



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R4-OAR-2023-0361; FRL-12238-01-R4]**

### **Air Plan Approval; Shelby County, Tennessee; Revisions to Startup, Shutdown, and Malfunction Rules**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a portion of a State Implementation Plan (SIP) revision submitted by the Tennessee Department of Environment and Conservation (TDEC) on behalf of Shelby County Health Department (SCHD) Pollution Control Section on March 2, 2022, in response to a finding of substantial inadequacy and SIP call published on June 12, 2015, regarding provisions in the Shelby County portion of the Tennessee SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. The revision contains amended air codes of Shelby County and the following municipalities within Shelby County: Town of Arlington, City of Bartlett, Town of Collierville, City of Germantown, City of Lakeland, City of Memphis, and Town of Millington (referred to hereinafter as the “included municipalities”). The SIP revision also contains other changes to the affected Chapter that are unrelated to the SIP call but of which Shelby County and the included municipalities are also requesting incorporation into the Shelby County portion of the Tennessee SIP. EPA is proposing to approve the portions of the SIP revision that correct certain deficiencies identified in the June 12, 2015, SSM SIP call and that are in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or Act).

**DATES:** Comments must be received on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R4-OAR-2023-0361 at [regulations.gov](https://www.regulations.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Estelle Bae, Air Permits Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Ms. Bae can be reached by telephone at (404) 562-9143 or via electronic mail at [bae.estelle@epa.gov](mailto:bae.estelle@epa.gov).

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## **I. Background**

On May 31, 1972, EPA issued a rulemaking which initially recognized SCHD's Air Pollution Control Section as a local agency for air pollution control and originally approved the Memphis and Shelby County Code into the Tennessee SIP. On June 15, 1989, EPA approved portions of SCHD's July 7, 1986, SIP revision to revise and update several provisions in the Shelby County portion of the Tennessee SIP, which includes the incorporation by reference of Tennessee's June 18, 1980, state-effective version of Tennessee Air Pollution Control Regulations (TAPCR) Chapter 1200-3-20, titled "Limits on Emissions due to Malfunctions, Startups, and Shutdowns," into City of Memphis Air Code Section 9-12-24 (formerly Section 16-87).<sup>1,2</sup>

In this notice of proposed rulemaking (NPRM), EPA is proposing to approve a portion of the SIP revision dated March 1, 2022, which was transmitted by TDEC to EPA on March 2, 2022, to revise the Shelby County portion of the Tennessee SIP. See below for more details on the portions of the March 2, 2022, SIP revision that EPA is not acting on in this NPRM. SCHD is requesting that EPA incorporate into the Shelby County portion of the Tennessee SIP portions

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<sup>1</sup> See 54 FR 25456 (June 15, 1989). EPA had initially approved the City of Memphis Code into the Tennessee SIP under "Memphis and Shelby County." See *id.* Included in "Memphis and Shelby County" are Shelby County and the following municipalities: Town of Arlington, City of Bartlett, Town of Collierville, City of Germantown, City of Lakeland, City of Memphis, and Town of Millington. Shelby County Health Department's Air Pollution Control Branch recommends to the aforementioned municipalities regulatory revisions, which, if approved, are adopted by Shelby County and these included municipalities, which implement and enforce the regulations within their respective jurisdictions. As the air pollution control regulations/ordinances adopted by those jurisdictions are substantively identical, EPA had selected just one to represent the SIP compilations for Shelby County and the included municipalities: the City of Memphis Air Code. Thus, the SIP-called provision from the Shelby County portion of the Tennessee SIP that was identified in the 2015 SSM SIP Action was City of Memphis Air Code (although it was referred to as "Shelby County Code") Section 16-87. For simplicity and brevity in this NPRM, and since the jurisdictions' regulations/ordinances remain substantively identical, EPA will continue to refer to the City of Memphis Air Code throughout this NPRM to represent the regulations/ordinances of Shelby County and the included municipalities.

<sup>2</sup> One of the intervening changes that EPA is proposing to approve as part of this proposed rulemaking is changing the relevant City of Memphis Air Code reference in the SIP from Section 16-87 to Section 9-12-24. The title of this section remains "Malfunctions, Startups and Shutdowns."

of the version of TAPCR Chapter 1200-3-20, titled “Limits on Emissions Due to Malfunctions, Startups, and Shutdowns” as effective on December 5, 2018.<sup>3,4</sup>

The revisions to City of Memphis Air Code Section 9-12-24 incorporate the changes that are responsive to the 2015 SSM SIP Action and correspond to changes approved by EPA into the Tennessee SIP on June 23, 2023.<sup>5</sup> The revisions include other changes unrelated to the 2015 SSM SIP Action that are consistent with Tennessee SIP revisions that EPA has approved since the last version of TAPCR Chapter 1200-3-20 was formally adopted into the Shelby County portion of the Tennessee SIP on June 15, 1989.

