



Billing Code: 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2012-0746; FRL-9902-49-Region 8]

Approval and Promulgation of Implementation Plans; Utah; Revisions to Utah Rule R307-107; General Requirements; Breakdowns

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving changes to Utah's rule R307-107, which pertains to source emissions during breakdowns. Utah's prior version of rule R307-107 had several deficiencies related to the treatment of excess emissions from sources during malfunction events. On April 18, 2011, EPA finalized a rulemaking which found that the Utah State Implementation Plan (SIP) was substantially inadequate to attain or maintain the national ambient air quality standards (NAAQS) or to otherwise comply with the requirements of the Clean Air Act (CAA) because it included rule R307-107. Concurrent with this finding, EPA issued a SIP call that required the State to revise its SIP by either removing R307-107 or correcting its deficiencies, and to submit the revised SIP to EPA by November 18, 2012. On August 16, 2012, the State submitted to EPA revisions to R307-107. EPA is approving these revisions because they correct the identified SIP deficiencies concerning the treatment of excess emissions during malfunctions and, therefore, satisfy EPA's April 18, 2011 SIP call. This final approval eliminates all potential clocks for sanctions and for EPA to promulgate a federal implementation plan (FIP) related to the April 18, 2011 SIP call.

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

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2012-0746. All documents in the docket are listed on the www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Adam Clark, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-7104, clark.adam@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

II. Response to Comments

III. Final Action

IV. Statutory and Executive Order Reviews

Definitions

For the purpose of this document, the following definitions apply:

- i. The words or initials Act or CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.
- ii. The words EPA, we, us or our mean or refer to the United States Environmental Protection Agency.
- iii. The initials FIP mean or refer to federal implementation plan.
- iv. The initials NAAQS mean or refer to National Ambient Air Quality Standards.
- v. The initials NESHAPS mean or refer to National Emission Standards for Hazardous Air Pollutants.
- vi. The initials NSPS mean or refer to New Source Performance Standards.
- vii. The initials SIP mean or refer to state implementation plan.
- viii. The words State or Utah mean the State of Utah, unless the context indicates otherwise.
- ix. The initials UDAQ mean or refer to the Utah Division of Air Quality, Utah Department of Environmental Quality.

I. Background

On April 18, 2011, EPA published a final rulemaking in the Federal Register (76 FR 21639) that found that the Utah SIP was substantially inadequate to attain or maintain the NAAQS or to otherwise comply with the requirements of the CAA because it included rule R307-107. As explained in more detail in that rulemaking, we evaluated R307-107 to determine whether it was consistent with CAA requirements for SIP provisions. EPA's longstanding interpretation of CAA requirements applicable to SIP provisions related to the treatment of excess emissions during startup, shutdown, and malfunction (SSM) events is reflected in a series of EPA guidance documents and rulemaking actions. In particular, we explained that R307-107:

(1) did not treat all exceedances of SIP and permit limits as violations; (2) could have been interpreted to grant the Utah executive secretary exclusive authority to decide whether excess emissions constituted a violation; and (3) improperly applied to Federal technology-based standards such as New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS). We concluded that R307-107 undermined EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on in the SIP to ensure attainment and maintenance of the NAAQS or meet other CAA requirements. 76 FR 21640, April 18, 2011. The failure to meet fundamental CAA requirements for SIP provisions rendered R307-107 substantially inadequate.

Accordingly, we issued a SIP call under CAA sections 110(a)(2)(H) and 110(k)(5) which required the State to revise its SIP by either removing R307-107 or correcting its deficiencies, and to submit the revised SIP to us by November 18, 2012. *Id.* We also explained that if the State failed to submit a complete SIP revision by November 18, 2012, or if we disapproved a submitted SIP revision intended to address the deficiencies identified in the SIP call, clocks would be triggered for mandatory sanctions and for EPA to promulgate a FIP. *Id.* at 21640-41.

On June 17, 2011, U.S. Magnesium challenged our finding of substantial inadequacy and SIP call in the United States Court of Appeals for the 10th Circuit. In particular, U.S. Magnesium argued that we had failed to base the finding of substantial inadequacy on specific factual findings concerning the impacts of the excess emissions that occurred during the events affected by the deficient SIP provision on attainment and maintenance of the NAAQS. On August 6, 2012, the 10th Circuit upheld EPA's finding of substantial inadequacy and SIP call.

