



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2013-0534; FRL-9946-29-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: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is withdrawing 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) for fine particulate matter (PM_{2.5}) in the San Joaquin Valley. Simultaneously, EPA is disapproving this SIP submission. These final 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. Finally, EPA is issuing a protective finding for transportation conformity determinations for the disapproval.

DATES: This rule is effective [Insert date 30 days from the date of publication in the Federal Register].

ADDRESSES: The EPA has established docket number EPA-R09-OAR-2013-0534 for this

action. Generally, documents in the docket for this action are available electronically at <http://www.regulations.gov> or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California 94015-3901. While all documents in the docket are listed at <http://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, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Doris Lo, EPA Region IX, (415) 972-3959, lo.doris@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, “we,” “us” and “our” refer to EPA.

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I. Proposed Action

On August 17, 2015, EPA proposed to withdraw its May 22, 2014 final action approving California’s July 3, 2013 submission to address contingency measure requirements for the 1997 annual and 24-hour PM_{2.5} NAAQS in the San Joaquin Valley (2013 Contingency Measure

Submittal).¹ Simultaneously, EPA proposed to disapprove this SIP submission. These proposed actions were in response to a decision issued by the U.S. Court of Appeals for the Ninth Circuit remanding EPA's approval of a related SIP submission and rejecting EPA's rationale for approving SIP submissions that rely on California mobile source control measures not actually part of the EPA-approved SIP in order to meet SIP requirements (*Committee for a Better Arvin v. EPA*, 786 F.3d 1169 (9th Cir. 2015)), which was a necessary basis for the May 22, 2014 final rule. EPA's May 22, 2014, approval of the 2013 Contingency Measure Submittal likewise relied on the same California mobile source control measures.

EPA proposed to determine that the disapproval of the 2013 Contingency Measure Submittal would not start a mandatory sanctions clock or Federal implementation plan (FIP) clock because the specific type of contingency measure at issue in that submittal was no longer a required attainment plan element for the San Joaquin Valley (SJV) area. The California Air Resources Board (CARB) had submitted the 2013 Contingency Measure Submittal to address the contingency measure requirement in CAA section 172(c)(9) as applied to the 2008 PM_{2.5} Plan, which provided for attainment of the 1997 PM_{2.5} NAAQS in the SJV by April 5, 2015, the latest permissible attainment date for this area under subpart 1 of part D, title I of the Act. EPA stated in the proposed rule that, as a consequence of EPA's March 27, 2015 reclassification of the SJV area from "Moderate" to "Serious" nonattainment for the 1997 PM_{2.5} NAAQS, the specific requirement for contingency measures for failure to attain as a Moderate area plan requirement had been eliminated and superseded by different planning obligations under subpart 4 of part D,

¹ 80 FR 49190 (August 17, 2015).

title I of the Act.² Because the State had submitted the 2013 Contingency Measure Submittal to address a contingency measure requirement for failure to attain by a statutory attainment date that no longer applied to the area (April 5, 2015), EPA proposed to find that this SIP submittal no longer addressed an applicable requirement of part D, title I of the Act, and that the disapproval of it therefore would not trigger sanctions. For the same reason, EPA proposed to find that disapproval of the submission would not create any deficiency in a mandatory component of the SIP for the area and, therefore, would not trigger the obligation on EPA to promulgate a FIP under section 110(c) of the Act.³

II. Public Comments and EPA Responses

EPA received one comment on the proposed action, submitted by Earthjustice. EPA summarizes and responds to the comment below.

Comment: Earthjustice argues that EPA has no legal basis for proposing to determine that the disapproval of the 2013 Contingency Measure Submittal would not start a mandatory sanctions clock or FIP clock. According to Earthjustice, section 179(a)(2) of the Clean Air Act provides that sanctions “shall apply” if EPA disapproves a submission based on its failure to meet one or more CAA requirements applicable to nonattainment areas, and section 110(c) provides that EPA “shall promulgate a Federal implementation plan at any time within 2 years after [EPA]...disapproves a State implementation plan in whole or in part....” Earthjustice asserts that contingency measures under CAA section 172(c)(9) are required elements for all attainment plans for nonattainment areas and must provide for the implementation of specific measures that will be undertaken if the area fails to attain, regardless of the applicable attainment

² *Id.* at 49192.

