



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA-R02-OAR-2015-0755, FRL-9940-00-Region 2]

Approval and Promulgation of State Plans for Designated Facilities;  
Commonwealth of Puerto Rico

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the State plan submitted by the Commonwealth of Puerto Rico to implement and enforce the Emission Guidelines (EG) for existing sewage sludge incineration (SSI) units. Puerto Rico's plan is consistent with the EG promulgated by the EPA on March 21, 2011. Puerto Rico's plan establishes emission limits and other requirements for the purpose of reducing toxic air emissions and other air pollutants from existing SSI units throughout the Commonwealth. At the request of Puerto Rico, the EPA is proposing not to take action on a provision of its SSI plan allowing for affirmative defenses of Clean Air Act violations in the case of malfunctions. Puerto Rico submitted its plan to fulfill the requirements of sections 111(d) and 129 of the Clean Air Act.

**DATES:** Written comments must be received on or before [insert date 30 days from date of publication in the Federal Register].

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R02-OAR-2015-0755 by one of the following methods:

- [www.regulations.gov](http://www.regulations.gov). Follow the on-line instructions for submitting comments.
- E-mail: [Ruvo.Richard@epa.gov](mailto:Ruvo.Richard@epa.gov)
- Mail: EPA-R02-OAR-2015-0755, Richard Ruvo, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25<sup>th</sup> Floor, New York, New York 10007-1866.
- Hand Delivery: Richard Ruvo, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25<sup>th</sup> Floor, New York, New York 10007-1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:00 p.m. excluding federal holidays.

**Instructions:** Direct your comments to Docket ID No.

EPA-R02-OAR-2015-0755. The EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes

information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov) your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some

information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available at [www.regulations.gov](http://www.regulations.gov) or at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25<sup>th</sup> Floor, New York, New York 10007-1866. The EPA requests, if at all possible, that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:00 p.m., excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Anthony (Ted) Gardella  
([Gardella.anthony@epa.gov](mailto:Gardella.anthony@epa.gov)), Environmental Protection Agency,  
Region 2 Office, Air Programs Branch, 290 Broadway, 25<sup>th</sup> Floor, New York, New York 10007-1866, (212) 637-3892.

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### **I. EPA Action**

- A. What action is the EPA proposing today?

The EPA is proposing to approve Puerto Rico's State plan, submitted on July 30, 2014, for the control of air emissions from existing SSI units throughout the Commonwealth. Puerto Rico

submitted its SSI plan to fulfill the requirements of sections 111(d) and 129 of the Clean Air Act (CAA). The Puerto Rico State SSI plan adopts and implements the Emission Guidelines (EG) applicable to existing SSI units, and establishes emission limits and other requirements for SSI units constructed on or before October 14, 2010.

As explained below, Puerto Rico requested in its July 30, 2014 submittal, that the EPA not take any action on a provision of the Puerto Rico State SSI plan allowing for affirmative defenses of CAA violations in the case of malfunctions. Therefore, the EPA is not taking any proposed action on the affirmative defense provision portion of Puerto Rico's State SSI plan.

B. Which provision of the Puerto Rico State sewage sludge incineration (SSI) plan is the EPA not taking action on?

Puerto Rico is requesting that the EPA not take any action on a provision in Puerto Rico's State SSI plan that allows for an affirmative defense by an owner/operator of an SSI unit for violations of air emissions or other requirements of Puerto Rico's plan in the event of malfunction(s) of a covered SSI unit. With the exception of the affirmative defense provision in Puerto Rico's State SSI plan, the EPA's proposed approval, once finalized and effective,

will make Puerto Rico's rules included in Puerto Rico's State SSI plan federally enforceable.

