

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 52

EPA-HQ-OAR-2009-0670; FRL-]

**Finding of Failure to Submit State Implementation Plans Required for the
1997 Particulate Matter Less Than 2.5 Micrometer (PM_{2.5}) National Ambient Air Quality
Standards (NAAQS)**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The EPA is taking a final action in which it finds that three states, Georgia, Illinois, and Pennsylvania, have failed to submit State Implementation Plans (SIPs) to satisfy requirements of the Clean Air Act (CAA) for attaining the 1997 National Ambient Air Quality Standards (NAAQS) for particulate matter less than 2.5 micrometers (PM_{2.5}). Under the CAA and EPA's implementing regulations, states with nonattainment areas were required to submit SIPs by April 5, 2008, demonstrating how each nonattainment area would attain the 1997 PM_{2.5} standards as expeditiously as practicable. If within 18 months of the effective date of this notice EPA has not determined that the state has submitted the required nonattainment plan, then any new or modified source in the nonattainment area will be required to obtain emission reduction offsets that exceed its emission increases on a two-to-one basis. If within 24 months of the effective date of this notice EPA has not determined that the state has submitted the required SIP, then the highway funding sanction also will apply in the nonattainment area. No later than 2 years after EPA makes the finding, EPA must promulgate a Federal Implementation Plan (FIP) if the state has not submitted the required nonattainment SIP and EPA has not approved it.

DATE: Effective Date. This action is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: General questions concerning this notice should be addressed to Mr. Butch Stackhouse, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code: C504-2, 109 T.W. Alexander Drive, Research Triangle Park, N.C. 27711; telephone (919) 541-5208.

SUPPLEMENTARY INFORMATION:

For questions related to a specific state please contact the appropriate regional office:

Regional Offices	States
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Table of Contents:

- I. Background
 - A. Statutory Requirements
 - B. Consequences of Findings of Failure to Submit
- II. This Action
- III. Statutory and Executive Order Reviews
 - A. Notice and Comment Under the Administrative Procedures Act
 - B. Effective Date Under the Administrative Procedures Act
 - C. Executive Order 12866: Regulatory Planning and Review
 - D. Paperwork Reduction Act

- E. Regulatory Flexibility Act (RFA)
- F. Unfunded Mandates Reform Act
- G. Executive Order 13132: Federalism
- H. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- I. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
- J. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
- K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
- L. National Technology Transfer and Advancement Act
- M. Congressional Review Act
- N. Judicial Review

I. Background

The CAA requires states with areas that are designated nonattainment for the 1997 PM_{2.5} NAAQS to develop a SIP providing how the state will attain the NAAQS. Section 172 of the CAA specifies the required elements of a SIP for an area designated nonattainment for the 1997 PM_{2.5} NAAQS. These requirements include, but are not limited to, an attainment demonstration, reasonably available control measures (RACM) and reasonably available control technology (RACT), annual emissions reductions to ensure reasonable further progress (RFP), and contingency measures. Most states with PM_{2.5} nonattainment areas designated in 2005 have submitted SIPs addressing these requirements as required under the CAA and EPA's implementing regulations. However, three states (Georgia, Illinois, and Pennsylvania) have not yet submitted SIPs to satisfy these requirements for four PM_{2.5} nonattainment areas. By this action, EPA is making a finding that these states have failed to submit the required SIPs for these areas.

A. Statutory Requirements

On July 18, 1997, EPA promulgated the NAAQS for fine particles (PM_{2.5}). The 1997

annual standard was set at a level of 15 micrograms per cubic meter, based on the 3-year average of annual mean PM_{2.5} concentrations. The 1997 24-hour standard was set at a level of 65 micrograms per cubic meter, based on the 3-year average of the 98th percentile of 24-hour concentrations. (62 FR 38652). These standards remain in effect. See 40 CFR section 50.7

The designation of PM_{2.5} nonattainment areas was delayed due to the need to obtain 3 years of data from an expanded nationwide air quality monitoring network, as well as due to a series of legal challenges to the 1997 standards which were resolved in 2002. See Whitman v. American Trucking Associations, Inc., 121 S.Ct. 903 (2001). The Transportation Equity Act for the Twenty-first Century revised the deadline for promulgation of designations to December 31, 2004, in order to provide additional time to collect air quality monitoring data, obtain designation recommendations from the states, and finalize the designation process.

The PM_{2.5} designations based on 2001-2003 air quality data were published in the Federal Register on January 5, 2005 (70 FR 943). A total of 47 nonattainment areas were identified. EPA noted that because 2004 air quality data was just becoming available, it would consider such data and modify the designations as appropriate prior to the April 5, 2005, effective date. EPA issued a supplemental notice on April 5, 2005, (70 FR 19844; published April 14, 2005) indicating that eight areas changed status to attainment based on consideration of 2002-2004 data, resulting in a final list of 39 areas designated as nonattainment for the 1997 PM_{2.5} NAAQS.

