ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2022–0956; FRL–10885–02–R3]

Air Plan Disapproval; West Virginia; Revision to the West Virginia State Implementation Plan To Add the Startup, Shutdown, Maintenance Rule 45CSR1—Alternative Emission Limitations During Startup, Shutdown, and Maintenance Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The Environmental Protection Agency (EPA) is disapproving a state implementation plan (SIP) revision submitted by the State of West Virginia on June 13, 2017. The revision pertains to a new rule setting forth the requirements to establish, at the discretion of the Secretary of the West Virginia Department of Environmental Protection, an alternative emission limitation (AEL) for a source that requests an AEL. This SIP revision was submitted subsequent to a finding of substantial inadequacy and SIP call published on June 12, 2015, for provisions in the West Virginia SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is disapproving this revision to the West Virginia SIP because it does not comply with the requirements of the Clean Air Act (CAA). EPA will also be issuing a finding of failure to submit (FFS) in a separate action, published elsewhere in this issue of the **Federal Register**, to address West Virginia's failure to correct the deficiencies identified in the June 12, 2015, SIP call.

DATES: This final action is effective on May 17, 2023.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2022–0956. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Serena Nichols, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2053. Ms. Nichols can also be reached via electronic mail at *Nichols.Serena@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 12, 2015, pursuant to CAA section 110(k)(5), the EPA finalized ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' [1] hereafter referred to as the ''2015 SSM SIP Action.'' The 2015 SSM SIP Action clarified, restated, and updated the EPA's interpretation that SSM exemptions (whether automatic or discretionary) and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016. With respect to the West Virginia SIP, in the 2015 SSM SIP Action, EPA determined that 14 provisions were substantially inadequate to meet CAA requirements.

On June 13, 2017, West Virginia submitted a SIP revision requesting the approval of a new state rule into the West Virginia SIP that sets forth the requirements to establish an AEL for a source that may require an AEL. The new West Virginia regulation, found at 45 Code of State Rules (CSR) 1, is referred to as ''Rule 1'' in West Virginia's SIP submission, and will be referred to the same way here.

On December 22, 2022, EPA published a notice of proposed rulemaking (NPRM) related to West Virginia's June 13, 2017 submittal.[2] In that document, EPA proposed disapproval of West Virginia's submittal for multiple reasons. These reasons included: (1) the SIP revision did not remove any of the existing West Virginia SSM exemptions identified as substantially inadequate in the 2015 SSM SIP Action; (2) the new AEL regulations did not specify that any AELs granted by the state would be submitted to EPA as SIP revisions; (3) the AEL regulations allowed sources to request AELs on a case-by-case basis, rather than adopting AELs for a narrow category of sources with similar characteristics and controls; (4) the AEL regulations did not allow for AELs for malfunctions; and (5) sources subject to the new source performance standard (NSPS) or national emission standard for hazardous air pollutants (NESHAPS) with startup and shutdown provisions could not obtain AELs and instead had to comply with the startup or shutdown standards in the applicable NSPS and/or NESHAP. A more complete explanation of the reasons for the proposed disapproval can be found in the December 22, 2022 NPRM.

In response to the NPRM, West Virginia submitted comments claiming that EPA failed to understand that the SIP revision allowing for AELs was only a first step in responding to the 2015 SSM SIP Action, and that therefore the AEL SIP revision should be judged solely on its own approvability under the Clean Air Act. Given this new information, which was not clearly stated in the documents included in the AEL SIP revision package, EPA is now assessing this AEL SIP revision independently of the state SIP provisions identified as the basis for West Virginia's inclusion in the 2015 SSM SIP Action. That is, EPA has reviewed the SIP submission solely on the basis of whether it meets the requirements of the Clean Air Act, rather than assessing whether it also addresses the deficiencies cited in the 2015 SSM SIP Action. However, when reviewed solely on this basis, and as discussed in response to West Virginia's comments below, the AEL SIP revision is not approvable as a SIP revision under section 110 of the CAA. In addition, based on West Virginia's clarification, EPA is also taking a separate action, published elsewhere in this issue of the **Federal Register**, making a FFS for West Virginia's failure to submit any SIP revision addressing the 14 State regulatory provisions identified in the 2015 SSM SIP Action.

