ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[NV033-FON; FRL-XX-XXX]

Finding of Failure to Submit a Required State Implementation Plan for Particulate Matter, Nevada–Clark County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to find that Nevada failed to make particulate matter (PM-10) nonattainment area state implementation plan (SIP) submittals required for the Las Vegas Valley Planning Area under the Clean Air Act (CAA or Act). The Las Vegas Planning Area was originally classified as a moderate PM-10 nonattainment area, but was later reclassified as serious. Under certain provisions of the Act, states are required to submit SIPs providing for, among other things, reasonable further progress and attainment of the PM-10 national ambient air quality standards (NAAQS) in areas classified as moderate and serious. The State of Nevada submitted several plans intended to meet these requirements. On June 14, 2000, EPA proposed to disapprove these SIP submittals. On December 5, 2000, prior to any final action by EPA, the State of Nevada withdrew the submittals. As a result of the State's withdrawal of the moderate and serious area SIP submittals, EPA is today finding that Nevada failed to make the PM-10 nonattainment area SIP submittals required for the Las Vegas Valley Planning Area under the Act.

This action triggers the 18-month time clock for mandatory application of sanctions and 2-year time clock for a federal implementation plan (FIP) under the Act. This action is consistent with the CAA mechanism for assuring SIP submissions.

EFFECTIVE DATE: This action is effective as of December 20, 2000.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

A. CAA Planning Requirements

In 1990, Congress amended the Clean Air Act to address, among other things, continued nonattainment of the PM-10 NAAQS.[1]

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[1] EPA revised the NAAQS for PM-10 on July 1, 1987 (52 FR 24672), replacing standards for total suspended particulates with new standards applying only to particulate matter up to 10 microns in diameter (PM-10). At that time, EPA established two PM-10 standards. The annual PM-10 standard is attained when the expected annual arithmetic average of the 24-hour samples for a period of one year does not exceed 50 micrograms per cubic meter (ug/m^3). The 24-hour PM-10 standard of 150 ug/m^3 is attained if samples taken for 24-hour periods have no more than one expected exceedance per year, averaged over 3 years. See 40 CFR 50.6 and 40 CFR part 50, Appendix K.

On July 18, 1997, EPA reaffirmed the annual PM-10 standard, and slightly revised the 24-hour PM-10 standard (62 FR 38651). The revised 24-hour PM-10 standard is attained if the 99th percentile of the distribution of the 24-hour results over 3 years does not exceed 150 ug/m^3 at each monitor within an area.

This finding applies to the outstanding obligation of the

Pub. L. 101-549, 104 Stat. 2399, codified at 42 U.S.C., 7401-7671q (1991). On the date of enactment of the Amendments, PM-10 areas meeting the qualifications of section 107(d)(4)(B) of the amended Act were designated nonattainment by operation of law. These areas included all former Group I areas identified in 52 FR 29383 (August 7, 1987) and clarified in 55 FR 45799 (October 31, 1980), and any other areas violating the PM-10 NAAQS prior to January 1, 1989. The Las Vegas Valley Planning Area was identified in the August 7, 1987, Federal Register (52 FR 29384). A Federal Register action announcing all areas designated nonattainment for PM-10 at enactment of the 1990 amendments was published on March 15, 1991 (56 FR 11101). The boundaries of the Las Vegas Valley nonattainment area (Hydrographic Area 212) are codified at 40 CFR 81.329.

Once an area is designated nonattainment, section 188 of the amended Act outlines the process for classification of the area and establishes the area's attainment date. In accordance with section 188(a), at the time of designation, all PM-10 nonattainment areas, including Las Vegas Valley, were initially classified as moderate by operation of law. Section 188(b)(1) of the Act further provides that moderate areas can subsequently be

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State to submit plans for the Las Vegas Valley Planning Area addressing the 24-hour and annual PM-10 standards, as originally promulgated.

Breathing particulate matter can cause significant health effects, including an increase in respiratory illness and premature death.

reclassified as serious before the applicable moderate area attainment date if at any time EPA determines that the area cannot "practicably" attain the PM-10 NAAQS by that date.