To be consistent with Tennessee’s approach with respect to its SIP-called provisions, SCHD withdrew certain portions of its March 2, 2022, SIP revision—specifically, the SCHD provisions with respect to which (1) EPA had determined the corresponding Tennessee provisions did not correct the deficiencies, (2) EPA had proposed to disapprove the corresponding Tennessee provisions in the April 6, 2023, NPRM, or (3) EPA’s proposed approval of the corresponding Tennessee provisions had received adverse comments during the public comment period for the April 6, 2023, NPRM. In particular, the changes to the March 2, 2022, SIP revision that SCHD has withdrawn include the changes to TAPCR Section 1200-3-20-

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<sup>3</sup> In this proposed action, EPA is proposing to incorporate by reference—with certain exceptions noted in this NPRM—into the Shelby County portion of the Tennessee SIP, the City of Memphis Air Code Section 9-12-24 (formerly Section 16-87), locally effective on February 22, 2022, which adopts by reference the December 5, 2018, state-effective version of TAPCR Chapter 1200-3-20, “Limits on Emissions Due to Malfunctions, Startups, and Shutdowns.” EPA is also proposing to incorporate by reference the following sections that contain substantively identical changes: Shelby County—Section 3-9 (locally effective on January 13, 2020); Town of Arlington—Section 20-101 (locally effective on November 2, 2020); City of Bartlett—Section 20-101 (locally effective on December 8, 2020); Town of Collierville—Section 96.02 (locally effective on November 23, 2020); City of Germantown—Section 9-21(24) (locally effective on July 12, 2021); City of Lakeland—Section 20-101 (locally effective on February 10, 2022); Town of Millington—Section 20-101 (locally effective on October 12, 2020). See the cover letter of the SIP revision dated March 1, 2022, with the subject line “Request to Incorporate Revisions into the Shelby County and Included Municipalities Ordinance into the SIP for Tennessee as Response to EPA’s SIP Call” in the docket for this proposed rulemaking for evidence of adoption into the air codes of Shelby County and the included municipalities.

<sup>4</sup> The state-effective dates for the rules within TAPCR Chapter 1200-3-20 that were in effect on December 5, 2018, are: 1200-3-20-.01, “Purpose” – September 26, 1994; 1200-3-20-.02, “Reasonable Measures Required” – November 11, 1997; 1200-3-20-.04, “Logs and Reports” – June 19, 2013; 1200-3-20-.05, “Copies of Log Required” – September 26, 1994; 1200-3-20-.06, “Report Required Upon The Issuance of a Notice of Violation” – November 16, 2016; 1200-3-20-.07, “Special Reports Required” – September 26, 1994; 1200-3-20-.08, “Rights Reserved” – September 26, 1994; and 1200-3-20-.09, “Additional Sources Covered” – September 26, 1994. As noted above, 1200-3-20-.03 was withdrawn from Shelby County’s submission. There were no substantive changes to 1200-3-20-.05; therefore, it is not further addressed in this NPRM.

<sup>5</sup> See 88 FR 41031.

.03, titled “Notice Required When Malfunction Occurs,” and TAPCR Section 1200-3-20-.06, “Report Required Upon the Issuance of a Notice of Violation,” paragraph (1) and paragraph (4). The letter withdrawing these provisions is provided in the docket for this NPRM.

**A. EPA’s 2015 SSM SIP Action**

On June 12, 2015, pursuant to CAA section 110(k)(5), 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,” hereinafter referred to as the “2015 SSM SIP Action.” *See* 80 FR 33839 (June 12, 2015). The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 45 State and local jurisdictions, including Shelby County, were substantially inadequate to meet CAA requirements and issued a SIP call to those State and local jurisdictions to submit SIP revisions to address the inadequacies. EPA established a deadline of November 22, 2016 (18 months after the effective date of the action) by which the affected State and local jurisdictions had to submit such SIP revisions.

On March 2, 2022, SCHD submitted a SIP revision in response to the 2015 SIP call requesting EPA approval of the adoption by reference of TAPCR Chapter 1200-3-20, as effective on December 5, 2018, into City of Memphis Air Code Section 9-12-24. The version of TAPCR Chapter 1200-3-20 of which SCHD is requesting incorporation into the SIP includes revisions that were submitted by the State in response to the 2015 SSM SIP Action along with other revisions that were not subject to the SIP call but had been approved into the Tennessee SIP in prior rulemakings. The March 2, 2022, SIP revision was deemed complete on July 21, 2023. A copy of the letter containing this completeness determination is provided in the docket for this NPRM.

