



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

EPA-HQ-OAR-2014-0032; FRL-9906-80-OAR]

Finding of Failure to Submit State Implementation Plans Required for the 2008 Lead National Ambient Air Quality Standards (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action finding that the Commonwealth of Pennsylvania has not submitted state implementation plans (SIPs) for three nonattainment areas in Berks and Beaver Counties to meet the requirements of the Clean Air Act (CAA) for attaining the 2008 Lead National Ambient Air Quality Standards (NAAQS). Pennsylvania has not yet submitted SIPs for three nonattainment areas—the Lyons and North Reading nonattainment areas in Berks County and the Lower Beaver Valley nonattainment area in Beaver County—that demonstrate how each nonattainment area would attain the 2008 Lead NAAQS as expeditiously as practicable. These plans were due by June 30, 2012. If Pennsylvania has not submitted and the EPA has not approved the required attainment plans for its nonattainment areas by no later than 2 years after the effective date of this finding, the EPA must promulgate a federal implementation plan (FIP) for the affected nonattainment area. In addition, the CAA provides for the imposition of sanctions if the state does not submit the required attainment SIP within specific timeframes.

DATES: *Effective Date:* This action is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Under the Administrative Procedure Act (APA), 5 U.S.C. 553(d)(3), an agency rulemaking may take effect before 30 days after the date of publication in the *Federal Register* if the agency has good cause to specify an earlier effective date. This action concerns SIP submissions that were due by June 30, 2012. In addition, this action simply starts a “clock” that will not result in sanctions for 18 months, and which Pennsylvania may avoid by submitting complete SIPs to the EPA. The EPA finds these reasons provide good cause for an immediate effective date.

FOR FURTHER INFORMATION CONTACT: General questions concerning this rule should be addressed to Ms. Mia South, Office of Air Quality Planning and Standards, Air Quality Policy Division, U.S. Environmental Protection Agency, Mail Code: C504-2, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711; telephone (919) 541-5550. For questions related to Pennsylvania, please contact the EPA’s Region 3, Cristina Fernandez, Associate Director, Office of Air Program Planning (3AP30), Air Protection Division, U.S. Environmental Protection Agency, Region 3, 1650 Arch Street, Philadelphia, PA 19103-2023; telephone (215) 814-2178.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Notice-and-Comment Under the APA

Section 553 of the APA, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure 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 rule final without prior proposal and opportunity for comment 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. Thus, notice and public procedure are unnecessary. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B). As the EPA has explained in prior rulemakings, *see e.g.*, 58 FR 51270, 51272, n.7 (October 1, 1993), under section 110(k)(1), the CAA provides the EPA with a 60-day period after receiving a submittal from a state in which to determine whether a submittal is complete. If no plan is submitted, the CAA requires the EPA to make a determination to that effect within 6 months of the deadline for submittal. Since Congress provided the EPA only 60 days to determine whether a state that has made some submittal failed to submit a complete SIP, and it is generally impossible to assess a submittal for completeness and then provide notice-and-comment before making a final determination within 60 days, the EPA believes that Congress clearly intended that the EPA should not go through notice-and-comment rulemaking prior to making findings of failure to submit a complete SIP when the state has made some submittal. In this case, the EPA is making findings that the state has made no submittal, and therefore no complete submittal, more than 6 months after the deadline for submittal, but the EPA similarly believes that Congress did not intend that the EPA go through notice-and-comment rulemaking in this case.

B. 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-2014-0032. Publicly available docket materials are available either electronically through *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. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. 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.

