Billing Code 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2013-0534; FRL-9932-45-Region 9]

Withdrawal of Approval and Disapproval of Air Quality Implementation Plans; California; San Joaquin Valley; Contingency Measures for the 1997 $PM_{2.5}$ Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to withdraw a May 22, 2014 final action approving a state implementation plan (SIP) revision submitted by the State of California under the Clean Air Act (CAA) to address contingency measure requirements for the 1997 annual and 24-hour national ambient air quality standards (NAAQS) in the San Joaquin Valley. Simultaneously, EPA is proposing to disapprove this SIP submission. These proposed actions are in response to a decision issued by the U.S. Court of Appeals for the Ninth Circuit (*Committee for a Better Arvin v. EPA*, 786 F.3d 1169 (9th Cir. 2015)) remanding EPA's approval of a related SIP submission and rejecting EPA's rationale for approving plan submissions that rely on California mobile source control measures to meet SIP requirements such as contingency measures, which was a necessary basis for the May 22, 2014 final rule.

DATES: Any comments must arrive by **[Insert date 30 days from the date of publication in the Federal Register]**.

ADDRESSES: Submit comments, identified by docket number EPA-R09-OAR-2013-0534, by one of the following methods:

- Federal eRulemaking Portal: www.regulations.gov. Follow the on-line instructions.

- E-mail: lo.doris@epa.gov.
- Mail or delivery: Doris Lo, (AIR-2), U.S. Environmental Protection Agency Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

Instructions: All comments will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comments due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: Generally, documents in the docket for this action are available electronically at www.regulations.gov and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at www.regulations.gov, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials in person, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Doris Lo, Air Planning Office (AIR-2), (415) 972-3959, lo.doris@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Background

On July 18, 1997, EPA established new national ambient air quality standards (NAAQS) for particles less than or equal to 2.5 micrometers (μm) in diameter ($PM_{2.5}$), including an annual standard of 15.0 micrograms per cubic meter ($\mu g/m^3$) based on a 3-year average of annual mean $PM_{2.5}$ concentrations and a 24-hour (daily) standard of 65 $\mu g/m^3$ based on a 3-year average of 98th percentile 24-hour $PM_{2.5}$ concentrations.[1] Effective April 5, 2005, EPA designated the San Joaquin Valley (SJV) area in California as nonattainment for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS.[2] The SJV $PM_{2.5}$ nonattainment area is located in the southern half of California's central valley and includes all or part of eight counties: San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings, and the valley portion of Kern.[3] The local air district with primary responsibility for developing state implementation plans (SIPs) to attain the NAAQS in this area is the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD or District).

---

[1] 62 FR 36852 (July 18, 1997) and 40 CFR 50.7. Effective December 18, 2006, EPA strengthened the 24-hour $PM_{2.5}$ NAAQS by lowering the level to 35 $\mu g/m^3$. 71 FR 61144 (October 17, 2006) and 40 CFR 50.13. Effective March 18, 2013, EPA strengthened the primary annual $PM_{2.5}$ NAAQS by lowering the level to 12 $\mu g/m^3$. 78 FR 3086 (January 15, 2013) and 40 CFR 50.18. In this preamble, all references to the $PM_{2.5}$ NAAQS, unless otherwise specified, are to the 1997 24-hour standard (65 $\mu g/m^3$) and annual standard (15.0 $\mu g/m^3$) as codified in 40 CFR 50.7.

[2] 70 FR 944 (January 5, 2005), codified at 40 CFR 81.305.

[3] For a precise description of the geographic boundaries of the San Joaquin Valley nonattainment area, see 40 CFR 81.305.

