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EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle"

By William Yeatman*

The Environmental Protection Agency's (EPA) record of compliance with statutory deadlines established for three core Clean Air Act programs raises serious questions regarding the agency's competence and discretion.

Since 1993, 98 percent of EPA regulations (196 out of 200) pursuant to these programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines. Currently, 65 percent of the EPA's statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days. In addition, the results demonstrate the insidiousness of a practice known as "sue and settle," whereby the EPA advances the agenda of environmental advocacy groups. This study reviews the EPA's performance since 1993 in meeting statutory deadlines codified in three core Clean Air Act regulatory programs:

- (1) Responsibility to review National Ambient Air Quality Standards under Clean Air Act Section 109(d)(1)¹ (see Appendix 1);
- (2) Responsibilities to promulgate and review National Emissions Standards for Hazardous Air Pollutants under Clean Air Act Sections 112(d)(4), 112(d)(5), 112(d)(6), and 112(f)(2)² (see Appendix 2); and
- (3) Responsibility to review New Source Performance Standards under Clean Air Act Section 111(b)(1)(B)³ (see Appendix 3).

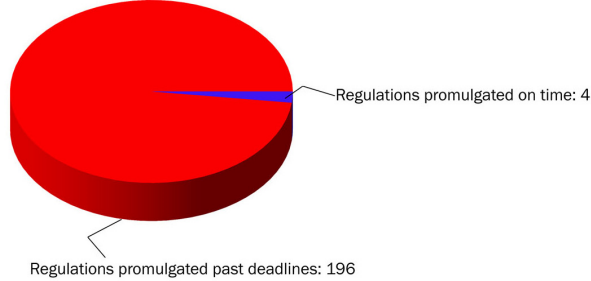
Since 1993, the EPA has promulgated 200 final regulations pursuant to these three programs. Of these 200 regulations, only four—a mere 2 percent—were promulgated on or before their statutorily defined deadlines. On average, the late regulations were promulgated 2,072 days after the statutory deadline. The problem persists. Currently, 65 percent of the EPA's statutorily defined responsibilities for these programs—212 of 322 possible—are past-due. The average outstanding deadline is 2,147 days late as of July 6, 2013

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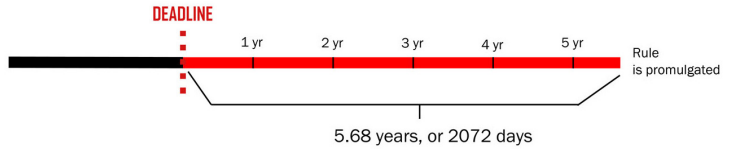
Of the 200 surveyed Clean Air Act Regulations promulgated by EPA since 1993, only 2 percent were on time.

Surveyed Regulations:

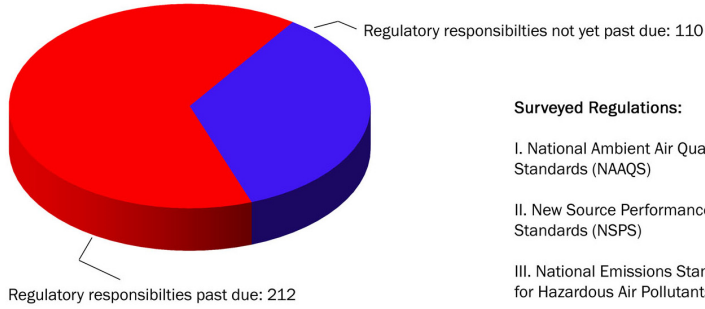
- I. National Ambient Air Quality Standards (NAAQS)
- II. New Source Performance Standards (NSPS)
- III. National Emissions Standards for Hazardous Air Pollutants (NESHAP)



On average, regulations promulgated late since 1993 were promulgated over 5 years after their deadlines.



