

The EPA Assistant Administrator for Air and Radiation, William L. Wehrum, signed the following notice on 11/29/2017, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2017-0667. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 52

[EPA-HQ-OAR-2017-0667; FRL-_____]

Findings of Failure to Submit State Implementation Plan Submittals for the 2008 Ozone National Ambient Air Quality Standards (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is taking final action to find that three states have failed to submit timely revisions to their state implementation plans (SIPs) as required to satisfy certain requirements under the Clean Air Act (CAA) for implementation of the 2008 ozone National Ambient Air Quality Standards (2008 ozone NAAQS). These findings of failure to submit apply to states with overdue SIP revisions (or attainment plans) for nonattainment areas reclassified from “Marginal” to “Moderate” in May 2016 because the areas failed to attain the 2008 ozone NAAQS by the Marginal area attainment date of July 20, 2015. The SIP revisions to address all applicable Moderate area attainment plan requirements for these areas were due on January 1, 2017. This action requires the affected states to timely submit a SIP revision consistent with the requirements of the CAA and the EPA regulations. If a state fails to

make the required timely SIP submittal, or if a submitted SIP is incomplete, the CAA requires the imposition of sanctions for the affected area(s). In addition, the EPA is obligated to promulgate a federal implementation plan (FIP) to address any outstanding SIP requirements if a state does not submit, and the EPA does not approve, a state's submittal within 24 months of the effective date of these findings.

DATES: The effective date of this action is **[INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2017-0667. All documents in the docket are listed and publicly available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information 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 either electronically at <http://www.regulations.gov> or in hard copy at the EPA Docket Center (EPA/DC), EPA WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Office of Air and Radiation Docket and Information Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Ms. Virginia Raps, Office of Air Quality Planning and Standards, Air Quality Policy Division, U.S. Environmental Protection Agency, Mail Code: C539-01, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711; by telephone (919) 541-4383; or by email at raps.virginia@epa.gov.

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Notice and Comment Under the Administrative Procedure Act (APA)

Section 553 of the APA¹ provides that, when an agency for good cause finds that notice and public procedures are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for making this final agency action without prior proposal and opportunity for comment because no significant EPA judgment is involved in making findings of failure to submit SIPs, or elements of SIPs. Rather, the findings are required by the CAA where states have made no submissions to meet the SIP requirements, or where the EPA has separately determined that they made incomplete submissions. Thus, notice and public procedures are unnecessary. The EPA finds that this constitutes good cause under 5 U.S.C. § 553(b)(3)(B).

B. How can I get copies of this document and other related information?

In addition to being available in the docket, an electronic copy of this action will be posted at <https://www.epa.gov/ozone-pollution/2008-ozone-national-ambient-air-quality-standards-naaqs-nonattainment-actions>.

C. Where do I go if I have a specific state question?

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

¹ See 5 U.S.C. §553(b)(3)(B).

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Regional Offices	States
EPA Region 2: Rick Ruvo, Chief, Air Programs Branch, 290 Broadway, New York, NY 10007.	New Jersey
EPA Region 5: John Mooney, Chief, Air Programs Branch, 77 West Jackson Blvd, Chicago, IL 60604.	Illinois
EPA Region 9: Doris Lo, Chief, Rulemaking Office; Anita Lee, Acting Chief, Planning Office; or Gerardo Rios, Chief, Permits Office, 75 Hawthorne Street, San Francisco, CA 94105.	California

D. How is the preamble organized?

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II. Background

On March 27, 2008, the EPA issued its final rule to revise the ozone NAAQS establishing new 8-hour standards to provide the necessary protection of public health and welfare.² In that action, the EPA promulgated identical standards of 0.075 parts per million (ppm) for the primary and secondary standards.³ Those standards are met when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.075 ppm.⁴

Promulgation of a revised NAAQS triggers a requirement for the EPA to designate areas of the country as nonattainment, attainment, or unclassifiable for the standards. For any revised ozone NAAQS, the EPA must classify each nonattainment area based on the severity of the ozone levels.⁵ The severity of ozone levels is determined based on an area's "design value," which is an indicator of the ozone levels in the area during the most recent 3 years.⁶ The possible classifications for ozone nonattainment areas are, in order from "lowest" to "highest" diversion from the standard, Marginal, Moderate, Serious, Severe and Extreme.⁷ Nonattainment areas with

² National Ambient Air Quality Standards for Ozone; final rule (73 FR 16436; March 27, 2008).