**B. *Environ. Comm. Fl. Elec. Power v. EPA*, 94 F.4th 77 (D.C. Cir. 2024)**

On March 1, 2024, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision in *Environ. Comm. Fl. Elec. Power v. EPA*, No. 15-1239 (“D.C. Circuit decision”). The case is a consolidated set of petitions for review of the 2015 SSM SIP Action. The Court granted the petitions in part, vacating the SIP call with respect to SIP provisions that EPA identified as automatic exemptions, director’s discretion provisions, and affirmative defenses that are functionally exemptions; and denied the petitions as to other provisions that EPA identified as overbroad enforcement discretion provisions, or affirmative defense provisions that would preclude or limit a court from imposing relief in the case of violations. EPA has assessed the impact of the decision with respect to the removal of overbroad defense provisions at issue in the Shelby County portion of the Tennessee SIP.<sup>6</sup> We have concluded that the previously stated reasons for the proposed removal of these provisions, as articulated in the 2015 SSM SIP Action, are consistent with the recent D.C. Circuit decision, as these are overbroad enforcement discretion provisions. The Court upheld<sup>7</sup> the EPA’s 2015 SSM SIP Action with regard to provisions that grant States overbroad enforcement discretion, which EPA found to be “inconsistent with the enforcement structure of the CAA as they could be interpreted to allow the State to make the final decision whether such emissions are violations, thus impeding the ability of the EPA and citizens to enforce the emission limitations of the SIP.”<sup>8</sup>

**C. *Shelby County SIP Provisions Related to Excess Emissions***

In the 2015 SSM SIP Action, with regard to the Shelby County portion of the Tennessee SIP, EPA determined that City of Memphis Air Code Section 9-12-24<sup>9</sup> was substantially

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<sup>6</sup> Those provisions are TAPCR Section 1200-3-20-.06(2) and (4) (formerly Sections 1200-3-20-.07(1) and 1200-3-20-.07(3)).

<sup>7</sup> See *Environ. Comm. Fl. Elec. Power v. EPA*, 94 F.4th 77, 114 (D.C. Cir. 2024).

<sup>8</sup> See 80 FR 33935.

<sup>9</sup> In the 2015 SSM SIP Action, City of Memphis Air Code (although it was referred to as “Shelby County Code”) Section 16-87 was SIP-called. Since the last (1989) SIP-approved version of the adoption by reference of this Section, City of Memphis Air Code Section 16-87 has been renumbered to Section 9-12-24. See *supra* notes 1 and 2.

inadequate to meet the fundamental requirements of the CAA and issued a SIP call for this provision. In the March 2, 2022, SIP revision, SCHD requests approval of a revised version of City of Memphis Air Code Section 9-12-24, which adopts by reference portions of TAPCR Chapter 1200-3-20 as state-effective on December 5, 2018. City of Memphis Air Code Section 16-87 (since renumbered to Section 9-12-24) comprises, through the adoption by reference of the June 30, 2003, state-effective version of TAPCR Chapter 1200-3-20, certain provisions of which were SIP-called as part of the same action.<sup>10</sup> Consequently, certain provisions of City of Memphis Air Code Section 16-87 (since renumbered to Section 9-12-24) were SIP-called for the same reasons that the corresponding provisions of TAPCR Chapter 1200-3-20 were SIP-called.

With regard to the State portion of the Tennessee SIP, EPA determined in the 2015 SSM SIP Action that two provisions in TAPCR Chapter 1200-3-20—Sections 1200-3-20-.07(1) and 1200-3-20-.07(3)—were substantially inadequate to satisfy CAA requirements and issued a SIP call for these provisions.<sup>11</sup> Paragraph (1) of Section 1200-3-20-.07, “Report Required Upon the Issuance of Notice of Violation,” provides the Technical Director with the discretion, upon review of a source’s excess emissions report, to determine if an event is a violation and whether to pursue an enforcement action. Paragraph (3) of Section 1200-03-20-.07 provides reporting requirements in the event of excess emissions and specifies that failure to submit the required report precludes the admissibility of the report data as an excuse for causing excess emissions during malfunctions, startups, and shutdowns. The rationale underlying EPA’s determination that these provisions are substantially inadequate to meet CAA requirements and therefore

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<sup>10</sup> See 80 FR 33839, 33965 (June 12, 2015).

<sup>11</sup> In the 2015 SSM SIP Action, with respect to Tennessee, EPA also identified TAPCR Section 1200-3-5-.02(1), under the Chapter titled “Visible Emissions,” as substantially inadequate on the basis that it contains an impermissible unbounded director’s discretion provision, and this provision was SIP-called. The Shelby County portion of the Tennessee SIP, under Shelby County Air Code Section 3-17 (the equivalent of SIP-approved City of Memphis Air Code Section 16-83, which has since been revised to Section 9-12-20), incorporates by reference Chapter 1200-3-5 of the TAPCR. This provision is likewise substantially inadequate to satisfy the requirements of the CAA for the same reason. While this provision was not included in the 2015 SSM SIP Action, EPA issued a NPRM on February 24, 2023, proposing to SIP-call this provision from the Shelby County portion of the Tennessee SIP. The proposed SIP call has not yet been finalized, and SCHD has not yet submitted a SIP submission addressing the relevant provision. See 88 FR 11842 (February 24, 2023).

require revisions is detailed in the 2015 SSM SIP Action and the corresponding proposals.