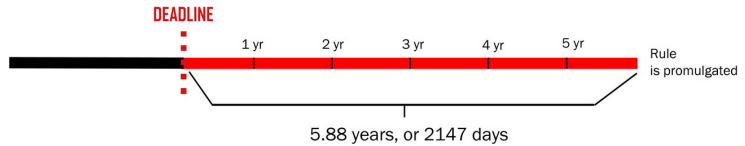
Of EPA's 312 current statutorily-defined responsibilities surveyed 65 percent are past deadline.



Surveyed Regulations:

- I. National Ambient Air Quality Standards (NAAQS)
- II. New Source Performance Standards (NSPS)
- III. National Emissions Standards for Hazardous Air Pollutants (NESHAP)

On average, the EPA's current statutory responsibilities that are past deadline and still outstanding are over 7 years late.



This matters for three important reasons:

It calls into question the EPA’s competence. These three programs comprise the core of the regulatory regime established by the Clean Air Act. For more than two decades, the EPA has failed to meet its congressionally delegated responsibilities for these foundational Clean Air Act programs by a wide margin. This has been the case under both Republican and Democratic administrations. Why has this failure been allowed to persist?

It calls into question EPA’s discretionary exercises of power. Since 2009, despite the EPA’s persistent failure to meet *non-discretionary* deadlines—that is, deadlines that have been codified in the statute—the agency has taken on enormous new *discretionary* regulatory responsibilities pursuant to the Clean Air Act as a result of its unilateral decision to regulate greenhouse gases as pollutants.⁴ Indeed, in every Unified Regulatory Agenda since 2010, EPA has listed climate change policy as its first “guiding priority.”⁵ Why is the EPA giving priority to duties chosen by unelected bureaucrats, rather than responsibilities assigned by elected representatives?

It exposes the insidiousness of “sue and settle.” “Sue and settle” refers to friendly lawsuits filed by environmental advocacy organizations against the EPA that lead to collusive policymaking.⁶ The basis of the preponderance of such lawsuits is the agency’s alleged failure to meet a particular Clean Air Act deadline. Instead of litigating, the agency agrees to enter directly into settlement negotiations with these groups in order to establish when the agency will meet its past due responsibilities.

Some commentators have questioned whether sue and settle causes any harm by asking: What could be inappropriate about negotiating a Clean Air Act deadline?⁷ Here is an answer: If the EPA is out of compliance with virtually all its deadlines—as shown by this report—then clearly the agency has limited resources relative to its responsibilities. As a result, establishing *any* deadline determines how the EPA deploys its limited resources, which is no different than rendering policy. This is troubling.

Sweetheart lawsuits are enabling secret policy negotiations between unelected bureaucrats and environmental lawyers. If the EPA wants to give priority to its many outstanding responsibilities, it should do so in cooperation with the states, which have to actually implement these regulations, rather than the likes of environmental special interests like the Sierra Club, Natural Resources Defense Council, or Center for Biological Diversity.⁸

Notes

¹ National Ambient Air Quality Standards (NAAQS) are the foundational regulatory program of the Clean Air Act. There are six NAAQS—for carbon monoxide, nitrogen dioxide, lead, particulate matter, ozone, and sulfur dioxide—established at levels requisite to protect public health, with an adequate margin of safety. Section 109(d)(1) of the Clean Air Act requires the EPA administrator to complete a thorough review of National Ambient Air Quality Standards, and revise them if necessary, every five years.

² The National Emissions Standards for Hazardous Air Pollutants (NESHAP) in its current form was amended to the Clean Air Act in 1990. The 1990 Clean Air Act Amendments established a thorough schedule by which the program was to be implemented. Not a single NESHAP was promulgated on time pursuant to section 112(d)(4) criteria for major and area sources and section 112(d)(5) alternative criteria for area sources. For all major sources, the EPA is

required by Clean Air Act section 112(f)(2) to conduct a residual risk review within eight years of the promulgation of the NESHAP. For both major and area sources, section 112(d)(6) requires the agency to review the NESHAP standards every eight years.

³ The New Source Performance Standards (NSPS) program establishes emissions limits for new, major stationary sources. Pursuant to Clean Air Act section 111(b)(1)(B), EPA is required to review NSPS every 8 years.