Air monitoring of the Las Vegas Valley during the past 18 years has measured some of the highest PM-10 pollution in the United States. Nevada submitted a moderate area PM-10 plan for the Las Vegas Valley on December 6, 1991. Based on this submittal, EPA determined on January 8, 1993, that the Las Vegas Valley could not practicably attain both the annual and 24-hour standards by the applicable attainment deadline for moderate areas (December 31, 1994, per section 188(c)(1) of the Act), and reclassified the Las Vegas Valley as serious (58 FR 3334). In accordance with section 189(b)(2) of the Act, SIP revisions for the Las Vegas Valley addressing the requirements for serious PM-10 nonattainment areas in section 189(b) and (c) of the Act were required to be submitted by August 8, 1994 and February 8, 1997.

The moderate and serious area requirements, as they currently pertain to the Las Vegas Valley nonattainment area, include:[2]

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[2] EPA has concluded that certain moderate area PM-10 requirements continue to apply after an area has been reclassified to serious. For a more detailed discussion of the planning requirements applicable to the Las Vegas Valley and the relationship between the moderate area and serious area requirements after the reclassification of the area to serious, see 65 FR 37324-37326 (June 14, 2000).

(a) A demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 2001, or an alternative demonstration that attainment by that date would be impracticable and that the plan provides for attainment by the most expeditious alternative date practicable (CAA section 189(b)(1)(A)(i) and (ii));

(b) Quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress toward attainment by December 31, 2001 (CAA section 189(c)).

(c) Provisions to assure that reasonably available control (RACM), including reasonably available control technology (RACT), measures shall be implemented as soon as practicable (CAA section 189(a)(1)(C)); and

(d) Provisions to assure that the best available control measures (BACM), including best available control technology (BACT) shall be implemented no later than four years after the reclassification of the area to a serious nonattainment area (CAA section 189(b)(1)(B).

B. Nevada’s PM-10 SIP Submittals for the Las Vegas Valley

The State of Nevada submitted the following plans that were prepared by the Clark County Department of Comprehensive Planning (CCDCP) to address the CAA’s moderate and serious area requirements for the Las Vegas Valley Planning Area:

1. The PM-10 moderate area nonattainment plan titled “PM-10

Air Quality Implementation Plan, Las Vegas Valley, Clark County, Nevada" (1991 Moderate Plan), submitted to EPA on December 6, 1991;

2. An "Addendum to the 'Moderate Area' PM-10 State Implementation Plan for the Las Vegas Valley" (1995 RACM Addendum), submitted to EPA on February 15, 1995;

3. A BACM analysis plan titled "Providing for the Evaluation, Adoption and Implementation of Best Available Control Measures and Best Available Control Technology to Improve PM-10 Air Quality" (1994 BACM Plan), submitted to EPA on December, 1994; and

4. The PM-10 serious area nonattainment plan for the Las Vegas Valley nonattainment area titled "Particulate Matter (PM-10) Attainment Demonstration Plan" (1997 Serious Plan), submitted to EPA on August 25, 1997.

The term "Moderate Area SIP" in this action refers collectively to the 1991 Moderate Plan and the 1995 RACM Addendum; "Serious Area SIP" refers collectively to the 1994 BACM Plan and the 1997 Serious Plan. These submittals became complete by operation of law.[3]

C. EPA Actions Relating to Nevada's PM-10 SIP Submittals for the Las Vegas Valley

[3] EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

On June 14, 2000, EPA proposed to disapprove both the Moderate Area SIP and the Serious Area SIP for the Las Vegas Valley Planning Area. See 65 FR 37324. Two comments supporting our proposed action were received.

On December 5, 2000, prior to EPA's taking final action on its proposed disapproval, the State of Nevada withdrew the Moderate Area SIP and the Serious Area SIP. See letter dated December 5, 2000 from Allen Biaggi, Administrator of the Division of Environmental Protection, Nevada Department of Conservation and Natural Resources to Felicia Marcus, Regional Administrator, EPA Region 9.