On April 25, 2007 (72 FR 20586), EPA published a final rule describing the requirements for implementation plans designed to meet the 1997 PM_{2.5} standards (the “PM_{2.5} Implementation Rule”). Section 172 of the CAA requires states with nonattainment areas to submit nonattainment SIPs within 3 years of the effective date of the designation. Therefore, the

PM_{2.5} plans were required to be submitted by April 5, 2008.

As explained in further detail in the PM_{2.5} Implementation Rule, the key required elements of the nonattainment SIP include the attainment demonstration, RACM and RACT, RFP, and contingency measures. The attainment demonstration is required to show how the nonattainment area would attain the 1997 PM_{2.5} standards as expeditiously as practicable, but no later than April 5, 2010. (Note that for an area with a more severe or complex nonattainment problem, the state could propose in its plan to have an extended attainment date of an additional one to 5 years beyond the initial 5 year period if it meets the statutory and regulatory requirements.) The attainment demonstration takes into account projected emission reductions from existing federal and state measures, plus any additional RACM/RACT that can be adopted by the state to attain “as expeditiously as practicable.” Air quality modeling of these projected emissions reductions in future years is an important element of the attainment demonstration.

Each nonattainment SIP must include RACM and RACT as necessary for the area to attain the 1997 PM_{2.5} NAAQS. The CAA requires the state to demonstrate that it has adopted all RACM, considering economic and technical feasibility and other factors, that are needed to show that the area will attain the fine particle standards as expeditiously as practicable. The PM_{2.5} Implementation Rule sets forth more specific requirements and guidance for making RACM and RACT determinations.

Each plan must also ensure that the area is making RFP in terms of emission reductions and air quality improvements toward attainment. The PM_{2.5} Implementation Rule provides that, for areas with an attainment date within 5 years of designation, the attainment demonstration is considered to satisfy the RFP requirement. Areas with attainment dates beyond 2010 are

required to submit an RFP plan according to the requirements in the implementation rule.

SIPs must also include contingency measures, which are emission reduction measures to be undertaken if the area fails to satisfy the RFP requirement or fails to attain the standards by the attainment date. These measures are to take effect without significant further action by the state or EPA.

We note that several PM_{2.5} nonattainment areas currently have air quality that attains the level of the 1997 PM_{2.5} NAAQS, but have not yet completed the process for redesignating the area to attainment. Under EPA's "Clean Data Policy," certain nonattainment SIP submission requirements may be suspended if the area is monitoring attainment. See 40 CFR 50.1004(c). EPA identifies these areas through clean data determinations published in the Federal Register. Pursuant to 40 CFR 51.1004, the states' obligation to submit the RACM/RACT, contingency measures, RFP, and attainment demonstrations are stayed as of the effective date of a final approval of the clean air determination for these areas. This stay will remain in effect for so long as the area remains in attainment and will no longer apply if the area is redesignated to attainment. For this reason, states with areas that have received final clean data determinations are not subject to the final action in this notice.

B. Consequences of Findings of Failure to Submit

Section 179(a)(1) of the CAA establishes specific consequences if EPA finds that a state has failed to submit a SIP or, with regard to a submitted SIP, if EPA determines it is incomplete or if EPA disapproves it. Additionally, any of these findings also triggers an obligation for EPA to promulgate a FIP if the state has not submitted, and EPA has not approved, the required SIP within 2 years of the finding. CAA section 110(c). The first finding, that a state has failed to

submit a plan or one or more elements of a plan required under the CAA, is the finding that EPA is making in this action.

EPA is finding that three states have failed to make the required nonattainment SIP submissions for four nonattainment areas. If EPA has not affirmatively determined that a state has made the required complete nonattainment SIP submission within 18 months of the effective date of this action, 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 area subject to the finding. If EPA has not affirmatively determined that the state has made a complete submission within 6 months after the emission offset sanction is imposed, then the highway funding sanction will also apply in areas designated nonattainment, in accordance with CAA section 179(b)(1) and 40 CFR 52.31. The 18-month clock will stop and the sanctions will not take effect if, within 18 months after the date of the finding, EPA finds that the state has made a complete nonattainment SIP submission for each area for which the findings is made. In addition, EPA is not required to promulgate a FIP if the state makes the required SIP submittal, and EPA takes final action to approve the submittal, within 2 years of EPA's finding.

At approximately the same time as the signing of this notice, EPA Regional Administrators are sending letters to the states of Georgia, Illinois, and Pennsylvania, informing them that EPA is determining that they have failed to make one or more of the required SIP submissions for the specified areas. These letters, and any accompanying enclosures, have been included in the docket to this rulemaking.

