



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2020-0425; FRL-10618-02-R9]

Disapproval of Clean Air Plans; Sacramento Metro, California; Contingency Measures for 2008 Ozone Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to disapprove under the Clean Air Act (CAA or “Act”), state implementation plan (SIP) submissions from the State of California that address contingency measures requirements for the 2008 ozone national ambient air quality standards (NAAQS) in the Sacramento Metro, California ozone nonattainment area. The EPA is finalizing this disapproval because the SIP submissions do not provide for contingency measures that would be triggered if the area fails to attain the NAAQS or make reasonable further progress (RFP).

DATES: This rule is effective on [Insert date 30 days after date of publication in the *Federal Register*].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R09-OAR-2020-0425. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with a disability who

needs a reasonable accommodation at no cost to you, please contact the person identified in the FOR FURTHER INFORMATION CONTACT section.

FOR FURTHER INFORMATION CONTACT: Laura Lawrence, EPA Region IX, (415) 972-3407, *lawrence.laura@epa.gov*.

SUPPLEMENTAL INFORMATION: Throughout this document, “we,” “us,” and “our” refer to the EPA.

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I. Summary of Proposed Action

A. Regulatory Background

On March 28, 2023, the EPA proposed to disapprove under the CAA, SIP submissions from the State of California that address the contingency measures requirements for the 2008 ozone NAAQS for the Sacramento Metro, California ozone nonattainment area.¹ This proposed disapproval addressed the contingency measures portions of the following two SIP submissions: the “Sacramento Regional 2008 NAAQS 8-hour Ozone Attainment and Reasonable Further Progress Plan,” submitted in 2017 (“2017 Sacramento Regional Ozone Plan”), and the Sacramento Metro portion of the “2018 Updates to the California State Implementation Plan,” submitted in 2018 (“2018 SIP Update”). In this same rulemaking, we also proposed to make a protective finding for the Sacramento Metro area under the transportation conformity rule.² The Sacramento Metro ozone nonattainment area consists of Sacramento and Yolo counties, and portions of El Dorado, Placer, Solano, and Sutter counties, and is regulated by the California Air

¹ 88 FR 18286.

² *Id.* at 18289. For an explanation of the consequences of a protective finding under the transportation conformity rule, see footnote 19 in Section III of this document.

Resources Board (CARB or “State”) and five local air districts (“Districts”).³ The area has a classification of “Severe-15” for the 2008 ozone NAAQS, with an attainment date of December 31, 2024. Accordingly, the area is subject to the requirements for Severe ozone nonattainment areas, including the requirement to submit contingency measures consistent with CAA 172(c)(9) and 182(c)(9), as discussed further in Section I.C of this document.

Our proposed action includes additional information about ozone and its precursor emissions, the Sacramento Metro nonattainment area, and the CAA regulatory framework for ozone nonattainment areas, including submittal requirements established in the EPA’s SIP Requirements Rule for the 2008 ozone NAAQS.⁴

B. State Submissions and Previous EPA Actions

CARB submitted the 2017 Sacramento Regional Ozone Plan to the EPA as a revision to the California SIP on December 18, 2017,⁵ and submitted the 2018 SIP Update to the EPA as a revision to the California SIP on December 11, 2018.⁶ The 2018 SIP Update provides updates to prior SIP submittals for eight California nonattainment areas, including the Sacramento Metro area, in response to the decision by the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) in *Bahr v. EPA*.⁷ Both submittals address nonattainment area requirements for the Sacramento Metro area concerning the 2008 ozone NAAQS, including the contingency measures

³ The five local air districts with jurisdiction in the area are the El Dorado County Air Quality Management District (EDCAQMD), the Feather River Air Quality Management District (FRAQMD), the Placer County Air Pollution Control District (PCAPCD), the Sacramento Metropolitan Air Quality Management District (SMAQMD), and the Yolo-Solano Air Quality Management District (YSAQMD).

⁴ 88 FR 18286, 18287–18289.

⁵ Letter dated December 18, 2017, from Richard Corey, Executive Officer, CARB, to Alexis Strauss, Acting Regional Administrator, EPA Region IX.

⁶ Letter dated December 5, 2018, from Richard Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX (submitted electronically December 11, 2018).

⁷ *Bahr v. EPA*, 836 F.3d 1218 (9th Cir. 2016). In this case, the court rejected the EPA’s longstanding interpretation of CAA section 172(c)(9) as allowing for early implementation of contingency measures. The court concluded that a contingency measure must take effect at the time the area fails to make RFP or attain by the applicable attainment date, not before. See also *Sierra Club v. EPA*, 985 F.3d 1055 (D.C. Cir. 2021), reaching a similar decision.

requirements.⁸ In 2020, CARB⁹ and the Districts¹⁰ committed to supplement the contingency measures elements in the 2017 Sacramento Regional Ozone Plan and the 2018 SIP Update by adopting and submitting, within 12 months of a final conditional approval of the contingency measures element, additional contingency measures that would be triggered upon the area's failure to attain or to meet RFP.