³ Since the 2008 primary and secondary NAAQS for ozone are identical, the EPA refers to both as the "2008 ozone NAAQS."

⁴ See 40 CFR 50.15. The 8-hour primary and secondary ozone standards are met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.075 ppm.

⁵ See CAA section 107(d)(1) and CAA section 181(a)(1).

⁶ The 8-hour ozone design value occurs at the area's ambient air quality monitoring site having the highest fourth-highest 8-hour concentration of ozone during a 3-year period.

⁷ See CAA section 181(a)(1).

a “lower” classification have ozone levels that are closer to the standard than areas with a “higher” classification.

On May 21, 2012, and June 11, 2012, the EPA issued rules designating 46 areas throughout the country as nonattainment for the 2008 ozone NAAQS (both rules were effective July 20, 2012), and establishing classifications for the designated nonattainment areas.⁸ Thirty-six of these areas were classified as Marginal; the remaining 10 areas were classified as Moderate or higher. All 46 areas are subject to the general nonattainment area planning requirements of CAA section 172 and also to the ozone-specific planning requirements of CAA section 182.⁹

Ozone nonattainment areas of lower classifications have fewer and less stringent mandatory air quality planning and control requirements than those of higher classifications. For a Marginal area, a state is required to provide a baseline emissions inventory, adopt regulations to receive emissions statements from major stationary sources, and implement a nonattainment New Source Review (NSR) program for the relevant ozone standard.¹⁰ For a Moderate area, a state is required to comply with all the Marginal area requirements and, in addition, submit an analysis demonstrating how the area will attain the 2008 ozone NAAQS no more than 6 years from the effective date of initial designation to nonattainment. A state is also required to adopt and implement certain emissions controls, such as Reasonably Available Control Technology (RACT), for new or modified major stationary sources, apply greater emissions offsets than required for a Marginal area under the state's nonattainment NSR program, develop a basic

⁸ Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards; final rule (77 FR 30088; May 21, 2012 and 77 FR 34221; June 11, 2012).

⁹ States within the Ozone Transport Region are further subject to CAA section 184.

¹⁰ See CAA section 182(a).

vehicle inspection and maintenance program consistent with established population criteria, meet certain Rate of Progress or Reasonable Further Progress (RFP) requirements, and develop contingency measures for failure to meet RFP or timely attain the NAAQS.

On March 6, 2015, the EPA established a final implementation rule for the 2008 ozone NAAQS (2008 Ozone SIP Requirements Rule).¹¹ That action detailed the attainment planning and control requirements applicable to ozone nonattainment areas and also established timelines for SIP submittals and compliance dates for implementing RACT in areas classified Moderate and above.

The attainment date for the 36 nonattainment areas initially classified as Marginal for the 2008 ozone NAAQS was July 20, 2015. On May 4, 2016, the EPA determined that for 11 of these areas, states failed to attain the standard by the attainment date and did not qualify for a 1-year attainment date extension. By operation of law, such areas were reclassified to Moderate. In the same action, the EPA established January 1, 2017, as the deadline for states to submit Moderate area attainment plans for those reclassified areas and for implementing RACT.¹² The EPA reclassified two additional areas from Marginal to Moderate in December 2016, both of which were also subject to the January 1, 2017, SIP submission and RACT compliance due dates.^{13, 14}

¹¹ Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements; final rule (80 FR 12264; March 6, 2015).