⁴ See Marlo Lewis, "EPA Runs Amuck," Green Watch, August 2011, <http://cei.org/other-studies/epa-runs-amuck>

⁵ EPA Unified Agenda 2010,

http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201010/Statement_2000.html; EPA Unified Agenda

2011, http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201110/Statement_2000.html; EPA Unified

Agenda 2012: http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201210/Statement_2000.html.

⁶ For more on sue and settle, see *Regulating Behind Closed Doors*, U.S. Chamber of Commerce, June 2013,

<http://www.uschamber.com/reports/sue-and-settle-regulating-behind-closed-doors>; See also, William Yeatman,

EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs, U.S. Chamber of Commerce

, June 2012, <http://cei.org/studies/epas-new-regulatory-front>.

⁷ See John Walke, Cantor Report Attacks Environmental Law Enforcement, Falls Flat with Baseless Conspiracy Theory," NRDC Switchboard, October 10, 2012,

http://switchboard.nrdc.org/blogs/jwalke/the_office_of_house_majority.html.

⁸ The EPA has actually litigated to prevent state and local officials from intervening in negotiations to establish deadlines pursuant to a Clean Air Act lawsuit. See section two of William Yeatman, "Environmental Protection Agency's Assault on State Sovereignty," American Legislative Exchange Council report, July 2013,

<http://cei.org/studies/us-environmental-protection-agencys-assault-state-sovereignty>.

APPENDIX 1

Section 109 National Ambient Air Quality Standards Deadline Review

Color Key

Yellow cells are actions promulgated past deadline

Green cells are outstanding deadlines

NAAQS Pollutant	NAAQS Promulgated	109(d)(1) Review Promulgated	Time Overdue
Carbon Monoxide	4/30/1971	9/13/1985	
		8/1/1994	1418
		8/31/2011	4413
Lead	10/5/1978	11/12/2008	9170 N.B. Lead NAAQS review is not sheduled to be completed on time.
Nitrogen dioxide	4/30/1971	6/19/1985	Review began in 2012
		10/8/1996	2303
		2/9/2010	3046
Ozone	4/30/1971	2/8/1979	
		3/9/1993	3317
		7/18/1997	
Particulate Matter	4/30/1971	3/27/2008	2079
		7/1/1987	
		7/18/1997	1843
Sulfur dioxide	4/30/1971	10/17/2006	1552
		1/15/2013	456
		9/14/1973	
		5/22/1996	6460
		6/22/2010	3318