C. What is the background for Puerto Rico's request that EPA not take action on the affirmative defense provision?

In an April 18, 2014 opinion, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) vacated an affirmative defense in one of the EPA's Section 112 regulations. Natural Resources Defense Council v. Environmental Protection Agency, 749 F.3d 1055 (D.C. Cir., 2014) (vacating affirmative defense provisions in Section 112 rule establishing emission standards for Portland cement kilns). The court found that the EPA lacked authority to establish an affirmative defense for private civil suits and held that under the CAA, the authority to determine civil penalty amounts in such cases lies exclusively with the courts, not the EPA. The Office of General Counsel determined that EPA policy should reflect the court's decision. The vacated affirmative defense provision in the EPA's Portland cement MACT rule is identical to the affirmative defense provision in the EPA's SSI EG, promulgated on March 21, 2011, under sections 111(d) and 129 of the CAA, at §60.5181 ("How do I establish an affirmative defense for exceedance of an emission limit or standard during a malfunction?"). Puerto Rico's

State SSI plan adopted all the applicable requirements of the EPA's SSI EG, including the affirmative defense provisions at §60.5181, into its State plan at Rule 405(d) of the Regulation for the Control of Atmospheric Pollution (RCAP). Specifically, Puerto Rico requests that the EPA not include the following affirmative defense provisions in Puerto Rico's Rule 405(d): (d) (2) (E), (d) (2) (E) (i) and (d) (2) (E) (ii) in Puerto Rico's State plan.

Because of the April 2014 D.C. Circuit Court's vacatur referred to above, Puerto Rico, in its July 30, 2014 submittal letter to the EPA, requested that the EPA not take action on the affirmative defense provision included in Puerto Rico's State SSI plan submitted to the EPA for approval on July 30, 2014.<sup>1</sup> Consequently, the EPA is proposing to not take any action on that particular provisions of Puerto Rico's State SSI plan as discussed herein.

D. Why is the EPA taking this action?

EPA has evaluated Puerto Rico's State SSI plan for consistency with the CAA, EPA guidelines and policy. The EPA has determined that Puerto Rico's State SSI plan meets all applicable requirements and

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<sup>1</sup> EPA has proposed a Federal SSI plan which would apply to SSI units that are not covered by an approved and effective state plan. The proposed federal plan does not include an affirmative defense to violations that result from malfunctions. 80 Fed. Reg. 23402, 23407 (Apr. 27, 2015).

therefore, the EPA is proposing to approve Puerto Rico's State plan to implement and enforce the EG applicable to existing SSI units, except that, as requested by Puerto Rico, the EPA is proposing not to take action on the affirmative defense provisions of Puerto Rico's SSI State plan for the reasons discussed above.

E. Who is affected by Puerto Rico's State SSI plan?

Puerto Rico's State plan regulates all the units designated by the EG for existing SSI units which commenced construction on or before October 14, 2010 and which are located at a wastewater treatment facility designed to treat domestic sewage sludge. If the owner or operator of an SSI unit made changes after September 21, 2011, that meet the definition of modification (see Title 40, Code of Federal Regulations, section 60.5250 (40 CFR 60.5250)), the SSI unit becomes subject to subpart LLLL (New Source Performance Standards for New Sewage Sludge Incineration Units) of 40 CFR part 60, and the State plan no longer applies to that unit.

## **II. Background**

A. What is a State plan?

Section 111 of the CAA, "Standards of Performance for New Stationary Sources," authorizes EPA to set air emissions standards

for certain categories of sources. These standards are called New Source Performance Standards (NSPS). When a NSPS is promulgated for new sources, section 111(d) also requires that EPA publish an EG applicable to control the same pollutants from existing (or designated) facilities. States<sup>2</sup> with designated facilities must then develop a State plan to adopt the EG into the State's body of regulations. States must also include in their State plan other requirements, such as inventories, legal authority, reporting and recordkeeping, and public participation documentation, to demonstrate their ability to enforce the State plans.

Section 129 of the CAA requires EPA to establish performance standards and emission guidelines for various types of new and existing solid waste incineration units. Section 129(b)(2) requires States to submit to EPA for approval section 111(d)/129 plans that implement and enforce the promulgated EG. Section 129(b)(3) requires EPA to promulgate a Federal plan (FP) within two years from the date on which the EG, or when revision to the EG, is promulgated. The FP is applicable to affected facilities when the state has failed to receive EPA approval of the section 111(d)/129

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<sup>2</sup> Section 302(d) of the CAA includes the Commonwealth of Puerto Rico in the definition of the term "State."

plan. The FP remains in effect until the state submits and receives EPA approval of its section 111(d)/129 plan.

