

result in equivalent or additional reductions of NO<sub>x</sub> and/or VOC emissions and should not interfere with any applicable requirement concerning attainment or reasonable further progress with the NAAQS or interfere with other applicable CAA requirement in section 110(l) of the CAA.

EPA's complete analysis of ACHD's case-by-case RACT SIP revisions is included in the TSD available in the docket for this rulemaking action and available online at <https://www.regulations.gov>, Docket number EPA-R03-OAR-2020-0575.

#### IV. Proposed Action

Based on EPA's review, EPA is proposing to approve the Pennsylvania SIP revisions for the ten case-by-case RACT facilities listed in Table 2 of this document and incorporate by reference in the Pennsylvania SIP, via the RACT II permits, source specific RACT determinations under the 2008 8-hour ozone NAAQS for certain major sources of NO<sub>x</sub> and VOC emissions. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action. As EPA views each facility as a separable SIP revision, should EPA receive comment on one facility but not others, EPA may take separate, final action on the remaining facilities.

#### V. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference source specific RACT determinations via the RACT II permits as described in Sections II and III—Summary of SIP Revisions and EPA's Evaluation of SIP Revisions in this document. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

#### VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 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 CAA. 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 proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
  - Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 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 U.S.C. 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 (Pub. L. 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 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; 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 proposed rulemaking, addressing the case-by-case NO<sub>x</sub> and VOC RACT requirements for sources at ten facilities for the 2008 8-hour ozone NAAQS, 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.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 23, 2021.

**Diana Esher,**

*Acting Regional Administrator, Region III.*

[FR Doc. 2021-09099 Filed 5-6-21; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R05-OAR-2019-0031; FRL-10023-37-Region 5]

### Air Plan Approval; Illinois; 2008 Ozone Moderate VOC RACT for Chicago

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve volatile organic compound (VOC) reasonably available control technology (RACT) State Implementation Plan (SIP) revisions for the Illinois portion of the Chicago-Naperville, IL-IN-WI nonattainment area (Illinois portion) under the 2008 8-hour ozone National Ambient Air Quality Standard ("NAAQS" or "standard") submitted by the Illinois Environmental Protection Agency ("Illinois" or "Illinois EPA") on January 10, 2019 and supplemented on April 30, 2020. EPA is also proposing to approve the Stepan Co. construction permit submitted by Illinois on March 29, 2021 as a revision to the Illinois SIP. The Illinois portion consists of Cook, DuPage, Kane, Lake, McHenry, and Will Counties and portions of Grundy (Aux Sable and Goose Lake Townships) and Kendall (Oswego Township) Counties. These VOC RACT SIP submittals satisfy the moderate VOC RACT requirements of section 182(b)(2) of the Clean Air Act (CAA).

**DATES:** Comments must be received on or before June 7, 2021.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R05-OAR-2019-0031 at <http://www.regulations.gov>, or via email to [aburano.douglas@epa.gov](mailto:aburano.douglas@epa.gov). For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment.

The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Katie Mullen, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-3490, [mullen.kathleen@epa.gov](mailto:mullen.kathleen@epa.gov). The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID-19.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What is EPA proposing?
- II. What is the background for this action?
- III. What is EPA’s evaluation of Illinois’ VOC RACT submittal?
- IV. What action is EPA taking?
- V. Incorporation by Reference
- VI. Statutory and Executive Order Reviews

## I. What is EPA proposing?

EPA is proposing to approve VOC RACT SIP revisions submitted by Illinois on January 10, 2019 and supplemented on April 30, 2020. EPA is also proposing to approve the Stepan Co. construction permit submitted by Illinois on March 29, 2021 as a revision to the Illinois SIP, making the throughput limits federally enforceable. These revisions satisfy the moderate VOC RACT requirements of section 182(b)(2) of the CAA for the Illinois portion under the 2008 8-hour ozone standard.