II. EPA's Response to Comments Received

EPA received two sets of comments on the December 22, 2022 NPRM. The full text of the comments is in the

[1] 80 FR 33839, June 12, 2015.

[2] 87 FR 78617, December 22, 2022.

docket for this action. A summary of the comments and EPA's responses are provided herein.

A. Summary of Comments From the Sierra Club and the Environmental Integrity Project.

Comment: These commenters agree with EPA's proposed disapproval of West Virginia's SSM SIP submittal, and offer three major reasons why EPA should disapprove West Virginia's SIP submission: (1) West Virginia's SIP call response did not remove the unlawful SSM SIP provisions, (2) West Virginia's proposed AEL rule would unilaterally amend its SIPs through permits without undergoing the SIP revision process, and (3) West Virginia's proposed AEL rule does not comply with the CAA and the SSM SIP call guidance on AELs. As a result, these commenters urge EPA to propose a FIP to remove the unlawful SSM SIP provisions.

Response: The first three points raised by this commenter are similar to reasons EPA cited for proposing to disapprove West Virginia's SIP revision. In response to the request that EPA promulgate a FIP if West Virginia does not promptly submit a SIP revision addressing this disapproval, EPA notes that the states are not required to adopt and submit to EPA SIP revisions creating AELs for periods of SSM. States may choose to remove SSM exemptions, director's discretion provisions, and affirmative defense provisions and not provide alternative limits for periods of SSM. Thus, following this disapproval, West Virginia could choose to not create new AEL regulations and submit those as a SIP revision, and instead rely upon their enforcement discretion should a source exceed an emission limit which is part of the EPA-approved SIP. In a separate action, published elsewhere in this issue of the **Federal Register**, EPA is issuing an FFS for West Virginia's failure to address the issues cited in the 2015 SSM SIP Action, and that FFS will provide deadlines, in accordance with CAA sections 110(c) and 179(a).

B. Summary of Comments From the West Virginia Department of Environmental Protection (WVDEP).

WVDEP objects to the proposed disapproval for multiple reasons, with the most important being that the SIP submittal was not intended to be a full remedy to the 2015 SSM SIP call. West Virginia also claims that EPA's lack of communication with West Virginia deprived the State of an opportunity to remedy the issues cited in the disapproval prior to the proposed disapproval. In addition, West Virginia also requests that EPA not take final action on this SIP revision until a decision is issued by the U.S. Court of Appeals for the D.C. Circuit in a lawsuit challenging EPA's SIP call. West Virginia's concerns are set forth with more specificity below.

Comment: West Virginia asks that EPA delay final action on this SIP submission until the United States Court of Appeals for the D.C. Circuit issues its ruling on the lawsuits seeking to challenge EPA's issuance of the 2015 SSM SIP Action.[3]

Response: EPA is under a court-ordered deadline to take final action on West Virginia's AEL SIP submittal.[4] Given this deadline, EPA cannot wait to take final action on West Virginia's AEL SIP submittal until the D.C. Circuit rules on the lawsuits challenging the 2015 SSM SIP Call. The judicial consent decree requires EPA to take final action on the West Virginia AEL SIP submittal within 240 days of the Court's entry of the final decree. Public notice and opportunity to comment upon this consent decree was published on April 11, 2022. No comments were received from West Virginia. The consent decree was entered on June 27, 2022, and as such the 240-day deadline for taking final action was February 22, 2023, but was extended to April 12, 2023 by court order.

Even if there were not a court-ordered deadline for EPA to take action, it would not be appropriate or necessary to wait until the D.C. Circuit rules on the lawsuits challenging the 2015 SSM SIP Call. EPA's disapproval of West Virginia's AEL SIP submission is based on other CAA legal deficiencies that are unrelated to the deficiencies and Agency policies underlying the 2015 SSM SIP Call (for example, the fact that West Virginia's submission would allow for changes to West Virginia's SIP without appropriate procedures), and thus are irrelevant to the D.C. Circuit's eventual decision.