On March 2, 2022, TDEC submitted a SIP revision on behalf of SCHD in response to the SIP call issued in the 2015 SSM SIP Action and requested that EPA replace the existing City of Memphis Air Code Section 16-87 (since renumbered to Section 9-12-24) in the Shelby County portion of the Tennessee SIP with the version of Section 9-12-24 that adopts by reference TAPCR Chapter 1200-3-20, as effective December 5, 2018. The March 2, 2022, revision contains changes that are responsive to the 2015 SSM SIP Action and other revisions approved into TAPCR Chapter 1200-3-20 of the Tennessee SIP since its last adoption into the City of Memphis Air Code. EPA's rationale for proposing to approve each revision is described in more detail in section II of this document.

## **II. Analysis of SCHD's Revisions to City of Memphis Air Code Section 9-12-24, "Malfunctions, Startups, and Shutdowns"**

EPA's last approval into the Shelby County portion of the Tennessee SIP of the adoption of TAPCR Chapter 1200-3-20 into the City of Memphis Air Code Section 16-87 (since renumbered to Section 9-12-24) was completed on June 15, 1989, with a local effective date of June 18, 1986. *See* 54 FR 25456 (June 15, 1989).<sup>12</sup> EPA now proposes to act on the changes adopted between the 1989 SIP-approved version and the version transmitted in response to the 2015 SSM SIP Action with a local effective date of February 22, 2022. These changes include, among other things, the removal of the adoption by reference of TAPCR Section 1200-3-20-.06, "Scheduled Maintenance," and the associated renumbering of the subsequent sections. SCHD requests to incorporate by reference the newly renumbered sections (Sections 1200-3-20-.07 through .10 are renumbered to 1200-3-20-.06 through .09) and the other sections that contain changes addressed in the SIP revision.

SCHD has excluded certain parts of the adoption by reference of TAPCR Chapter 1200-

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<sup>12</sup> The "State effective date" identified in 40 CFR 52.2220(c) for Memphis Air Code Section 16-87 is incorrect; instead of August 14, 1989, it should be June 18, 1986.

3-20 from its request for EPA approval of City of Memphis Air Code Section 9-12-24 into the SIP. The February 22, 2022, version of City of Memphis Air Code Section 9-12-24, through which the City of Memphis adopts by reference TAPCR Chapter 1200-3-20, does not exclude Section 1200-3-20-.06(5), which lists various types of sources and corresponding “de minimis” emission levels below which no notice of violation(s) of certain pollutant limits will be automatically issued and SSM exemptions may apply. However, in the March 2, 2022, SIP revision, SCHD requests that Section 1200-3-20-.06(5) not be incorporated into the Shelby County portion of the Tennessee SIP. In addition, on June 30, 2023, EPA received a request submitted by TDEC, on behalf of SCHD, to withdraw the portion of its submission making changes to TAPCR Section 1200-3-20-.03, new TAPCR Section 1200-3-20-.06(1), and new TAPCR Section 1200-3-20-.06(4), as submitted in the March 2, 2022, SIP revision.<sup>13</sup> Therefore, EPA is proposing to approve SCHD’s changes to its adoption by reference of TAPCR Sections 1200-3-20-.01, 1200-3-20-.02, 1200-3-20-.04, 1200-3-20-.05, 1200-3-20-.06 (renumbered from 1200-3-20-.07) except for 1200-3-20-.06(1), 1200-3-20-.06(4), and 1200-3-20-.06(5), 1200-3-20-.07 (renumbered from 1200-3-20-.08), 1200-3-20-.08 (renumbered from 1200-3-20-.09), and 1200-3-20-.09 (renumbered from 1200-3-20-.10). EPA is also proposing to approve the removal of existing Section 1200-3-20-.06, “Scheduled Maintenance.” The changes EPA proposes to approve are described in more detail below.

**A. TAPCR Section 1200-3-20-.01, “Purpose”**

SCHD’s March 2, 2022, SIP revision adopts by reference portions of the December 5, 2018, state-effective version of TAPCR Chapter 1200-3-20, which includes TAPCR Section 1200-3-20-.01. Changes to City of Memphis Air Code Section 9-12-24 with respect to TAPCR Section 1200-3-20-.01 are consistent with TDEC’s January 20, 2023, SIP revision, which EPA approved on June 23, 2023.<sup>14</sup> These changes are minor, are not responsive to the 2015 SIP call,

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<sup>13</sup> The June 30, 2023, letter from TDEC is included in the docket for this NPRM, as is SCHD’s June 29, 2023, letter regarding withdrawal of certain provisions.

<sup>14</sup> See 88 FR 41031 (June 23, 2023).

and are otherwise consistent with the CAA. Specifically, they include removing the list of examples of sources that are considered to be an “air contaminant source.” The definition of “air contaminant source” is also included elsewhere in the Shelby County portion of the SIP—specifically, under City of Memphis Air Code Section 9-12-1, “Definitions,” which adopts by reference TAPCR Chapter 1200-3-2, “Definitions,” as approved on June 15, 1989.<sup>15</sup> This revision would remove the redundancy of this term in the Shelby County portion of the Tennessee SIP and would not relax the applicability of the regulations in City of Memphis Air Code Section 9-12-24. Accordingly, EPA is proposing to approve the requested change to this regulation.