State plan submittals under CAA sections 111(d) and 129 must be consistent with the relevant EG, in this instance 40 CFR part 60, subpart M, and the requirements of 40 CFR part 60, subpart B and part 62, subpart A. Section 129 of the CAA regulates air pollutants that include organics (dioxins/furans), carbon monoxide, metals (cadmium, lead, and mercury), acid gases (hydrogen chloride, sulfur dioxide, and nitrogen oxides), particulate matter, and opacity (as appropriate).

B. What is a State SSI plan?

A State SSI plan is a State plan, as described above, that controls air pollutant emissions from existing sewage sludge incinerators located at a wastewater treatment facility designed to treat domestic sewage sludge and that commenced construction on or before October 14, 2010. The applicable types of SSI units include fluidized bed and multiple hearth incinerators.

C. Why is the EPA requiring Puerto Rico to submit a State SSI plan?

When the EPA developed the NSPS for SSI units, we simultaneously developed the EG to control air emissions from existing SSI units (see 76 FR 15371, March 21, 2011). Under section 129 of the CAA, the EG is not federally enforceable; therefore, section 129 of the CAA also requires states to submit to EPA for approval State plans that implement and enforce the EG. Under section 129 of the CAA, these State plans must be at least as protective as the EG, and they become federally enforceable upon approval by EPA.

The procedures for adopting and submitting State plans are located in 40 CFR part 60, subpart B. If a state fails to have an approvable plan in place by March 21, 2013, the EPA is required to promulgate a federal plan to establish requirements for those sources not under an EPA-approved State plan. The procedures for EPA's approval and disapproval of State plans are located in 40 CFR part 62, subpart A. The EPA is proposing to approve Puerto Rico's State SSI plan, except, as discussed above, for the affirmative defense provisions, since its SSI plan is deemed at least as protective as the standards set in the EG. Puerto Rico has developed and submitted a State plan, as required by sections 111(d)/129 of the CAA, to gain federal approval to implement and enforce the EG for existing SSI units.

D. What are the requirements for a State SSI plan?

A section 111(d) State plan submittal must meet the requirements of 40 CFR part 60, subpart B, sections 60.23 through 60.26, and the EG found at 40 CFR part 60, subpart MMMM (see 76 FR 15371, March 21, 2011). Subpart B contains the procedures for the adoption and submittal of State plans. This subpart addresses public participation, legal authority, emission standards and other emission limitations, compliance schedules, emission inventories, source surveillance, and compliance assurance and enforcement requirements.

EPA promulgated the EG at 40 CFR part 60, subpart MMMM on March 21, 2011. Subpart MMMM contains guidelines to the states for submittal of plans that address existing SSI units. In addition, subpart MMMM contains the technical requirements for existing SSI units located at a wastewater treatment plant designed to treat domestic sewage sludge and applies to SSI units that commenced construction on or before October 14, 2010. A state can address the SSI technical requirements by adopting its own regulation that includes all the applicable requirements of subpart MMMM or by adopting by reference subpart MMMM. The section 111(d) State plan

is required to be submitted within one year of the EG promulgation date, i.e., by March 21, 2012. Prior to submittal to EPA, the State must make available to the public the State plan and provide opportunity for public comment, including a public hearing.

### **III. Puerto Rico's State SSI Plan**

A. What is contained in the Puerto Rico State SSI plan?

On July 30, 2014<sup>3</sup>, the Puerto Rico Environmental Quality Board submitted its section 111(d) State plan for implementing EPA's EG for existing SSI units located in the Commonwealth of Puerto Rico.

Puerto Rico amended Rule 102, entitled "Definitions of the Regulation for the Control of Atmospheric Pollution (RCAP)," and incorporated Rule 405(d), entitled "Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units (SSI)," to include the requirements for implementing the SSI EG covered under Sections 111(d) and 129 of the CAA, and codified in 40 CFR part 60, subpart MMMM. Revisions to Puerto Rico's Rules became effective on July 13, 2014.

