



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2023-0442; FRL-11287-01-OAR]

RIN 2060-AW03

Findings of Failure to Submit State Implementation Plan Revisions for Reclassified Moderate Nonattainment Areas for the 2015 Ozone National Ambient Air Quality Standards (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to find that 11 States failed to submit State Implementation Plan (SIP) revisions required by the Clean Air Act (CAA) in a timely manner for certain nonattainment areas classified as Moderate for the 2015 ozone National Ambient Air Quality Standards (NAAQS). The States that failed to submit the required SIP revisions for reclassified Moderate areas are Arizona, California, Connecticut, Delaware, Illinois, Indiana, Michigan, New Jersey, Nevada, Texas, and Wisconsin. This action triggers certain CAA deadlines for the imposition of sanctions if a State does not submit a complete SIP addressing the outstanding requirements and for the EPA to promulgate a Federal Implementation Plan (FIP) if the EPA does not approve the State's SIP revision addressing the outstanding requirements.

DATES: This final action 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-HQ-OAR-2023-0442. 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 electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Robert Lingard, Office of Air Quality Planning and Standards, Air Quality Policy Division (C539-01), Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541-5272; email address: lingard.robert@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How is this Federal Register document organized?

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B. Notice and Comment under the Administrative Procedure Act (APA)

Section 553 of the APA, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedures 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 final agency action without prior proposal and opportunity for comment because no significant EPA judgment is involved in making findings 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 procedures are unnecessary to take this action. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this *Federal Register* document will be posted at <https://www.epa.gov/ground-level-ozone-pollution/findings-failure-submit-state-implementation-plan-revisions>.

D. Where do I go if I have specific State questions?

For questions related to specific States mentioned in this document, please contact the appropriate EPA Regional office:

| Regional Offices | States |
|---|--|
| EPA Region 1: Mr. John Rogan, Chief, Air Quality Branch, EPA Region 1, 1 Congress Street, Suite 1100, Boston, Massachusetts 02203. <i>rogan.john@epa.gov</i> | Connecticut |
| EPA Region 2: Mr. Kirk Wieber, Manager, Air Program Branch, EPA Region 2, 290 Broadway, New York, New York 10007. <i>wieber.kirk@epa.gov</i> | New Jersey |
| EPA Region 3: Mr. Mike Gordon, Chief, Planning and Implementation Branch, EPA Region 3, 1600 JFK Boulevard, Philadelphia, Pennsylvania 19103. <i>gordon.mike@epa.gov</i> | Delaware |
| EPA Region 5: Mr. Doug Aburano, Manager, Air Programs Branch, EPA Region 5, 77 West Jackson Boulevard (AR-18J), Chicago, Illinois 60604. | Illinois, Indiana, Michigan, Wisconsin |

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| <i>aburano.douglas@epa.gov</i> | |
| EPA Region 6: Mr. Guy Donaldson, Manager, State Planning and Implementation Branch, EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270. <i>donaldson.guy@epa.gov</i> | Texas |
| EPA Region 9: Ms. Idalia Perez, Manager, Air Planning Office, EPA Region 9, 75 Hawthorne Street, San Francisco, California 94105. <i>perez.idalia@epa.gov</i> | Arizona, California, Nevada |

II. Background

On October 1, 2015, the EPA revised the NAAQS for ozone to establish new 8-hour standards.¹ In that action, the EPA promulgated identical revised primary and secondary ozone standards, designed to protect public health and welfare, of 0.070 parts per million (ppm). Those standards are met when the 3-year average of the annual fourth highest daily maximum 8-hour average ozone concentration is less than or equal to 0.070 ppm.²

Promulgation of revised NAAQS triggers a requirement for the EPA to designate areas of the country as nonattainment, attainment, or unclassifiable for the standards; for the ozone NAAQS, this also involves classifying any nonattainment areas at the time of initial area designation.³ Ozone nonattainment areas are classified based on the severity of their ambient ozone levels (as determined based on an area's "design value," which represents air quality in the area for the most recent 3 years). The possible classifications for ozone nonattainment areas are Marginal, Moderate, Serious, Severe, and Extreme.⁴ Nonattainment areas with a "lower" classification (*e.g.*, Marginal) have ozone levels that are closer to the standards than areas with a "higher" classification (*e.g.*, Severe).⁵

¹ 80 FR 65292 (October 1, 2015).