The CAA establishes specific consequences if EPA finds that a State has failed to meet certain requirements of the CAA. Of particular relevance here is CAA section 179(a)(1), the mandatory sanctions provision. Section 179(a) sets forth four findings that form the basis for application of a sanction. The first finding, that a State has failed to submit a plan required under the CAA, is the finding relevant to this rulemaking because withdrawal of a plan is tantamount to failing to submit it.

If Nevada has not made the required complete submittal (in this case resubmittal) within 18 months of the effective date of today's rulemaking, pursuant to CAA section 179(a) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b) will be applied in the affected area. If the State has still not made a complete submission 6 months after the offset sanction is

imposed, then the highway funding sanction will apply in the affected area, in accordance with 40 CFR 52.31.[4] 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 submittal of a plan addressing the applicable moderate area and the serious area PM-10 requirements for the Las Vegas Valley.

In addition, CAA section 110(c)(1) provides that EPA must promulgate a federal implementation plan (FIP) no later than 2 years after a finding under section 179(a) unless EPA takes final action to approve the submittal within 2 years of EPA's finding.

EPA encourages the responsible parties to work together on a solution in a broad, open public process which can result in the avoidance of the sanctions and FIP.

D. Recent Developments in Nevada

Since November, 1998, we have been working with CCDCP to develop an approvable SIP that would replace those we proposed to disapprove in June 2000. On October 30, 2000, EPA received a 60-day notice of intent to sue under section 304(a)(2) of the CAA

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[4] In a 1994 rulemaking, EPA established the Agency's selection of the sequence of these two sanctions: the offset sanction under section 179(b)(2) shall apply at 18 months, followed 6 months later by the highway sanction under section 179(b)(1) of the Act. EPA does not choose to deviate from this presumptive sequence in this instance. For more details on the timing and implementation of the sanctions, see 59 FR 39832 (August 4, 1994), promulgating 40 CFR 52.31, “Selection of sequence of mandatory sanctions for findings made pursuant to section 179 of the Clean Air Act.”

from the Sierra Club alleging that we had failed to take final action on the 1997 Serious Plan by the CAA deadline. While in the midst of finalizing our disapproval action, the State of Nevada withdrew both the Moderate Area SIP and Serious Area SIP from EPA consideration. As noted above, the withdrawal means that EPA cannot finalize the proposed disapproval action and the Agency is compelled to find that the State of Nevada has failed to make the required SIP submissions for the Las Vegas Valley PM-10 nonattainment area.[5]

EPA is hopeful that in addition to withdrawing these plans, CCDCP intends to consult more broadly and openly with stakeholders concerned with the planning process; EPA urges them to do so. EPA is encouraged by recent efforts by CCDCP to develop an approvable PM-10 SIP that would replace the ones which have been withdrawn.

EPA believes that some of the work found in the most recent CCDCP draft plan[6] will contribute towards attaining the 24-hour and annual PM-10 standards. For instance, they have:

- adopted several new fugitive dust rules for significant

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[5] EPA notes that the sanctions for failing to submit these plans are identical to those which would have been imposed had we finalized our disapproval action.

[6] This plan, which was informally submitted to EPA on September 11, 2000, is entitled “PM-10 State Implementation Plan for Clark County - September 2000 Draft”. Some of this work is being currently implemented by the Clark County Health District.

sources, as well as some of the most advanced and stringent Best Management Practices for construction sites among PM-10 nonattainment areas,

- conducted studies to identify vacant land in the Las Vegas Valley and they are engaging in public outreach efforts to vacant land owners regarding compliance with new requirements,
- committed to hire additional staff to conduct inspections of fugitive dust sources to ensure rule compliance, and
- funded near-term research on standards/test methods for fugitive dust sources.

However, EPA notes that while we are encouraged by the work of CCDCP in developing an approvable PM-10 replacement SIP, we have also identified significant concerns with the draft plan that we have reviewed so far. Specifically, EPA is concerned about[7]:

1) the underlying data (including whether or not all emission sources are included) which ultimately must result in an accurate emissions inventory,
2) how the use of the locally-implemented paved road offset program may affect attainment and conformity,

[7] This list is not exhaustive. See letter from Kenneth F. Bigos, EPA to John Schlegel, CCDCP, dated November 15, 2000 for additional details.