Comment: West Virginia states that the only purpose of the 2017 West Virginia SIP revision was to add Rule 1 into the West Virginia SIP, and that nothing in the 2017 SIP revision states that the revision was intended to be a complete response to the 2015 SSM SIP Action. West Virginia further states that it was considering revising or removing requirements identified in the 2015 SSM SIP Action through subsequent legislative rulemaking after sources had a SIP-approved mechanism to obtain AELs, but that EPA's failure to take timely action on the 2017 SIP revision prevented West Virginia from doing so. Therefore, West Virginia argues that this SIP revision should have been evaluated on its own merits, and EPA's reliance on West Virginia's failure to remove the provisions allowing exemptions from emission limits during SSM events cited in the 2015 SSM SIP Call is irrelevant.

Response: EPA notes that West Virginia's 2017 SIP submission did not specifically state that it was only a first step in addressing the 2015 SSM SIP Call. EPA reviewed the SIP submission and found that, in response to a comment submitted by the Sierra Club, West Virginia stated that ''Division of Air Quality (DAQ) intends to propose removal of the provisions identified in the SSM SIP Call after 45 CSR1 is effective.'' West Virginia's own comments do not cite to this statement in its SIP submission. In the absence of a specific statement directed to EPA in the SIP submittal noting that this was DAQ's plan, it is easy to see how EPA misunderstood DAQ's intent.

In response to this clarification by West Virginia, EPA is no longer identifying the AEL submission's failure to fully address the SIP call as a basis for its disapproval. Instead, in a separate action published elsewhere in the ''Rules'' section of this issue of the **Federal Register**, EPA is issuing a FFS for West Virginia's failure to submit SIP revisions addressing the other deficiencies identified in the 2015 SSM SIP Action.[5] The reasons for issuing a FFS will be discussed in that separate action and therefore are not discussed here.

Regarding West Virginia's claim that it was hampered by a lack of communication from EPA, the Region and Agency has publicly recognized that there were changes to the Agency's SSM policy in 2020 and 2021[6] which could have caused confusion and delay in the submission of SIP revisions. However, the policy changes occurred well after the November 2016 deadline for submitting SIP revisions set by the 2015 SSM SIP Call, which is still in place, and was never lifted. Indeed, the 2020 Memorandum specifically noted that it ''[did] not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state

[3] *Environ. Comm. Fl. Elec. Power* v. *EPA, et al,* No. 15–1239 (D.C. Cir.) (and consolidated cases).

[4] *Sierra Club, et. al.,* v. *Michael S. Regan,* Case No. 4:21–cv–6956–SBA (N.D. Ca., Sept. 8, 2021).

[5] See Docket ID No. EPA–R03–OAR–2023–0179.

[6] October 9, 2020, Memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,'' from Andrew R. Wheeler, Administrator. September 30, 2021; Memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.

SIP provisions that were substantially inadequate to meet the requirements of the Act.'' [7]

Finally, based on EPA's new understanding of West Virginia's intention in submitting the AEL SIP revision, EPA has analyzed the 2017 AEL SIP revision on its own merits, but nevertheless finds that the AEL SIP revision is not approvable for two reasons that are independent of the 2015 SSM SIP Action. First, as noted in the NPRM, the AEL SIP revision cannot be approved because it does not specify that any AEL granted by West Virginia must be submitted to EPA as a SIP revision for approval. Instead, West Virginia's comments note that the submitted AEL regulations require that any AEL granted by West Virginia must be incorporated into a permit under West Virginia Rule 13, Rule 14, or Rule 19, and that each of these permitting programs are approved by EPA as part of the SIP. West Virginia cites to its original response to EPA's 2016 comments when Rule 1 was proposed at the State level:

> These permitting rules are all SIP approved and are an integral part of the State air program designed to address compliance with the NAAQS [National Ambient Air Quality Standard]. By virtue of their SIP approval, it is immaterial whether an AEL is directly approved into the SIP because it will be embodied in a permit under a SIP approved program and is therefore fully federally enforceable.

