US EPA ARCHIVE DOCUMENT

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-XXXX-X]

Section 126 Rule: Withdrawal Provision

US EPA ARCHIVE DOCUMENT

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In today's action, EPA is proposing to revise one narrow aspect of a final rule published on January 18, 2000, known as the Section 126 Rule. The EPA promulgated the rule in response to petitions submitted by four Northeastern States under section 126 of the Clean Air Act (CAA) for the purpose of mitigating interstate transport of nitrogen oxides (NOx) and ozone. Nitrogen oxides are one of the main precursors of ground-level ozone pollution. The Section 126 Rule requires electric generating units (EGUs) and non-electric generating units (non-EGUs) located in 12 eastern States and the District of Columbia to reduce their NOx emissions through a NOx cap-and-trade program.

Originally, EPA harmonized the Section 126 Rule with a related ozone transport rule, known as the NOx State

implementation plan call (NOx SIP Call), which also addresses NOx and ozone transport in the eastern United States. The EPA established the same compliance date for both rules, May 1, 2003. Where States adopted, and EPA approved, SIPs meeting the NOx SIP Call, and with a May 1, 2003 compliance date, EPA would withdraw the Section 126 requirements for sources in that State. This was a practical way to address the overlap between the two rules. As a result of court actions, the compliance dates for the Section 126 Rule and the NOx SIP Call have now been delayed until May 31, 2004. In addition, the NOx SIP Call has been divided into two phases. Therefore, EPA is proposing to revise the Section 126 withdrawal provision so that it will operate under these new circumstances. In today's action, EPA is proposing to withdraw the Section 126 Rule if a State adopts, and EPA approves, a SIP with a May 31, 2004 compliance date that meets either the full NOx SIP Call or Phase 1 where the State is regulating the Section 126 sources to the same stringency as the Section 126 Rule.

DATES: The comment period on this proposal ends on May 24, 2003. Comments must be postmarked by the last day of the comment period and sent directly to the Docket Office

US EPA ARCHIVE DOCUMENT

listed in ADDRESSES (in duplicate form if possible). A public hearing will be held on April 24, 2003 in Washington, DC, if one is requested by April 10, 2003. Please refer to SUPPLEMENTARY INFORMATION for additional information on the comment period and hearing.

ADDRESSES: Comments may be submitted through the *U.S. Postal Service* to the following address: U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, NW, Room B108, Mail Code 6102T, Washington, DC 20460, Attention: Docket No. A-97-43. To mail comments or documents through Federal Express, UPS, or other *courier* services, the mailing address is: U.S. Environmental Protection Agency, EPA Docket Center (Air Docket), 1301 Constitution Avenue, NW, Room B108, Mail Code 6102T, Washington, DC 20004. The telephone number for the Air Docket is 202-566-1742 and the fax number is 202-566-1741. 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 public inspection at the EPA Docket Center, located at

US EPA ARCHIVE DOCUMENT

1301 Constitution Avenue, NW, Room B102, Washington, DC between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

The public hearing, if requested, will be held at Ariel Rios North, Room 1332, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460.

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

SUPPLEMENTARY INFORMATION:

Public Hearing

The EPA will conduct a public hearing on this proposal on April 24, 2003 beginning at 9:00 a.m., if requested on or before April 10, 2003. The EPA will not hold a hearing if one is not requested. Please check EPA's web page at http://www.epa.gov/ttn/naaqs/ozone/rto/rto_whatsnew.html on April 11, 2003 for the announcement of whether the hearing will be held. If there is a public hearing, it

US EPA ARCHIVE DOCUMENT

will be held at Ariel Rios North, Room 1332, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460. The Metro stop is Federal Triangle. If you want to request a hearing and present oral testimony at the hearing, you should notify, on or before April 10, 2003, JoAnn Allman, EPA, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, C539-02, 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 addresses given above for submittal of comments. The hearing schedule, including the list of speakers, will be posted on EPA's web page at http://www.epa.gov/ttn/naaqs/ozone/rto/rto_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 EPA Docket Center address given above for inspection of documents.

US EPA ARCHIVE DOCUMENT

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 8:30 a.m. to 4:30 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/naaqs/ozone/rto/126/index.html.

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

US EPA ARCHIVE DOCUMENT

documents in that docket are part of the rulemaking record for this rule. Documents related to the NOx SIP Call rulemaking are available for inspection in docket number A-96-56 at the address and times given above.

Submitting Electronic Comments

Electronic comments are encouraged and can be sent directly to EPA at A-and-R-Docket@epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 8.0 or ASCII file format. All comments and data in electronic form must be identified by the docket number A-97-43. Electronic comments may be filed online at many Federal Depository Libraries.