³ *Id.*

date. Although EPA has some flexibility to establish a schedule for submitting a plan meeting the requirements of section 172(c), according to Earthjustice, that schedule may not be extended beyond three years from the date of the nonattainment designation, a date that has passed for the San Joaquin Valley. Earthjustice argues that the contingency measure requirement was not a “Moderate area” requirement and is not reset or eliminated with reclassification under subpart 4, and that although reclassification as a “Serious area” may affect the tonnage of reductions that must be achieved, it does not eliminate the section 172(c)(9) requirement that the District was required to meet years ago. For all of these reasons, Earthjustice argues that the disapproval of this submittal triggers a sanctions clock under CAA section 179 and a FIP clock under section 110(c).

Response: Upon further consideration of these issues, EPA agrees with the commenter that the disapproval of the 2013 Contingency Measure Submittal triggers a mandatory sanctions clock under CAA section 179 and a FIP clock under section 110(c).

Section 179(a) of the Act provides that, for any SIP revision required under part D of title I of the Act or required in response to a finding of substantial inadequacy as described in section 110(k), if EPA disapproves a submission for a nonattainment area based on the state’s failure to meet one or more of the CAA requirements applicable to the area, mandatory sanctions under section 179(b) shall apply. The 2013 Contingency Measure Submittal was a plan revision required under part D of title I of the Act for the purposes of implementing the 1997 PM_{2.5} NAAQS in the SJV PM_{2.5} nonattainment area. As explained in the proposed action, EPA is disapproving the 2013 Contingency Measure Submittal based on the failure to meet the contingency measure requirement in CAA section 172(c)(9) for the area – *i.e.*, because of the

reliance on California waiver measures that EPA has not approved into the California SIP. This disapproval triggers a mandatory sanctions clock under section 179.

Section 110(c) of the Act states that EPA “shall promulgate a Federal implementation plan at any time within 2 years after the Administrator -- ... (B) disapproves a State implementation plan submission in whole or in part,” unless the State corrects the deficiency and EPA approves the plan or plan revision before promulgating such FIP. As a consequence of our disapproval of the 2013 Contingency Measure Submittal, the California SIP does not contain any contingency measures to be triggered if the SJV area fails to attain the 1997 PM_{2.5} NAAQS by the Serious area attainment date, which is currently December 31, 2015. Because this disapproval creates a deficiency in the SIP, the disapproval triggers the obligation on EPA to promulgate a FIP under section 110(c), unless the State submits and EPA approves a SIP revision correcting the deficiency within two years of the disapproval.

As explained in the proposed action, contingency measures for failure to attain by the Moderate area attainment date are no longer required in the SJV as the requirement for such measures has been superseded by the requirement for contingency measures as part of a Serious area plan for the 1997 PM_{2.5} NAAQS in this area.⁴ Thus, the State is no longer required to adopt contingency measures for failure to attain by April 5, 2015. Because the SJV area is currently classified as a Serious nonattainment area for the 1997 PM_{2.5} NAAQS, however, the State must satisfy the contingency measure requirement in section 172(c)(9) as applied to a Serious area attainment plan to provide for attainment of the 1997 PM_{2.5} NAAQS in the SJV no later than the applicable attainment date, which is currently December 31, 2015.

⁴ *Id.* at 49192 (August 17, 2015).

California submitted a Serious area plan for the 1997 PM_{2.5} NAAQS in the SJV on June 25, 2015, together with requests for extension of the Serious area attainment date under CAA section 188(e) to December 31, 2018 and December 31, 2020 for the 1997 24-hour and annual standards, respectively, and EPA has proposed to grant these requests for extension of the attainment date.⁵ If EPA takes final action to extend the Serious area attainment date for the 1997 PM_{2.5} NAAQS in the SJV, the State will be obligated to adopt and submit contingency measures to be implemented if the SJV area fails to make reasonable further progress or to attain the 1997 PM_{2.5} NAAQS by the extended attainment date(s) approved by EPA in that action. We encourage the State and District to consult with EPA during their development of a corrective SIP submission to ensure that it fully satisfies the section 172(c)(9) contingency measure requirement for the 1997 PM_{2.5} NAAQS in the SJV area and thereby corrects the current deficiency in the SIP.

