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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-R06-OAR-2014-0380; FRL-9911-25-Region 6]

Finding of Failure To Submit a Prevention of Significant Deterioration State Implementation Plan Revision for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}); Arkansas**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finding that the State of Arkansas has not made a necessary Prevention of Significant Deterioration (PSD) State Implementation Plan (SIP) submission to address the PSD permitting of PM_{2.5} emissions, as required by the Clean Air Act (CAA). Specifically, the EPA is determining that Arkansas has not submitted a SIP revision to address the PM_{2.5} PSD increments and implementing regulations as promulgated by EPA on October 20, 2010. The deadline for the State to make the required submittal was July 20, 2012. The CAA requires EPA to promulgate a Federal Implementation Plan (FIP) to address the outstanding PSD SIP elements by no later than 24 months after the effective date of this finding. EPA is making this finding in accordance with section 110 and part C of the CAA.

DATES: The effective date of this rule is May 22, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, Air permits Section (6PD-R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202-2733. The telephone number is (214) 665-2115. Ms. Wiley can also be reached via electronic mail at wiley.adina@epa.gov.

SUPPLEMENTARY INFORMATION: Section 553 of the Administrative Procedures Act (APA), 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure 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 rule final without prior proposal and opportunity for comment because no significant EPA judgment is

involved in making a finding of failure to submit SIPs, or elements of SIPs, required by the CAA, where states have made no submissions to meet the requirement. No additional fact gathering is necessary. Thus, notice and public procedure are unnecessary. Furthermore, providing notice and comment would be impracticable because of the limited time provided under the CAA for making such determinations. 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. 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). The EPA finds that these constitute good cause under 5 U.S.C. 553(b)(B).

EPA has also determined that today's Finding of Failure to Submit for Arkansas is effective immediately upon publication because this final action falls under the good cause exemption in 5 U.S.C. 553(d)(3) of the APA. The expedited effective date for this action is authorized under 5 U.S.C. 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." The EPA has determined that there is good cause for making this rule effective upon publication because the PSD SIP element is already overdue and the state has been made aware of applicable provisions of the CAA relating to overdue SIP revisions. The State of Arkansas failed to submit a required PSD SIP revision by the mandated deadline of July 20, 2012. We have previously alerted Arkansas through meetings that it has failed to make the submittal by the deadline. Also on May 9, 2014, we sent a letter to Arkansas, explaining that we were planning to take the action we are finalizing today. Consequently, the State has been on notice that today's action was pending. The State and general public are aware of applicable provisions of the CAA that relate to failure to submit a required implementation plan. In addition, this action only starts a 24-month "clock" wherein the EPA must promulgate a Federal Implementation Plan. Furthermore, the purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to prepare before the final rule takes effect. Whereas here, the

affected parties, such as the State of Arkansas and sources within the State, do not need time to adjust and prepare before the Finding of Failure to Submit takes effect. After numerous discussions with the Arkansas Department of Environmental Quality to resolve outstanding issues, the EPA has determined that moving as expeditiously as practicable on this finding is in the best interest of the implementation of the required PSD permitting program. The EPA finds that the above reasons support an effective date prior to thirty days after the date of publication and constitute good cause under 5 U.S.C. 553(d)(3).

Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

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I. Background and Overview**A. Overview of the PM NAAQS Requirements**

The EPA initially established National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) under section 109 of the CAA in 1971. Since then, the EPA has made a number of changes to these standards to reflect

continually expanding scientific information. The revisions to the PM NAAQS are briefly summarized below.

- In 1971, the EPA established NAAQS for PM, measured as Total Suspended Particles (TSP) (36 FR 8186). The primary standards were 260 $\mu\text{g}/\text{m}^3$ 24-hour average, not to be exceeded more than once per year, and 75 $\mu\text{g}/\text{m}^3$, annual geometric mean. The secondary standard was 150 $\mu\text{g}/\text{m}^3$, 24-hour, not to be exceeded more than once per year.