West Virginia's comment does not address the most important element of EPA's concern, which is that these regulations creating AELs do not require that the AELs, when issued, be submitted to EPA for approval as a SIP revision. While inclusion of the AEL limits in a permit issued under an EPA-approved permitting program in the SIP does make the limit federally enforceable, it does not provide a SIP mechanism for assuring that SIP limits would not be changed without first going through the CAA's SIP revision process. To the contrary, it creates a non-SIP mechanism for amending the SIP by creating alternatives to it. It also creates the potential for confusion because the associated AEL would not be contained in the SIP with the SIP limits that it amends, and it allows for the possibility of non-SIP AELs that conflict with the SIP limits. Moreover, it does so without opportunity for EPA review or disapproval where the AEL fails to meet CAA requirements. Any AEL which revises a limit that is EPA-approved as part of the West Virginia SIP must go through the process of being submitted as a SIP revision in accordance with CAA section 110. EPA's SIP call makes clear that AELs that modify SIP-approved emissions limitations, whether adopted on a case-by-case basis or as an AEL generally applicable to a narrow category of similar sources, must be presented to EPA for approval as a SIP revision, and go through the SIP revision process. This is because the AELs at issue here would be changes to a state emission regulation adopted as part of the state's SIP to implement the CAA, and as such must be approved as a SIP revision by EPA. States cannot unilaterally make changes to SIP-approved emission limits without the requirements of CAA section 110 being met, including a public comment process and EPA approval.

EPA specifically addressed this concern in the 2015 SSM SIP Action, at 80 FR 33918, June 12, 2015:

> Pursuant to the EPA's own responsibilities under sections 110(k)(3), 110(l) and 193 . . ., it would be inappropriate for the Agency to approve a SIP provision that automatically preauthorized the state unilaterally to revise the SIP emission limitation without meeting the applicable procedural and substantive statutory requirements for a SIP revision.

The 2015 SSM SIP Action also stated—

> It is a fundamental tenet of the CAA that states cannot unilaterally change SIP provisions, including the emission limitations within SIP provisions, without the EPA's approval of the change through the appropriate process.

Thus, the fact that an AEL must be incorporated into a permit that is part of the EPA-approved West Virginia SIP does not do away with this requirement that the AEL be submitted as a SIP revision and go through the SIP revision process.

The second reason for disapproving the AEL SIP submission which is unrelated to the deficiencies in the 2015 SSM SIP Action is that the AEL prohibits a source from obtaining an AEL if that source is subject to a CAA section 111 Federal new source performance standard (NSPS) and/or a national emission standard for hazardous air pollutants (NESHAP) under section 112, and that NSPS or NESHAP has a startup or shutdown provision. The regulation at 45CSR1–1.5.b specifically states that persons subject to NSPS in 45CSR16 or to NESHAPS in 45CSR34 ''shall meet the applicable startup and shutdown provisions of the applicable Federal rule and are not eligible for an alternative emission limit under this rule for affected sources.'' As EPA explained in the 2015 SSM SIP Action and in the NPRM for this action, those NSPS and NESHAPS adopted before 2008 but not yet updated may contain problematic exemptions for startups and shutdowns that have not yet been corrected to comply with the 2008 *Sierra Club* v. *Johnson* decision.[8] West Virginia's 45CSR1–1–5.b does not distinguish between the updated standards and not-yet-updated standards. For those not-yet-updated, the Agency cannot approve as a SIP revision a regulation that allows these NSPS and/or NESHAP-related SSM provisions to continue to exist in State-issued permits, nor can it approve a blanket provision preventing the State from issuing or revising permits to address the problematic provisions.[9] In addition, West Virginia's blanket rule requiring sources to follow applicable NSPS or NESHAP startup and shutdown provisions assumes that emission limitation requirements in recent NESHAP and NSPS are appropriate for all pollutants and sources regulated by the SIP. That is, the NSPS or NESHAP may not be designed to address the excess emission of NAAQS pollutants, which the SIPs seek to control, and as such may not adequately address excess emission of NAAQS pollutants during startup or shutdown. West Virginia's regulation assumes, without support, that NSPS and/or NESHAP startup and shutdown provisions are directed at controlling emissions of NAAQS pollutants, which may not be the case. Thus, a source's compliance with an NSPS or NESHAP startup or shutdown provision is not guaranteed to address excessive emissions of NAAQS pollutants or precursors. Therefore, the particular emissions limitation which any particular NSPS or NESHAP adopts for a startup or shutdown event as part of a continuously applicable emission limitation would still need to be evaluated on a case-by-case basis as to their applicability and appropriateness as AELs for SIP purposes.