## II. What is the background for this action?

VOCs contribute to the production of ground-level ozone, or smog, which harms human health and the environment. Sections 172(c)(1) and 182(b)(2) of the CAA require states to implement RACT in ozone nonattainment areas classified as moderate (and higher). Specifically, these areas are required to implement

RACT for all major VOC sources and for all sources covered by a Control Techniques Guideline (CTG). A CTG is a document issued by EPA which establishes a “presumptive norm” for RACT for a specific VOC source category. States must submit rules, or negative declarations when no such sources exist for CTG source categories.

EPA’s SIP Requirements Rule for the 2008 ozone NAAQS indicates that states may meet RACT through the establishment of new or more stringent requirements that meet RACT control levels, through a certification that previously adopted RACT controls in their SIPs approved by EPA for a prior ozone NAAQS also represent adequate RACT control levels for attainment of the 2008 ozone NAAQS, or with a combination of these two approaches. See 80 FR 12,264, 12,278–79 (Mar. 6, 2015). As stated above, a state may submit a negative declaration in instances where there are no CTG sources.

On June 11, 2012, EPA designated the Chicago-Naperville, IL-IN-WI nonattainment area as a marginal nonattainment area for the 2008 ozone NAAQS (77 FR 34221). The Illinois portion includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties and parts of Grundy and Kendall Counties. On May 4, 2016, pursuant to section 181(b)(2) of the CAA, EPA determined that the Chicago-Naperville, IL-IN-WI nonattainment area failed to attain the 2008 ozone NAAQS by the July 20, 2015, marginal area attainment deadline and thus reclassified the area from marginal to moderate nonattainment (81 FR 26697). In that action, EPA established January 1, 2017, as the due date for the state to submit all moderate area nonattainment plan SIP requirements applicable to newly reclassified areas. On August 23, 2019, pursuant to section 181(b)(2) of the CAA, EPA determined that the Chicago-Naperville, IL-IN-WI nonattainment area failed to attain the 2008 ozone NAAQS by the July 20, 2018, moderate area attainment deadline and thus reclassified the area from moderate to serious nonattainment (84 FR 44238). In that action, EPA established August 3, 2020 and March 23, 2021 as the due dates for serious area nonattainment plan SIP submissions for newly reclassified areas. This action only addresses the moderate VOC RACT SIP submissions.

## III. What is EPA’s evaluation of Illinois’ VOC RACT submittal?

Illinois previously addressed RACT requirements for the Illinois portion under the 1979 and 1997 ozone

standards (45 FR 11472, 52 FR 45333, 59 FR 46562, and 77 FR 16940). Illinois’ VOC RACT rules for the Illinois portion are contained in 35 Ill. Adm. Code Part 218 (Part 218). Illinois has evaluated the regulations previously approved by EPA and determined that these rules continue to satisfy RACT requirements under the 2008 ozone NAAQS.

The rules in Part 218 include rules addressing CTG categories adopted by EPA through 2018 for which there are existing sources in the Illinois portion. Negative declarations for other CTG categories are detailed below.

Major non-CTG VOC sources, which are subject to RACT, are stationary sources that have the potential to emit (PTE) at least 100 tons per year (TPY) of VOCs in moderate ozone nonattainment areas and are not subject to the applicability criteria in the CTGs. Many major non-CTG VOC sources located in the ozone nonattainment area that are not subject to specific RACT rules are subject to generic RACT rules. Thus, Illinois has met the obligation to implement RACT for many major non-CTG VOC sources in the Illinois portion with SIP-approved regulations under Part 218 subparts PP, QQ, RR, and TT.

Illinois has previously submitted several negative declarations for CTG categories for which there were no applicable sources found in Illinois that meet the applicability criteria for those CTGs. In those cases, it was unnecessary to adopt new state rules and submit SIP revisions to address those CTG categories. Illinois has determined that these negative declarations are still valid and appropriate for the CTGs for the Shipbuilding and Ship Repair Industry, Natural Gas/Gasoline Processing Plants, Aerospace Manufacturing and Rework Facilities, High-Density Polyethylene/Polypropylene Manufacturing, Vegetable Oil Processing, and Oil and Natural Gas Industry.