² 40 CFR 50.15.

³ CAA sections 107(d)(1) and 181(a)(1).

⁴ CAA section 181(a)(1).

⁵ *See* 40 CFR 51.1303 for the design value thresholds for each classification for the 2015 ozone NAAQS.

The EPA finalized the air quality thresholds corresponding with, and attainment dates for, each level of nonattainment area classification for the 2015 ozone NAAQS on March 9, 2018.⁶ In multiple separate rules, the EPA cumulatively designated 53 areas throughout the country as nonattainment for the 2015 ozone NAAQS and established classifications for the designated nonattainment areas.⁷ On October 7, 2022, the EPA determined that 22 areas or portions of areas classified as Marginal under the 2015 ozone NAAQS failed to attain the standards by the applicable attainment date and were reclassified as Moderate, effective November 7, 2022.⁸ Separately, on January 5, 2023, the EPA determined that the Las Vegas, Nevada, area classified as Marginal under the 2015 ozone NAAQS failed to attain the standards by the August 3, 2021, attainment date and was reclassified as Moderate, effective the same day.⁹

Responsible State air agencies with nonattainment areas classified as Moderate for the 2015 ozone NAAQS are required to submit a SIP revision that satisfies the air quality planning requirements for a Moderate area under sections 172, 182(b), and 182(f) of the CAA. The required SIP elements include: nonattainment new source review (NNSR); reasonable further progress (RFP); ozone attainment demonstration (AD); reasonably available control measures (RACM); reasonably available control technology (RACT); contingency measures (CM); and Basic motor vehicle inspection and maintenance (I/M Basic) where required. Included within RACT are provisions to require the implementation of RACT for each category of volatile organic compound (VOC) sources in the area covered by any control techniques guideline (CTG), for major stationary sources of VOC not covered by a CTG, and for major stationary

⁶ 83 FR 10376 (March 9, 2018).

⁷ 83 FR 25776 (June 4, 2018), effective August 3, 2018; 83 FR 35136 (July 25, 2018), effective September 24, 2018; 86 FR 31438 (June 14, 2021), effective July 14, 2021.

⁸ 87 FR 60897 (October 7, 2022). The applicable Marginal area attainment date was August 3, 2021, except for the San Antonio, Texas, area, which was September 24, 2021.

⁹ 88 FR 775 (January 5, 2023). The applicable Marginal area attainment date was August 3, 2021.

sources of NO_x.¹⁰ The SIP revisions for the nonattainment areas reclassified as Moderate, effective November 7, 2022, were due no later than January 1, 2023.¹¹

Pursuant to CAA section 110(k)(1)(B), the EPA must determine no later than 6 months after the date by which a State is required to submit a SIP whether a State has made a submission that meets the minimum completeness criteria established pursuant to CAA section 110(k)(1)(A). These criteria are set forth at 40 CFR part 51, appendix V. For those States that have not yet made a submittal that was complete with respect to the applicable minimum completeness criteria, the EPA is making a finding of failure to submit a complete SIP.

Based on a review of SIP submittals received and deemed complete as of the date of this final action, the EPA is finding that the States listed in Table 1 have failed to submit specific required SIP elements, which were due no later than January 1, 2023.

Table 1 – Findings of Failure to Submit Certain Required SIP Elements for the 2015 Ozone NAAQS

| Region | State | Area name | Required Moderate Area SIP element* |
|--------|-------|---------------------------------------|--|
| 1 | CT | Greater Connecticut | RFP Ozone AD CM I/M Basic |
| 2 | NJ | Philadelphia-Wilmington-Atlantic City | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 3 | DE | Philadelphia-Wilmington-Atlantic City | RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources |

¹⁰ See CAA sections 182(b)(2) and 182(f). The EPA’s CTGs may be accessed at <https://www.epa.gov/ground-level-ozone-pollution/control-techniques-guidelines-and-alternative-control-techniques>.