Comment: Rule 1 does not establish limits for sources. West Virginia objects to EPA citing as one reason for the disapproval the fact that the SIP submittal setting AEL requirements did not address those provisions of West Virginia's regulations granting sources an automatic or discretionary exemption during SSM events that were specifically cited by EPA in the 2015 SSM SIP Action. West Virginia notes that states are allowed some discretion in how they establish programs to meet CAA requirements, and they chose to adopt the guidance and codify the requirements for sources to establish AELs. West Virginia also seems to

[7] October 9, 2020 Memorandum at 3.

[8] 87 FR 78617, at 78620, December 22, 2022.

[9] *Id.*

believe that EPA's comments ''suggest that West Virginia should have conducted a detailed technical analysis for each distinct category of sources . . .''.

Response: As noted above, in response to West Virginia's claim that the AEL SIP revision was not intended to address all of the deficiencies cited in the 2015 SSM SIP Action, EPA is evaluating the AEL SIP submission solely as to whether it meets the requirements for approvability under the CAA, without regard to whether it addresses all the 2015 SSM SIP Action deficiencies. Thus, whether the AEL SIP submission addresses all the SIP Action deficiencies is no longer relevant to this action.

Regarding the claim that EPA's proposal suggests that West Virginia should have conducted an analysis for each distinct category of sources, EPA believes that West Virginia is misinterpreting the discussion in the proposed disapproval at 87 FR 78620 (87 FR 78617, December 22, 2022). That discussion points out that some NSPS and NESHAP regulate pollutants other than criteria pollutants. Therefore, controls, operational standards and other measures in those regulations that are meant to address non-criteria pollutants may not work for criteria pollutants. As such, reliance by a state on the NSPS or NESHAP control requirements may not address the emission of pollutants regulated by a state's SIP.

Comment: WVDEP did not and does not now consider it necessary to require all sources to apply for an AEL, nor is it necessary for the DEP to conduct a detailed analysis to review every permit for every source to make that determination.

Response: EPA agrees that it may not be necessary for all sources to apply for an AEL. However, the EPA statement quoted in West Virginia's comments does not say or imply that every source must apply for an AEL. As noted above, EPA also did not state that West Virginia must conduct a detailed analysis of every permit for every source.

Comment: The WVDEP disagrees with the EPA's concern regarding the first of the seven criteria set forth in the 2015 SSM SIP Action because the criterion for narrowly defined source categories using specific control strategies is embodied in the West Virginia case-by-case approach codified in Rule 1. WVDEP argues that the EPA has been unable to define alternatives for narrowly defined source categories in the almost eight years since it finalized the 2015 SSM SIP Call and objects to EPA's expectation that the states do the same in a much shorter time frame and without EPA assistance.

Response: EPA agrees that West Virginia's case-by-case approach to AELs embodies the idea of granting AELs narrowly to specific types of sources using specific controls. However, EPA continues to believe that the case-by-case approach could prove to be a resource-intensive endeavor for WVDEP. As such, EPA reiterates that West Virginia could meet the requirements of the 2015 SSM SIP Action by removing the cited SSM exemptions from its SIP. There is no requirement that West Virginia adopt an AEL regulation to address the SIP call. This approach would avoid West Virginia having to undertake the potentially difficult task of creating AELs. If West Virginia nevertheless decides to proceed with a case-by-case AEL approach, the important point is that the regulation allowing for AELs must make it clear that each AEL must be submitted as a SIP revision to EPA for approval in accordance with section 110 of the CAA. In addition, as EPA explained in the proposed disapproval, West Virginia's case-by-case approach could lead to inconsistent alternative limits for sources that, based on similar operating characteristics, fuels, and other similar traits, should have similar AELs, and makes it difficult to consider any cumulative impact of source-specific emission limitations on West Virginia's air quality. Moreover, consistent with the court decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. (2008)) and provisions set forth in CAA section 302(k), EPA is revising NESHAP and NSPS regulations, which generally apply to defined source categories and require specific emission controls or other standards, as they come up for statutorily required review to eliminate SSM exemptions and ensure that standards apply at all times.

Comment: The fact that malfunctions are not included in the scope of 45CSR1 is not a reason for the SIP to be disapproved.