¹² See 80 FR 12264; March 6, 2015, Section III.D.1.b., What are the SIP requirements for the 2008 ozone NAAQS?

¹³ Determination of Nonattainment and Reclassification of the Houston-Galveston-Brazoria 2008 8-Hour Ozone Nonattainment Area; Texas; final rule (81 FR 90207; December 14, 2016).

¹⁴ Reclassification of the Sheboygan, Wisconsin Area to Moderate Nonattainment for the 2008 Ozone National Ambient Air Quality Standards; final rule (81 FR 91841; December 19, 2016).

III. Consequences of Findings of Failure to Submit

For plan requirements under subpart D, title I of the CAA, such as those for ozone nonattainment areas, if the EPA finds that a state has failed to make the required SIP submittal or that a submitted SIP is incomplete, then CAA section 179 establishes specific consequences, including the eventual imposition of mandatory sanctions for the affected area(s).¹⁵ Additionally, such a finding triggers an obligation under CAA section 110(c) for the EPA to promulgate a FIP no later than 2 years from the effective date of the finding, if the affected state has not submitted, and the EPA has not approved, the required SIP submittal.¹⁶

If the EPA has not affirmatively determined that a state has submitted a complete SIP addressing the deficiency that is the basis for these findings within 18 months of the effective date of this rulemaking, or the submittal has not become complete by operation of law 6 months after submittal, then pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b)(2) will apply in the affected nonattainment area. If the EPA has not affirmatively determined that the state has submitted a complete SIP addressing the deficiencies that are the basis for these findings within 6 months after the offset sanction is imposed, or the submittal has not become complete by operation of law 6 months after submittal, then the highway funding sanction will apply in the affected nonattainment area, in accordance with CAA section 179(b)(1) and 40 CFR 52.31. The state must make the required SIP submittal and the EPA must take final action to approve the submittal within 2 years of the effective date

¹⁵ See 42 U.S.C. § 7509.

¹⁶ See 42 U.S.C. § 7410(c).

of these findings; otherwise, the EPA is required to promulgate a FIP. This is required pursuant to CAA section 110(c), for the affected nonattainment area.

IV. Findings of Failure to Submit for States that Failed to Make a Moderate

Nonattainment Area SIP submittal

Based on a review of SIP submittals received as of the date of this final action, the EPA is finding that the states listed in Table 1 have failed to submit specific SIP elements for the 2008 ozone NAAQS required under subpart 2 of part D of title 1 of the CAA.

Table 1. Findings of Failure to Submit Certain Required SIP Elements for 2008 Ozone NAAQS Nonattainment Areas

Region	State	Area Name	Required SIP Elements
2	NJ	New York-N. New Jersey- Long Island	<ul style="list-style-type: none"> Contingency measures for volatile organic compounds (VOC) and oxides of nitrogen (NO_x); Ozone attainment demonstration; RACT Non-Control Techniques Guidelines for major stationary sources of VOC; RACT for major stationary sources of NO_x; and RFP for VOC and NO_x for Moderate nonattainment area.
5	IL	Chicago- Naperville	<ul style="list-style-type: none"> Basic Vehicle Inspection and Maintenance (I/M) program; Contingency measures for VOC and NO_x; Nonattainment NSR program for Moderate nonattainment area; Ozone attainment demonstration; RACT Non-Control Techniques Guidelines for major stationary sources of VOC; RACT for major stationary sources of NO_x; and RFP for VOC and NO_x for Moderate nonattainment area.
9	CA	Kern County (Eastern Kern)	<ul style="list-style-type: none"> Nonattainment NSR program for Moderate nonattainment area; and RACT for major sources of NO_x.
9	CA	Mariposa County	<ul style="list-style-type: none"> Emissions Statement; and Nonattainment NSR for Moderate nonattainment area.