- In July 1987, the EPA changed the indicator for PM from TSP to PM_{10} , the latter including particles with an aerodynamic diameter less than or equal to a nominal 10 μm . (52 FR 24634). The EPA also revised the primary standards by (1) replacing the 24-hour TSP standard with a 24-hour PM_{10} standard of 150 $\mu\text{g}/\text{m}^3$ with no more than one expected exceedance per year, and (2) replacing the annual TSP standard with a PM_{10} standard of 50 $\mu\text{g}/\text{m}^3$, annual arithmetic mean. The secondary standard was revised by replacing it with 24-hour and annual PM_{10} standards identical in all respects to the primary standards.

- In July 1997, the EPA determined that although the PM NAAQS should continue to focus on PM_{10} , the fine and coarse fractions of PM_{10} should be considered separately (62 FR 38652). New standards were added, using $\text{PM}_{2.5}$ as the indicator for fine particles. The PM_{10} standards were retained for the purpose of regulating the coarse fraction of PM_{10} . The EPA established two new $\text{PM}_{2.5}$ standards: an annual standard of 15 $\mu\text{g}/\text{m}^3$, based on the 3-year average of annual arithmetic mean $\text{PM}_{2.5}$ concentrations from single or multiple monitors sited to represent community-wide air quality and a 24-hour standard of 65 $\mu\text{g}/\text{m}^3$, based on the 3-year average of the 98th percentile of 24-hour $\text{PM}_{2.5}$ concentrations at each population-oriented monitor within the area.

- On October 17, 2006, the EPA promulgated revisions to the NAAQS for $\text{PM}_{2.5}$ and PM_{10} with an effective date of December 18, 2006 (71 FR 61144). We lowered the 24-hour NAAQS for $\text{PM}_{2.5}$ from 65 $\mu\text{g}/\text{m}^3$ to 35 $\mu\text{g}/\text{m}^3$, and retained the existing annual $\text{PM}_{2.5}$ NAAQS of 15 $\mu\text{g}/\text{m}^3$. In addition, we retained the existing PM_{10} 24-hour NAAQS of 150 $\mu\text{g}/\text{m}^3$, and revoked the annual PM_{10} NAAQS (set at 50 $\mu\text{g}/\text{m}^3$).

- On January 15, 2013, the EPA promulgated revisions to the NAAQS for $\text{PM}_{2.5}$ and PM_{10} with an effective date of March 18, 2013 (78 FR 3086). We lowered the annual standard for $\text{PM}_{2.5}$ to 12 $\mu\text{g}/\text{m}^3$ and retained the 24-hour $\text{PM}_{2.5}$ standard at the level of 35 $\mu\text{g}/\text{m}^3$. For PM_{10} , the EPA retained the current 24-

hour PM_{10} primary and secondary standards.

B. Revisions to the PSD Program To Implement the PM NAAQS

To implement the PM NAAQS for PSD purposes, EPA issued two separate final rules that establish the New Source Review (NSR) permitting requirements for $\text{PM}_{2.5}$: the NSR $\text{PM}_{2.5}$ Implementation Rule promulgated on May 16, 2008 (73 FR 28321), and the $\text{PM}_{2.5}$ PSD Increments—Significant Impact Levels (SILs)—Significant Monitoring Concentration (SMC) Rule promulgated on October 20, 2010 (75 FR 64864).

1. Required Components of the 2008 NSR $\text{PM}_{2.5}$ Implementation Rule

EPA's final NSR $\text{PM}_{2.5}$ Implementation Rule required states to submit applicable SIP revisions to EPA no later than May 16, 2011, to address this rule's PSD and nonattainment NSR SIP requirements. With respect to PSD permitting, the SIP revision submittals are required to: (1) Address directly emitted $\text{PM}_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and nitrogen oxides (NO_x)) that contribute to the secondary formation of $\text{PM}_{2.5}$; (2) establish significant emission rates for direct $\text{PM}_{2.5}$ and precursor pollutants; and (3) account for gases that condense to form particles (condensables) in $\text{PM}_{2.5}$ and PM_{10} applicability determinations and emission limits in PSD permits.