Response: EPA agrees. In the NPRM, EPA specifically points out that states are not required to establish an AEL for malfunction.[10]

Comment: WVDEP does not agree that an AEL developed by the EPA under the NESHAP program for an overlapping source category would not be relevant for sources covered by Rule 1. The WVDEP is confused by the EPA's argument that West Virginia should rely on a case-by-case analysis regarding the use of alternative limits allowed under a particular NSPS or NESHAP, which contradicts EPA's previous concern regarding WVDEP use of case-by-case analysis under Rule 1.

Response: EPA has reviewed the NPRM and cannot identify an EPA statement suggesting that an AEL developed by EPA under the NESHAP program for an overlapping source category[11] would not be relevant for sources seeking an AEL under Rule 1. EPA believes that West Virginia is conflating EPA's concern that existing SSM exemptions in NESHAPS should not be relied upon with EPA's other expressed concern that NESHAPS may not be focused on addressing criteria pollutants (or criteria pollutant pre-cursors), so reliance on limits in such NESHAP limits addressing periods of SSM for these other pollutants may not control certain criteria pollutants, which are the focus of SIPs. The discussion of these issues, at 87 FR 78620 of EPA's NPRM, was in the context of 45CSR1–1–5.b, which states that sources subject to NSPS, as incorporated into 45CSR16, and NESHAPS, as incorporated into 45CSR34, shall follow any startup or shutdown provisions set forth in an applicable NSPS and/or NESHAP and is not eligible for an AEL. EPA has been clear that state reliance on NSPS or NESHAPs with ''legacy'' SSM exemptions is not an acceptable alternative to the removal of the specific SSM provisions cited in the 2015 SSM SIP Call. EPA is separately working to remove these SSM exemptions, and if EPA develops AELs for emissions of certain NAAQS pollutants when removing these SSM provisions from NSPS and NESHAPS, those AELs may be relevant for purposes of the state if it elects to set an AEL for the same NAAQS pollutants when removing SSM provisions from its SIP. If EPA has not yet removed such SSM exemption, the state may, in conjunction with removing its SIP-based SSM exemption, elect to establish an AEL. If so, it would need to perform a ''case-by-case'' analysis of the particular source category at issue to determine what would constitute an appropriate AEL. EPA also notes, again, that West Virginia could resolve the CAA violations detailed in the 2015 SSM SIP Call without implementing any AELs, but simply by removing the violating provisions from the State's SIP.

Comment: At multiple places, West Virginia notes that EPA did not comment on certain issues when it

[10] 87 FR 78620, December 22, 2022.

[11] EPA interprets ''overlapping source category'' as a source category currently granted an SSM exemption by state regulations which is also regulated as a NESHAP source category.

submitted comments to the state during the 2016 public comment period.

Response: EPA's relevant comments, dated July 28, 2016, addressed seven submitted West Virginia proposed air quality rules, including Rule 1. These rules were submitted by WVDEP to EPA on or about June 29, 2016. At that time, EPA identified four issues, one being an issue cited in this disapproval, that the AEL limitations must be submitted for EPA approval into West Virginia's SIP for SIP compliance purposes. EPA's failure to identify all of its concerns with Rule 1 at that time is not a waiver of its responsibility to do so now, and EPA notes that it must also address comments submitted by commenters in response to EPA's NPRM. Commenter Sierra Club has identified many of the same issues with Rule 1 as EPA, so even if EPA had not raised these issues in the NPRM, the issues would need to be addressed.

III. Final Action

EPA is disapproving West Virginia's June 13, 2017 submittal as a revision to the West Virginia SIP.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to review state choices, and approve those choices if they meet the minimum criteria of the Act. Accordingly, this final action disapproving West Virginia's new rule related to AELs as a SIP revision merely ascertains that this State law does not meets Federal requirements and therefore does not impose additional requirements beyond those imposed by State law.

Additional information about these statutes and Executive orders can be found at *www.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 pre-existing 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 does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will 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 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 pre-existing 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 Populations

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental

justice for people of color, low-income populations, and Indigenous peoples.

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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 16, 2023. Filing a petition for reconsideration by the Administrator of this final action 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 action. This action pertaining to the disapproval of West Virginia's June 13, 2017 submittal, 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Adam Ortiz,

Regional Administrator, Region III.

