Part III

Environmental Protection Agency

40 CFR Parts 52, 70, and 71
Rulemaking on Section 126 Petitions From New York and Connecticut Regarding Sources in Michigan; Revision of Definition of Applicable Requirement for Title V Operating Permit Programs; Proposed Rule
that any standard or other requirement under section 126 is an applicable requirement and must be included in operating permits issued under title V of the CAA.

DATES: The comment period on this proposal ends on April 15, 2002. Comments must be postmarked by the last day of the comment period and sent directly to the Docket Office listed in ADDRESSES (in duplicate form if possible). A public hearing will be held on March 15, 2002 in Arlington, VA, if one is requested by March 7, 2002. Please refer to SUPPLEMENTARY INFORMATION for additional information on the comment period and hearing.

ADDRESSES: Comments may be submitted to the Office of Air and Radiation Docket and Information Center (6102), Attention: Docket No. A–97–43, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, telephone (202) 260–7548. The EPA encourages electronic submission of comments and data following the instructions under SUPPLEMENTARY INFORMATION of this document. No confidential business information should be submitted through e-mail.

Documents relevant to this action are available for inspection at the Docket Office, located at 401 M Street SW., Room M–1500, Washington, DC 20460, between 7:30 a.m. and 5:30 p.m., Monday through Friday, excluding holidays. A reasonable fee may be charged for copying.

The public hearing, if requested, will be held at Crystal Mall 2 (Room 1110 “the fish bowl”), Crystal City, 1921 Jefferson Davis Hwy, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Questions concerning today’s action should be addressed to Carla Oldham, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, C539–02, 4930 Old Page Road, Research Triangle Park, NC 27711, telephone (919) 541–3347, e-mail oldham.carla@epa.gov.

SUPPLEMENTARY INFORMATION:

Public Hearing

The EPA will conduct a public hearing on this proposal on March 15, 2002 beginning at 9:00 a.m., if requested by March 7, 2002. The EPA will not hold a hearing if one is not requested. Please check EPA’s webpage at http://www.epa.gov/ttn/rt0/whatsnew.html on March 15, 2002 for the announcement of whether the hearing will be held. If there is a hearing, it will be held at Crystal Mall 2 (Room 1110 “the fish bowl”), Crystal City, 1921 Jefferson Davis Hwy, Arlington, VA 22202. The Metro stop is Crystal City. If you want to request a hearing and present oral testimony at the hearing, you should notify, on or before March 7, 2002, JoAnn Allman, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, C539–02, 4930 Old Page Road, Research Triangle Park, NC 27711, telephone (919) 541–1815, e-mail allman.joann@epa.gov. Oral testimony will be limited to 5 minutes each. The hearing will be strictly limited to the subject matter of the proposal, the scope of which is discussed below. Any member of the public may file a written statement by the close of the comment period. Written statements (duplicate copies preferred) should be submitted to Docket No. A–97–43 at the address given above for submittal of comments. The hearing schedule, including the list of speakers, will be posted on EPA’s webpage at http://www.epa.gov/ttn/rt0/whatsnew.html. A verbatim transcript of the hearing, if held, and written statements will be made available for copying during normal working hours at the Office of Air and Radiation Docket and Information Center address given above for inspection of documents.

Availability of Related Information

The official record for this rulemaking, as well as the public version, has been established under docket number A–97–43 (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as confidential business information, is available for inspection from 7:30 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in ADDRESSES at the beginning of this document. In addition, the Federal Register rulemaking actions and associated documents are located at http://www.epa.gov/ttn/rt0/126

The EPA has issued a separate rule on NOX transport entitled, “Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone.” The rulemaking docket for that rule (Docket No. A–96–56), hereafter referred to as the NOX SIP call, contains information and analyses that EPA has relied upon in the section 126 rulemaking, and hence documents in that docket are part of the rulemaking record for this rule. Documents related to the NOX SIP call
I. Background

In final rules published on May 25, 1999 (64 FR 28250) (May 1999 Rule) and January 18, 2000 (65 FR 2674) (January 2000 Rule), EPA took action on petitions filed separately by eight Northeastern States under section 126 of the CAAA. Each petition requested that EPA make a finding that certain stationary sources located in other specified States are emitting NOX in amounts that significantly contribute to ozone nonattainment and maintenance problems in the petitioning State. All of the States directed their petitions at the 1-hour ozone standard. Five of the States also directed their petitions at the 8-hour ozone standard. The petitions targeted electric utilities, industrial boilers and turbines, and certain other stationary sources of NOX. The States that submitted petitions are Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Pennsylvania, and Vermont.

