24(h)(2)). The rule provides each State with flexibility to achieve the required mercury

emission reductions in a manner chosen by the State and provides a model mercury trading rule that a State may choose to adopt to achieve the reductions. Section 60.24(h)(1) in CAMR lists the States required to submit CAMR State Plans (70 FR 28649-50).

Status of Submission of State Plans

EPA acknowledges and appreciates the extensive effort that States have undertaken to develop CAMR State Plans as quickly as possible. In particular, EPA acknowledges that certain States (listed below) have submitted State Plans in response to CAMR by the November 17, 2006, deadline. (EPA intends to treat State Plans as being timely submitted as long as the plan is postmarked November 17, 2006 or earlier, regardless of when it is actually received. As a result, it is possible that one or more of the States not listed below did in fact submit a State Plan by November 17, 2006 that EPA has not yet received. If this is the case, EPA will notify each State in question of that fact and will withdraw today's finding that the State did not submit the required State Plan by November 17, 2006.) EPA is now reviewing these plans. EPA also recognizes that additional States that did not submit CAMR State Plans by November 17, 2006 are, nevertheless, making substantial efforts to complete and submit State Plans. EPA encourages

continuation of these efforts and will continue to assist States as they develop their plans. EPA looks forward to receiving these State Plans in the relatively near future, will give full consideration to all State Plans, and will approve those plans that meet the criteria specified in CAMR and subpart B of 40 CFR part 60, regardless of when the plan is submitted.

EPA also believes that some States may choose Federal implementation of CAMR and, therefore, do not intend to submit a State Plan. This may be advantageous for States with limited resources. EPA believes that it is appropriate for States to determine whether it is more effective to develop their own plans or to decide to allow Federal implementation of the required mercury emission reductions. EPA fully supports either approach. There are no sanctions that apply to States that choose Federal implementation of CAMR. EPA will continue to work with States that have not yet submitted State Plans to meet the requirements in CAMR and wish to submit such a plan.

Under 40 CFR 60.27(b), the Administrator must approve or disapprove State Plans within 4 months of the November 17, 2006 submission deadline. Moreover, under 40 CFR 60.27(c), the Administrator must propose a Federal Plan for States that did not submit State Plans by the submission

deadline or whose State Plans the Administrator disapproves. Within 6 months of the submission deadline, the Administrator must finalize a Federal Plan for such States under 40 CFR 60.27(d), unless in the meantime the State submits a State Plan that the Administrator determines to be approvable. Consistent with the regulation, EPA is proposing a Federal Plan in a separate action and intends to then proceed with promulgating a final Federal Plan. The final Federal Plan will only apply in those States that have not submitted a State Plan, whose State Plan submitted by November 17, 2006 has been disapproved by EPA as of the date of promulgation of the final Federal Plan, or whose State Plan submitted after November 17, 2006 has not been approved as of the date of promulgation of the final Federal Plan. The final Federal Plan will not apply in States that have submitted a State Plan by November 17, 2006 on which EPA has not taken final action. EPA intends to review any submitted State Plans as expeditiously as practicable. Even if EPA finalizes a Federal Plan for a State, it is EPA's intention to work quickly to review any State Plan or revision of a State Plan submitted by the State so that an approvable State Plan can take the place of the Federal Plan as quickly as possible.

EPA's administrative efforts for CAMR will be similar to those occurring for CAIR in that the Agency wants to work with States to implement the program using mechanisms chosen by the States (for States choosing to implement the programs), while also guaranteeing the public that in a timely manner all coal-fired EGUs will be covered by the CAMR requirements, including emissions monitoring that begins in 2009 and the annual emissions cap that starts in 2010. EPA intends to propose a CAMR Federal Plan with provisions that provide administrative flexibility to States, similar to the flexibility provided in the CAIR Federal Implementation Plan (FIP) (see 71 FR 25328, April 28, 2006).

II. This Action

By this action, EPA is, in accordance with sections 110(c) and 111(d)(2) of the CAA and 40 CFR 60.27(c)(1), making a finding that certain States did not submit a CAMR State Plan by November 17, 2006, as required by CAMR. CAMR covers the States listed in 40 CFR 60.24(h)(1). The following States submitted CAMR State Plans as of the November 17, 2006, deadline: Alabama, Arizona, Connecticut, Delaware, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas,

Vermont, and West Virginia. No other States subject to CAMR submitted CAMR State Plans by the November 17, 2006 deadline. As to those States that did not submit CAMR State Plans, EPA finds, in accordance with CAA sections 110(c) and 111(d)(2) and 40 CFR 60.27(c)(1), that each such State did not submit a State Plan by the November 17, 2006 deadline. Recognizing that many States that did not submit CAMR State Plans by November 17, 2006 are making substantial efforts to complete and submit their State Plans, EPA encourages continuation of these efforts and looks forward to receiving and reviewing those State Plans. As discussed above, EPA is proposing a Federal Plan in a separate action.

III. Statutory and Executive Order Reviews

A. Notice and Comment under the Administrative Procedures Act

This is a final EPA action, but is not subject to notice-and-comment requirements of the Administrative Procedures Act (APA), 5 U.S.C. 553(b). The EPA invokes, consistent with past practice, the good cause exception pursuant to APA, 5 U.S.C. 553(b)(3)(B). Notice and comment are unnecessary because no significant EPA judgment is involved in finding that certain States did not submit a State Plan by the November 17, 2006 deadline specified in

CAMR and providing notice of the status of submission of State Plans. In addition, EPA believes that providing notice and an opportunity to comment would be contrary to the public interest in that the finding is a necessary predicate to EPA proposing a Federal Plan that will ultimately ensure that emission reductions are achieved in areas not covered by an approved State Plan and EPA needs to proceed promptly with proposing a Federal Plan to ensure that the Federal Plan can be finalized in a timely manner.

B. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

This final rule simply identifies those States that did not submit a CAMR State Plan and provides notice of the status of State Plan submissions in response to CAMR, therefore, EPA did not prepare an analysis of the potential costs and benefits associated with this action.

C. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, et seq. This rule relates to the requirement in CAMR for States to submit State Plans. The

present final rule simply identifies those States that did not submit a CAMR State Plan by the November 17, 2006 deadline specified in CAMR and, otherwise, provides notice of the status of State Plan submissions and does not establish any new information collection requirement.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.

This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in the Code of Federal Regulations (CFR) are listed in 40 CFR part 9.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act (APA) or any other statute unless the EPA certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purpose of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) a small business that is a small industry entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which independently owned and operated is not dominate in its field.

Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule. See

Michigan v. EPA, 213 F.3d 663, 668-69 (D.C. Cir., 2000), cert. den., 532 U.S. 903 (2001). The present final rule simply identifies those States that did not submit a CAMR State Plan by the November 17, 2006 deadline specified in CAMR and, otherwise, provides notice of the status of State Plan submissions and does not establish requirements applicable to small entities. After considering the economic impacts of today's final rule on small entities, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, or Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory

alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This action does not include a Federal mandate within the meaning of UMRA that may result in expenditures of \$100 million or more in any 1 year by either State, local, or Tribal governments in the aggregate or to the private

sector and, therefore, is not subject to the requirements of sections 202 and 205 of the UMRA. It does not create any additional requirements beyond those of CAMR.

Therefore, no UMRA analysis is needed. The present final rule simply identifies those States that did not submit a CAMR State Plan by the November 17, 2006 deadline specified in CAMR and, otherwise, provides notice of the status of State Plan submissions in response to CAMR.

Inasmuch as this action simply provides notice of the status of State submissions in response to pre-existing requirements under CAMR, EPA has determined that this action contains no regulatory requirements that might significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications."

"Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, or the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government.”

This final rule 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, as specified in Executive Order 13132. The Clean Air Act (CAA) establishes the scheme whereby States take the lead in developing plans to meet the standards of performance for new and existing sources. This rule will not modify the relationship of the States and EPA for purposes of developing programs to implement the standards. In addition, this rule does not impose any new obligations on the States. Thus, Executive Order 13132 does not apply to this rule.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.” This final rule does not have “Tribal implications” as specified in Executive Order

13175. The present final rule simply identifies those States that did not submit a CAMR State Plan by the November 17, 2006 deadline specified in CAMR and, otherwise, provides notice of the status of State Plan submissions in response to CAMR. The Tribal Authority Rule (TAR) gives Tribes the opportunity to develop and implement CAA programs, but it leaves to the discretion of the Tribe whether to develop these programs and which programs, or appropriate elements of a program, the Tribe will adopt. Moreover, the present final rule does not have a substantial direct effect on one or more Indian Tribes, because no Tribe has implemented an air quality management program related to the standards of performance for new and existing EGUs under CAMR at this time.

Furthermore, this rule does not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the TAR establish the relationship of the Federal government and Tribes in developing plans to implement the standards of performance for new and existing EGUs, and this rule does nothing to modify that relationship. Because this rule does not have Tribal implications, Executive Order 13175 does not apply.

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

Executive Order 13045: "Protection of Children from Environmental Health and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health and safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA 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 EPA. This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866 and because EPA does not have reason to believe that the environmental health risks or safety risks addressed by this action present a disproportionate risk or safety risk to children.

I. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, "Actions that Significantly Affect Energy Supply,

Distribution, or Use" (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. The present final rule simply identifies those States that did not submit a CAMR State Plan by the November 17, 2006 deadline specified in CAMR and, otherwise, provides notice of the status of State Plan submissions in response to CAMR.

J. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when EPA decides not to use available and applicable VCS.

This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

K. Congressional Review Act

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. This action is not a "major rule" as defined by the 5 U.S.C. 804(2). This rule will be effective upon promulgation. 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.

L. Judicial Review

Section 307 (b)(1) of the CAA indicates which Federal Courts of Appeal have jurisdiction and are the appropriate venue for filing petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) when the EPA action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator;" or (ii) when such action is locally or regionally applicable, if "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."

This action identifying those States that did not submit a CAMR State Plan by the November 17, 2006 deadline specified in CAMR and, otherwise, providing notice of the status of State Plan submissions in response to CAMR is "nationally applicable" within the meaning of section 307(b)(1). For the same reasons, the Administrator also is determining that notice of the status of submission of CAMR State Plans is based on a determination of nationwide scope and effect for the purposes of section 307(b)(1). This is particularly appropriate because in the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that an action is of "nationwide scope or effect" would be appropriate for any action that has "scope or effect beyond a single judicial circuit." H.R. Rep. No. 95-294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402-03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits since the findings and notice of the status of submission of CAMR State Plans apply to all areas of the country. In these circumstances, section 307(b)(1) and its legislative history call for the Administrator to find the rule to be of "nationwide scope or effect" and for

venue to be in the D.C. Circuit. Thus, any petitions for review of this action related to the present final rule must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the Federal Register.

List of Subjects in 40 CFR Part 60 and 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations.

Notice of Finding that Certain States Did Not Submit Clean Air Mercury Rule (CAMR) State Plans for New and Existing Electric Utility Steam Generating Units and Status of Submission of Such Plans. (Page 23 of 23.)

Date: _____

Stephen L. Johnson,
Administrator