

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-XXXX-X]

**Final Rule to Extend the Stay of Action on Section 126
Petitions for Purposes of Reducing Interstate Ozone
Transport****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule

SUMMARY: Today, EPA is taking final action to extend the temporary stay of the effective date of the May 25, 1999 final rule (64 FR 28250) regarding petitions filed under section 126 of the Clean Air Act (CAA) until January 10, 2000. This stay provides EPA time to finalize its work on these petitions and publish its decision in the Federal Register. On June 24, 1999 (64 FR 33956) EPA issued an interim final rule that temporarily stayed the effective date of the May 25 final rule regarding petitions filed under section 126 of the CAA until November 30, 1999. This final action to extend the temporary stay will prevent the findings under section 126 from being triggered automatically on November 30, 1999, under the mechanism EPA established in the May 25 final rule.

EFFECTIVE DATE: This final rule is effective from November 30, 1999 until January 10, 2000.

ADDRESSES: Documents relevant to this action are available for inspection at the Air and Radiation Docket and Information Center (6102), Attention: Docket No. A-97-43, U.S. Environmental Protection Agency, 401 M Street SW, room M-1500, Washington, DC 20460, telephone (202) 260-7548 between 8:00 a.m. and 5:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

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, MD-15, Research Triangle Park, NC, 27711, telephone (919) 541-3347, e-mail at oldham.carla@epa.gov.

SUPPLEMENTARY INFORMATION:

Availability of Related Information

The official record for the May 25, 1999 section 126 rulemaking, as well as the public version of the record, has been established under docket number A-97-43 (including comments and data submitted electronically as described below). The 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 8:00 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 rulemakings and associated documents are located at <http://www.epa.gov/ttn/rto/126>.

I. Background

A. Interim Final Rule to Stay Affirmative Technical Determinations under Section 126 Petitions to Reduce Interstate Ozone Transport

On May 25, 1999 (64 FR 28250), EPA made final determinations that portions of the petitions filed by eight Northeastern States under section 126 of the CAA were technically meritorious. The petitions sought to mitigate what they described as significant transport of one of the main precursors of ground-level ozone, nitrogen oxides (NO_x), across State boundaries. Each petition specifically requested that EPA make a finding that certain stationary sources emit NO_x in violation of the CAA's prohibition on emissions that significantly contribute to nonattainment problems in the petitioning State.

On June 24, 1999 (64 FR 33956), EPA issued an interim final rule to temporarily stay the effectiveness of the May 25 final rule regarding the section 126 petitions until November 30, 1999. The purpose of the interim final rule

was to provide EPA time to conduct notice-and-comment rulemaking addressing issues raised by two recent rulings of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). In one ruling in American Trucking Assn., Inc., v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), the court remanded the 8-hour national ambient air quality standard (NAAQS) for ozone, which formed part of the underlying technical basis for certain of EPA's determinations under section 126. On October 29, 1999, the D.C. Circuit granted in part EPA's Petition for Rehearing and Rehearing En Banc (filed on June 28, 1999) in American Trucking, and modified portions of its opinion addressing EPA's ability to implement the eight-hour standard. See American Trucking, 1999 WL 979463 (Oct. 29, 1999). The court denied the remainder of EPA's rehearing petition. Id. EPA continues to evaluate the effect of American Trucking, as modified by the D.C. Circuit's October 29, 1999 opinion and order. EPA expects, however, that the status of the eight-hour standard will be uncertain for some time to come. In a separate action, the D.C. Circuit granted a motion to stay the State implementation plan (SIP) submission deadlines established in a related EPA action, the NOx SIP call (October 27, 1998, 63 FR 57356). In the interim final rule, EPA explained why it would be contrary to the public interest for the May 25 rule to remain in effect while EPA

conducted rulemaking to respond to issues raised by the court rulings. The reader should refer to the June 24, 1999 interim final rule (64 FR 33956) and May 25, 1999 final rule (64 FR 28250) for further details and background information.

B. Proposal to Amend the May 25, 1999 Final Rule

On June 24, 1999 (64 FR 33962), EPA proposed to amend two aspects of the May 25 final rule. The EPA proposed to stay indefinitely the affirmative technical determinations based on the 8-hour standard pending further developments in the NAAQS litigation. The EPA also proposed to remove the trigger mechanism for making section 126 findings that was based on the NOx SIP call deadlines and instead make the findings in a final rule to be issued in November 1999. In the June 24 proposal, EPA explained why it originally made sense to link the section 126 action to the NOx SIP call and why EPA believes it is no longer appropriate to do so in the absence of a compliance schedule for the NOx SIP call. At that time, the EPA indicated that it expected to promulgate the final rule based on the proposal by November 30, 1999, when the interim final rule would expire. To address the possibility that there could be a delay in amending the May 25 final rule, EPA requested comments in the June 24 proposal on extending the temporary stay beyond November 30

until EPA completed the final rule. The EPA noted that if additional time were needed, it would likely not be more than two or three months. Two commenters agreed that it would be appropriate for EPA to further extend the stay under such circumstances, while one commenter expressed concern that an extension of time would increase the likelihood of delay.