C. How is this preamble organized?

Table of Contents

- I. General Information
 - A. Notice-and-Comment Under the APA
 - B. How can I get copies of this document and other related information?
 - C. How is the preamble organized?
- II. Background and Overview
 - A. Statutory Requirements
 - B. The EPA's Clean Data Policy
- III. Findings of Failure to Submit for Pennsylvania for Attainment SIPs for the 2008 Lead NAAQS
- IV. This Action
- V. Statutory and Executive Order (EO) Reviews
 - A. Executive Order 12866: Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act (RFA)
 - D. Unfunded Mandates Reform Act of 1995 (UMRA)
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
 - H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

- I. National Technology Transfer and Advancement Act (NTTAA)
- J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority and Low Income Populations
- K. Congressional Review Act
- L. Judicial Review

II. Background and Overview

Subpart 5, part D of title I of the CAA requires states with areas that are designated nonattainment for the 2008 Lead NAAQS to develop a SIP providing how the state will attain the air standards. Section 172 of the CAA specifies the required elements of a SIP for an area designated nonattainment for the 2008 Lead NAAQS. These requirements include, but are not limited to, an attainment demonstration, reasonably available control measures (RACM) and reasonably available control technology (RACT), annual emissions reductions as necessary to ensure reasonable further progress (RFP) and contingency measures. Most states with lead nonattainment areas designated in 2010 have submitted SIPs addressing these requirements as required under the CAA. However, one state, Pennsylvania, has not yet submitted SIPs for three nonattainment areas—the Lyons and North Reading nonattainment areas in Berks County and the Lower Beaver Valley nonattainment area in Beaver County. These SIPs were due on June 30, 2012. By this action, the EPA is making a finding that Pennsylvania has failed to submit the required complete SIPs for these three nonattainment areas.

A. Statutory Requirements

On October 15, 2008, the EPA promulgated revised NAAQS for lead.¹ The agency revised the level of the primary lead standard from 1.5 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) to 0.15 $\mu\text{g}/\text{m}^3$, and also revised the averaging time and form of the lead standards. The calculation method for the averaging time is a “rolling” 3-month period with a maximum (not-to-be-exceeded) form, evaluated over a 3-year period. The EPA also revised the secondary NAAQS to make it identical to the revised primary standard. In conjunction with strengthening the lead standards, the EPA improved the existing lead monitoring network by requiring monitors to be placed in areas with sources, such as certain industrial facilities, and at other sites.

On November 16, 2010, the EPA identified or “designated” 16 areas, consisting of 17 partial counties, as “nonattainment areas” not meeting the 2008 NAAQS for lead. In this first round, the EPA designated areas nonattainment based on 2007-2009 air quality monitoring data. These designation actions were effective on December 31, 2010. On November 8, 2011, the EPA completed a second round of designations, based on monitoring data from 2008-2010, including monitors newly established under the 2008 Lead NAAQS Rule. In this second round, the EPA designated five areas, including five partial counties, as nonattainment and designated the remaining areas in the country as attainment/unclassifiable or unclassifiable for the 2008 Lead NAAQS. These designation actions were effective on December 31, 2011. For the full listing of areas designated nonattainment for the 2008 Lead NAAQS (15 states, 21 nonattainment areas and 22

¹ See 73 FR 66964, November 12, 2008, National Ambient Air Quality Standards for Lead, Final Rule.

partial counties) *see*

<http://www.epa.gov/leaddesignations/2008standards/documents/2011-11-08/LeadNAAreaList.pdf>.

The three areas in Pennsylvania were designated nonattainment in the first round, effective December 31, 2010. In accordance with the CAA, attainment SIPs for these areas were required to be submitted no later than June 30, 2012. As explained in further detail in the 2008 Lead NAAQS Rule, the key required elements of the attainment SIP include the attainment demonstration, RACM/RACT, RFP and contingency measures. The attainment demonstration provides details on how a nonattainment area will reduce pollution and provides a plan for the area to meet the lead NAAQS. Under subpart 5 part D of title I of the CAA, an attainment demonstration for these areas is required to show how the nonattainment area will attain the 2008 Lead NAAQS as expeditiously as practicable, but no later than 5 years after the effective date of designation, or December 31, 2015, for the areas designated in the first round for which Pennsylvania failed to submit an attainment SIP. The attainment demonstration takes into account projected emission reductions from existing federal and state measures, plus any additional RACM/RACT that are adopted by the state to attain “as expeditiously as practicable.” Air quality modeling of these projected emissions reductions in future years is an important element of the attainment demonstration.