Between 2007 and 2011, California made six SIP submittals to address nonattainment area planning requirements for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS in the SJV.[4] We refer to these submittals collectively as the "2008 $PM_{2.5}$ Plan." On November 9, 2011, EPA approved all elements of the 2008 $PM_{2.5}$ Plan except for the contingency measures, which EPA disapproved for failure to satisfy the requirements of CAA section 172(c)(9).[5] On July 3, 2013, the State made a new submission to meet the contingency measure requirements for the 1997 $PM_{2.5}$ NAAQS in the SJV (2013 Contingency Measure Submittal) to correct the deficiencies identified in EPA's November 2011 action disapproving the contingency measure element of the 2008 $PM_{2.5}$ Plan.[6]

On May 22, 2014, EPA fully approved the 2013 Contingency Measure Submittal based on the Agency's conclusion that this SIP submittal corrected then outstanding deficiencies in the CAA section 172(c)(9) contingency measures for the 1997 $PM_{2.5}$ NAAQS.[7] Among other things, the 2013 Contingency Measure Submittal relied on the ongoing implementation of California's mobile source control program as a basis for satisfying the contingency measure requirements in CAA section 172(c)(9). Specifically, the 2013 Contingency Measure Submittal relied on California mobile source measures to achieve 21 tons per day (tpd) of reductions in emissions of nitrogen oxides (NO_x) in 2015, roughly two-thirds of the total amount of NO_x emission reductions (31.6 tpd) necessary to achieve one year's worth of reasonable further progress (RFP) in the SJV.[8] In its May 22, 2014 final action on the 2013 Contingency Measure Submittal, EPA determined that CARB's continuing implementation of these mobile source control measures in 2015, together with other fully-adopted measures implemented by the District in the same

[4] 76 FR 69896 at n. 2 (November 9, 2011) (final action on 2008 $PM_{2.5}$ Plan).
[5] *Id.* at 69924.
[6] 78 FR 53113, 53115-53116 (August 28, 2013) (proposed action on Contingency Measure SIP).
[7] 79 FR 29327 (May 22, 2014) (final action on Contingency Measure SIP).
[8] 78 FR 53113, 53123 (August 28, 2013) and 79 FR 29327, 29336-29337 (May 22, 2014).

timeframe, would provide for an appropriate level of continued emission reduction progress should the SJV area fail to attain the 1997 $PM_{2.5}$ NAAQS by the applicable attainment date, which was April 5, 2015, thereby meeting the requirement for contingency measures for failure to attain.[9] With respect to the requirement for contingency measures for failure to meet RFP requirements, EPA determined that this requirement was moot because the District had already met the RFP requirements relevant to the 2008 $PM_{2.5}$ Plan by the time of EPA's May 22, 2014 action.[10]

Several environmental and community organizations filed a petition for review of EPA's November 9, 2011 action on the 2008 $PM_{2.5}$ Plan, arguing, among other things, that the 2008 $PM_{2.5}$ Plan had calculated the necessary emission reductions and forecasts in part based on state-adopted mobile source measures that are not themselves incorporated into the federally enforceable plan, in violation of the CAA.[11] At that time, EPA's longstanding and consistent practice had been to allow California SIPs to rely on emission reduction credit for state mobile source rules waived or authorized by EPA under section 209 of the Act ("waiver measures") to meet certain SIP requirements without requiring approval of those control measures into the SIP under section 110 of the Act. On May 20, 2015, the U.S. Court of Appeals for the Ninth Circuit granted the petition with respect to this issue, holding that EPA violated the CAA by approving the 2008 $PM_{2.5}$ Plan even though the plan did not include the waiver measures on which the plan relied to achieve its emission reduction goals. *Committee for a Better Arvin, et. al. v. EPA*, 786 F.3d 1169 (9th Cir. 2015) (*CBA*) (partially granting and partially denying petition for review). The court rejected EPA's arguments supporting the Agency's longstanding practice, finding that section 110(a)(2)(A) of the Act plainly mandates that all control measures on which states rely to

[9] 78 FR 53113, 53123 and 79 FR 29327, 29350.
[10] 79 FR 29327, 29350.
[11] *Committee for a Better Arvin et. al v. EPA*, Case No. 11-73924 (9th Cir.).

attain the NAAQS must be "included" in the SIP and subject to enforcement by EPA and citizens. The court remanded EPA's November 9, 2011 action for further proceedings consistent with the decision.