2. Required Components of the 2010 $\text{PM}_{2.5}$ PSD Increment—SILs—SMC Rule

The $\text{PM}_{2.5}$ PSD Increment—SILs—SMC Rule required states to submit SIP revisions to EPA by July 20, 2012, adopting provisions equivalent to or at least as stringent as the $\text{PM}_{2.5}$ PSD increments and associated implementing regulations. Specifically, the SIP rule requires a state's submitted PSD SIP revision to adopt and submit for EPA approval the $\text{PM}_{2.5}$ increments issued pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. States were also required to adopt and submit for EPA approval revisions to the definitions for "major source baseline date," "minor source baseline date," and "baseline area" as part of the implementing regulations for the $\text{PM}_{2.5}$ increment.

3. Optional Components of the 2010 $\text{PM}_{2.5}$ PSD Increment—SILs—SMC Rule

The $\text{PM}_{2.5}$ PSD Increment—SILs—SMC Rule also allowed States to discretionarily adopt and submit for EPA approval: (1) SILs, which are used as a screening tool to evaluate the

impact a proposed new major source or major modification may have on the NAAQS or PSD increment; and (2) a SMC (also a screening tool) which is used to determine the subsequent level of data gathering required for a PSD permit application for emissions of $\text{PM}_{2.5}$. However, on January 22, 2013, the U.S. Court of Appeals for the District of Columbia granted a request from the EPA to vacate and remand portions of the federal PSD regulations (40 CFR 51.166(k)(2) and 52.21(k)(2)) establishing the SILs for $\text{PM}_{2.5}$ so that the EPA could reconcile the inconsistency between the regulatory text and certain statements in the preamble to the 2010 final rule. *Sierra Club v. EPA*, 705 F.3d 458, 463–64. The court declined to vacate the portion of the federal PSD regulations (40 CFR 51.165(b)(2)) establishing SILs for $\text{PM}_{2.5}$ that did not contain the same inconsistency in the regulatory text. *Id.* at 465–66. The court further vacated the portions of the PSD regulations (40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c)) establishing a $\text{PM}_{2.5}$ SMC, finding that the EPA lacked legal authority to adopt and use the $\text{PM}_{2.5}$ SMC to exempt permit applicants from the statutory requirement to compile and submit ambient monitoring data. *Id.* at 468–69. On December 9, 2013, EPA issued a good cause final rule formally removing the affected SILs and SMC provisions from the CFR. See 78 FR 73698. As such, SIP submittals should no longer include the vacated $\text{PM}_{2.5}$ SILs at 40 CFR 51.166(k)(2) and 52.21(k)(2) and vacated $\text{PM}_{2.5}$ SMC provisions at 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) for $\text{PM}_{2.5}$ PSD permitting. EPA notes that today's finding of failure to submit for the State of Arkansas does not include the optional SILs and SMC component of the $\text{PM}_{2.5}$ PSD Increment—SILs—SMC Rule.

II. Finding of Failure To Submit

The EPA is making a finding that the State of Arkansas has failed to submit a required PSD SIP revision to address the implementation and permitting of $\text{PM}_{2.5}$ emissions in the Arkansas PSD program. Specifically, we are finding that Arkansas failed to submit a SIP revision, addressing the required $\text{PM}_{2.5}$ PSD elements establishing increments and the implementing regulations by the specified deadline of July 20, 2012, as required by the 2010 $\text{PM}_{2.5}$ PSD Increments—SILs—SMC Rule. By no later than 24 months after the effective date of this ruling, the EPA is required by the Act to promulgate a FIP for Arkansas to address the $\text{PM}_{2.5}$ PSD requirements for increment. In addition, CAA section 110(c) provides that EPA

can promulgate a FIP immediately after making the finding of failure to submit a required SIP, as late as two years after making the finding, or any time in between. This finding of failure to submit does not impose sanctions or set deadlines for imposing sanctions as described in section 179 of the CAA, because this finding does not pertain to the elements of a part D, title I plan for nonattainment areas as required under section 110(a)(2)(I) and because this action is not a SIP call pursuant to section 110(k)(5). This action will be effective on May 22, 2014.

This action also does not make a finding of failure to submit for Arkansas regarding the required PM_{2.5} PSD SIP revision due on May 19, 2011, pursuant to the 2008 NSR PM_{2.5} Implementation Rule. EPA previously promulgated a partial approval and partial disapproval of the Arkansas infrastructure SIP for the 1997 ozone NAAQS and the 1997 and 2006 PM_{2.5} NAAQS on August 20, 2012. See 77 FR 50033. The partial disapproval was specific to the Arkansas PSD program for failing to include the required PSD elements from the May 16, 2008 NSR PM_{2.5} Implementation Rule. EPA's disapproval as to these required SIP revisions started a separate FIP clock because the Arkansas PSD program lacked the PM_{2.5} PSD revisions as required by the 2008 rule. This separate FIP clock will expire on September 19, 2014.