The EPA previously approved the 2017 Sacramento Regional Ozone Plan and the 2018 SIP Update as meeting the emissions inventory, attainment demonstration, reasonable further progress, reasonable available control measures, and motor vehicle emissions budgets requirements for the 2008 ozone NAAQS for the Sacramento Metro nonattainment area.¹¹

Regarding the contingency measures requirements, on October 29, 2020, we proposed to conditionally approve the contingency measures element of the 2017 Sacramento Regional Ozone Plan and the 2018 SIP Update, based on the commitments by the Districts and CARB to submit the new and amended District rules to the EPA within 12 months of a final conditional approval of the contingency measures element for the Sacramento Metro area.¹² On August 26, 2021, the Ninth Circuit issued a decision in *Association of Irrigated Residents v. U.S. Environmental Protection Agency*¹³ (“*AIR v. EPA*”) which remanded the EPA's conditional approval of contingency measures for the San Joaquin Valley nonattainment area, another nonattainment area in California. Our proposed conditional approval of the contingency measures requirements for the Sacramento Metro area had relied on a similar approach as the

⁸ For a more complete description of the 2017 Sacramento Regional Ozone Plan and 2018 SIP Update as they relate to the Sacramento Metro nonattainment area for the 2008 ozone NAAQS, see 85 FR 68509, 68512 (October 29, 2020).

⁹ Letter dated July 7, 2020, from Richard W. Corey, Executive Officer, CARB, to John Busterud, Regional Administrator, EPA Region IX.

¹⁰ Letter dated May 26, 2020, from Alberto Ayala, Ph.D., M.S.E, Executive Officer/Air Pollution Control Officer, SMAQMD, Dave Johnston, Air Pollution Control Officer, EDCAQMD, Christopher Brown, AICP, Air Pollution Control Officer, FRAQMD, Erik White, Air Pollution Control Officer, PCAPCD, and Mat Erhardt, P.E., Executive Director/Air Pollution Control Officer, YSAQMD, to Richard Corey, Executive Officer, CARB, Subject: “Commitments from the Sacramento Federal Nonattainment Area Districts to Adopt and/or Amend Rules as Contingency Measures for the Sacramento Regional 2008 NAAQS 8-Hour Ozone Attainment and Reasonable Further Progress Plan.”

¹¹ 86 FR 58581 (October 22, 2021).

¹² 85 FR 68509.

¹³ 10 F.4th 937 (9th Cir. 2021).

one remanded by the court in *AIR v. EPA*. Based on the Ninth Circuit’s decision in *AIR v. EPA*, we did not finalize our proposed conditional approval of the contingency measures element for the Sacramento Metro area.¹⁴ Our March 28, 2023 proposed disapproval action¹⁵ replaced our October 29, 2020 proposed conditional approval of the contingency measures element.

Our proposed disapproval action includes more information about CARB’s submittals for the 2008 ozone NAAQS and the EPA’s previous actions on these submittals.¹⁶

C. Contingency Measures Requirements

Ozone nonattainment areas classified under subpart 2 of the CAA as “Serious” or above must include in their SIPs contingency measures consistent with CAA sections 172(c)(9) and 182(c)(9). Contingency measures are additional controls or measures to be implemented in the event that an area fails to make RFP or to attain the NAAQS by the attainment date. CAA section 172(c)(9) requires states with nonattainment areas to provide for the implementation of specific measures to be undertaken if the area fails to make RFP or to attain the NAAQS by the applicable attainment date. Such measures must be included in the SIP as contingency measures to take effect in any such case without further action by the state or the EPA. Similarly, CAA section 182(c)(9) requires states with an ozone nonattainment area classified as Serious or above to provide contingency measures in the event that the area fails to meet any applicable RFP milestone.

Contingency measures must be designed so as to be implemented prospectively; control measures that have already been implemented may not serve as contingency measures even if they provide emissions reductions beyond those needed for any other CAA purpose.¹⁷ The SIP should contain trigger mechanisms for the contingency measures, specify a schedule for

¹⁴ 86 FR 58581, 58590 (responding to comments on proposed approval of contingency measures element submitted by Air Law for All, Ltd. on behalf of the Center for Biological Diversity and Center for Environmental Health).

¹⁵ 88 FR 18286.

¹⁶ Id. at 18288.

¹⁷ See *Bahr v. EPA*, 836 F.3d at 1235–1237 (9th Cir. 2016).

implementation, and indicate that the measure or measures will be implemented without significant further action by the state or the EPA.¹⁸

As noted in Section I.B of this document and in our proposed action, the EPA previously proposed a conditional approval of the contingency measures requirements for the Sacramento Metro area, based upon commitments by the Districts and CARB to adopt and submit additional contingency measure provisions in District rules within 12 months of the final conditional approval. Because the EPA did not finalize the conditional approval, the Districts and CARB did not submit the additional contingency measure provisions. Thus, the relevant submittals before us are limited to the portions of the 2017 Sacramento Regional Ozone Plan and 2018 SIP Update that address the contingency measures requirements for the Sacramento Metro area.