II. This Action

In this action, EPA is making a finding of failure to submit for three states with regard to

the PM_{2.5} nonattainment areas listed below. In each case, the state failed to submit one or more of the required nonattainment SIP elements identified in the CAA and in the PM_{2.5}

Implementation Rule:

- attainment demonstration (including emission inventory and modeling; CAA section 172(c)(1) and (3), and 40 CFR 51.1007 and 1008);
- RACM/RACT (CAA section 172(c)(1) and 40 CFR 51.1010);
- RFP (CAA sections 172(c)(2) and 40 CFR 51.1009); and
- contingency measures (CAA sections 172(c)(9) and 40 CFR 51.1012).

In accordance with CAA section 179, this finding starts the 18-month emission offset sanctions clock, the 24-month highway funding sanctions clock, and a 24-month clock for the promulgation by EPA of a FIP. This action will be effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

<u>State</u>	<u>Area</u>
Georgia	Atlanta
Illinois	St. Louis (Illinois portion only)
Pennsylvania	Liberty-Clairton
Pennsylvania	Philadelphia-Wilmington (PA portion only)

III. Statutory and Executive Order Reviews

A Notice and Comment Under the Administrative Procedure Act

This is a final EPA action, but is not subject to notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553(b). EPA believes that, because of the limited time provided to make findings of failure to submit regarding SIP submissions, Congress did not intend such findings to be subject to notice-and-comment rulemaking. However, to the extent such findings are subject to notice-and-comment rulemaking, EPA invokes the good cause

exception pursuant to the APA, 5 U.S.C. 553(b)(3)(B). Notice and comment are unnecessary because no EPA judgment is involved in making a nonsubstantive finding of failure to submit elements of SIP submissions required by the CAA. Furthermore, providing notice and comment would be impracticable because of the limited time provided under the statute for making such determinations. Finally, notice and comment would be contrary to the public interest because it would divert agency resources from the critical substantive review of complete SIPs. See 58 FR 51270, 51272, n.17 (Oct. 1, 1993); 59 FR 39832, 39853 (Aug. 4, 1994).

B. Effective Date Under the Administrative Procedure Act

This action will be effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Under the APA, 5 U.S.C. 553(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the Federal Register if the agency has good cause to specify an earlier effective date. This action concerns SIP submissions that are already overdue. In addition, this action simply starts a “clock” that will not result in sanctions against the states for 18 months, and that the states may “turn off” by submitting complete SIPs to EPA. These reasons support an effective date prior to 30 days after the date of publication.

C. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review by the Office of Management and Budget (OMB) under the Executive Order.

D. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). This

rule relates to the requirement in the CAA for states to submit SIPs under section Part D of title I of the CAA to satisfy elements required for the 1997 PM_{2.5} NAAQS. The present final rule does not establish any new information collection requirement.

E. Regulatory Flexibility Act (RFA)

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because, although the rule is subject to the APA, the Agency has invoked the “good cause” exemption under 5 USC 553(b), therefore it is not subject to the notice and comment requirement. Thus Executive Order 13132 does not apply to this action.

F. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1998 (UMRA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This action imposed no enforceable duty on any state, local, or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any new obligations or enforceable duties on any

small governments.

G. Executive Order 13132: Federalism

This final rule 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, as specified in Executive Order 13132. The CAA establishes the scheme whereby states take the lead in developing plans to meet the NAAQS and the federal government acts as a backstop where states fail to take the required actions. This rule will not modify the relationship of the states and EPA for purposes of developing programs to implement the NAAQS. Thus, Executive Order 13132 does not apply to this rule.

H. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule responds to the requirement in the CAA for states to submit SIPs to satisfy the nonattainment area requirements of the CAA for the 1997 PM_{2.5} NAAQS. The CAA requires states with areas that are designated nonattainment for the NAAQS to develop a SIP describing how the state will attain and maintain the NAAQS. The rule will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the federal government and Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this action.

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

This final rule is not subject to the Executive Order because it is not economically

significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action does not directly affect the level of protection provided to human health or the environment.

J. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. In this action, EPA is finding that several states have failed to submit SIPs to satisfy the nonattainment area requirement of the CAA for the PM_{2.5} NAAQS.

K. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

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

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not directly affect the level of protection provided to human health or the environment.

M. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5

U.S.C. 804(2). This rule will be effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

N. 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 District of Columbia Circuit Court within 60 days from the date final is action is published in the Federal Register. 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 must be filed, and shall not postpone the effectiveness of action.

Thus, any petitions for review of this action making findings of failure to submit PM_{2.5} SIPs for the nonattainment areas identified in section II above, must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the Federal Register.

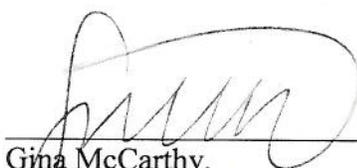
Page 15 of 15 - Finding of Failure to Submit State Implementation Plans Required for the 1997 Particulate Matter Less Than 2.5 Micrometer (PM_{2.5}) National Ambient Air Quality Standards (NAAQS)

LIST OF SUBJECTS IN 40 CFR PART 52

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: _____

11/19/09



Gina McCarthy,
Assistant Administrator,
Office of Air and Radiation.