### Shipbuilding and Ship Repair Industry

On November 11, 1996, Illinois submitted to EPA a negative declaration letter for the Ship Building and Ship Repair Industry. This CTG applies to sources with potential emissions greater than or equal to 25 tons of VOC per year for this category. Illinois determined that there were no such sources in the Illinois portion of the nonattainment area.

Illinois reviewed its most recent inventory to determine if any sources fall under this category. Illinois found four sources that required further review. All four of these sources are barge cleaning sources with VOC emissions limitations under 25 TPY.

Therefore, the negative declaration is still valid and appropriate for this CTG category.

#### *Natural Gas/Gasoline Processing Plants*

On November 14, 1985, Illinois submitted to EPA a negative declaration letter for the Natural Gas/Gasoline Processing Plant industry. Illinois determined that there were no sources of any size in this source category in the Illinois portion.

Illinois reviewed its most recent inventory to determine if any sources fall under this category. There were 35 sources that required further review. One source (SIC 1321) does have emission units that fall under the CTG. This source was built after Illinois' negative declaration for this CTG category and is subject to the control requirements in the New Source Performance Standard (NSPS) 40 CFR 60 subpart KKK Standards of Performance for Equipment Leaks of VOC from Onshore Natural Gas Processing Plants. The NSPS standards and control requirements are equivalent to or more stringent than the CTG requirements.

The other 34 sources (SIC 4922, 4923, and 4924) are natural gas pipelines that are used to transport gas across Illinois to nearby states. None of these sources have emission units that fall under this CTG category. Therefore, the negative declaration/RACT certification is still valid and appropriate for the CTG category.

#### *Aerospace Manufacturing and Rework Facilities*

On October 11, 1996, Illinois submitted to EPA a negative declaration letter for the Aerospace Manufacturing and Rework Operations CTG. This CTG applies to sources in this category with potential emissions greater than or equal to 25 tons of VOC per year. Illinois determined that there were no such sources in the Illinois portion.

Illinois reviewed its most recent inventory to determine if any sources fall under this category. Illinois found 11 sources under SIC codes 3728, 4512, 4581, and 9711. None of these sources have emission units that fall under this CTG category. Therefore, the negative declaration is still valid and appropriate for the CTG category.

#### *High-Density Polyethylene, Polypropylene, and Polystyrene Resins*

The Control of Volatile Organic Compound Emissions from Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins CTG covers the manufacture of those three materials. Illinois previously

submitted a negative declaration to EPA that applied to two of those materials, Polyethylene and Polypropylene, and certified that there were no sources manufacturing those materials in the Illinois portion. The third material, Polystyrene, is regulated by State RACT rules in Part 218 subpart BB: Polystyrene Plants.

Illinois reviewed its most recent inventory and confirmed that no sources fall under the four SIC codes (2821, 2822, 2823, and 2824) for this CTG category for the manufacture of polyethylene and polypropylene. There are two sources out of 11 under SIC 2821 that manufacture polystyrene resin and are subject to Part 218 subpart BB Polystyrene Plants, the current RACT rule in Illinois. Therefore, the negative declaration/RACT certification is still valid and appropriate for the CTG category.

#### *Vegetable Oil Processing*

Illinois determined there were no such sources in the Illinois portion. Illinois reviewed its most recent inventory to determine if any sources fall under this category and found one source that required further review. This source is subject to the control requirements in the NESHAP 40 CFR 63 subpart GGGG for Solvent Extraction for Vegetable Oil Production.

The NESHAP standards for control are equivalent to or more stringent than the outdated former CTG. Thus, the negative declaration/RACT certification is still valid and appropriate.