**B. TAPCR Section 1200-3-20-.02, “Reasonable Measures Required”**

The March 2, 2022, SIP revision to the adoption by reference under City of Memphis Air Code Section 9-12-24 of TAPCR Section 1200-3-20-.02 contains substantive changes that are not responsive to the 2015 SIP call but that either strengthen or do not alter the stringency of the Shelby County portion of the Tennessee SIP and are otherwise consistent with the CAA.

Existing paragraph (1) of the SIP-approved version of the adoption by reference of TAPCR Section 1200-3-20-.02 under City of Memphis Air Code Section 9-12-24, “Reasonable Measures Required,” provides, in part, that for sources that are in or are significantly affecting a nonattainment area, “failures that are caused by poor maintenance, careless operation or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions, and shall be considered in violation of the emission standard exceeded and this rule.” The revision removes the statement that such equipment failures “shall be considered in violation of the emission standard exceeded and this rule.” This revision simply eliminates unnecessary language indicating that a source which experiences an equipment failure is automatically in violation of applicable emission standards and the City of Memphis Air Code provision. This change is appropriate because an instance of equipment failure does not always

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<sup>15</sup> See 54 FR 25456 (June 15, 1989).

result in an exceedance of an emission standard.

In addition, SCHD is requesting removal of a portion of this provision that limits the regulation to “sources identified in Tennessee Rule 1200-3-19, or by a permit condition or an order issued by the Board or by the Technical Secretary as being in or significantly affecting a nonattainment area.” The effect of removing this language would be to expand the applicability of the adoption by reference of TAPCR Section 1200-3-20-.02 under City of Memphis Air Code Section 9-12-24 so that the regulation would now apply to all air contaminant sources instead of sources that are in or significantly affecting a nonattainment area only.

These changes do not provide an exemption for any applicable emission standards, nor do they modify any applicable requirements for air contaminant sources. With these changes, all applicable emission standards will continue to apply during all times. EPA is proposing to approve these changes to the adoption by reference of TAPCR Section 1200-3-20-.02 under City of Memphis Air Code Section 9-12-24 in the Shelby County portion of the Tennessee SIP because they are consistent with the CAA.

### **C. TAPCR Section 1200-3-20-.04, “Logs and Reports”**

The changes that SCHD is requesting to this provision through the adoption of TAPCR Section 1200-3-20-.04, “Logs and Reports,” as effective December 5, 2018, are not responsive to the 2015 SSM SIP Action. They include the removal of the existing text of paragraph (2) from the original March 21, 1979, SIP-approved version of the adoption by reference of TAPCR Section 1200-3-20-.04 under City of Memphis Air Code Section 9-12-24 and replacement of the removed paragraph with the word “Reserved.” EPA approved Tennessee’s revision to this regulation in 2016.<sup>16</sup> Existing paragraph (2) provides that all sources located in or having a significant impact on a nonattainment area must submit a quarterly report that (1) identifies

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<sup>16</sup> See 81 FR 66826 (September 29, 2016). In the NPRM for that rulemaking, EPA included an evaluation of the impact of this removal on the reporting obligations for major sources, minor sources, and on TDEC’s ability to determine whether sources are operating in compliance with the SIP. See 81 FR 49201 (July 27, 2016). The NPRM also further evaluated the removal of this language with the requirements of section 110(l) and section 193 of the CAA. The effect of this corresponding revision in the Shelby County Air Code is consistent with the effect as evaluated by EPA with respect to Tennessee.

periods of exceedance of an applicable emission limitation, (2) estimates the excess emissions released during such SSM events, and (3) provides total source emissions where such emissions are not otherwise required to be reported under SCHD's adoption by reference of TAPCR Section 1200-3-10-.02 or Chapter 1200-3-16. EPA is proposing to approve this SIP revision as it is consistent with the CAA.

**D. TAPCR Section 1200-3-20-.06, "Scheduled Maintenance"**

In its March 2, 2022, SIP revision, SCHD requests the removal of the adoption by reference of TAPCR Section 1200-3-20-.06, "Scheduled Maintenance," from City of Memphis Air Code Section 9-12-24, as approved in the Shelby County portion of the Tennessee SIP. Although this provision was not SIP-called in the 2015 SSM SIP Action, TAPCR Section 1200-3-20-.06 specifies reporting requirements for any shutdown of air pollution control equipment for necessary scheduled maintenance that will result in excess emissions. Specifically, this regulation requires notification within 24 hours of planned maintenance of air pollution control equipment unless the maintenance is routine, in which case the notifications may be made on an annual basis.

Section 110(l) of the CAA provides that EPA shall not approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA. EPA proposes to approve the removal of this regulation in its entirety because the removal is not expected to cause any increase in emissions. This revision does not remove a prohibition on excess emissions or any specific requirements to minimize those emissions and thus is not a relaxation of a control requirement. Furthermore, as Tennessee noted in its corresponding SIP revision,<sup>17</sup> the routine shutdown of air pollution control equipment described in Section 1200-3-20-.06 is inappropriate.