¹¹ 87 FR 60897, 60907 (October 7, 2022).

| | | | |
|---|----|-----------------|--|
| | | | NO _x RACT for major sources CM I/M Basic |
| 5 | IL | Chicago | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 5 | IL | St. Louis | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 5 | IN | Chicago | NO _x RACT for major sources |
| 5 | MI | Allegan County | RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM |
| 5 | MI | Berrien County | RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM |
| 5 | MI | Muskegon County | RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM |
| 5 | WI | Chicago | NNSR RFP Ozone AD |

| | | | |
|---|----|----------------------------|--|
| | | | RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 5 | WI | Milwaukee | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 5 | WI | Sheboygan County | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM |
| 6 | TX | Dallas-Fort Worth | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 6 | TX | Houston-Galveston-Brazoria | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 6 | TX | San Antonio | NNSR RFP Ozone AD RACM VOC CTG RACT |

| | | | |
|---|----|-----------------|--|
| | | | Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 9 | AZ | Phoenix-Mesa | NNSR RFP Ozone AD RACM VOC CTG RACT** Non-CTG VOC RACT for major sources** NO _x RACT for major sources** CM I/M Basic |
| 9 | CA | Mariposa County | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |
| 9 | NV | Las Vegas | NNSR RFP Ozone AD RACM VOC CTG RACT Non-CTG VOC RACT for major sources NO _x RACT for major sources CM I/M Basic |

* Listed SIP elements are to satisfy the air quality planning requirements for Moderate areas under CAA sections 172, 182(b), and 182(f), which were due for the listed areas no later than January 1, 2023.

** The Arizona Department of Environmental Quality submitted a RACT SIP for the Maricopa County portion of the Phoenix-Mesa Moderate area on May 4, 2023, and EPA determined the submittal was complete on September 12, 2023.

The Kentucky portion of the Louisville, Kentucky-Indiana, area is not included in this action because the State of Kentucky submitted a complete request for the EPA to redesignate its area portion to attainment for the 2015 ozone NAAQS, and this request was received before the

January 1, 2023, SIP submittal deadline for reclassified Moderate areas.¹² The Washington, District of Columbia-Maryland-Virginia, area is not included in this action because the EPA has proposed a clean data determination for the area for the 2015 ozone NAAQS.¹³ Finally, the Pechanga Band of Luiseño Mission Indians of the Pechanga Reservation area is not included in this action because CAA provisions mandating the submission of State implementation plans do not apply to tribes.¹⁴

III. Consequences of Findings of Failure to Submit

If the EPA finds that a State has failed to make the required SIP submittal or that a submitted SIP is incomplete, then CAA section 179(a) establishes specific consequences, after a period of time, including the imposition of mandatory sanctions for the affected area.

Additionally, such a finding triggers an obligation under CAA section 110(c) for the EPA to promulgate a FIP no later than 2 years after issuance of the finding of failure to submit if the affected State has not submitted, and the EPA has not approved, the required SIP submittal.

If the EPA has not affirmatively determined that a State has made the required complete SIP submittal for an area 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 the affected nonattainment area. If the EPA has not affirmatively determined that the State has made the required complete SIP submittal within 6 months after the offset sanction is imposed, then the highway funding sanction will apply in the affected nonattainment area, in accordance with CAA section 179(b)(1) and 40 CFR 52.31. The sanctions will not take effect if, within 18 months after the effective date of these findings, the EPA

¹² The EPA proposed but has not yet finalized action on a redesignation request for Kentucky's portion of the Louisville area received September 6, 2022 (88 FR 23598, April 18, 2023). No requirements under CAA section 182(b) became due prior to Kentucky's submittal of a complete redesignation request and, therefore, none will be applicable for purposes of any final redesignation. The Indiana portion of the Louisville area was redesignated to attainment for the 2015 ozone NAAQS effective July 11, 2022 (87 FR 39750, July 11, 2022).

¹³ 88 FR 6688 (February 1, 2023).

¹⁴ 40 CFR 49.4.

affirmatively determines that the State has made a complete SIP submittal addressing the deficiency for which the finding was made. Additionally, if the State makes the required SIP submittal and the EPA takes final action to approve the submittal within 2 years of the effective date of these findings, the EPA is not required to promulgate a FIP for the affected nonattainment area.