Outline

I. What is the Relationship Between the Section 126 Rule and the NOx SIP Call?
II. What is the History of the Section 126 Rule Withdrawal Provision?
III. Why Does the Section 126 Rule Withdrawal Provision Need to be Revised?
A. Under What Circumstances Does the Section 126 Rule Withdrawal Provision Currently Operate?
B. How Have Court Actions Affected the Circumstances Upon Which the Section 126 Rule Withdrawal Provision Was Based?
1. Court Actions on the NOx SIP Call.
2. Court Actions on the Section 126 Rule.
IV. What is EPA's Proposal to Revise the Section 126

US EPA ARCHIVE DOCUMENT

Rule Withdrawal Provision?
A. What is EPA's Proposal Related to the SIP Compliance Date?
B. What is EPA's Proposal Related to Withdrawing the Section 126 Rule Based on a Phase 1 SIP?
V. What is the Current Status of the NOx SIPs Under the NOx SIP Call and EPA's Proposed Action to Withdraw the Section 126 Rule in a State?
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act

I. What is the Relationship Between the Section 126 Rule and the NOx SIP Call?

In the past several years, EPA has been engaged in two separate rulemakings to address the interstate ozone transport problem in the eastern half of the United States. These rules, known as the NOx SIP Call and the Section 126 Rule, both require reductions in NOx emissions, which are precursors to ground-level ozone formation.

On October 27, 1998 (63 FR 57356), EPA promulgated the NOx SIP Call thereby requiring 22 Eastern States and

US EPA ARCHIVE DOCUMENT

the District of Columbia to reduce statewide NOx emissions to a specified level (NOx budget).[1] The States have the flexibility to choose the particular mix of control measures necessary to meet the NOx budget. The primary statutory provision for the NOx SIP Call is CAA section 110(a)(2)(D)(i), under which, in general, each SIP is required to include provisions to assure that sources within the State do not emit pollutants in amounts that significantly contribute to nonattainment or interfere with maintenance problems downwind.

In 1997, while EPA was in the process of developing the NOx SIP Call, eight Northeastern States submitted petitions under section 126 of the CAA seeking to mitigate significant interstate transport of NOx and ozone. Section 126 refers to State obligations under CAA section 110(a)(2)(D)(i) as does the NOx SIP Call. Section 126 authorizes a State to petition EPA to make a finding that any major source or group of stationary sources in upwind States are significantly contributing to nonattainment, or interfering with maintenance, in the petitioning State. If EPA makes such a finding, EPA is

---

[1]As a result of a court decision, EPA will now only be including 21 States and the District of Columbia in the SIP Call.

US EPA ARCHIVE DOCUMENT

authorized to establish Federal emission limits for the affected sources. The petitions requested that EPA make such findings and establish control requirements for certain sources in about 30 States.

The EPA took action on the Section 126 petitions in final rules issued on May 25, 1999 and January 18, 2000 (together known as the Section 126 Rule)(64 FR 28250 and 65 FR 2674). In acting on the section 126 petitions, EPA relied on analyses and information used in the NOx SIP Call rulemaking, including the linkages it drew between specific upwind States and nonattainment and maintenance problems in specific downwind States. The EPA determined that large EGUs and large industrial boilers and turbines (non-EGUs) in 12 States and the District of Columbia were significantly contributing to nonattainment problems in four of the petitioning States under the 1-hour ozone national ambient air quality standard.[2] The EPA required these sources to reduce their NOx emissions through a Federal NOx cap-and-trade program.

---

[2]Several of the petitions also requested that EPA also make findings under the 8-hour ozone standard. The EPA made technical determinations under the 8-hour standard in the May 25, 1999 rule but later stayed that portion of the rule in light of litigation on the 8-hour standard (65 FR 2674; January 18, 2000).

US EPA ARCHIVE DOCUMENT

The Section 126 Rule overlaps considerably with the NOx SIP Call. Both the Section 126 Rule and the NOx SIP Call are based on much the same set of facts regarding the same pollutants. Both rely on section 110(a)(2)(D)(i) of the CAA. All of the sources affected by the Section 126 Rule are located in States that are covered by the NOx SIP Call. Therefore, as discussed below, EPA coordinated its actions under the two transport rules. (See the May 25, 1999 and January 18, 2000 Section 126 Rules for a detailed history of the relationship between the NOx SIP Call and the Section 126 Rule.)