EPA also notes that a requirement for sources to identify and report any anticipated excess emissions event resulting from control equipment undergoing scheduled maintenance is

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<sup>17</sup> See 88 FR 20443, 20446 (April 6, 2023).

not a CAA-required element of SIPs. The Shelby County portion of the Tennessee SIP contains other reporting requirements that include the reporting of actual excess emissions events once such events have occurred.<sup>18</sup> Thus, the removal from City of Memphis Air Code Section 9-12-24 of the adoption by reference of Section 1200-3-20-.06 would not prevent the receipt of reports of actual excess emissions. EPA proposes to find that removing the adoption by reference of TAPCR Section 1200-3-20-.06 would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA. Furthermore, this removal would be consistent with EPA’s approval of Tennessee’s removal of this regulation from the SIP.<sup>19</sup> Accordingly, EPA is proposing to approve Shelby County’s request to remove the adoption by reference of TAPCR Section 1200-3-20-.06, “Scheduled Maintenance,” from City of Memphis Air Code Section 9-12-24 in the Shelby County portion of the Tennessee SIP.

**E. New TAPCR Section 1200-3-20-.06, “Report Required Upon The Issuance of a Notice of Violation”**

Due to the requested deletion of the adoption by reference of TAPCR Section 1200-3-20-.06, “Scheduled Maintenance,” as discussed above, SCHD is requesting the renumbering of the existing adoption by reference of TAPCR Section 1200-3-20-.07, “Report Required Upon The Issuance of a Notice of Violation,” to TAPCR Section 1200-3-20-.06 under City of Memphis Air Code Section 3-9 in the Shelby County portion of the Tennessee SIP. Shelby County’s March 2, 2022, SIP revision also requests that EPA approve the adoption by reference of Tennessee’s changes to several paragraphs within this regulation, some of which are responsive to the 2015 SIP call. Some of the other changes include regulatory revisions that became state-effective prior to the changes made in response to the 2015 SSM SIP Action.

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<sup>18</sup> For example, Shelby County Air Code adopts by reference TAPCR Chapter 1200-3-10. Under TAPCR Section 1200-3-10-.02, sources are required to report any actual excess emissions if the source has a continuous emissions monitoring system.

<sup>19</sup> See 88 FR 41031, 41033 (June 23, 2023).

The changes to this section that are not in response to the 2015 SSM SIP Action include the renumbering of the adoption by reference of TAPCR Section 1200-3-20-.07, “Report Required Upon the Issuance of a Notice of Violation,” to 1200-3-20-.06, consistent with the removal of the current SIP-approved version of the adoption by reference of Section 1200-3-20-.06, “Scheduled Maintenance,” under City of Memphis Air Code Section 3-9. Shelby County also revises the regulation by splitting the requirements of paragraph .07(1) into two paragraphs, now renumbered as .06(1) and .06(2). The text from current SIP-approved paragraph .07(1) that has been moved to new paragraph .06(1) has been revised to, among other things, improve clarity and ensure consistency with other Tennessee regulations that have been adopted by reference into the City of Memphis Air Code and with the terms defined in City of Memphis Air Code Section 9-12-1 which adopts by reference TAPCR Chapter 1200-3-2, “Definitions.” The revised text also updates internal references to the regulations.

The text from current SIP-approved paragraph .07(1) that has been moved to new paragraph .06(2) has been revised to, among other things, update the citation in the provision to reflect the renumbering of the adoption by reference of TAPCR Section 1200-3-20-.07(2) to 1200-3-20-.06(3).

In a letter dated June 29, 2023, SCHD withdrew several changes submitted in the March 2, 2022, SIP revision that SCHD had determined may not be approvable into the Shelby County portion of the Tennessee SIP based on EPA’s proposed partial disapproval of Tennessee’s SIP call response,<sup>20</sup> including the revisions to the adoption by reference of TAPCR Section 1200-3-20-.06(1). The version of TAPCR Section 1200-3-20-.06(1) adopted by reference under City of Memphis Air Code Section 9-12-24 and submitted in the March 2, 2022, SIP revision contains a cross-reference to TAPCR Section 1200-3-5-.02(1), which EPA proposed to disapprove.<sup>21</sup> Although Tennessee submitted a SIP revision to revise TAPCR Section 1200-3-5-.02(1), EPA

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<sup>20</sup> See 88 FR 20443.

<sup>21</sup> See *id.* at 20446.

determined that the State’s changes to this regulation did not adequately correct the deficiencies and proposed to disapprove this portion of Tennessee’s SIP revision.<sup>22</sup> The D.C. Circuit upheld the EPA’s SIP call for former TAPCR Sections 1200-3-20-.07(1) and 1200-3-20-.07(3) (now Sections 1200-3-20-.06(1), 1200-3-20-.06(2), and 1200-3-20-.06(4)) in *Environ. Comm. Fl. Elec. Power v. EPA* on the basis that they are impermissible “overbroad enforcement discretion” provisions.<sup>23</sup> In light of the D.C. Circuit decision, SCHD intends to resubmit the language in those provisions to remove the remaining “overbroad enforcement discretion” language therein. SCHD will be in a position to do that after Tennessee has made a determination about how to revise those provisions and the updated regulations have been adopted into the air codes for Shelby County and the included municipalities.