Each nonattainment SIP must include RACM/RACT as necessary for the area to attain the 2008 Lead NAAQS. The CAA requires the state to demonstrate that it has adopted all RACM, considering economic and technical feasibility and other factors, that

are needed to show that the area will attain the lead standards as expeditiously as practicable. The 2008 Lead NAAQS Rule sets forth more specific guidance for making RACM and RACT determinations.

Each plan must also ensure that the area is making RFP in terms of emission reductions and air quality improvements toward attainment. The 2008 Lead NAAQS Rule provides that the RFP element of a SIP include a detailed schedule for the implementation of RACM (including RACT) that accurately indicates the corresponding annual emission reductions to be achieved.

SIPs must also include contingency measures, which are emission reduction measures to be undertaken if the area fails to satisfy the RFP requirement or fails to attain the 2008 Lead NAAQS by the attainment date. These measures are to take effect without significant further action by the state or the EPA. As discussed in the 2008 Lead NAAQS Rule, the EPA generally expects that contingency measures will be implemented as expeditiously as practicable, and will be fully implemented within 60 days of the EPA notifying the state that contingency measures are necessary.

B. The EPA's Clean Data Policy

The Clean Data Policy represents the EPA's interpretation that certain requirements of subpart 1 of part D of title I of the Act are by their terms not applicable to areas that are attaining the NAAQS.² The specific requirements that are inapplicable to an area attaining the standard are the requirements to submit a SIP that provides for:

² This discussion refers to subpart 1 because subparts 1 and 5 contain the requirements relating to attainment of the lead NAAQS.

attainment of the NAAQS, implementation of all RACM, RFP and implementation of contingency measures for failure to meet deadlines for RFP and attainment. The EPA has previously applied the Clean Data Policy to the 2008 Lead NAAQS. *See e.g.*, 77 FR 35653 (June 14, 2012) (proposed determination of attainment of the 2008 lead standards for Bristol, TN); 77 FR 52232 (August 29, 2012) (final rule). For more information about the history, rationale and application of the Clean Data Policy, *see* 77 FR 35653-35654.

We note that several lead nonattainment areas currently have air quality that attains the 2008 Lead NAAQS, but have not yet completed the process for redesignating the area to attainment. Where the EPA has published in the *Federal Register* a clean data determination for an area, a state's obligation to submit RACM/RACT, contingency measures, RFP and attainment demonstrations for that area are suspended as of the effective date of the clean air determination. This suspension will remain in effect unless the EPA subsequently determines, after notice-and-comment rulemaking, that the area has again violated the 2008 Lead NAAQS, in which case the requirements are again due or the area is redesignated to attainment, in which case the requirements are permanently no longer applicable. Thus, states with areas that have received final clean data determinations and have not submitted SIPs for these areas are not subject to the final action in this rule.

III. Findings of Failure to Submit for Pennsylvania for Attainment SIPs for the 2008 Lead NAAQS

Section 179(a)(1) of the CAA establishes specific consequences if the EPA finds that a state has failed to submit a SIP or, with regard to a submitted SIP, if the EPA

determines it is incomplete or if the EPA disapproves it. Additionally, any of these findings also triggers an obligation for the EPA to promulgate a FIP if the state has not submitted, and the EPA has not approved, the required SIP within 2 years of the finding.

The EPA is finding that Pennsylvania has failed to make the required nonattainment SIP submissions for the Lyons and North Reading nonattainment areas in Berks County and the Lower Beaver Valley nonattainment area in Beaver County. If the EPA has not affirmatively determined that Pennsylvania has made the required complete nonattainment SIP submissions within 18 months of the effective date of this 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 any area subject to the findings for which a complete submission has not been made. If the EPA has not affirmatively determined that Pennsylvania has made a complete submission for each area subject to the findings within 6 months after the emission offset sanction is imposed, then the highway funding sanction will also apply in any area subject to the finding for which a complete submission has not been made, in accordance with CAA section 179(b)(1) and 40 CFR 52.31. The 18-month clock will stop and the sanctions will not take effect, within 18 months after the date of this finding, if the EPA finds that Pennsylvania has made a complete nonattainment SIP submission for each area for which the finding is being made or if the EPA makes a determination the area is attaining the standard consistent with the EPA's Clean Data Policy. In addition, the EPA is not required to promulgate a FIP if Pennsylvania makes the required SIP submittal, and the EPA takes final action to approve the submittal, or if EPA makes a final determination the area is attaining the

standard consistent with the Clean Data Policy, within 2 years of the EPA’s finding.