3) the plan's treatment of mobile source emissions growth,

4) the plan's incomplete or inadequate process for determining appropriate controls for the area and measurement standards/techniques for certain sources (RACM/BACM and the most stringent measures analysis under CAA section 188(e)),

5) the plan's inaccurate determination that BACT application is unnecessary at sources which are clearly subject to such federal requirements,

6) an overall strategy to attain which inappropriately assumes future construction occurring on all vacant land within the nonattainment area[8],

7) failure to integrate the conformity budget into the plan so that the budget and the plan can be shown to be working together towards attainment, and

8) failure to address significant elements necessary to justify an extension of time to achieve attainment of PM-10 standards.

We are hopeful that by CCDCP working with the local agencies and business, environmental, and other stakeholders, our concerns will be addressed with the submittal of an approvable PM-10 SIP

[8] EPA notes that this is consistent with concerns that the Sierra Club raised both in its comment letter on the June 14, 2000 proposed disapproval action and in its October 30, 2000 notice of intent to sue EPA.

for the Las Vegas Valley area. Further, it is our understanding that CCDCP intends to adopt a plan which addresses our concerns on the following schedule:

- January 5, 2001 - CCDCP will send a second draft of their draft plan to EPA for comment,
- March 20, 2001 - CCDCP presents the draft plan to their Board and opens the public comment period on the plan,
- April 20, 2001 - CCDCP will close the public comment period,
- June 2001 - CCDCP's Board will approve the plan, and
- Late June 2001 - State of Nevada will submit the plan to EPA for action.

II. Final Action

A. Rule

EPA is today making a finding that the State of Nevada failed to submit SIP revisions addressing the CAA's moderate and serious area PM-10 requirements to attain the 24-hour and annual PM-10 NAAQS for the Las Vegas Valley PM-10 nonattainment area.

B. Effective Date Under the Administrative Procedures Act

Today's action will be effective on December 20, 2000. Under the Administrative Procedures Act (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 an agency has good cause to mandate an earlier effective date. Today's action

concerns a SIP submission that is already overdue and the State has been aware of applicable provisions of the CAA relating to overdue SIPs. In addition, today's action simply starts a “clock” that will not result in sanctions for 18 months, and that the State may “turn off” through the submission of a complete SIP submittal. These reasons support an effective date prior to 30 days after the date of publication.

C. Notice-and-Comment Under the Administrative Procedures Act

This final agency action is not subject to the notice-and-comment requirements of the APA, 5 U.S.C. 533(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(d)(3). Notice and comment are unnecessary because no EPA judgment is involved in making a nonsubstantive finding of failure to submit SIPs 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 submitted SIPs. See 58 FR 51270, 51272, note 17 (October 1,

1993); 59 FR 39832, 39853 (August 4, 1994).

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, entitled “Regulatory Planning and Review.”

B. Executive Order 13045

Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be “economically significant” as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

C. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a

regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, E.O. 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

D. Executive Order 13132

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, Federalism and 12875, Enhancing the Intergovernmental Partnership. E.O. 13132 requires EPA to develop an accountable

process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that 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.” Under E.O. 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule 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 E.O. 13132, because it does not alter the relationship or the distribution of power and responsibilities

established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This final rule will not have a significant impact on a substantial number of small entities because findings of failure to submit required SIP revisions do not by themselves create any new requirements. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, EPA must select the most

cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that today's action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. The CAA provision discussed in this notice requires states to submit SIPs. This notice merely provides a finding that Nevada has not met that requirement. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to today's action because it does not require the public to perform activities conducive to the use of VCS.

H. Submission to Congress and the Comptroller General

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. However, section 808 provides that any rule for which the issuing agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest, shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of December 20, 2000. EPA will submit a report containing this rule 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. This rule is not a ``major rule'' as defined by 5 U.S.C. 804(2).

I. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of

this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, particulate matter, Intergovernmental relations.

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

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Date

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