Section 126 of the Clean Air Act (CAA) authorizes a downwind State to petition EPA for a finding that any new (or modified) or existing major stationary source or group of stationary sources upstream of the State emits or would emit in violation of the prohibition of section 110(a)(2)(D)(i) because their emissions contribute significantly to nonattainment, or interfere with maintenance, of a national ambient air quality standard in the State. Sections 110(a)(2)(D)(i), 126(b)–(c). If EPA makes the requested finding, the sources must shut down within 3 months from the finding unless EPA directly regulates the sources by establishing emissions limitations and a compliance schedule, extending no later than 3 years from the date of the finding, to eliminate the prohibited interstate transport of pollutants as expeditiously as possible. See sections 110(a)(2)(D)(i) and 126(c).

A. What Does the May 1999 Section 126 Rule Do?

In the May 1999 Rule, EPA determined which petitions were approvable based on their technical merit. The EPA made affirmative technical determinations pending certain actions by EPA and the States with respect to the NOX SIP call. Instead, according to the rule, the section 126 findings and associated control requirements would be automatically triggered at specific future dates if States and EPA failed to stay on track to meet the SIP call obligations. In the May 1999 Rule, EPA also denied the portions of the petitions that did not have technical merit.

In evaluating the petitions, EPA relied on the analyses and information from the NOX SIP call.

B. How Did the January 2000 Rule Revise the May 1999 Rule?

Shortly after EPA issued the May 1999 Rule (which was signed by the Administrator on April 30, 1999), two separate rulings by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affected the Rule. In light of the court rulings, on January 18, 2000 EPA published a final rule (January 2000 Rule) which modified two aspects of the May 1999 Rule.

1. How Did the Court Ruling on the 8-Hour Standard Affect the May 1999 Section 126 Rule?

In one of the court rulings, issued on May 14, 1999, the D.C. Circuit questioned the constitutionality of the CAAA authority to review and revise the national ambient air quality standards (NAAQS), as applied by EPA in its promulgation of the 8-hour ozone standard (as well as the particulate matter NAAQS). See American Trucking Ass’ns v. EPA, 175 F.3d 1027 (D.C. Cir.), modified, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 68 U.S.C.W. 3724 (May 22, 2000), 68 U.S.C.W. 3739 (May 30, 2000). The court’s ruling curtailed EPA’s ability to require States to comply with a more stringent ozone NAAQS. On October 29, 1999, the D.C. Circuit granted in part and denied in part EPA’s rehearing request.

On January 27, 2000, the Administration filed a petition of certiorari with the Supreme Court seeking review of this opinion. Several of the parties who challenged the NAAQS filed conditional cross-petitions for certiorari on the issue of whether the CAAA precludes the consideration of costs in establishing NAAQS. In May 2000, the Supreme Court granted EPA’s petition and the petitioners’ cross-petitions, and the parties have filed their briefs with the Court. The ongoing litigation continues to create uncertainty.

IV. Administrative Requirements

A. Executive Order 13066: Regulatory Planning and Review

B. Unfunded Mandates Reform Act

C. Executive Order 13132: Federalism

D. Unfunded Mandates Reform Act

E. Regulatory Flexibility Act

F. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

G. National Technology Transfer and Advancement Act

H. Paperwork Reduction Act

I. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

The EPA deferred making the section 126 findings based on the affirmative technical determinations pending certain actions by EPA and the States with respect to the NOX SIP call.

The final rule was published on May 25, 1999 (64 FR 28250) (May 1999 Rule). The final rule was published on January 18, 2000 (65 FR 2674) (January 2000 Rule). The final rule was published on March 3, 2000 (65 FR 13045) (March 2000 Rule). The final rule was published on May 30, 2000 (65 FR 3739) (May 30, 2000). The court’s ruling curtailed EPA’s ability to require States to comply with a more stringent ozone NAAQS. On October 29, 1999, the D.C. Circuit granted in part and denied in part EPA’s rehearing request. On January 27, 2000, the Administration filed a petition of certiorari with the Supreme Court seeking review of this opinion. Several of the parties who challenged the NAAQS filed conditional cross-petitions for certiorari on the issue of whether the CAAA precludes the consideration of costs in establishing NAAQS. In May 2000, the Supreme Court granted EPA’s petition and the petitioners’ cross-petitions, and the parties have filed their briefs with the Court. The ongoing litigation continues to create uncertainty.
with respect to EPA’s ability to rely upon the 8-hour ozone standard as a basis for making findings under section 126 at this time.