APPENDIX 2

APPENDIX 3

Section 111(b)(1)(B) New Source Performance Standards Deadline Review					
	Color Key				
	Yellow cells are actions promulgated past deadline				
	Brown cells are actions promulgated on time				
	Green cells are source categories with an outstanding 112(d)(6) deadline				
CFR Cite	Industry	NSPS Promulgated	111(b)(1)(B) Review	Time Overdue (Days)	Duration Current Regulation Is Past Due (Days as of 7/6/2013)
40 CFR 60 Subpart Da	Electric Utility Steam Generating Units	6/11/1979	9/16/1998	4115	
40 CFR 60 Db	Industrial-Commercial-Institutional Steam Generating Units	11/25/1986	2/27/2006	1391	
40 CFR 60 Subpart Dc	Small Industrial-Commercial-Institutional Steam Generating Units	9/12/1990	9/16/1998	2725	
40 CFR 60 Subpart F	Portland Cement	12/23/1971	2/27/2006	5017	
40 CFR 60 Subpart G	Nitric Acid Plants	12/23/1971	9/9/2010	5660	
40 CFR 60 Subpart H	Sulfuric Acid Production	12/23/1971	8/14/2012		4204
40 CFR 60 Subpart I	Hot Mix Asphalt Facilities	3/8/1974	none since 1994		4204
40 CFR 60 Subpart J	Petroleum Refineries	3/8/1974	6/24/2008	9605	
40 CFR 60 Subpart Ka	Storage Vessels for Which Construction, Reconstruction, or Modification Commenced aft	4/4/1980	none since 1994		4204
40 CFR 60 Subpart Kb	Storage Vessels for Which Construction, Reconstruction, or Modification Commenced aft	4/8/1987	none since 1994		4204
40 CFR 60 Subpart L	Standards of Performance for Secondary Lead Smelters	3/8/1974	none since 1994		4204
40 CFR 60 Subpart M	Secondary Brass and Bronze Production Plants	3/8/1974	none since 1994		4204
40 CFR 60 Subpart N	Primary Emissions from Basic Oxygen Process Furnaces for Which Construction Is Comm	3/8/1974	none since 1994		4204
40 CFR 60 Subpart Na	Secondary Emissions from Basic Oxygen Process Steelmaking Facilities for Which Const	1/2/1986	none since 1994		4204
40 CFR 60 Subpart P	Primary Copper Smelters	1/15/1976	none since 1994		4204
40 CFR 60 Subpart Q	Primary Zinc Smelters	1/15/1976	none since 1994		4204
40 CFR 60 Subpart R	Primary Lead Smelters	1/15/1976	none since 1994		4204
40 CFR 60 Subpart S	Primary Aluminum Reduction Plants	1/26/1976	none since 1994		4204
40 CFR 60 Subpart T	Phosphate Fertilizer Industry--Wet-Process Phosphoric Acid Plants	8/6/1975	none since 1994		4204
40 CFR 60 Subpart U	Phosphate Fertilizer Industry--Superphosphoric Acid Plants	8/6/1975	none since 1994		4204
40 CFR 60 Subpart V	Phosphate Fertilizer Industry--Diammonium Phosphate Plants	8/6/1975	none since 1994		4204
40 CFR 60 Subpart W	Phosphate Fertilizer Industry--Triple Superphosphate Plants	8/6/1975	none since 1994		4204
40 CFR 60 Subpart X	Phosphate Fertilizer Industry--Granular Triple Superphosphate Storage Facilities	8/6/1975	none since 1994		4204
40 CFR 60 Subpart Y	Coal Preparation and Processing Plants	1/15/1976	none since 1994		4204
40 CFR 60 Subpart Z	Ferroalloy Production Facilities	5/4/1976	none since 1994		4204
40 CFR 60 Subpart AA	Steel Plants: Electric Arc Furnaces Constructed after October 21, 1974 and before August	9/23/1975	none since 1994		4204
40 CFR 60 Subpart Aaa	Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructe	10/31/1984	none since 1994		4204
40 CFR 60 Subpart BB	Kraft Pulp Mills	2/23/1978	994 [Proposed Review 5/23/2013]		4204
40 CFR 60 Subpart CC	Glass Manufacturing Plants	10/7/1980	none since 1994		4204
40 CFR 60 Subpart DD	Grain Elevators	8/3/1978	none since 1994		4204
40 CFR 60 Subpart EE	Surface Coating of Metal Furniture	10/29/1982	none since 1994		4204
40 CFR 60 Subpart GG	Stationary Gas Turbines	9/10/1979	7/6/2006	6874	
40 CFR 60 Subpart HH	Lime Manufacturing	3/7/1978	none since 1994		4204