9	CA	Nevada County (Western part)	<ul style="list-style-type: none"> • Contingency measures for VOC and NO_x; • Emissions statement; • Ozone attainment demonstration; • RACT Non-Control Techniques Guidelines for major stationary sources of VOC; • RACT for major stationary sources of NO_x; and • RFP for VOC and NO_x for Moderate nonattainment area.
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V. Environmental Justice Considerations

The EPA believes that the human health or environmental risks addressed by this action will not have disproportionately high or adverse human health or environmental effects on minority, low-income, or indigenous populations. This is because it does not directly affect the level of protection provided to human health or environment under the ozone NAAQS. The purpose of this rule is to make findings that three states have failed to provide the EPA with the identified SIP submissions, which are required by the CAA for purposes of implementing the 2008 ozone NAAQS. As such, this action does not directly affect the level of protection provided for human health or the environment. Moreover, it is intended that the actions and deadlines resulting from this notice will lead to greater protection for United States citizens, including minority, low-income, or indigenous populations by ensuring that states meet their statutory obligation to develop and submit SIPs to ensure that areas make progress toward attaining the 2008 ozone NAAQS.

VI. Statutory and Executive Order Reviews

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

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

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B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

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

D. Regulatory Flexibility Act (RFA)

I certify that this rule will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. The rule is a finding that the named states have not submitted the necessary SIP revisions.

E. Unfunded Mandates Reform Act of 1995 (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.

F. 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.

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

This action does not have tribal implications as specified in Executive Order 13175. This rule finds that several states have failed to submit SIP revisions that satisfy the nonattainment area planning requirements under sections 172 and 182 of the CAA for the 2008 ozone NAAQS. No tribe is subject to the requirement to submit an implementation plan under section 172, or under subpart 2 of part D of Title I of the CAA. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it is a finding that several states have failed to submit SIP revisions that satisfy the Moderate nonattainment area planning requirements under sections 172 and 182 of the CAA for the 2008 ozone NAAQS and does not directly or disproportionately affect children.

I. 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.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. In finding that several states have failed to submit SIP revisions that satisfy the Moderate nonattainment area planning requirements under sections 172 and 182 of the CAA for the 2008 ozone NAAQS, this action does not directly affect the level of protection provided to human health or the environment. The results of this evaluation are contained in Section V of this preamble titled “Environmental Justice Considerations.”

L. 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).

M. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit, (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

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The EPA has determined that this final rule consisting of findings of failure to submit certain of the required SIP revisions is "nationally applicable" within the meaning of section 307(b)(1) of the CAA. This final agency action affects three states with Moderate nonattainment areas located in three of the ten EPA Regional offices, and in three different U.S. Federal Circuit Courts (3rd Circuit for New Jersey; 7th Circuit for Illinois; and 9th Circuit for California).

In addition, the EPA has determined that this rule has nationwide scope or effect because it addresses a common core of knowledge and analysis involved in formulating the decision and a common interpretation of the requirements of 40 CFR 51 appendix V applied to determining the completeness of SIPs in states across the country. This determination is appropriate because, in the 1977 CAA Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that an action is of "nationwide scope or effect" would be appropriate for any action that has "scope or effect beyond a single judicial circuit." H.R. Rep. No. 95-294 at 323 - 324, reprinted in 1977 U.S.C.C.A.N. 1402-03. Here, the scope and effect of this action extends to the three judicial circuits that include the states across the country affected by this action. In these circumstances, CAA section 307(b)(1) and its legislative history authorize the Administrator to find the rule to be of "nationwide scope or effect" and, thus, to indicate that venue for challenges lies in the District of Columbia Circuit. Accordingly, the EPA is determining that this rule is of nationwide scope or effect.

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 within 60 days from the date this final action is published in the **Federal Register**. Filing a petition for review by the Administrator of this final action does not affect the finality of the action for the purposes

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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 such rule or action.

List of Subjects in 40 CFR Part 52

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

Dated:

William L. Wehrum,
Assistant Administrator.