II. Today's Final Rule to Extend the Temporary Stay

Today's final rule, which is effective November 30, 1999, temporarily extends the stay of the May 25 rule until January 10, 2000. Today's action will prevent findings under section 126 from being automatically triggered on November 30, 1999 under the mechanism in the May 25 rule. The EPA plans to sign the final rule to modify the May 25, 1999 rule no later than early to mid December 1999. However, a stay needs to apply until the effective date of the final section 126 rule. As the final section 126 rule will not become effective until 30 days after publication in the Federal Register, EPA is extending the stay until January 10, 2000. If necessary, given the ultimate date of publication of the final section 126 rule, EPA will further extend the stay for a few additional weeks.

This extension of the stay does not affect the compliance date of May 1, 2003 for emission reductions under

the section 126 rule. Also, the affected entities will have notice of the requirements under section 126 as of the date that EPA signs and releases the final section 126 rule to the public.

III. Rulemaking Procedures

As noted above, this rule will be effective on November 30, 1999. Providing for a delay of the effective date of this final rule (either 30 or 60 days after publication) would be unnecessary and contrary to the public interest. Because the final rule relieves a regulatory burden that would otherwise be imposed, there is no need to provide time for education and compliance with a new regulatory requirement. Moreover, allowing the stay to lapse before the final rule becomes effective would allow the section 126 findings to be automatically triggered upon November 30, 1999 for sources potentially subject to the section 126 findings in all States that had not submitted SIPs in compliance with the NO_x SIP call and for which EPA had not proposed approval of such SIPs. As explained in the June 24 proposal (64 FR 33962), EPA believes it is no longer appropriate to link the section 126 findings with compliance with the NO_x SIP call, in light of the judicial stay of the compliance dates under the NO_x SIP call. Thus, allowing the findings to be triggered automatically would be contrary to

the purposes of the ongoing section 126 rulemaking and contrary to the public interest. In addition, under the automatic trigger mechanism, findings would be made on November 30 based on both the 1-hour and 8-hour standards. The EPA believes it is appropriate in light of the court's decision in American Trucking Ass'n v. EPA to stay the findings based on the 8-hour standard at this time. Given the lack of burden upon affected parties and the need to make this final rule effective on November 30, 1999, EPA finds good cause for expediting the effective date of this portion of today's rule. EPA believes that this is consistent with 5 U.S.C. 553(d)(1) and (3).

V. 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 a 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.

The EPA believes that this final rule is not a "significant regulatory action" because it relieves, rather than imposes, regulatory requirements, and raises no novel legal or policy issues.

B. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this 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 action does not create any new requirements. Thus, this rule will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub.L. 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 rule that "includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more ... in any one year." A "Federal mandate" is defined to include a "Federal intergovernmental mandate" and a "Federal private sector mandate" (2 U.S.C. 658(6)). 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)(i)), except for, among other things, a duty that is "a condition of Federal assistance (2 U.S.C. 658(5)(A)(i)(I)). 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 action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Paperwork Reduction Act

This final rule does not impose any new information collection requirements. Therefore, an Information Collection Request document is not required.

E. Executive Order 13045--Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 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 rule on children, and explain why the regulation is preferable to other potentially effective and reasonably

feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it is not "economically significant" as defined under Executive Order 12866 and because 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.

F. Executive Order 12898: Environmental Justice

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. This Federal action imposes no new requirements and will not delay achievement of emissions reductions under existing requirements. Accordingly, no disproportionately high or adverse effects on minorities or low-income populations result from this action.

G. 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 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. 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.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's

position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This final rule 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 rule does not create a mandate on State, local or Tribal governments. The rule does not impose any enforceable duties on these entities. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

H. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal

government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. No. 104-113, 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.

This final rule does not involve the promulgation of any new technical standards. Therefore, NTTAA requirements are not applicable to today's rule.

J. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This Section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based

on such a determination."

For the reasons discussed in the May 25 NFR, the Administrator determined that final action regarding the section 126 petitions is of nationwide scope and effect for purposes of section 307(b)(1). Thus, any petitions for review of final actions regarding the section 126 rulemaking must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the Federal Register.

K. Congressional Review Act

The Congressional Review Act (CRA), 5 U.S.C. § 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to November 30, 1999. This action is not a "major rule" as defined by 5 U.S.C. § 804(2).

List of Subjects

Final Rule to Extend the Stay for Action on Section 126
Petitions for Purposes of Reducing Interstate Ozone
Transport Page 18 of 19

40 CFR Part 52

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

Dated:

Carol M. Browner,
Administrator.

40 CFR Part 52 is 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 paragraph (1) to read as follows:

§52.34 Action on petitions submitted under section 126 relating to emissions of nitrogen oxides.

* * * * *

(1) Temporary stay of rules. Notwithstanding any other provisions of this subpart, the effectiveness of this section is stayed from July 26, 1999 until January 10, 2000.