EPA is proposing to approve SCHD’s revisions to the adoption by reference of new TAPCR Section 1200-3-20-.06(2) (former TAPCR Section 1200-3-20-.07(1), now renumbered to .06(2)), which include removing the language which States that the report detailing the circumstances of the excess emissions will be used “to assist the Technical Secretary in deciding whether to excuse or proceed upon the violation.” By removing this phrase, the provision will no longer appear to provide an impermissible discretionary exemption from SIP emission limits. In addition, the adoption by reference of new TAPCR Section 1200-3-20-.06(2) includes minor updates to the wording for clarification purposes. By removing the ambiguous language in TAPCR Section 1200-3-20-.06(2) that EPA SIP-called as an impermissible discretionary exemption, SCHD has addressed the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to the adoption by reference of TAPCR Section 1200-3-20-.06(2).

EPA is also proposing to approve SCHD’s revisions to the adoption by reference of new TAPCR Section 1200-3-20-.06(3) (former Section 1200-3-20-.07(2), now renumbered to .06(3)),

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<sup>22</sup> TDEC ultimately withdrew its changes to 1200-3-5-.02(1). See 88 FR 20443 (April 6, 2023) and 88 FR 41031 (June 23, 2023).

<sup>23</sup> See *Environ. Comm. Fl. Elec. Power v. EPA*, 94 F.4th 77, 114 (D.C. Cir. 2024). Sections 1200-3-20-.06(1) and (2) were formerly part of 1200-3-20-.07(1), and Section 1200-3-20-.06(4) was formerly 1200-3-20-.07(3).

which describes the contents of the report required to be submitted to the State when a notice of violation is issued. The only changes made to this paragraph are minor wording and punctuation changes.

Next, SCHD submitted revisions to the adoption by reference of new TAPCR Section 1200-3-20-.06(4) (former Section 1200-3-20-.07(3)), including wording changes, in the March 2, 2022, SIP revision. However, due to an adverse comment EPA received during the public comment period for the April 6, 2023, NPRM, regarding Tennessee's revisions to this provision, SCHD withdrew from EPA's consideration the adoption by reference of TAPCR Section 1200-3-20-.06(4).

The March 2, 2022, SIP revision also includes the adoption by reference of TAPCR Section 1200-3-20-.06(5), which lists various types of sources and "de minimis" emission levels, below which no notice of violation(s) of certain pollutant limits will be automatically issued and SSM exemptions may apply. However, as part of the March 2, 2022, SIP revision, SCHD requested that paragraph (5) not be incorporated into the Shelby County portion of the Tennessee SIP at this time.

In paragraph .06(6), which was not SIP-called, the following statement has been added: "No emission during periods of malfunction, start-up, or shutdown that is in excess of the standards in Division 1200-03 or any permit issued thereto shall be allowed which can be proved to cause or contribute to any violations of the Ambient Air Quality Standards contained in TAPCR Chapter 1200-3-3 or the National Ambient Air Quality Standards." As revised, this paragraph simply notes that excess emissions during periods of SSM which are known to cause or contribute to violations of ambient air quality standards are not allowed. EPA notes that, while this provision does not convey an inaccurate concept, in light of the D.C. Circuit decision, EPA is continuing its longstanding interpretation that emission limits in the SIP, whether intended to provide for attainment and maintenance of the national ambient air quality standards (NAAQS) or otherwise, must be continuous. Any excess emissions that would violate an

applicable SIP emission limitation are not allowed, regardless of whether they can be proved to cause or contribute to violations of any ambient air quality standards, and regardless of whether they occur during periods of SSM. With Shelby County's changes to the adoption by reference of TAPCR Chapter 1200-3-20, there are no specific exemptions from applicable SIP emission limitations in this Chapter.

For the reasons described in this Section II.E, EPA is proposing to approve SCHD's March 2, 2022, SIP revision to City of Memphis Air Code Section 9-12-24, which incorporates by reference the portions of TAPCR Section 1200-3-20-.06, as renumbered from 1200-3-20-.07, that have not been withdrawn in the letter dated June 29, 2023. Specifically, with respect to the adoption by reference of new TAPCR Section 1200-3-20-.06, EPA is proposing to approve: the re-numbering of this provision from TAPCR Section 1200-3-20-.07 to TAPCR Section 1200-3-20-.06, splitting former TAPCR Section 1200-3-20-.07, paragraph (1), into paragraphs (1) and (2); and the textual revisions to new TAPCR Section 1200-3-20-.06, paragraphs (2), (3), and (6). The portions of the March 2, 2022, SIP revision that SCHD has withdrawn from EPA's consideration as a SIP revision include the adoption by reference of TAPCR Section 1200-3-20-.06, paragraphs (1) and (4) (SCHD's June 29, 2023, letter withdrawing these provisions is included in the docket for this proposed rulemaking.) and (5) (SCHD requests in its March 2, 2022, SIP revision that this provision not be incorporated into the Shelby County portion of the Tennessee SIP). As noted above in this Section II.E, SCHD plans to reevaluate and resubmit at a later date a revised version of these provisions. The withdrawal of these provisions from EPA's consideration is relevant to EPA's previous finding of failure to submit for those SIP-called provisions. The finding of failure to submit for Shelby County will continue to remain in effect and will be considered in a separate action.