In the January 2000 section 126 Rule, EPA explained that it believed it should not continue implementation efforts under section 126 with respect to the 8-hour standard that could be construed as inconsistent with the Court ruling in American Trucking. Therefore, in the January 2000 Rule, EPA voluntarily stayed the 8-hour affirmative technical determinations set forth in the May 1999 Rule. The EPA will address the 8-hour portion of the section 126 Rule through additional notice-and-comment rulemaking if and when EPA is able to implement the 8-hour standard.

2. How Did the Court Stay of the NOx SIP Call Affect the Section 126 Rule?

The NOx SIP Call required submission of the SIP revisions by September 30, 1999. State Petitioners submission of the SIP revisions by to reduce NOx sources affected by the 1-hour findings to each source. The rule required and issued NOx Trading Program as the control remedy to reduce NOx emissions by May 1, 2003.

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Eastern Missouri and northern Georgia were in the fine grid while western Missouri and southern Georgia were in the coarse grid.

The analysis OTAG conducted found that emissions controls examined by OTAG, when modeled in the entire coarse grid (i.e., all States and portions of States in the OTAG region that are in the coarse grid) had little impact on high 1-hour ozone levels in the downwind ozone problem areas of the fine grid. The Court vacated EPA’s determination of significant contribution for all of Georgia and Missouri. Michigov v. EPA, 213 F.3d at 685. The Court did not seem to call into question the proposition that the fine grid portion of each State should be considered to make a significant contribution downwind. However, the Court emphasized that “EPA must first establish that there is a measurable contribution,” id. at 684, from the coarse grid portion of the State before determining that the coarse grid portion of the State significantly contributes to ozone nonattainment downwind.

Based on OTAG’s modeling and recommendations, the technical record for the EPA’s final NOX SIP Call rulemaking, and emissions data, EPA believes that emissions in the fine grid portions of Georgia and Missouri comprise a measurable portion of the entire State’s significant contribution to downwind nonattainment. Specifically, OTAG’s technical findings and recommendations state that areas located in the fine grid should receive additional controls because they contribute to ozone in other areas within the fine grid. In addition, EPA performed State-by-State modeling for Georgia and Missouri as part of the final NOX SIP Call rulemaking. The results of this modeling show that emissions in both Georgia and Missouri make a significant contribution to nonattainment in other States. The EPA’s finding of significant contribution for Missouri and Georgia was not disturbed by the Court, and the Georgia and Missouri industry petitioners challenging the rule did not challenge this part of the decision. Id. at 681.

3. What Is EPA’s Response to the NOX SIP Call Court Decision?

The EPA is preparing a rulemaking on the NOX SIP call to address issues remedied by the court in the March 3, 2000 decision. Among other issues, the proposal addresses the geographic applicability of the NOX SIP call for States located partially in the coarse grid. With regard to Georgia and Missouri, which the Court remanded to EPA for further consideration, EPA is proposing that the SIP call only cover the fine grid portions at this time. The EPA also explains that although this aspect of the court decision did not directly address the States of Michigan and Alabama, the reasoning of the court regarding control requirements for Georgia and Missouri calls into question the inclusion of the coarse grid portions of Michigan and Alabama in the NOX SIP call. Therefore, EPA is proposing to only cover the fine grid portions of Michigan and Alabama as well. The EPA intends to address the emissions from the coarse grid portions of these States at such time as it evaluates transport from 15 other States in the OTAG region that were not included in the final NOX SIP call.

II. Section 126 Proposal

The section 126 Rule is based on technical analyses and information from the NOX SIP call and covers certain sources located in the coarse grid of the OTAG modeling domain. Thus, the court ruling in the NOX SIP call litigation regarding whether coarse grid portions of States should be included in the NOX SIP call is relevant to the section 126 action as well.

In light of the court ruling, EPA is proposing to withdraw its section 126 findings and to deny the Connecticut and New York petitions under the 1-hour ozone standard with respect to sources that are or will be located in the coarse grid portion of Michigan. There are no other coarse grid areas covered by the section 126 Rule under the 1-hour standard. The EPA emphasizes that it is not reopening any other part of the section 126 final rule for public comment and reconsideration.