#### *Oil and Natural Gas Industry*

On December 5, 2018 Illinois submitted to EPA a negative declaration for the Oil and Natural Gas Industry, which is the subject of the October 20, 2016 CTG. Illinois reviewed the Chicago-Naperville, IL-IN-WI nonattainment area emission inventory and performed assessments for sources and units that might require additional regulation pursuant to the Oil and Gas CTG. Illinois found no oil or gas producing wells, and found no sources or units affected by this CTG in the Illinois portion for which a SIP revision is necessary to achieve RACT level control. Most of the sources identified in the oil and gas industry in the Illinois portion are involved exclusively in the processing, transmission and distribution of oil and gas. Sources and units that were found to be potentially affected by the Oil and Gas CTG were found to be exempt and are already controlled by Federal and/or State regulations that include requirements more stringent than the CTG RACT

requirements. Thus, the negative declaration/RACT certification is valid.

#### *Industrial Wastewater*

EPA issued a draft CTG for the industrial wastewater category in September 1992. However, because this CTG was never finalized, industrial wastewater sources are considered to be non-CTG VOC sources. Industrial wastewater is a category that is not covered by the Illinois non-CTG VOC RACT rules.

On December 23, 1999, Illinois submitted to EPA a negative declaration letter for the Illinois portion covering industrial wastewater sources. At that time, Illinois determined that all sources in the Illinois portion to which the draft CTG would be applicable were covered by other regulations that were as stringent or more stringent than the draft CTG. Those sources were two refineries and one chemical plant that were subject to Federal regulations covering waste operations.

Illinois reviewed its most recent inventory to determine if any sources fall under the industrial wastewater category, including: Organic chemicals, plastics, and synthetic fibers; pharmaceuticals; pesticides manufacturing; petroleum refining; pulp, paper, and paperboard mills; and hazardous waste treatment, storage, and disposal facilities. Illinois found 54 sources that required further review. Illinois examined each unit at these sources and the operating permits of those sources to determine whether a source was a significant source of wastewater or if the draft CTG was potentially applicable to a source or unit. Of those 54 sources, it was determined that the draft CTG would be applicable to only six sources. It was found that all subject sources were covered under the NESHAP 40 CFR 63 subpart G, the NESHAP 40 CFR 63 subpart FFFF, or by Part 218 subpart C, all of which are equivalent or more stringent than the draft CTG.

EPA requested additional information for twelve industrial wastewater sources that were identified as potentially being subject to non-CTG VOC RACT based on historical emissions. On April 30, 2020, Illinois submitted supplementary information demonstrating that either the existing levels of control represent RACT (RACT equivalence) or that the sources' potential to emit VOC are below the 100 TPY non-CTG VOC moderate area major source threshold and thus the sources are not subject to non-CTG VOC RACT.

The twelve sources that the EPA evaluated include the following refineries and chemical plants: Ester

Solutions, Hexion Inc., INEOS Joliet, INEOS Styrolution America LLC, Polynt Composites USA, Akzo Nobel, AbbVie, LyondellBasell, Exxon Mobil Oil Corp., Citgo Petroleum, Koppers Inc., and Stepan Co.

Ester in Bedford Park, IL, Hexion in Bedford Park, IL, INEOS Styrolution America LLC in Channahon, IL, and Polynt in Carpentersville, IL are not subject to RACT because the PTE VOC from each of these sources is less than 100 TPY.

The second INEOS source, INEOS Joliet, is also located in Channahon, IL. The supporting documentation provided by INEOS Joliet indicates that some of the wastewater streams are hard piped to two emission points. These two emission points are a storage tank vent and an anaerobic flare, each of which has a federally enforceable permitted limit of 0.44 TPY. The remaining wastewater streams at this source are directed through open sewers to the wastewater treatment system. After considering the federally enforceable permitted limit, EPA calculated the total PTE VOC to be 41.1 TPY, which is below the 100 TPY non-CTG threshold.

