



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2023-0206; FRL-11037-02-R3]

Air Plan Disapproval; Delaware; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The Environmental Protection Agency (EPA) is disapproving certain portions of a state implementation plan (SIP) revision submitted by the State of Delaware, through the Delaware Department of Natural Resources and Environmental Control (DNREC), on November 22, 2016. The revision was submitted by Delaware in response to a national finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is disapproving certain portions of the SIP revision and determining that such SIP revision does not correct the remaining deficiencies in Delaware's SIP identified in the June 12, 2015, SIP call in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or Act). This action addresses the remaining deficiencies identified in EPA's June 2015 SIP call that have not yet been addressed by prior EPA actions on Delaware's November 2016 SIP submission.

DATES: This final action is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2023-0206. All documents in the docket are listed on the www.regulations.gov website. 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 www.regulations.gov, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Mallory Moser, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2030. Ms. Moser can also be reached via electronic mail at moser.mallory@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On June 12, 2015, pursuant to CAA section 110(k)(5), the EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,”¹ hereafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated the EPA's interpretation that SSM exemptions (whether automatic or discretionary) and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

With respect to the Delaware SIP, in the 2015 SSM SIP Action, EPA determined that the following 7 provisions were substantially inadequate to meet CAA requirements: Title 7 of Delaware's Administrative Code (7 DE Admin. Code) 1104 Section (§) 1.5, 7 DE Admin. Code

¹ 80 FR 33839, June 12, 2015.

1105 § 1.7, 7 DE Admin. Code 1108 § 1.2, 7 DE Admin. Code 1109 § 1.4, 7 DE Admin. Code 1114 § 1.3, 7 DE Admin. Code 1124 § 1.4 and 7 DE Admin. Code 1142 § 2.3.1.6. Delaware submitted a SIP revision on November 22, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. Delaware's submission noted that the deficiency highlighted in 7 DE Admin. Code 1108 § 1.2 was corrected by a previous SIP revision submitted to EPA on July 10, 2013. A final rule acting on this 2013 submission and remedying 7 DE Admin. Code 1108 § 1.2 published in the *Federal Register* on July 11, 2022.² Delaware's submission also requested that EPA revise the Delaware SIP by removing 7 DE Admin. Code 1124 § 1.4 and 7 DE Admin. Code 1142 § 2.3.1.6 in their entirety, thereby removing these provisions, and their deficiencies, from the Delaware SIP. A final rulemaking remedying 7 DE Admin. Code 1124 § 1.4 and 7 DE Admin. Code 1142 § 2.3.1.6 published in the *Federal Register* on February 14, 2023.³

II. Summary of SIP Revision and EPA Analysis

On June 21, 2023, EPA published a notice of proposed rulemaking (NPRM) related to the remaining four provisions identified in EPA's June 2015 SIP call that had not yet been addressed by prior EPA actions.⁴ In that document, EPA proposed disapproval of the remainder of Delaware's 2016 submittal for multiple reasons. With regards to 7 DE Admin. Code 1104 and 7 DE Admin. Code 1105, Delaware's 2016 submittal requested EPA replace both two-hour averaging periods for particulate emission limits with 30-day rolling averages with no change to the level of the limit. The increases in averaging times were not supported by a sufficient analysis explaining why these changes meet the requirements of CAA section 110(l). Additionally, Delaware did not provide an explanation or analysis of how increasing the averaging time of the affected limits without any adjustment to their levels would or would not affect attainment or maintenance of the national ambient air quality standards (NAAQS). With regards to 7 DE Admin. Code 1109 and 7 DE Admin. Code 1114, Delaware's 2016 submission

² See 87 FR 41074.

³ See 88 FR 9399.

⁴ See 88 FR 40136.

requested the removal of these regulations from the SIP and instead noted that other requirements, including the CAA New Source Performance Standards (NSPS), are adequate to protect the NAAQS. This is problematic because the specific NSPS which Delaware cited allow for periods of excess emissions during SSM events. Also, these changes were not supported by a sufficient analysis explaining how these changes meet the requirements of CAA section 110(I). A more complete explanation of the reasons for the proposed disapproval can be found in the June 21, 2023, NPRM.

III. EPA's Response to Comments Received

EPA received two comments which can be found in the docket. One comment, from the State of Delaware, notes the State is reviewing the record and preparing a path forward to respond to the concerns found within the NPRM. EPA acknowledges Delaware's comment. The other comment, from the Sierra Club and Environmental Integrity Project (EIP), was partially adverse, and the adverse portions are discussed below.

Comment 1: The commenters, Sierra Club and EIP, expressed support for EPA's proposed disapproval action on the remaining provisions in Delaware's 2016 submittal, while disagreeing with EPA's position in the NPRM that a properly set longer-term averaging period can be protective of a shorter-term NAAQS. Commenters also urged EPA to propose a Federal Implementation Plan (FIP) to address the remaining disapproved provisions of Delaware's 2016 submittal.

