

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[Docket No. OAR-2005-0154; FRL-]

RIN-

**Final Rule Making Findings of Failure to Submit Required
State Implementation Plans for Phase II of 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 Indiana, Illinois, Kentucky, Michigan, and Virginia failed to make complete State implementation plan (SIP) submittals required under the CAA. Under the CAA and Phase II of 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.

DATES: This final rule is effective on **[Insert date 30 days after date of publication]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-OAR-2005-0514.

All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index,

some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The public reading room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding holidays. The telephone number for the public reading room is (202) 566-1744, and the Air Docket telephone number is (202) 566-1742.

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, C539-02, Research Triangle Park, NC 27711; telephone number (919) 541-5665; fax number (919) 541-0824; e-mail king.jan@epa.gov. Legal questions should be addressed to Winifred Okoye, Office of General Counsel, (2344A), 1200 Pennsylvania Avenue, N.W., Washington, DC 20460; telephone number: (202) 564-5446; e-mail okoye.winifred@epa.gov.

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I. Background

On October 27, 1998 (63 FR 57356), we took final action in the NO_x SIP Call Rule, under sections 110(a)(2)(D) and 110(k)(5) of the CAA, to prohibit specified amounts of emissions of one of the main precursors of ground-level ozone, NO_x, in order to reduce ozone transport across State boundaries in the eastern half of the United States. Based on extensive air quality modeling and analyses, we found that sources in 22 States and the District of Columbia (D.C.) (23 States) emit NO_x in amounts that significantly contribute to nonattainment of both the 1-hour and 8-hour ozone national ambient air quality standards (NAAQS) in downwind States. We set forth requirements for each of the

affected upwind States to submit SIP revisions prohibiting those amounts of NO_x emissions which significantly contribute to downwind air quality problems. In the NO_x SIP Call Rule, as modified by the March 2, 2000, technical amendments (65 FR 11222), we also established statewide NO_x emissions budgets for the affected States. The budgets were calculated by assuming the emissions reductions that would be achieved by applying available, highly cost-effective controls to source categories of NO_x emissions. States had the flexibility to adopt the appropriate mix of controls to meet their statewide NO_x emissions budgets.

A number of parties, including certain States as well as industry and labor groups, challenged our NO_x SIP Call Rule by filing petitions for review in the U.S. Court of Appeals for the District of Columbia (D.C. Circuit or Court). On March 3, 2000, the D.C. Circuit issued an opinion, largely upholding the 1-hour basis for the NO_x SIP Call¹.

In response to the Court decision, EPA divided the NO_x

¹ In light of various legal challenges to our promulgation of the 8-hour ozone NAAQS (62 FR 38856; July 18, 1997), we requested, and the Court granted our motion to stay consideration of issues regarding the 8-hour basis for the NO_x SIP Call. Additionally, on September 18, 2000, we stayed the 8-hour basis for the NO_x SIP Call indefinitely. (65 FR 56245). See also 40 CFR § 51.121(q).

SIP Call Rule into two phases, now known as Phase I and Phase II. Under Phase I of the rule, EPA moved ahead with implementing those aspects of the rule that were upheld by the Court for 19 States and the District of Columbia. The EPA required these States to submit SIPs that comply with Phase I by October 30, 2000. Because the Court vacated the rule as to Wisconsin, Georgia, and Missouri, these States were not required to submit Phase I SIPs.

On April 21, 2004, EPA published a final response to the Court decision that addressed the outstanding issues remanded or otherwise vacated by the Court, and which is Phase II of the NOx SIP Call rule. The affected States were required to submit Phase II SIPs by April 1, 2005².

II. What Action is EPA Taking Today?

Today, EPA is making findings of failure to submit complete SIP revisions, including adopted rules, in response to Phase II of the NOx SIP Call³. The States that are

² The States which are required to submit Phase II SIPs are Alabama, Georgia, Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. With respect to Georgia, however, EPA has stayed this requirement in order to respond to a petition of reconsideration filed by the Georgia Coalition for Sound Environmental Policy. (70 FR 5159; August 31, 2005).

³ Our stay of the 8-hour basis of the NOx SIP Call Rule is with respect to all aspects of the rule as they relate to the 8-hour requirements, thus, the affected States remain

receiving findings of failure to submit Phase II SIP revisions are Indiana, Illinois, Kentucky, Michigan, and Virginia. This finding defines the start of a clock for EPA to develop a federal implementation plan (FIP) under section 110(c) of the CAA.

Recently, EPA sent letters to State officials of the affected States describing the status of the States' effort in completing a Phase II SIP. The letters also noted that we would be publishing findings of failure to submit in the Federal Register. (These letters are included in the docket for this rulemaking). The EPA intends to continue working with these States so that they can submit approvable adopted rules as soon as possible.

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

under no obligation to submit SIP revisions that address the 8-hour basis for the NO_x SIP Call. Today's findings, therefore, are only for purposes of the 1-hour basis, and not the 8-hour basis of the NO_x SIP Call Rule.

notice-and-comment requirements of the Administrative Procedures Act (APA), 5 U.S.C. 553(b). The EPA invokes, consistent with past practice (see for example, 61 FR 36294, July 10, 1996), the good cause exception pursuant to the APA, 5 U.S.C. 553(b)(3)(B). Notice and comment are unnecessary because no significant EPA judgment is involved in making a finding of failure to submit SIPs or elements of SIPs required by the CAA, where States have made no submissions to meet the requirement by the statutory date.

B. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is "significant" and, therefore, subject to OMB review and the requirements of the Executive Order. The order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

- (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, a determination has been made that this rule is not a "significant regulatory action" because none of the above factors apply. As such, this final action was not formally submitted to the Office of Management and Budget (OMB) for review.

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.

D. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory

Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice-and-comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 USC 553(b), therefore it is not subject to the notice and comment requirement.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 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. 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 to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small government on compliance with regulatory requirements.

The EPA has determined that this rule does not contain a Federal mandate 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 in any 1 year. It does not create any additional requirements beyond those of the NOx SIP Call (63 FR 57356). This rule responds to the requirement in the CAA for States to submit SIPs to satisfy requirements of the NOx SIP Call. This action simply finds that States have failed to submit SIPs to address a pre-existing statutory requirement under the CAA. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

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.

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. This rule responds to the requirement in the CAA for States to submit SIPs to satisfy certain elements required under section 110(a)(2) of the CAA for the NO_x SIP Call. Thus, Executive Order 13175 does not apply to this rule.

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 rule present a disproportionate risk or safety risk to children.

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

This rule 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.

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. The 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. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective **[insert date 30 days after date of publication]**.

List of Subjects

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

Dated:

William L. Wehrum,
Acting Assistant Administrator for Air and Radiation