Akzo Nobel is located in Morris, IL and has two wastewater emission units. One unit is classified as an insignificant activity (less than 0.1 pounds per hour and less than 0.44 TPY) and the other unit is required by a SIP-approved rule to route its VOC emissions to an afterburner that achieves at least 85 percent control. After considering this federally enforceable control, the total PTE VOC from wastewater at Akzo Nobel was determined to be less than 1 TPY.

AbbVie in North Chicago, IL demonstrated RACT equivalence. Most of its wastewater is taken off site for treatment. The remaining VOC-containing wastewater streams are well controlled at the on-site wastewater treatment plant. The requirements to conduct pretreatment are federally enforceable through its Discharge Control Document, which was issued by the publicly owned treatment works as required by its National Pollutant Discharge Elimination System permit issued by Illinois EPA. A comparison of controlled and uncontrolled emissions demonstrated approximately 98 percent control of VOC from their wastewater operations. EPA concluded that AbbVie is well controlled and that this level of control represents RACT.

LyondellBasell is subject to the Miscellaneous Organic Chemical Manufacturing NESHAP and Benzene Waste Operations NESHAP (BWON). After considering these applicable NESHAPs, the EPA calculated the total

PTE VOC to be 20.38 TPY, which is below the 100 TPY non-CTG threshold.

Both Exxon Mobil Oil Corporation's Joliet Refinery and Citgo Petroleum's Lemont Refinery demonstrated that potential VOC emissions from sources at each facility not subject to a CTG are below the 100 TPY non-CTG threshold for moderate areas. Both refineries are subject to the BWON NESHAP (40 CFR 61, subpart FF). After considering BWON restrictions, the PTE VOC from refinery wastewater was calculated to be 75.3 TPY, which is below the 100 TPY non-CTG threshold. This value was derived from BWON NESHAP's 6.0 megagrams per year benzene limit and EPA's technology review in support of the recent amendments to the Petroleum Refinery Sector Rule.

Koppers in Cicero, IL submitted a modeling demonstration for the wastewater system at the plant. Environmental Resources Management, Inc. modeled the Koppers wastewater treatment plant using a Toxchem model to predict the annual PTE VOC. The total PTE VOC at Koppers was estimated to be 2.25 TPY, which is far below the 100 TPY non-CTG threshold.

Stepan Co. in Elwood, IL applied for a construction permit that provides operational limits on throughput from upstream processes into the wastewater stream. The operational limits on throughput are on the masses of methanol and other VOC compounds in the wastewater, which contribute to the VOC wastewater emissions. Biodegradation is also required to meet the effluent limitation in the federally enforceable National Pollutant Discharge Elimination System permit. After considering the application of biodegradation provided by the three aeration tanks at Stepan Co., the operational limits result in a potential to emit VOC of 97.8 TPY, which is below the 100 TPY non-CTG threshold. EPA is proposing to approve this construction permit as a revision to the Illinois SIP, making the throughput limits federally enforceable.

Based on the information that Illinois provided, we agree that these sources either demonstrated RACT equivalence or are below the 100 TPY non-CTG major source threshold for moderate areas. Therefore, the VOC RACT SIP submittals for the Illinois portion are approvable as meeting the moderate VOC RACT requirements of section 182(b)(2) of the CAA.

#### IV. What action is EPA taking?

EPA is proposing to approve negative declarations, a VOC RACT certification, and the Stepan Co. construction permit submitted by Illinois as meeting the

CAA section 182(b)(2) moderate RACT requirements for the Illinois portion under the 2008 8-hour ozone NAAQS.

#### V. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the Illinois construction permit for Stepan Company's Millsdale Plant, issued October 30, 2020, as described in section III. of this preamble. EPA has made, and will continue to make, these documents generally available through [www.regulations.gov](http://www.regulations.gov) and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

#### VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 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 CAA. 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 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 U.S.C. 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 (Pub. L. 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 U.S.C. 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, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Volatile organic compounds.

Dated: May 3, 2021.

Cheryl Newton,

Acting Regional Administrator, Region 5.