II. What is the History of the Section 126 Rule Withdrawal Provision?

When EPA issued the May 25, 1999 Section 126 Rule, there was an existing requirement under the NOx SIP Call for States to reduce their NOx emissions and an explicit and expeditious schedule to do so. Therefore, EPA was able to coordinate, or harmonize, the Section 126 Rule with the NOx SIP Call. The EPA established the same compliance date, May 1, 2003 for both rules. Then, EPA structured its action on the section 126 petitions to give a State the opportunity to address its NOx transport

US EPA ARCHIVE DOCUMENT

first under the NOx SIP Call before EPA would directly regulate sources in the State under the Section 126 Rule. Thus, in the May 25, 1999 Section 126 Rule, EPA made technical determinations as to which sources were significantly contributing to the petitioning States but deferred making the Section 126 findings, which would trigger the control requirements, as long as States and EPA stayed on track to meet the NOx SIP Call obligations. The EPA included a withdrawal provision in the Section 126 Rule under which the Section 126 Rule for sources in a State would be automatically withdrawn if that State submitted and EPA approved a NOx SIP fully meeting the NOx SIP Call (see 64 FR 28271-28274; May 25, 1999). Thus, the section 126 control requirements would not go into place if a State took timely action under the NOx SIP Call. This gave upwind States the flexibility to address the ozone transport problem themselves, but would not delay implementation of the NOx transport remedy beyond the May 1, 2003 Section 126 Rule compliance date.[3] This was a practical way to address the overlap between

---

[3]This approach of "harmonizing" the Section 126 Rule and the NOx SIP Call was provided as a rulemaking option in a consent decree developed by the petitioning States and EPA.

US EPA ARCHIVE DOCUMENT

the actions that would be required under the NOx SIP Call and under the rulemaking on the section 126 petitions. (The basis for the withdrawal provision is discussed below in section III.A. For a more detailed discussion of the basis for harmonizing the two rules and the interplay of the underlying statutory provisions, see the May 25, 1999 final rule.)

The NOx SIP Call originally required States to submit their NOx SIPs to EPA by September 30, 1999. On May 25, 1999, in response to a request by States challenging the NOx SIP Call, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit or the court) issued a stay of the SIP submission deadline pending further order of the court. Michigan v. EPA, 213 F.3d 663 (D.C. Cir., 2000), cert. denied, 121 S. Ct. 1225 (2001)(order granting stay in part). Inasmuch as the compliance date is linked with the SIP submission date, the stay created uncertainty regarding the compliance date. Because there was no longer a schedule for the NOx SIP Call, and therefore, no assurance that transport would be addressed by May 1, 2003, EPA no longer had a basis for deferring action under the Section 126 Rule. Therefore, in a final rule published on January 18, 2000,

US EPA ARCHIVE DOCUMENT

EPA moved forward to make the findings with respect to the 1-hour ozone standard and activate the control requirements under the Section 126 Rule (65 FR 2674).[4] However, the Section 126 Rule continued to contain a provision (§53.34(i)) whereby the section 126 requirements would be automatically withdrawn for sources in a State if EPA approved a State's SIP that provided for the NOx SIP Call emission reduction requirements by May 1, 2003.

III. Why Does the Section 126 Rule Withdrawal Provision Need to Be Revised?

A. Under What Circumstances Does the Section 126 Rule Withdrawal Provision Currently Operate?

Section 52.34(i) of the Section 126 Rule currently provides that:

> ...a finding [under the Section 126 Rule] as to a particular major source or group of stationary sources in a particular State will be deemed to be withdrawn, and the corresponding part of the relevant petition(s) denied, if the Administrator issues a final action putting in place implementation plans that comply with the requirements of §§51.121 and 51.122 [the NOx SIP Call] of this chapter for such State.

[4]Because of the stay on the Section 126 Rule with respect to the 8-hour standard, EPA did not make findings under the 8-hour standard at that time. EPA plans to complete it's actions on the 8-hour petitions in a future rulemaking.

US EPA ARCHIVE DOCUMENT

As discussed in the Section 126 Rule (65 FR 2682-2684), the premise for the automatic withdrawal provision was that once a SIP (or Federal implementation plan (FIP)) controls the full amount of significant contribution from a State, the section 126 sources in that State could no longer be significantly contributing to downwind nonattainment, and hence the basis for the section 126 findings would no longer be present. Further, the provision would ensure that the downwind petitioning States receive the emission reduction benefits they are entitled to under section 126 by May 1, 2003, which was then the compliance date, either under the Section 126 Rule or under a Federally enforceable SIP or FIP (65 FR 2684). Thus, EPA's rationale for adopting the automatic withdrawal provision depended upon a May 1, 2003 compliance date for sources under the SIP that would substitute for the control remedy under the Section 126 Rule. Accordingly, EPA interpreted section 52.34(i) to apply only where EPA approves a SIP revision (or promulgates a FIP) meeting the full requirements of the NOx SIP Call and including a May 1, 2003 compliance date for sources (See 65 FR 2683). The automatic withdrawal provision does not address any other circumstances.

US EPA ARCHIVE DOCUMENT

B. How Have Court Actions Affected the Circumstances Upon Which the Section 126 Rule Withdrawal Provision Was Based?

Both the NOx SIP Call and the Section 126 Rule were challenged in court. As a result of court actions, certain circumstances upon which the Section 126 withdrawal provision was based have changed--the deadlines for the NOx SIP Call and the Section 126 Rule have been delayed and the SIP Call has been divided into 2 phases (known as Phase 1 and Phase 2).