Response 1: While EPA acknowledges commenters' support of this action, EPA continues to believe that in appropriate cases properly set longer-term emission limits can be protective of a shorter-term NAAQS. EPA has explained in the 2014 Guidance for 1-Hour Sulfur dioxide (SO₂) Nonattainment Area SIP Submissions (2014 SO₂ Guidance)⁵ how a short-term rate that is shown to be NAAQS protective for a given source can be converted to a comparably

⁵ The 2014 SO₂ Guidance can be found at the following web address: https://www.epa.gov/sites/default/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf.

stringent longer-term limit that is also NAAQS protective. The 1-hour SO₂ Guidance recommends that emission limits be expressed as short-term averages, but also describes the option to use emission limits with longer averaging times of up to 30 days so long as the state meets various suggested criteria to adjust the longer-term limit downward to account for the variability of the source's emissions. EPA has approved several SO₂ SIPs relying on longer term average limits derived according to the methods found in the 2014 SO₂ guidance. See, for example, 83 FR 4591 (February 1, 2018) (approval of Illinois SO₂ SIP); 83 FR 25922 (June 5, 2018) (approval of New Hampshire SO₂ SIP); 84 FR 8813 (March 12, 2019) (approval of Arizona SO₂ SIP); 84 FR 30920 (June 28, 2019) (approval of Kentucky SO₂ SIP); 84 FR 51988 (October 1, 2019) (approval of Pennsylvania SO₂ SIP for the Beaver County area); 85 FR 22593 (April 23, 2020) (approval of Pennsylvania SO₂ SIP for the Allegheny County area), and 85 FR 49967 (August 17, 2020) (approval of Indiana SO₂ SIP). The principles found in the 2014 SO₂ Guidance can be applied to other NAAQS pollutants with short-term averaging times, such as particulate matter, if adequately demonstrated in a specific case. With an appropriate analysis, a properly set longer-term averaging period can be protective of a shorter-term NAAQS; however, in this matter Delaware merely lengthened the averaging time for the limit without adjusting the limit's value in accordance with the SIP Guidance. As such, a critical portion of the demonstration is lacking so EPA is not yet prepared to apply this methodology in this specific action.

In response to the request that EPA promulgate a FIP, EPA acknowledges this comment and recognizes the Agency's statutory obligation to promulgate a FIP within 24 months of a final disapproval of a SIP submission unless the State corrects the deficiency, and EPA approves the plan or plan revision, before EPA promulgates the FIP.

IV. Final Action

For the reasons discussed in detail in the proposed rulemaking and summarized herein, EPA is disapproving the portion of Delaware's November 22, 2016, SIP submission addressing 7

DE Admin. Code 1104 § 1.5, 7 DE Admin. Code 1105 § 1.7, 7 DE Admin. Code 1109 § 1.4, and 7 DE Admin. Code 1114 § 1.3.

As a result of our disapproval, CAA section 110(c)(1) would require EPA to promulgate a FIP within 24 months of the effective date of the final disapproval action, unless EPA first approves a complete SIP revision that corrects the deficiencies in 7 DE Admin. Code 1104 Section (§) 1.5, 7 DE Admin. Code 1105 §1.7, 7 DE Admin. Code 1109 §1.4 and 7 DE Admin. Code 1114 §1.3, within such time. In addition, final disapproval could trigger mandatory sanctions under CAA section 179 and 40 CFR 52.31 unless the State submits, and EPA approves, a complete SIP revision that corrects the identified deficiencies within 18 months of the effective date of the final disapproval action.⁶

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, if they meet the criteria of the CAA. Accordingly, this final action disapproving portions of Delaware's SIP revision merely ascertains that these State law provisions do not meet Federal requirements and does not impose additional requirements beyond those imposed by state law.

Additional information about these statutes and Executive Orders can be found at 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

⁶ The offset sanction in CAA section 179(b)(2) would be triggered 18 months after the effective date of a final disapproval, and the highway funding sanction in CAA section 179(b)(1) would be triggered 24 months after the effective date of a final disapproval. Although the sanctions clock would begin to run from the effective date of a final disapproval, mandatory sanctions under CAA section 179 generally apply only in designated nonattainment areas. This includes areas designated as nonattainment after the effective date of a final disapproval. As discussed in the 2015 SSM SIP Action, EPA will evaluate the geographic scope of potential sanctions at the time it makes a determination that the air agency has failed to make a complete SIP submission in response to the 2015 SIP call, or at the time it disapproves such a SIP submission. The appropriate geographic scope for sanctions may vary depending upon the SIP provisions at issue. See the 2015 SSM SIP Action at 80 FR 33839, 33930 (June 12, 2015) EPA Docket ID No. EPA-HQ-OAR-2012-0322 available at www.regulations.gov.

This action is not a “significant regulatory action” as defined by Executive Order 12866 and was therefore not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

This proposed action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

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 merely proposes to disapprove a portion of a SIP submission as not meeting the CAA.

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. The action imposes no 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 does not apply on any Indian reservation land, any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. 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 it merely proposes to disapprove a portion of a SIP submission as not meeting the CAA.

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

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, 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. 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.” 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 proposed action disapproves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. 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, 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. This action merely proposes to disapprove a SIP submission as not meeting the CAA.

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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 16, 2023. 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 may be filed and shall not postpone the effectiveness of such action. This action pertaining to the disapproval of these portions of Delaware’s November 22, 2016, submittal, 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 oxides, Volatile organic compounds.

Adam Ortiz,
Regional Administrator,
Region III.

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