EPA recognizes that the PM_{2.5} PSD elements from 2008 and 2010 are necessary for proper functioning of the PSD program for issuing permits for PM_{2.5}. As described above, we also acknowledge that we now have two separate FIP clocks running for PM_{2.5} PSD elements with respect to Arkansas. The first clock, expiring on September 19, 2014, is for the PSD revisions required by the 2008 NSR PM_{2.5} Implementation Rule. The second clock, ending 24-months from the effective date of today's finding, addresses the PSD revisions required by the 2010 PM_{2.5} PSD Increments—SILs—SMC Rule. Pursuant to the CAA, EPA will promulgate a FIP to address the entirety of the PM_{2.5} PSD permitting requirements in order to satisfy both FIP clocks and section 110(c) of the CAA.

III. 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" under the terms of

Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under EO 12866 and 13563 (76 FR 3821, January 21, 2011).

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.* 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 PSD SIPs under section 166(b) to satisfy certain prevention of significant deterioration requirements under the CAA for the PM_{2.5} NAAQS. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in the CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute 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 organizations and small governmental jurisdictions. For the purpose of assessing the impacts of this final rule on small entities, small entity is defined as: (1) A small business that is a small industry entity as defined in the U.S. Small Business Administration (SBA) size standards (*See* 13 CFR 121); (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 this final rule on small entities, I certify that this rule will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. This action relates to the requirement in the CAA for states to submit PSD SIPs under section 166(b) to satisfy certain prevention of significant deterioration requirements of the CAA for the PM_{2.5} NAAQS. Because EPA has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the APA and any other statute, it is not subject to the regulatory flexibility provisions of the RFA.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538 for state, local and tribal governments and the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action relates to the requirement in the CAA for states to submit PSD SIPs under section 166(b) to satisfy certain prevention of significant deterioration requirements under the CAA for the PM_{2.5} NAAQS. This rule merely finds that Arkansas has not met that requirement. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector result from this action.

Additionally, because EPA has made a "good cause" that this action is not subject to notice-and-comment requirements under the APA or any other statute, it is not subject to sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

EO 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the 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 EO to include regulations that have “substantial direct effects on the states, or the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government.” This final rule 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 EO 13132. The CAA establishes the scheme whereby states take the lead in developing plans to meet the NAAQS. This rule will not modify the relationship of the states and the EPA for purposes of developing programs to implement the NAAQS. Thus, EO 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

EO 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires the EPA to develop an accountable process to ensure “meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.” This final rule does not have tribal implications, as specified in EO 13175. This rule responds to the requirement in the CAA for states to submit PSD SIPs under section 166(b) to satisfy certain prevention of significant deterioration requirements under the CAA for PM_{2.5} NAAQS. No tribe is subject to the requirement to submit an implementation plan under section 166(b) within 21 months of promulgation of PSD regulations under section 166(a).

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The 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 merely finds that Arkansas has failed to make a submission that is required under the Act to implement the PM_{2.5} NAAQS.

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

This rule is not a “significant energy action” as defined in EO 13211,

“Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS. This action does not involve technical standards. Therefore, the EPA did not consider the use of any VCS.

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

EO 12898 (59 FR 7629, February 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. The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not directly affect the level of protection provided to human health or the environment. This notice is making a finding that the State of Arkansas failed to submit a SIP revision that provides certain basic permitting requirements for the PM_{2.5} NAAQS.

K. Congressional Review Act

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. Section 808 allows the issuing agency to make any rule effective “at such time as the Federal agency promulgating the rule determines” if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established an effective date of May 22, 2014. EPA submitted 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 action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective May 22, 2014.

L. 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 July 21, 2014. 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).)

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practices and procedures, Air pollution control, Incorporation by reference, Intergovernmental Relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: May 9, 2014.

Samuel Coleman,

Acting Regional Administrator, Region 6.

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