Separately, environmental and community organizations also filed a petition for review of EPA's May 22, 2014 action on the 2013 Contingency Measure Submittal, arguing, among other things, that EPA violated the CAA by approving that submittal even though it did not include the waiver measures on which it relied to achieve the necessary emission reductions to meet contingency measure requirements.[12] On June 10, 2015, EPA filed an unopposed motion for voluntary remand of the May 22, 2014 final rule without vacatur based, *inter alia*, on the Agency's substantial and legitimate need to reexamine this rulemaking in light of the Ninth Circuit's May 20, 2015 decision in *CBA*.[13] As explained in EPA's motion, the 2013 Contingency Measure Submittal that EPA approved in the May 22, 2014 rulemaking relied upon waiver measures to achieve a significant percentage of the emission reductions necessary to comply with the statutory requirement for contingency measures, and these waiver measures are not included in the SIP.[14] EPA moved the court for an order remanding the May 22, 2014 final rule to allow the Agency to reconsider it in light of the *CBA* decision.[15] On June 15, 2015, the Ninth Circuit granted EPA's motion and remanded the petition for review to EPA.[16]

II. Proposed Action and Clean Air Act Consequences

As noted above, the Ninth Circuit rejected EPA's prior interpretation of the CAA under which EPA had allowed California SIPs to rely on waiver measures without requiring approval

[12] *Medical Advocates for Healthy Air et. al v. EPA*, Case No. 14-72219 (9th Cir.).
[13] *Medical Advocates for Healthy Air et. al v. EPA*, Case No. 14-72219 (9th Cir.), United States Unopposed Motion for Voluntary Remand of the Rule at Issue Without Vacatur, Docket Entry 29-1.
[14] *Id.*
[15] *Id.*
[16] *Medical Advocates for Healthy Air et. al v. EPA*, Case No. 14-72219 (9th Cir.), Order, Docket Entry 30.

of those measures into the SIP in accordance with section 110 of the Act. This interpretation formed a necessary basis for EPA's approval of the 2013 Contingency Measure Submittal.[17] In response to the court's ruling in *CBA*, we are proposing to withdraw our May 22, 2014 approval of the 2013 Contingency Measure Submittal (79 FR 29327) because it was predicated on an interpretation of the CAA that has been rejected by the Ninth Circuit. For the same reason, we are proposing to disapprove the 2013 Contingency Measure Submittal for failure to satisfy the requirements of the Act. This proposed withdrawal and disapproval, if finalized, would have the effect of removing the 2013 Contingency Measure Submittal from the applicable California SIP and deleting the provisions in 40 CFR 52.220(c) where EPA's approval of the SIP submittal is currently codified.[18]

Under section 179(a) of the CAA, final disapproval of a SIP submittal that addresses a requirement of part D, title I of the Act or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP Call) starts a mandatory sanctions clock. Disapproval of a SIP element also triggers the requirement under CAA section 110(c) for EPA to promulgate a FIP no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such FIP.

EPA is proposing to determine that this disapproval of the 2013 Contingency Measure Submittal does not start a mandatory sanctions clock or FIP clock because the specific type of contingency measure at issue in that submittal is no longer a required attainment plan element under the facts and circumstances of this situation. CARB submitted the 2013 Contingency Measure Submittal to address the contingency measure requirement in CAA section 172(c)(9) as

[17] 79 FR 29327, 29336-37 (May 22, 2014).
[18] *See* 40 CFR 52.220(c)(438)(ii).