III. Final Action

EPA is withdrawing its May 22, 2014 final action approving the 2013 Contingency Measure Submittal. Simultaneously, under section 110(k)(3) of the Act, EPA is disapproving this SIP submission for failure to satisfy the requirements of CAA section 172(c)(9).

Under section 179(a) of the CAA, a final disapproval of a submittal that addresses a requirement of part D of title I of the CAA or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP Call), triggers a sanction clock under CAA section 179(b) that runs from the effective date of the final action. The first sanction, the offset sanction in CAA section 179(b)(2), will apply in the SJV PM_{2.5} nonattainment area 18

⁵ 81 FR 6936 at 6938 (February 9, 2016).

months after [INSERT DATE 30 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

The second sanction, highway funding sanctions in CAA section 179(b)(1), will apply in the area six months after the offset sanction is imposed. Neither sanction will be imposed under the CAA if California submits and we approve, prior to the implementation of the sanctions, a SIP submission that corrects the deficiencies identified in this final action.

In addition to the sanctions, CAA section 110(c)(1) provides that EPA must promulgate a federal implementation plan (FIP) addressing the deficiency at any time within two years after [INSERT DATE 30 DAYS AFTER PUBLICATION IN FEDERAL REGISTER], the effective date of this rule, unless the state makes a SIP submission to correct the deficiency and EPA approves such submission before promulgating a FIP.

Because we previously approved the RFP and attainment demonstrations and the motor vehicle emissions budgets,⁶ we are issuing a protective finding under 40 CFR 93.120(a)(3) to the disapproval of the contingency measures. Without a protective finding, the final disapproval would result in a conformity freeze, under which only projects in the first four years of the most recent conforming Regional Transportation Plan and Transportation Improvement Programs can proceed. During a freeze, no new RTPs, TIPs or RTP/TIP amendments can be found to conform.⁷ Under this protective finding, the final disapproval of the contingency measures does not result in a transportation conformity freeze in the San Joaquin Valley PM_{2.5} nonattainment area.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at

⁶ 76 FR 69896 (November 9, 2011).

⁷ 40 CFR 93.120(a)(2).

<http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review 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.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA, because this SIP disapproval does not in-and-of itself create any new information collection burdens, but simply disapproves certain State requirements for inclusion in the SIP.

C. Regulatory Flexibility Act (RFA)

I certify that this action 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. This SIP disapproval does not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion in the SIP.

D. Unfunded Mandates Reform Act (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. This action disapproves 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

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.

F. Executive Order 13175: Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP revision that the EPA is disapproving would not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and 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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental 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 this SIP disapproval does not in-and-of itself create any new regulations, but simply disapproves certain State requirements for inclusion in the SIP.

H. 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.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise

impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

K. 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).

L. 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 **[insert date 60 days after the 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 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, Incorporation by reference,

Intergovernmental relations, Nitrogen dioxide, Particulate matter, Sulfur Oxides.

Dated: April 29, 2016.

Jared Blumenfeld,
Regional Administrator,
Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended 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 F - California

2. Section 52.220 is amended by adding paragraph (c)(438)(ii)(C) to read as follows:

§52.220 Identification of plan.

* * * * *

(c) * * *

(438) * * *

(ii) * * *

(C) Previously approved in paragraphs (c)(438)(ii)(A)(1), (c)(438)(ii)(A)(2), (c)(438)(ii)(A)(3), and (c)(438)(ii)(B)(1) of this section and now deleted without replacement: “Quantifying Contingency Reductions for the 2008 PM2.5 Plan” (dated June 20, 2013), SJVUAPCD Governing Board Resolution No. 13-6-18 (dated June 20, 2013), *Electronic mail* (dated July 24, 2013) from Samir Sheikh to Kerry Drake, and California Air Resources Board Executive Order 13-30 (dated June 27, 2013).

* * * * *

3. Section 52.237 is amended by adding paragraph (a)(8) to read as follows:

§52.237 Part D disapproval.

(a) * * *

(8) The contingency measure portion of the 2008 PM2.5 Plan for attainment of the 1997 PM2.5 standards in the San Joaquin Valley (June 2013).

[FR Doc. 2016-11125 Filed: 5/11/2016 8:45 am; Publication Date: 5/12/2016]