**F. New TAPCR Section 1200-3-20-.07, "Special Reports Required"; New TAPCR Section 1200-3-20-.08, "Rights Reserved"; and New TAPCR Section 1200-3-20-.09, "Additional Sources Covered"**

EPA is proposing to approve Shelby County's request to incorporate the non-substantive changes to the code that adopt by reference TAPCR Sections 1200-3-20-.07 and 1200-3-20-.08. Additionally, EPA is proposing to approve Shelby County's request to incorporate the adoption by reference of TAPCR Section 1200-3-20-.09, as renumbered from 1200-3-20-.10, which includes other minor edits to assign a number to the provision now included as paragraph .09(1) and to include parentheses around existing text in this provision. EPA is proposing to approve these revisions.

### **III. Proposed Action**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Based on the analysis in section II of this NPRM, EPA is proposing to approve the portion of Tennessee's March 2, 2022, SIP revision that makes changes to the Shelby County portion of the Tennessee SIP under City of Memphis Air Code Section 9-12-24 (formerly Section 16-87), which adopts by reference portions of TAPCR Chapter 1200-3-20 as effective on December 5, 2018. Specifically, EPA is proposing to approve the changes to the adoption by reference of Section 1200-3-20-.01, "Purpose"; Section 1200-3-20-.02, "Reasonable Measures Required"; Section 1200-3-20-.04, "Logs and Reports"; Section 1200-3-20-.06, "Report Required Upon the Issuance of Notice of Violation," renumbered from 1200-3-20-.07, except for 1200-3-20-.06(1), 1200-3-20-.06(4), and 1200-3-20-.06(5); Section 1200-3-20-.07, "Special Reports Required," renumbered from 1200-3-20-.08; and Section 1200-3-20-.09, "Additional Source Covered," renumbered from 1200-3-20-.10. EPA is also proposing to approve the addition of Section 1200-3-20-.08, "Rights Reserved." EPA is also proposing to approve the removal of Section 1200-3-20-.06, "Scheduled Maintenance."

EPA is not reopening the 2015 SSM SIP Action nor soliciting comment on the rationale for issuing the 2015 SIP call to Shelby County or the 2022 finding of failure to submit in response to the 2015 SIP call for Shelby County. EPA is taking comment on whether the

proposed revisions to the Shelby County portion of the Tennessee SIP are consistent with CAA requirements and whether these changes remedy the substantial inadequacies in the specific Tennessee SIP provisions identified in the 2015 SSM SIP Action.

#### **IV. Incorporation by Reference**

In this document, EPA is proposing to include in a final rule regulatory text that includes incorporation by reference.<sup>24</sup> In accordance with the requirements of 1 CFR 51.5, and as discussed in sections I through III of this preamble, EPA is proposing to incorporate by reference, with certain exceptions, City of Memphis Air Code Section 9-12-24, locally effective on February 22, 2022, which itself adopts by reference TAPCR Chapter 1200-3-20, as State effective on December 5, 2018.<sup>25</sup> These revisions are intended, in part, to conform Shelby County's regulations with the State of Tennessee's SIP-approved regulations. EPA has made and will continue to make these materials generally available through <https://www.regulations.gov> and at the EPA Region 4 Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information).

#### **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. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State

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<sup>24</sup> EPA's proposed approval of the changes to and incorporation by reference of City of Memphis Air Code Section 9-12-24 also includes the approval of substantively identical changes to regulations/ordinances submitted for Shelby County and the other included municipalities and the incorporation by reference of those impacted sections in these jurisdictions. See footnote 3, above.

<sup>25</sup> EPA is not proposing to incorporate by reference into the Shelby County portion of the Tennessee SIP the adoption by reference of TAPCR Section 1200-3-20-.03, 1200-03-20-.06(1), 1200-3-20-.06(4), and 1200-03-20-.06(5). If EPA finalizes this action as proposed, it will revise the entry for Section 16-87 in Table 2 of 40 CFR 52.2220(c) to reflect the retention of TAPCR Section 1200-3-20-.03 as State-effective March 21, 1979, and the first sentence of TAPCR Section 1200-3-20-.07(1) as State-effective December 14, 1981, and add an entry for Section 9-12-24 with the exceptions noted in the prior sentence.

law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- 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 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a State program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- 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 CAA.

In addition, the SIP 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 country, 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 (65 FR 67249, November 9, 2000).

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.”

The air agency did not evaluate EJ 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 proposed action. Due to the nature of the action being proposed here, this proposed 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 proposed action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving EJ for communities with EJ concerns.

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: September 6, 2024.

**Jeaneanne Gettle,**  
*Acting Regional Administrator,*  
*Region 4.*