These submittals provide only an analysis of surplus emissions, and do not include specific measures to be triggered upon a failure to attain or to meet an RFP milestone. As described in detail in our proposed action, this approach is inconsistent with CAA sections 172(c)(9) and 182(c)(9), in light of the Ninth Circuit's decisions in *Bahr v. EPA* and *AIR v. EPA*. For this reason, we are taking final action to disapprove these portions of the 2017 Sacramento Regional Ozone Plan and 2018 SIP Update as contingency measures for the Sacramento Metro area for the 2008 ozone NAAQS.

II. Public Comments

Our proposed action provided for a 30-day comment period, during which we received no comments.

III. Final Action and Clean Air Act Consequences

For the reasons summarized herein and presented in more detail in the proposed action, we are taking final action to disapprove the 2017 Sacramento Regional Ozone Plan and 2018 SIP Update with respect to CAA contingency measures requirements under CAA sections 172(c)(9)

¹⁸ For more information about the contingency measures requirements, see the 1997 Ozone Phase 2 Implementation Rule at 70 FR 71612 (November 29, 2005) and the 2008 Ozone SRR at 80 FR 12264, 12285.

and 182(c)(9) for the Sacramento Metro area for the 2008 ozone NAAQS. We are also making a protective finding under the transportation conformity rule because, notwithstanding the disapproval of the contingency measures element, the 2017 Sacramento Regional Ozone Plan, as modified by the 2018 SIP Update, reflects adopted control measures and contains enforceable commitments that fully satisfy the emissions reductions requirements for RFP and attainment for the 2008 ozone NAAQS.¹⁹

As a consequence of this final disapproval of the contingency measures element, the EPA must promulgate a federal implementation plan (FIP) under section 110(c) unless we approve subsequent SIP revisions that correct the rule deficiencies within 24 months of the effective date of this action. In addition, under 40 CFR 52.35, the offset sanction in CAA section 179(b)(2) will be imposed 18 months after the effective date of this action, and the highway funding sanction in CAA section 179(b)(1) six months after the offset sanction is imposed. A sanction will not be imposed if the EPA determines that a subsequent SIP submission corrects the identified deficiencies before the applicable deadline.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

¹⁹ 40 CFR 93.120(a)(3). Without a protective finding, this disapproval action would result in a conformity freeze, under which only projects in the first four years of the most recent conforming Regional Transportation Plan (RTP) and Transportation Improvement Programs (TIP) can proceed. Generally, during a freeze, no new RTPs, TIPs, or RTP/TIP amendments can be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted, the EPA finds the motor vehicle emissions budget(s) in the plan revision adequate pursuant to 40 CFR 93.118 or approves the submission, and conformity to the implementation plan revision is determined. Under a protective finding, disapproval of the contingency measures element will not result in a transportation conformity freeze in the Sacramento Metro ozone nonattainment area and the local metropolitan planning organizations may continue to make transportation conformity determinations.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA, because this SIP disapproval does not in-and-of itself create any new information collection burdens, but simply disapproves certain state requirements for inclusion in the SIP.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This SIP disapproval does not in-and-of itself create any new requirements but simply disapproves certain state requirements for inclusion in the SIP.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action disapproves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132: Federalism

This 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.

F. Executive Order 13175: Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP revision that the EPA is disapproving would not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because this SIP disapproval does not in-and-of itself create any new regulations, but simply disapproves certain state requirements for inclusion in the SIP.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The EPA further defines the term fair treatment to mean that “no

group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to review state choices, and approve those choices if they meet the minimum criteria of the Act. Accordingly, this final action disapproves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

Neither CARB nor the Districts evaluated environmental justice considerations as part of their SIP submittals; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an environmental justice analysis and did not consider environmental justice in this action. Consideration of environmental justice is not required as part of this action, and there is no information in the record inconsistent with the stated goal of EO 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report 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 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [**insert date 60 days after date of publication in the *Federal Register***]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be

filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 7, 2023.

Martha Guzman Aceves,
Regional Administrator,
Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F – California

2. Section 52.237 is amended by adding paragraph (a)(14) to read as follows:

§ 52.237 Part D disapproval.

(a) * * *

(14) The contingency measures element of the “Sacramento Regional 2008 NAAQS 8-hour Ozone Attainment and Reasonable Further Progress Plan,” adopted November 16, 2017, as modified by the “2018 Updates to the California State Implementation Plan,” adopted October 25, 2018, for the Sacramento Metro area with respect to the 2008 ozone NAAQS.

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