

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[FRL-XXXX-X]

**Final Rule Making Findings of Failure to Submit Required
State Implementation Plans for the NOx SIP Call**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action making findings, under the Clean Air Act (CAA), that Virginia, West Virginia, Alabama, Kentucky, North Carolina, South Carolina, Tennessee, Illinois, Indiana, Michigan, Ohio, and the District of Columbia failed to make complete State implementation plan (SIP) submittals required under the CAA. Under the CAA and EPA's nitrogen oxides (NOx) SIP call regulations, these States were required to submit SIP measures providing for reductions in the emissions of NOx, an ozone precursor. The EPA is continuing to work with these States to assist them in adopting State plans that meet the requirements of the NOx SIP Call and is hopeful that States will submit fully approvable plans. The EPA is taking this step today to continue the progress being made towards reducing NOx

emissions in the eastern portion of the country because of the significant public health benefits of those reductions. This action triggers the 18-month time clock for mandatory application of sanctions in these States under the CAA. This action also triggers the requirement that EPA promulgate a Federal implementation plan (FIP) within 2 years of making the finding.

EFFECTIVE DATE: [Insert 30 days after date of publication].

ADDRESSES: A docket containing information relating to this rulemaking (Docket No. A-98-12) is available for public inspection at the Air and Radiation Docket and Information Center (6102), U.S. Environmental Protection Agency, 401 M Street, SW, room M-1500, Washington, DC 20460, telephone (202) 260-7548, between 8:00 a.m. and 5:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: General questions concerning this notice should be addressed to Jan King, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, MD-15, Research Triangle Park, NC 27711; telephone (919) 541-5665. Legal

questions should be addressed to Howard J. Hoffman,
Office of General Counsel, 1200 Pennsylvania Avenue, NW,
MC-2344A, Washington, DC 20460, telephone (202) 564-5582.

SUPPLEMENTARY INFORMATION:

You can find a copy of today's action at
<http://www.epa.gov/ttn/rto>.

The contents of this preamble are listed in the
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- I. **Background**

For almost 30 years, Congress has focused major efforts on curbing ground-level (tropospheric) ozone. In 1990, Congress amended the CAA to better address, among other things, continued nonattainment of the 1-hour ozone National Ambient Air Quality Standards (NAAQS) and transport of air pollutants across State boundaries.

The 1990 Amendments reflect general awareness by Congress that ozone is a regional, as well as local problem. Ozone and NO_x, one of its precursors, may be transported long distances across State lines to combine with ozone and precursors downwind, thereby worsening the ozone problems downwind. This transport phenomenon is a major reason for the persistence of the ozone problem, notwithstanding the imposition of numerous emission controls, both Federal and State, across the country.

Section 110(a)(2)(D) of the CAA is one of the most important tools for addressing the problem of transport. This section states that States must adopt SIPs that contain provisions prohibiting sources within the State from contributing significantly to nonattainment problems in, or interfering with maintenance by, downwind States. Section 110(k)(5) of the CAA authorizes EPA to find that

a SIP is substantially inadequate to meet any CAA requirement. It further authorizes EPA to require a State with an inadequate SIP to submit, within a specified period, a SIP revision to correct the inadequacy.

By notice dated October 27, 1998, EPA issued its final rule under sections 110(a)(2)(D) and 110(k)(5) NOx SIP call rules finding that emissions of NOx from 22 States and the District of Columbia significantly contribute to downwind areas' nonattainment of the 1-hour ozone NAAQS (63 FR 57356). In the NOx SIP call rule, as modified by the March 2, 2000 technical amendment (65 FR 11222), EPA also established emissions budgets for NOx that each of the identified States must meet through enforceable SIP measures. The SIP call rule addressed both the 1-hour ozone NAAQS in existence since 1979 and a revised 8-hour NAAQS EPA promulgated in 1997. Various industries and States challenged the final NOx SIP call rule by filing petitions for review in the U.S. Court of Appeals for the District of Columbia (D.C. Circuit).¹

¹

In a separate legal challenge to EPA's revised NAAQS for ozone and particulate matter, the D.C. Circuit

The September 24, 1998 NOx SIP call required States to submit SIP revisions by September 30, 1999. State Petitioners challenging the NOx SIP call filed a motion requesting the Court to stay the submission schedule until April 27, 2000. In response, in May 1999, the D.C. Circuit issued a stay of the SIP submission deadline pending further order of the Court. Michigan v. EPA, No. 98-1497 (D.C. Cir., May 25, 1999) (order granting stay in part).