applied to the 2008 $PM_{2.5}$ Plan, which provided for attainment of the 1997 $PM_{2.5}$ NAAQS by April 5, 2015, the latest permissible attainment date for this area under subpart 1 of part D, title I of the Act.[19] Thus, CARB intended the specific measures to be contingency measures that would apply in the event of a failure to attain by April 5, 2015. However, intervening events have affected the applicable requirements for contingency measures for this area. A January 2013 decision of the D.C. Circuit Court of Appeals (*NRDC v. EPA,* 706 F.3d 428 (D.C. Cir. 2013)) held that EPA must implement the 1997 PM2.5 NAAQS in accordance with the requirements of subpart 4 of Part D, title I of the Act. In order to address the requirements of subpart 4, EPA promulgated a rulemaking to classify all existing PM2.5 nonattainment areas, including SJV, as "Moderate" nonattainment areas and to provide additional time for states to make or supplement SIP submissions in order to meet the requirements of subpart 4.[20] On April 7, 2015, EPA determined that the SJV area could not attain by the applicable attainment date (i.e., April 5, 2015) and therefore reclassified the area from "Moderate" to "Serious." As a consequence of the SJV area's reclassification as a Serious area for the 1997 $PM_{2.5}$ NAAQS, California is now required to submit a Serious area plan, including both a demonstration that the plan provides for attainment of the 1997 $PM_{2.5}$ standards in the SJV by the Serious area attainment date, which is December 31, 2015, and contingency measures to be implemented if the area fails to make RFP or to attain by that date.[21] Another consequence of this reclassification, however, is that the specific requirement for contingency measures for failure to attain as a Moderate area plan

[19] 80 FR 1482, 1483 at n. 10 (January 12, 2015) (proposed rule to reclassify SJV as Serious nonattainment for 1997 $PM_{2.5}$ NAAQS).
[20] 79 FR 31566 (June 2, 2014).
[21] 80 FR 18528 (April 7, 2015). California has requested an extension of the Serious area attainment date pursuant to CAA section 188(e), and EPA is currently evaluating that request. *See* letter dated June 25, 2015, from Richard Corey, Executive Officer, California Air Resources Board, to Jared Blumenfeld, Regional Administrator, EPA Region 9, transmitting "2015 Plan for the $PM_{2.5}$ Standard."

requirement was superseded and eliminated.[22] Thus, the specific contingency measures at issue in the 2013 Contingency Measure Submittal are no longer required and disapproval of those specific measures should not be a basis for sanctions or a FIP under these facts and circumstances.

Our proposed disapproval of the 2013 Contingency Measure Submittal, if finalized, would not trigger sanctions or FIP clocks because the contingency measure requirement that this SIP submittal addressed has been superseded by different planning obligations under subpart 4 of part D, title I of the Act. That is, because the State submitted the 2013 Contingency Measure Submittal to address a contingency measure requirement for failure to attain by a statutory attainment date that no longer applies to the area (April 5, 2015), this SIP submittal no longer addresses an applicable requirement of part D, title I of the Act, and our disapproval of it therefore would not trigger sanctions. For the same reason, our disapproval of the 2013 Contingency Measure Submittal would not create any deficiency in a mandatory component of the SIP for this area and, therefore, would not trigger the obligation for EPA to promulgate a FIP under section 110(c) to address this issue.

III. Request for Public Comment

We will accept comments from the public on these proposals for the next 30 days. The deadline and instructions for submission of comments are provided in the "Date" and "Addresses" sections at the beginning of this preamble.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

[22] EPA does not interpret the requirement for failure-to-attain contingency measures to apply to Moderate $PM_{2.5}$ nonattainment areas that cannot practicably attain the NAAQS by the statutory attainment date. Rather, EPA believes it is appropriate for the state to identify and adopt attainment contingency measures as part of the Serious area attainment plan that it will develop once EPA reclassifies the area. *See* 59 FR 41998, 42015 (August 16, 1994).

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

B. 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, because this proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements submitted for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. 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. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will

not in-and-of itself create any new requirements but simply disapproves certain State requirements submitted for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the Clean Air Act prescribes that various consequences (e.g., higher offset requirements) may or will result from disapproval actions does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for State, local, or tribal governments or the private sector." EPA has determined that the proposed disapproval 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. This action proposes to disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), 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."

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, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP EPA is proposing to disapprove would not apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This proposed SIP

disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements submitted for inclusion into the SIP.

H. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. 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, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

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

Executive Order (EO) 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 lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen Oxides, Sulfur Oxides, Particulate Matter.

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

Dated: August 6, 2015.

Jared Blumenfeld,
EPA Regional Administrator, Region 9.

[FR Doc. 2015-20240 Filed: 8/14/2015 08:45 am; Publication Date: 8/17/2015]