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<sup>3</sup> In emails dated 6/04/2015, 8/10/2015 and 11/10/2015, Puerto Rico responded to EPA's requests to provide clarifying information concerning Puerto Rico's State SSI plan. This clarifying information also is available in EPA's docket at [www.regulations.gov](http://www.regulations.gov).

Section 60.5015 of the EG describes all of the required elements that must be included in a state's plan for SSI units. Puerto Rico's State SSI plan includes all of the required elements described in section 60.5015 of the EG, as summarized herein:

(1) A demonstration by the Attorney General of the Puerto Rico Department of Justice of the Commonwealth's legal authority to implement the sections 111(d) and 129 State SSI plan;

(2) State Rules 102 and 405(d) adopted into RCAP as the mechanism for implementing and enforcing the State SSI plan;

(3) An inventory of one known SSI facility, including one SSI unit, along with an inventory of estimated air pollutant emissions (see sections VI of Puerto Rico's State plan as well as the clarifying information submitted by Puerto Rico<sup>4</sup>). The affected SSI unit is a fluidized bed combustor, identified in the inventory as 'Sludge Incinerator,' and is located at the Puerto Rico Aqueduct and Sewer Authority (PRASA) facility in Puerto Nuevo;

(4) Emission limits, emission standards, operator training and qualification requirements, and operating limits that are as protective as the EG;

(5) Enforceable compliance schedules incorporated into Rule 405(d), as follows: if an owner of an affected SSI unit plans

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<sup>4</sup> In an email dated 11/10/2015, Puerto Rico provided additional emissions inventory data for the one known SSI unit in the Commonwealth. This information is available in the EPA's docket at [www.regulations.gov](http://www.regulations.gov).

to achieve compliance more than one year following the effective date of state plan approval the owner must (1) submit a final control plan to Puerto Rico by September 21, 2014, and (2) achieve final compliance by March 21, 2016 (see section (d) (7) of Puerto Rico's State plan);

(6) Testing, monitoring, reporting and recordkeeping requirements for the designated facilities;

(7) Records of the public hearing on the State SSI plan;  
and,

(8) Provisions for annual state progress reports to EPA on implementation of the State plan.

The EPA proposes to determine that Puerto Rico's State SSI plan for existing SSI units includes all the required State plan elements described in section 60.5015 of the EG.

B. What approval criteria did the EPA use to evaluate Puerto Rico's State SSI plan?

The EPA reviewed Puerto Rico's State SSI plan for approval against the following criteria: 40 CFR 60.23 through 60.26, "Subpart B-Adoption and Submittal of State Plans for Designated Facilities;" and 40 CFR 60.5000 through 60.5250, "Subpart MMMM-Emission Guidelines and Compliance Times for Existing Sewage Sludge

Incineration Units;" and 40 CFR 62, subpart A, "General Provisions" for "Approval and Promulgation of State Plans for Designated Facilities and Pollutants."

#### **IV. What is the EPA's Conclusion?**

The EPA has determined that Puerto Rico's State SSI plan meets all the applicable approval criteria as discussed above and, therefore, the EPA is proposing to approve Puerto Rico's sections 111(d) and 129 State plan for existing sewage sludge incineration units. As explained above, at the request of Puerto Rico, the EPA is proposing to not take any action on the affirmative defense provisions in Puerto Rico's State SSI plan.

#### **V. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a 111(d)/129 plan submission that complies with the provisions of the Act and applicable Federal regulations. 40 CFR 62.04. Thus, in reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272

note) because application of those requirements would be inconsistent with the Clean Air Act; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The 111(d)/129 plan is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian Nation Land, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65FR67249, November 9, 2000).

#### **List of Subjects in 40 CFR Part 62**

Environmental protection, Administrative practice and procedure, Air pollution control, Aluminum, Fertilizers, Fluoride, Intergovernmental relations, Paper and paper products industry, Phosphate, Reporting and recordkeeping requirements, Sulfur oxides, Sulfur acid plants, waste treatment and disposal.

AUTHORITY: 42 U.S.C. 7401 et seq.

Dated: November 30, 2015.

Judith A. Enck,  
Regional Administrator  
Region 2

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