[FR Doc. 2023–07615 Filed 4–14–23; 8:45 am]

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FEDERAL MARITIME COMMISSION

46 CFR Parts 501 and 502

[Docket No. FMC–2023–0011]

RIN 3072–AC97

Delegations to Bureau of Enforcement, Investigations, and Compliance

AGENCY: Federal Maritime Commission

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) is delegating authority to the Bureau of Enforcement, Investigations, and Compliance (BEIC), to issue Notice(s) of Violations and to compromise civil penalty claims subject to review by the Commission. Delegation of authority to BEIC provides enhanced efficiency flexibility during the enforcement process while maintaining Commission oversight.

DATES: The rule is effective without further action on May 17, 2023.

FOR FURTHER INFORMATION CONTACT: William Cody, Secretary; Phone: (202) 523–5725; Email: *secretary@fmc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC) is responsible for investigating potential violations of the Shipping Act of 1984, as amended, and associated Commission regulations, and initiating enforcement actions. The Commission is delegating authority to BEIC to issue Notice(s) of Violations (NOV) and to compromise civil penalty claims subject to approval by the Commission. Delegation of authority to BEIC coupled with Commission review of compromise agreements will provide enhanced efficiency and flexibility during the enforcement process while maintaining Commission oversight.

II. Background

Pursuant to its authority under the Shipping Act of 1984, as amended, Commission regulations currently provide for two types of enforcement actions seeking civil penalties, formal enforcement action under 46 CFR 502.63 and informal compromise procedures under 46 CFR 502.604. Currently, both require Commission approval to proceed at multiple steps during the process, thereby making the enforcement process unnecessarily burdensome and hindering the efficient resolution of enforcement matters.

The current process for BEIC to conduct an enforcement action requires: (1) providing notice to the subjects of investigations that BEIC intends to recommend that the Commission initiate enforcement proceedings and allowing the subject an opportunity to respond before BEIC submits those recommendations and responses to the Commission for approval; (2) receiving Commission approval before formal or informal enforcement action is undertaken, including approval to enter into compromise discussions; and (3) receiving Commission approval of any proposed compromise agreements. The current process has proven procedurally complicated since it involves multiple levels and cycles of approval prior to any case culminating in resolution. The rigidity of the process combined with the opportunity for respondents to submit responses of up to 40 pages has increased time and resource costs in enforcement matters both for the Commission and for the entities it regulates.

III. Regulatory Changes

As briefly described in Section II, the Commission is streamlining the current process by delegating authority to BEIC to issue Notice(s) of Violations setting forth alleged violations and to compromise such claims, subject to review by the Commission instead of requiring Commission approval at each step under the current approach. Compromise agreements will be subject to Commission review after the parties have reached an agreement rather than before negotiations begin and again at the conclusion, thereby increasing the efficiency of Commission enforcement efforts by removing an added level of approval at the outset of an informal enforcement action.

The revised procedure will also give BEIC delegated authority with respect to the investigative and initial compromise phases of the enforcement process. Specifically, BEIC will have the authority to (1) directly enter discussions to compromise civil penalty allegations prior to the issuance of an NOV if a party requests to negotiate a compromise, (2) issue NOVs providing notice of alleged violations and the corresponding civil penalty proposed by BEIC, or (3) recommend that the Commission institute a formal adjudicatory proceeding. An NOV will provide the opportunity for the subject to either request to enter into compromise discussions or to submit a written response, if desired. The Commission retains the authority to review any proposed compromise agreement reached by the parties pursuant to § 501.11(f)(2); and Commission approval continues to be required to initiate a formal proceeding pursuant to § 502.63(a). Accordingly, BEIC has the flexibility to assess an enforcement matter and to determine the most appropriate process given the facts of a particular matter.

A. Informal Enforcement Process

The Commission is revising the informal enforcement process under § 502.63(d) to give BEIC discretion to issue an NOV to expedite the enforcement process. The current pre-enforcement notice (PEN) process requires multiple levels of review and approval for an enforcement case to progress, starting with the issuance of a PEN and culminating either in a compromise agreement or a formal proceeding. In either instance, BEIC's ability to compromise is subject to approval by the Commission. Once a PEN is issued, the respondent has 30