IV. Findings of Failure to Submit for States that Failed to Make a Nonattainment Area SIP Submittal

Based on a review of SIP submittals received and deemed complete as of the date of signature of this action, the EPA finds that the States listed in Table 1 above failed to submit the indicated SIP elements required under sections 172, 182(b), and 182(f) of the CAA and that were due no later than January 1, 2023, for the listed nonattainment areas.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review, and Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA. This final action does not establish any new information collection requirement apart from what is already required by law. This action relates to the requirement in the CAA for States to submit SIPs under CAA sections 172 and 182 that address the statutory requirements that apply to areas designated as nonattainment for the ozone NAAQS.

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 action is a finding that the named States have not made the necessary SIP submission for certain nonattainment areas to meet the requirements of part D of title I of the CAA.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no new enforceable duty on any State, local or Tribal governments or the private sector.

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: Consultation and Coordination with Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175. This action finds that several States have failed to submit SIP revisions that satisfy the nonattainment area planning requirements under sections 172 and 182 of the CAA. No Tribe is subject to the requirement to submit an implementation plan under section 172 or under subpart 2 of part D of title I of the CAA. 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 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 it is a finding that

several States failed to submit SIP revisions that satisfy the nonattainment area planning requirements under sections 172 and 182 of the CAA and does not concern an environmental health risk or safety risk.

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)

This action does not involve technical standards.

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, February 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.”

The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, which finds that certain States have failed to submit SIP revisions that satisfy the nonattainment area planning requirements under sections 172 and 182 of the CAA, and there is no information

in the record inconsistent with the stated goal of E.O. 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. Determinations Under CAA Section 307(b)(1) and (d)

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit if (i) the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) such action is locally or regionally applicable, but "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).

This rulemaking is “nationally applicable” within the meaning of CAA section 307(b)(1). In this final action, the EPA is applying a uniform legal interpretation with respect to findings of failure to submit required SIPs for reclassified Moderate areas under the 2015 ozone NAAQS from 11 States with nonattainment areas, located in six of the 10 EPA Regions, and in the 2nd, 3rd, 5th, 6th, 7th, and 9th Circuits. This final action is also based on a common core of factual findings concerning the receipt and completeness of the relevant SIP submittals. For these reasons, this is a “nationally applicable” action within the meaning of CAA section 307(b)(1).

In the alternative, to the extent a court finds this action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of “nationwide

scope or effect” within the meaning of CAA section 307(b)(1).¹⁵ In this final action, the EPA is applying a uniform legal interpretation with respect to findings of failure to submit required SIPs for reclassified Moderate areas under the 2015 ozone NAAQS, based on a common core of factual findings concerning the receipt and completeness of the relevant SIP submittals. In deciding to invoke this exception, the Administrator has taken into account a number of policy considerations, including his judgment regarding the benefit of obtaining the D.C. Circuit’s authoritative centralized review, rather than allowing development of the issue in other contexts, in order to ensure consistency in the Agency’s approach to implementation of the 2015 ozone NAAQS in the majority of the nonattainment areas nationwide for the 2015 ozone NAAQS. This final action treats all of the identified States with reclassified Moderate nonattainment areas consistently, in making findings of failure to submit required SIPs.

The Administrator finds that this is a matter on which national uniformity is desirable to take advantage of the D.C. Circuit’s administrative law expertise and facilitate the orderly development of the basic law under the CAA. The Administrator also finds that consolidated review of this action in the D.C. Circuit will avoid piecemeal litigation in the regional circuits, further judicial economy, and eliminate the risk of inconsistent results for different States. The Administrator also finds that a nationally consistent approach to the CAA’s mandate concerning reclassification of areas that fail to attain the 2015 ozone NAAQS constitutes the best use of agency resources. The Administrator is publishing his finding that this action is based on a determination of nationwide scope or effect in the *Federal Register* as part of this final action.

For these reasons, this final action is nationally applicable or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA

¹⁵ In the report on the 1977 Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator’s determination that the “nationwide scope or effect” exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. *See* H.R. Rep. No. 95–294 at 323–24, reprinted in 1977 U.S.C.C.A.N. 1402–03.

section 307(b)(1) and is publishing that finding in the *Federal Register*. 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 District of Columbia Circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

List of Subjects in 40 CFR Part 52

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

Joseph Goffman,

Principal Deputy Assistant Administrator.

[FR Doc. 2023-22987 Filed: 10/17/2023 8:45 am; Publication Date: 10/18/2023]