[FR Doc. 2021-09686 Filed 5-6-21; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 10

[Docket No. FWS-HQ-MB-2018-0090; FF09M21200-212-FXMB1231099BPP0]

RIN 1018-BD76

#### Regulations Governing Take of Migratory Birds; Proposed Rule

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** On January 7, 2021, we, the U.S. Fish and Wildlife Service (we, the Service, or USFWS), published a final rule defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. We are now proposing to revoke that rule for the reasons set forth below. The effect of this proposed rule would be to return to implementing the MBTA

as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent.

**DATES:** We request public comments on this proposed rule on or before June 7, 2021.

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-HQ-MB-2018-0090, which is the docket number for this action. Then, click on the Search button. You may submit a comment by clicking on "Comment Now!" Please ensure you have located the correct document before submitting your comments.

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-HQ-MB-2018-0090, U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

#### FOR FURTHER INFORMATION CONTACT:

Jerome Ford, Assistant Director, Migratory Birds, at 202-208-1050.

**SUPPLEMENTARY INFORMATION:** On January 7, 2021, we published a final rule defining the scope of the MBTA (16 U.S.C. 703 *et seq.*) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA (86 FR 1134) (hereafter referred to as the "January 7 rule"). The January 7 rule codified an interpretation of the MBTA set forth in a 2017 legal opinion of the Solicitor of the Department of the Interior, Solicitor's Opinion M-37050, which concluded that the MBTA does not prohibit incidental take.

As initially published, the January 7 rule was to become effective 30 days later, on February 8, 2021. However, on February 4, 2021, USFWS submitted a final rule to the **Federal Register** correcting the January 7 rule's effective date to March 8, 2021, to conform with its status as a "major rule" under the Congressional Review Act, which requires a minimum effective date period of 60 days, *see* 5 U.S.C. 801(a)(3) and 804(2). The final rule extending the effective date of the January 7 final rule itself became effective when it was made available for public inspection in the reading room of the Office of Federal Register on February 5, 2021 and was published in the **Federal Register** on February 9, 2021 (86 FR 8715). In that

document, we also sought public comment to inform our review of the January 7 rule and to determine whether further extension of the effective date is necessary.

After further review, we decided not to extend the effective date of the January 7 rule beyond March 8. We acknowledge that the January 7 rule will remain in effect for some period of time even if it is ultimately determined, after notice and comment, that it should be revoked. But, rather than extending the effective date again, we believe that the most transparent and efficient path forward is instead to immediately propose to revoke the January 7 rule. This proposed rule provides the public with notice of our current intent to revoke the January 7 rule's interpretation of the MBTA that it does not prohibit incidental take, subject to our final decision after consideration of public comments.

We have undertaken further review of the January 7 rule and have determined that the rule does not reflect the best reading of the MBTA's text, purpose, and history. It is also inconsistent with the majority of relevant court decisions addressing the issue, including the decision of the District Court for the Southern District of New York that expressly rejected the rationale offered in the rule. The rule's reading of the MBTA also raises serious concerns with a United States' treaty partner, and for the migratory bird resources protected by the MBTA and underlying treaties. Accordingly, we are proposing to revoke the January 7 rule.

The MBTA statutory provisions at issue in the January 7 rule have been the subject of repeated litigation and diametrically opposed opinions of the Solicitors of the Department of the Interior. The longstanding historical agency practice confirmed in the earlier Solicitor M-Opinion, M-37041, and upheld by most reviewing courts, had been that the MBTA prohibits the incidental take of migratory birds (subject to certain legal constraints). The January 7 rule reversed these several decades of past agency practice and interpreted the scope of the MBTA to exclude incidental take of migratory birds. In so doing, the January 7 rule codified Solicitor's Opinion M-37050, which itself had been vacated by the United States District Court for the Southern District of New York. This interpretation focused on the language of section 2 of the MBTA, which, in relevant part, makes it "unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill" migratory birds or attempt to do the same. 16 U.S.C. 703(a). Solicitor's