A. What Is the Geographic Scope of the 1-Hour Findings for Michigan Sources?

The section 126 petitions identified sources in different geographic areas. Both the Connecticut and New York petitions identified sources in specific OTAG Subregions. These Subregions were delineated by OTAG for use in some of the early air quality modeling analyses to determine the spatial scale of transport. The Subregional divisions were not used for the purpose of evaluating various control strategies. (See 62 FR 60318; November 7, 1997.)

The Connecticut petition targeted sources located in OTAG Subregions 2, 6, and 7 and the portion of the Ozone Transport Region extending west and south of Connecticut. The New York petition targeted sources located in OTAG Subregions 2, 6, and 7 and the portion of the Ozone Transport Region extending west and south of New York. Part of Michigan is included in OTAG Subregion 2 (see Figure 1 below). In the January 2000 Rule, EPA made findings that large EGUs and large non-EGUs located in that portion of Michigan are significantly contributing to both Connecticut and New York under the 1-hour ozone standard. (Other portions of the Michigan fine and coarse grids were not covered by section 126 findings because the Connecticut and New York petitions did not target those areas.)
B. What Is Today's Proposal on the Michigan Coarse Grid Sources Under the 1-Hour Standard?

The Subregion 2 portion of Michigan, for which EPA made 1-hour section 126 findings, covers the area south of 45 degrees latitude and east of 86 degrees longitude. The fine-coarse grid line cuts through Michigan at 44 degrees latitude. Thus, a strip at the northern end of Subregion 2 is located in the coarse grid. In today's action, EPA is proposing to withdraw the section 126 findings made in response to the petitions from Connecticut and New York under the 1-hour standard for sources that are or will be located in the coarse grid portion of Michigan. The EPA has not identified any existing section 126 sources located in that area of the coarse grid. As discussed above in section I.C.2, in the Michigan v. EPA decision on the NOx SIP call, the court indicated that “EPA must first establish that there is a measurable contribution” from the coarse grid portion of the State before holding the coarse grid portion of the State partly responsible for the significant contribution of downwind ozone nonattainment in another State. Michigan v. EPA, 213 F.3d at 684. Elsewhere, the Court seemed to identify the standard as “material contribution”[1]. Id. In response to the court opinion, EPA is proposing to include only the fine grid portion of Michigan in the NOx SIP call at this time. The EPA is applying the same reasoning to the Section 126 Rule. The EPA does not have analyses specific to the coarse grid to demonstrate that emissions from that area measurably or materially contribute to nonattainment in the petitioning States. Therefore, EPA is proposing to deny the New York and Connecticut petitions with respect to the Michigan coarse grid sources. Under today’s proposal, any existing or new sources located in that affected segment of the coarse grid (north of 44 degrees latitude, south of 45.0 degrees latitude, and east of 86.0 degrees latitude) would no longer be subject to the control requirements of the section 126 Rule.5

C. Is EPA Proposing Action Under the 8-Hour Standard on the Affirmative Technical Determinations That Affect Coarse Grid Sources?

As discussed above in section I.B.1, as a result of the court decision on the 8-hour ozone standard, EPA voluntarily stayed the 8-hour affirmative technical determinations in the May 1999 Rule (65 FR 2674, January 18, 2000). Thus, EPA has not moved forward to make any section 126 findings or establish any control requirements based on the 8-hour portion of the May 1999 Rule. However, the affirmative technical determinations are final EPA actions specifying which portions of the 8-hour petitions are approvable and could provide a basis for future required control measures. The 8-hour affirmative technical determinations affect sources located in 19 States and the District of Columbia, including the coarse grid portions of Alabama, Michigan, Missouri, and New York. Because EPA has indefinitely stayed the section 126 Rule with respect to the 8-hour standard, EPA is not at this time proposing to revise the 8-hour affirmative technical determinations for coarse grid sources. The EPA intends to address these sources through notice-and-comment rulemaking if and when EPA is able to implement the 8-hour standard.