In a separate legal challenge to EPA's revised NAAQS for ozone, the D.C. Circuit remanded the 8-hour ozone NAAQS. American Trucking Associations, Inc. v. EPA, 175 F.3d 1027 upon rehearing 195 F.3d 4 (D.C. Cir. 1999). The Supreme Court is considering this case. Prior to presenting argument in the SIP call case, EPA informed

remanded the 8-hour ozone NAAQS. American Trucking Associations, Inc. v. EPA, 175 F.3d 1027 on rehearing 195 F.3d 4 (D.C. Cir. 1999). The Supreme Court is considering this case. Because EPA believes we should not continue implementation efforts under section 110 due to the uncertainty created by the D.C. Circuit's decision, and the continued litigation, EPA indefinitely stayed the NOx SIP call as it applies for the purposes of the 8-hour NAAQS (65 FR 56245, September 18, 2000), including the SIP submission obligation. Therefore, EPA is making no findings with respect to the 8-hour basis for the NOx SIP call.

the court that it would stay the 8-hour basis of the SIP call and requested that the court stay its consideration of the 8-hour basis of the SIP call due to the uncertainties created by the litigation. The EPA indefinitely stayed the NO_x SIP call as it applies for the purposes of the 8-hour NAAQS (65 FR 56245, September 18, 2000).

On March 3, 2000, the court of appeals issued an opinion, largely upholding the 1-hour basis for the NO_x SIP call. However, the court vacated and remanded the rule as it applied to three States - Wisconsin, Georgia and Missouri - on the basis that the record for the 1-hour standard did not support EPA's determinations with respect to these three States. The court also remanded, but did not vacate, two other minor issues - the definition of an electric generating unit, as applied to cogeneration units, and the control level assumed for internal combustion engines.

On April 11, 2000, in light of the court's favorable decision, EPA filed a motion with the court to lift the stay of the SIP submission date. The EPA requested that the court lift the stay as of April 27, 2000. The EPA

recognized, however, that at the time the stay was issued, States had approximately 4 months (128 days) remaining to submit SIPs. Therefore, EPA's motion to lift the stay indicated that EPA would allow States until September 1, 2000 to submit SIPs addressing the SIP call.² On June 22, 2000, the Court granted EPA's request in part. The Court ordered that EPA allow the States 128 days from the June 22, 2000 date of the order to submit their SIPs.³ Therefore, SIPs were due October 30, 2000.⁴ Because the court vacated the rule as to Wisconsin,

² In the April 11 letters to the States, EPA recognized that Wisconsin, Georgia and Missouri were not required to submit SIPs because the court vacated (and remanded to EPA for further consideration) the NOX SIP call rule as it applied to those States. Recognizing that the court remanded (but did not vacate) as to two limited issues, EPA also provided that the States that remained subject to the SIP call could choose to submit SIPs addressing only the portion of the NOX budgets that were not affected by the courts remand of two issues: the definition of an electric generating unit and the level of control for internal combustion engines.

³ The EPA determined that SIPs were due on October 30, 2000, which is the first business day following the expiration of the 128-day period.

⁴ The EPA's stay of the 8-hour basis stayed all aspects of the rule for purposes of the 8-hour standard, including their obligation to submit a SIP. Thus, the findings EPA is making are not for purposes of the 8-hour basis of the SIP call.

Georgia, and Missouri, these States were not required to submit SIPs by that date.

II. What Action is EPA Taking Today?

Today, EPA is making findings of failure to officially submit complete submissions to their SIPs, including adopted rules, in response to the SIP call. The States that are receiving these findings are Virginia, West Virginia, Alabama, Kentucky, North Carolina, South Carolina, Tennessee, Illinois, Indiana, Michigan, Ohio, and the District of Columbia. The EPA intends to continue working with these States so that they can submit approvable adopted rules as soon as possible. EPA is issuing findings today to help ensure continued progress in reducing NOx emissions in the eastern portion of the country.