40 CFR 60 Subpart KK	Lead Acid Battery Manufacturing Plants	4/16/1982	none since 1994		4204
40 CFR 60 Subpart LL	Metallic Mineral Processing Plants	2/21/1984	none since 1994		4204
40 CFR 60 Subpart MM	Automobile and Light Duty Truck Surface Coating Operations	12/24/1980	10/11/1994	2117	
40 CFR 60 Subpart NN	Phosphate Rock Plants	4/16/1982	none since 1994		4204
40 CFR 60 Subpart PP	Amonium Sulfate Manufacture	11/12/1980	none since 1994		4204
40 CFR 60 Subpart QQ	Graphic Arts Industry: Publication Rotogravure Printing	11/8/1982	none since 1994		4204
40 CFR 60 Subpart RR	Pressure Sensitive Tape and Label Surface Coating Operations	10/18/1983	none since 1994		4204
40 CFR 60 Subpart SS	Industrial Surface Coating: Large Appliances	10/27/1982	none since 1994		4204
40 CFR 60 Subpart TT	Metal Coil Surface Coating	11/1/1982	none since 1994		4204
40 CFR 60 Subpart UU	Asphalt Processing and Asphalt Roofing Manufacture	8/6/1982	none since 1994		4204
40 CFR 60 Subpart VV	Equipment Leaks of VOC in SOCM1 for which Construction, Reconstruction, or Modificati	1/18/1983	11/16/2007	6146	
40 CFR 60 Subpart WW	Beverage Can Surface Coating Industry	8/25/1983	none since 1994		4204
40 CFR 60 Subpart XX	Bulk Gasoline Terminals	8/18/1983	none since 1994		4204
40 CFR 60 Subpart AAA	New Residential Wood Heaters	2/26/1988	none since 1994		4204
40 CFR 60 Subpart BBB	Rubber Tire Manufacturing	9/15/1987	none since 1994		4204
40 CFR 60 Subpart DDD	VOC Emissions from the Polymer Manufacturing Industry	12/11/1990	none since 1994		4204
40 CFR 60 Subpart FFF	Flexible Vinyl and Urethane Coating and Printing	6/29/1984	none since 1994		4204
40 CFR 60 Subpart GGG	Equipment Leaks of VOC in Petroleum Refineries for Which Construction, Reconstruction	5/30/1984	11/16/2007	5648	
40 CFR 60 Subpart HHH	Synthetic Fiber Production Facilities	4/5/1984	none since 1994		4204
40 CFR 60 Subpart III	VOC Emissions from the Synthetic Organic Chemical Manufacturing Industry Air Oxidatio	6/29/1990	none since 1994		4204
40 CFR 60 Subpart JJJ	Petroleum Dry Cleaners	9/21/1984	none since 1994		4204
40 CFR 60 Subpart KKK	Equipment Leaks of VOC from Onshore Natural Gas Processing Plants for Which Construc	6/24/1985	8/16/2012	6993	
40 CFR 60 Subpart LLL	SO 2 from Onshore Natural Gas Processing for Which Construction, Reconstruction, or M	10/1/1985	8/16/2012	6894	
40 CFR 60 Subpart NNN	VOC emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Distilla	6/29/1990	none since 1994		4204
40 CFR 60 Subpart OOO	Nonmetallic Mineral Processing Plants	8/1/1985	6/9/1997	1408	
			4/28/2009	1419	
40 CFR 60 Subpart PPP	Wool Fiberglass Insulation Manufacturing Plants	2/25/1985	none since 1994		4204
40 CFR 60 Subpart QQQ	VOC Emissions from Petroleum Refinery Wastewater Systems	11/23/1998	none since 1994		4204
40 CFR 60 Subpart RRR	VOC Emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Reacto	8/31/1993	none since 1994		4204
40 CFR 60 Subpart SSS	Magnetic Tape Coating Facilities	10/3/1988	none since 1994		4204
40 CFR 60 Subpart TTT	Industrial Surface Coating: Surface Coating of Plastic Parts for Business Machines	1/29/1988	none since 1994		4204
40 CFR 60 Subpart UUU	Calciners and Dryers in Mineral Industries	9/28/1992	none since 1994		4204
40 CFR 60 Subpart VVV	Polymeric Coating of Supporting Substrates Facilities	9/11/1989	none since 1994		4204
40 CFR 60 Subpart WWW	Municipal Solid Waste Landfills	3/12/1996	none since 1994		4204
40 CFR 60 Subpart IIII	Stationary Compression Ignition Combustion Engines	7/11/2006			
40 CFR 60 Subpart JJJJ	Stationary Spark Ignition Internal Combustion Engines	1/18/2008			
Summary	68 total source categories				
	54 source category reviews are past due				