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5The EPA is taking a different approach to interpreting the fine-coarse grid split for purposes of a new NOx SIP call proposal. Under the NOx SIP call, with respect to Michigan, EPA is proposing findings only for the fine grid. Thus, the coarse grid portion, which was covered under the October 27, 1998 NOx SIP call, would no longer be affected. The NOx SIP call establishes State emissions budgets rather than regulating individual sources. Because of the uncertainties with accurately dividing emissions between the fine and coarse grid portions of individual counties, EPA is proposing that the NOx SIP call emissions budgets be based on all counties that are wholly contained within the fine grid. That is, counties that are in the coarse grid or that straddle the fine-coarse grid line would be excluded. Because the section 126 action regulates specific stationary sources, the issue of how to apportion a full NOx inventory on a partial-county basis does not arise. Therefore, the section 126 proposal follows the fine-coarse grid line exactly. The EPA notes that the Section 126 Rule has already covered partial counties for Michigan in its January 2000 Rule. In that rule, only sources east of 86 degrees longitude and south of 45 degrees latitude were affected.
D. Does Today’s Proposal Affect the Section 126 Requirements for Michigan Fine Grid Sources or Sources Located in Other States?

Today’s proposal does not affect the NOx allowance allocations for Michigan sources located in the fine grid that were established in the January 2000 Rule. In addition, today’s proposal does not affect the section 126 trading budget for Michigan or the compliance supplement pool. The EPA has not identified any existing large EGUs and large non-EGUs in the coarse grid portion of Michigan affected by today’s proposal. Therefore, the NOx allowance calculations in the January 2000 Rule were already based only on fine grid emissions. This proposal does not affect any of the section 126 Rule requirements for sources located in other States. Therefore, today’s proposal does not affect the ability of any sources located in the fine grid to comply with the section 126 requirements by the compliance deadline.

III. What Is the Revision to the Definition of “Applicable Requirement” for Title V Operating Permit Programs?

The EPA is proposing to revise the definitions of the “applicable requirement” in 40 CFR 70.2 and 71.2 by providing expressly that any standard or other requirement under section 126 of the CAA is an applicable requirement and must be included in operating permits issued under title V of the CAA. Section 504(a) of the CAA explicitly requires that each permit include “enforceable emission limitations and standards, a schedule of compliance, * * * and such other conditions as are necessary to assure compliance with applicable requirements of this Act, including the requirements of the applicable implementation plan.” 42 U.S.C. 7661c(a). The current § 70.2 and § 71.2 definitions of “applicable requirement” do not include requirements that are imposed under section 126, even though section 126 authorizes the Administrator to adopt standards and requirements under certain circumstances as discussed above. Our proposed revision remedies this omission and clarifies the treatment, in title V operating permits, of section 126 requirements promulgated by the Administrator.

Emission limitations, compliance schedules, and other regulatory requirements adopted under section 126 are, on their face, requirements of the CAA and therefore should be included in the definitions of “applicable requirement” in § 70.2 and § 71.2.

Indeed, in the preamble of the January 18, 2000 final rule establishing the NOx Budget Trading Program under section 126, EPA stated that the requirements of the final rule “are applicable requirements under § 70.2 and must be reflected in the title V operating permit” of sources that are subject to the program and required to have such a permit (65 FR 2688). However, this statement was based on an erroneous reading that paragraph (1) of the definition of “applicable requirement” in § 70.2 (which is identical to the definition of the same term in § 71.2) is written broadly enough to include section 126 requirements as an “applicable requirement.”

Despite the erroneous discussion in the preamble of the January 18, 2000 rule expressly requires that title V operating permits include the requirements of the NOx Budget Trading Program. Specifically, the rule states that, for each source required to have a “federally enforceable permit” (e.g., a title V operating permit), such permit must include the requirements of the NOx Budget Trading Program for units subject to that program. See 40 CFR 97.20(a).

In order to clarify that section 126 requirements are indeed an applicable requirement under the CAA and must be included in title V operating permits, EPA is proposing to revise the definition of “applicable requirement” in § 70.2 and § 71.2 to expressly include standards and other requirements promulgated under section 126. The requirements of the NOx Budget Trading Program promulgated on January 18, 2000 are an example of requirements that would be covered this proposed revision to § 70.2 and § 71.2.

IV. Administrative Requirements

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is “significant” and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Under Executive Order 12866, this proposed action is not a “significant regulatory action” and is therefore not subject to review by OMB. In the January 2000 Rule titled “Findings of Significant Contribution and Rulemaking on section 126 Petitions for Purposes of Reducing Interstate Ozone Transport,” (65 FR 2674), EPA partially approved four section 126 petitions under the 1-hour ozone standard. Today’s action proposes to withdraw its section 126 findings and deny petitions under the 1-hour ozone standard with respect to sources located in a portion of Michigan. This proposed action does not create any additional impacts beyond what was promulgated in the January 2000 Rule. This proposed rule also does not raise novel legal or policy issues. Therefore, EPA believes that this action is not a “significant regulatory action.”

B. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rules with “Federal mandates” that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. A “Federal mandate” is defined to include a “Federal intergovernmental mandate” and a “Federal private sector mandate” (2 U.S.C. 658(b)). A “Federal intergovernmental mandate,” in turn, is defined to include a regulation that
“would impose an enforceable duty upon State, local, or tribal governments.” (2 U.S.C. 658(5)(A)(ii)), except for, among other things, a duty that is “a condition of Federal assistance” (2 U.S.C. 658(5)(A)(ii)). A “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector,” with certain exceptions (2 U.S.C. 658(7)(A)).

The EPA has determined that this proposed action does not include a Federal mandate that may result in estimated costs of $100 million or more for either State, local, or tribal governments in the aggregate, or for the private sector. This proposed Federal action does not propose any new requirements, as discussed above. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, would result from this action.

C. Executive Order 13132: Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that 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.”

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed 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, as specified in Executive Order 13132. Today’s proposed action imposes no additional burdens beyond those imposed by the January 2000 Rule. Thus, the requirements of section 6 of the Executive Order do not apply to this rulemaking action.

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

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, the Agency specifically solicits additional comment on this proposed rule from tribal officials.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

Today’s proposal, if promulgated, would not create new requirements for small entities or other sources. Instead, this action is proposing to withdraw the section 126 requirements for sources that are or would be located in a specified portion of Michigan. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

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

Executive Order 13045: “Protection of Children From Environmental Health Risks and Safety Hazards” (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because this action is not “economically significant” as defined under Executive Order 12866 and the Agency does not have reason to believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Transfer and Advancement Act of 1995 (“NTTAA”), Pub. L. 104–113 section 12(d) 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.
The National Technology Transfer and Advancement Act of 1997 does not apply because today’s action does not propose any new technical standards. This action is proposing to amend the January 2000 Rule by reducing the portion of Michigan that is covered by the rule.

H. Paperwork Reduction Act

Today’s action does not propose any new information collection request requirements. Therefore, an information collection request document is not required.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355; May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. Today’s action does not propose any new regulatory requirements.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Emissions trading, Intergovernmental relations, Nitrogen oxides, Ozone, Ozone transport, Reporting and recordkeeping requirements.

40 CFR Part 70

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Christine Todd Whitman,
Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

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

Subpart A—General Provisions

2. Section 52.34 is amended by revising paragraphs (c)(2)(vi) and (g)(2)(vi) to read as follows:

§ 52.34 Action on petitions submitted under section 126 relating to emissions of nitrogen oxides.
* * * * *
(c) * * *
(2) * * *
(vi) Portion of Michigan located south of 44 degrees latitude in OTAG Subregion 2, as shown in appendix F, Figure F–2, of this part.
* * * * *
(g) * * *
(2) * * *
(vi) Portion of Michigan located south of 44 degrees latitude in OTAG Subregion 2, as shown in appendix F, Figure F–6, of this part.
* * * * *

Appendix F—[Amended]

3. Appendix F is amended by adding a new figure F–10 in numerical order to read as follows:

Appendix F to Part 52—Clean Air Act Section 126 Petitions From Eight Northeastern States: Named Source Categories and Geographic Coverage
* * * * *
PART 70—STATE OPERATING PERMIT PROGRAMS

4. The authority citation for part 70 continues to read as follows:

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

5. Section 70.2 is amended by redesignating paragraphs (7) through (12) of the definition of “Applicable requirement” as paragraphs (8) through (13) and adding a new paragraph (7) to read as follows:

§ 70.2 Definitions.

* * * * *

Applicable requirement * * *

(7) Any standard or other requirement under section 126(a)(1) and (c) of the Act;

* * * * *

PART 71—FEDERAL OPERATING PERMIT PROGRAMS

6. The authority citation for part 71 continues to read as follows:

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

7. Section 71.2 is amended by redesignating paragraphs (7) through (12) of the definition of “applicable requirement” as paragraphs (8) through (13) and adding a new paragraph (7) to read as follows:

§ 71.2 Definitions.

* * * * *

Applicable requirement * * *

(7) Any standard or other requirement under section 126(a)(1) and (c) of the Act;

* * * * *

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