These findings start an 18-month sanctions clock; if the State fails to make the required submittal which EPA determines is complete within that period, the emissions offset sanction will apply in accordance with 40 CFR 51.121(n) and 52.31. The offset sanction requires new or modified sources subject to a CAA section 173 new source review program for ozone to obtain reductions in existing

emissions in a 2:1 ratio to offset their new emissions.⁵ If 6 months after the sanction is imposed, the State still has not made a complete submittal that EPA has determined is complete, limitations on the approval of Federal highway funds will apply in accordance with 51.212(a) and 52.31. Conversely, the 18-month clock, or additional 6-month clock, stops and the sanctions will not take effect (or will be lifted) when EPA finds that the State has made a complete SIP submittal under the SIP call.

In addition, CAA section 110(c) provides that EPA can promulgate a FIP immediately after making the findings, as late as 2 years after making the findings, or any time in between. Public health in downwind States depends on reductions being made upwind, and it is important that sources in States that have met their obligations under the NO_x SIP call are not at a competitive disadvantage to sources in other States

⁵ In general, the areas subject to a section 173 new source review program are those areas with areas designated nonattainment for the 1-hour ozone standard. However, all areas in the Northeast Ozone Transport Region, regardless of designation, are subject to this requirement.

subject to the NOx SIP call. The EPA will take these needs into consideration as it reviews taking any action regarding FIPs.

Our goal is to have approvable SIPs that meet the requirements of the NOx SIP call. We remain ready to work with the States to develop fully approvable SIPs, which would eliminate the need for EPA to promulgate a FIP or replace any FIP that EPA adopts. The process of developing the SIP call rulemaking offered opportunities for collaboration, and such opportunities remain as the States continue to develop their SIPs.

Recently, EPA sent letters to the Governors of the affected States describing the status of the States' effort and these findings in more detail. These letters are included in the docket to this rulemaking.

III. ADMINISTRATIVE REQUIREMENTS

A. Notice and Comment Under the Administrative Procedure Act

This notice is final agency 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 (for

example, 61 FR 36294), the good cause exception pursuant to the APA, 5 U.S.C. 553(b)(3)(B). The EPA believes that because of the limited time provided to make findings of failure to submit and findings of incompleteness regarding SIP submissions or elements of SIP submission requirements, Congress did not intend such findings to be subject to notice-and-comment rulemaking. Notice and comment are unnecessary because no significant EPA judgment is involved in making a nonsubstantive finding of failure to submit SIPs or elements of SIP submissions required by the CAA. Furthermore, providing notice and comment would be impracticable because of the limited time provided under the statute for making such determinations. Finally, notice and comment would be contrary to the public interest because it would divert agency resources from the critical substantive review of complete SIPs. See 58 FR 51270, 51272, n.17 (October 1, 1993); 59 FR 39832, 39853 (August 4, 1994).

B. Executive Order 12866 (Regulatory Planning and Review)

This action is exempt from OBM review under Executive Order 12866.

C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. et seq., EPA must prepare a regulatory flexibility analysis assessing the impact on small entities of any rule subject to the notice-and-comment rulemaking requirements. Because this action is exempt from such requirements, as described under (A) above, it is not subject to the RFA.

D. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and 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, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 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.

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.

Today's rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, or tribal governments or the private sector. The various CAA provisions discussed in this notice require the States to submit SIPs. This notice merely provides a finding that the States have not met those requirements. This notice does not, by itself, require any particular

action by any State, local, or tribal government, or by the private sector.

For the same reasons, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the APA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), EPA submitted, by the effective date of this rule, 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 General Accounting Office. This rule is not a "major rule" as defined by APA § 804(2), as amended.

The EPA is issuing this action as a rulemaking. There is a question as to whether this action is a rule of "particular applicability" under § 804(3)(A) of the APA as amended by SBREFA, and thus exempt from the congressional submission requirements, because this rule applies only to named States. In this case, EPA has decided to err on the side of submitting this rule to

Congress, but will continue to consider this issue of the scope of the exemption for rules of "particular applicability."

F. Paperwork Reduction Act

This rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

G. Judicial Review

Under CAA section 307(b)(1), a petition to review today's action may be filed in the Court of Appeals for the District of Columbia within 60 days of [insert date of publication].

Dated:

Robert Perciasepe
Assistant Administrator