Contemporaneous with the signing of this rule, the EPA Region 3 Regional Administrator is sending a letter to the governor of Pennsylvania informing the governor that the EPA is determining that Pennsylvania has failed to make the required SIP submissions for the specified areas. This letter and any accompanying enclosures have been included in the docket for this action.

IV. This Action

In this action, the EPA is making a finding of failure to submit for Pennsylvania with regard to areas designated nonattainment for lead in 2010. Pennsylvania has not yet submitted attainment SIPs for three nonattainment areas—the Lyons and North Reading nonattainment areas in Berks County and the Lower Beaver Valley nonattainment area in Beaver County.

In accordance with CAA section 179, this finding starts the 18-month emission offset sanctions clock, the 24-month highway funding sanctions clock and a 24-month clock for the promulgation by the EPA of a FIP. This action will be effective on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

V. Statutory and Executive Order (EO) Reviews

A. Executive Order 12866: Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory 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 EO 12866 and 13563 (76 FR 3821, January 21, 2011).

B. 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 final action does not establish any new information collection requirement apart from that already required by law. This action makes a finding that Pennsylvania failed to submit attainment SIPs for the 2008 Lead NAAQS as required by the CAA. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain, 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 Office of Management and Budget (OMB) control number. The OMB control numbers for the EPA's regulations in the CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act (RFA)

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 APA or any other statute unless the agency 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 this final action 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); (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 is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final action will not impose any requirements on small entities. This action makes a finding that Pennsylvania failed to submit attainment SIPs for the 2008 Lead NAAQS as required by the CAA.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538 for state, local and tribal governments and the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector, because the requirement to submit an attainment SIP is established in the Clean Air Act. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action makes a finding that Pennsylvania failed to submit attainment SIPs for the 2008 Lead NAAQS as required by the CAA.

E. Executive Order 13132: Federalism

EO 13132, titled "Federalism" (64 FR 43255, August 10, 1999), requires the 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 EO 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 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, as specified in Executive Order 13132. The CAA establishes the scheme whereby states take the lead in developing plans to meet the NAAQS. This action will not modify the relationship of the states and the EPA for purposes of developing programs to implement the NAAQS. Thus, Executive Order 13132 does not apply to this action.

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

EO 13175, titled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires the 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 action does not have tribal implications, as specified in EO 13175. This action responds to the requirement in the CAA for states to submit nonattainment SIPs for the 2008 Lead NAAQS.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is subject to Executive Order 13045 because it is making findings that Pennsylvania failed to submit nonattainment SIPs for the 2008 Lead NAAQS as required by the CAA. The enforceable measures in the attainment SIPs will ensure that the areas will attain the NAAQS for lead, which was established to protect public health, including the health of children, with an adequate margin of safety.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply,

Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA of 1995 Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. VCS 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 the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS. This action does not involve technical standards. Therefore, the EPA did not consider the use of any VCS.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States. The EPA has determined that this final action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations

because it does not directly affect the level of protection provided to human health or the environment. This rule is making a finding that Pennsylvania failed to submit nonattainment SIPs for the 2008 Lead NAAQS as required by the CAA. The enforceable measures in the attainment SIPs will ensure that the areas will attain the NAAQS for lead, which was established to protect public health, including the health of minority and low income populations, with an adequate margin of safety.

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 action 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 action 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 action will be effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

L. Judicial Review

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

reconsideration by the Administrator of this final action does not affect the finality of this 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 this action.

List of Subjects in 40 CFR Part 52

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

Dated: February 7, 2014

Janet G. McCabe,
Acting Assistant Administrator,
Office of Air and Radiation.

[FR Doc. 2014-03329 Filed 02/24/2014 at 8:45 am; Publication Date: 02/25/2014]