On August 16, 2012, the State submitted to EPA revisions to R307-107 for the purpose of correcting the deficiencies described in the SIP call. In this SIP revision, the State specifically

eliminated the exemption for excess emissions during malfunction events that was inconsistent with fundamental requirements of the CAA for emission limitations in SIP provisions. The State likewise revised prior regulatory language that appeared to grant state personnel the exclusive authority to determine whether a violation had occurred, thereby precluding independent enforcement by EPA and citizens if the State made a non-violation determination. As revised, R307-107 now only pertains to the State's exercise of its own enforcement discretion in the case of violations that occur due to excess emissions during malfunctions, and that exercise of discretion by the State will have no bearing upon potential enforcement by EPA or citizens. The State's August 16, 2012, SIP submission thus eliminated the deficiencies in R307-107 and made it consistent with fundamental CAA requirements for SIP provisions applicable to excess emissions during malfunction events. Accordingly, we proposed to approve the State's revisions on May 9, 2013. 78 FR 27165.

II. Response to Comments

We received one comment letter on our proposed approval from the organizations Western Resource Advocates and Utah Physicians for a Healthy Environment. The letter primarily expressed support for our proposed approval, but requested that the State's revised R307-107 "include a requirement that any reports of excess emissions be posted on the Division of Air Quality website in a manner readily available to public review."

We acknowledge the commenters' support for our proposed action. Regarding the comment that the State's rule should require that reports of excess emissions be posted on the Utah Division of Air Quality (UDAQ) website, the commenters do not indicate whether they think the lack of such a requirement constitutes a deficiency under the CAA that warrants our disapproval of the rule now, or whether they would like the State to revise the rule in the future

to provide for such posting. The totality of the commenters' letter suggests that they would like us to approve revised R307-107 now.

Regardless of the commenters' intent, we do not find that the revised rule's lack of such a requirement for posting of excess emissions reports on a State website requires our disapproval of the revised rule. The commenters have not specified, and we are not aware of, a CAA or regulatory provision that specifically requires a state to post excess emissions reports on an internet website in order to meet SIP requirements. CAA section 110(a) generally requires that SIP provisions be legally and practicably enforceable, but such requirements long predate the advent of the internet. CAA section 110(a)(2)(F) only requires that emissions reports be available at reasonable times for public inspection. So long as the information in these reports is treated as emissions data, available to the public by other means, posting the reports on the internet is not necessary. While we agree that it may be helpful for a state to post such reports on a website, at this time we do not interpret CAA section 110(a) as requiring it. Were the State to revise R307-107 to include such a requirement for posting of excess emissions reports on a State website, however, this could serve to strengthen and enhance compliance with applicable SIP emission limits.

We find that the revised R307-107 submitted by the State addresses the deficiencies we identified in our April 18, 2011 SIP call and, consistent with CAA section 110(l), our approval of the revised rule will not interfere with any applicable requirement of the CAA. Our approval of the revised rule will enhance the State's, our, and citizens' ability to enforce the Utah SIP.

III. Final Action

For the reasons discussed in our notice of proposed rulemaking (78 FR 27165) and in our response to comments, we are approving the revisions to rule R307-107 of the Utah SIP that the

State submitted to us on August 16, 2012. We are approving these revisions because they correct the deficiencies identified in our April 18, 2011 SIP call. We wish to emphasize one point we discussed in our notice of proposed rulemaking. Revised R307–107 only addresses the State’s exercise of its enforcement discretion and contains no language that suggests that a State decision not to pursue an enforcement action for a particular violation bars EPA or citizens from taking an enforcement action. Therefore, EPA interprets revised R307-107, consistent with EPA’s interpretations of the CAA, as not barring EPA and citizen enforcement of violations of applicable requirements when the State decides not to undertake enforcement.

This approval eliminates all potential clocks for mandatory sanctions and for EPA to promulgate a FIP related to the April 18, 2011 SIP call.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 USC 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 Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 USC 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 USC 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 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 USC 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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).

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 [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the Clean Air Act.)

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: October 23, 2013.

Howard M. Cantor,
Acting Regional Administrator,
Region 8.

40 CFR part 52 is amended to read as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

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

Subpart TT – [AMENDED]

2. Section 52.2320 is amended by adding paragraph (c)(74) to read as follows:

§52.2320 Identification of plan.

* * * * *

(c) * * *

(74) On August 16, 2012 the State of Utah submitted as a SIP revision a revised version of its breakdown rule, Utah Administrative Code (UAC) R307-107, which replaces the prior version of UAC R307-107.

(i) Incorporation by reference.

(A) Title R307 of the Utah Administrative Code, Environmental Quality, Air Quality, Rule R307-107, General Requirements: Breakdowns. Effective July 31, 2012; as published in the Utah State Bulletin on March 1, 2012, modified on July 1, 2012, and August 15, 2012. Note: The August 15, 2012 publication contains a typographical error in the title of Rule R307-107.