1. Court Actions on the NOx SIP Call.

On March 3, 2000, a panel of the D.C. Circuit largely upheld the NOx SIP Call but remanded a few issues to EPA for further consideration. (See Michigan v. EPA, 213 F.3d 663 (D.C. Cir., 2000), cert. denied, 121 S. Ct. 1225 (2001).) As discussed in section II above, during the litigation, the court issued a stay of the SIP submission deadline. On June 22, 2000, in response to a motion by EPA, the court lifted the stay and established a new SIP submission date of October 30, 2000. On August 30, 2000, the D.C. Circuit ordered that the deadline for implementation of the NOx SIP Call be extended from May 1, 2003 to May 31, 2004. The NOx SIP Call then had a

US EPA ARCHIVE DOCUMENT

later compliance date and was no longer harmonized with the Section 126 Rule.

As a result of the court decision, EPA divided the NOx SIP Call into two phases. Phase 1 represents the portion of the rule that was upheld by the court and accounts for approximately 90 percent of the total emissions reductions called for by the original NOx SIP Call. The court-established SIP submission date and compliance date apply to Phase 1. Phase 2 of the NOx SIP Call is addressing issues remanded by the court. The EPA proposed the Phase 2 requirements on February 22, 2002 (67 FR 8396). The SIP submission date and compliance date for the Phase 2 will be established through that rulemaking action.

The EPA promulgated the January 2000 Section 126 Rule at the time when the NOx SIP Call stay was in place. In the preamble to the rule, EPA noted that if EPA prevailed in the NOx SIP Call litigation, the court or EPA would need to establish a new deadline for SIP submission and the delay from the original September 1999 SIP deadline could require a shift in the date for achieving the NOx SIP Call emissions reductions beyond May 1, 2003 (65 FR 2683). The EPA indicated that when

US EPA ARCHIVE DOCUMENT

and if such a situation were to arise, EPA would address through rulemaking the effects of the new NOx SIP Call deadline on the Section 126 withdrawal provision.

2. Court Actions on the Section 126 Rule

On May 15, 2001, the court ruled on a number of challenges to EPA's Section 126 Rule. See Appalachian Power v. EPA, 249 F.3d 1032 (D.C. Cir. 2001). The court largely upheld the Section 126 Rule, but remanded two issues to EPA. The court directed EPA to: (1) properly justify either the current or a new set of EGU heat input growth rates to be used in estimating State heat input in 2007, and (2) either properly justify or alter its categorization of cogenerators that sell electricity to the electric grid as EGUs.[5]

On August 24, 2001, the D.C. Circuit Court tolled (suspended) the compliance period for EGUs under the Section 126 Rule as of the May 15, 2001 decision pending EPA's response to the remand related to EGU growth rates. Appalachian Power v. EPA, 249 F.3d 1052 (D.C. Cir 2001), Order (August 24, 2001). The EPA issued its response in a notice published on May 1, 2002 (67 FR 21868). Because

[5]The EPA is responding to the remand related to the categorization of cogenerators in a rulemaking that was proposed on February 22, 2002 (67 FR 8396).

US EPA ARCHIVE DOCUMENT

of the time needed to fully respond to the growth factor remand, the tolling of the compliance period resulted in a delay in the implementation of the Section 126 Rule until the 2004 ozone season. This created a need for EPA to once again harmonize the Section 126 Rule with the NOx SIP Call. Therefore, on April 30, 2002, EPA issued a final rulemaking to revise the Section 126 Rule compliance date and other related dates (67 FR 21522). The new compliance date is May 31, 2004, which is the same compliance date for Phase 1 of the NOx SIP Call, but slightly more than a year later than the compliance date upon which the Section 126 Rule withdrawal provision was based.

IV. What is EPA's Proposal to Revise the Section 126 Rule Withdrawal Provision?

A number of reasons supported structuring the May 25, 1999 Section 126 Rule to provide for an automatic withdrawal of the section 126 findings upon approval of a SIP revision complying with the NOx SIP Call. As discussed above, EPA believes it is appropriate, when consistent with the relevant statutory provisions, to structure the Section 126 Rule to allow for State rather than Federal regulation when either would be equally

US EPA ARCHIVE DOCUMENT

effective in implementing the statutory goal of producing timely emissions reductions. The withdrawal provision also avoids the overlap of the Federal requirements under section 126 and State measures in response to the NOx SIP Call. However, due to the changes that have occurred to the Section 126 Rule and the NOx SIP Call as a result of court actions, the Section 126 Rule withdrawal provision is now out of date. Therefore, it is necessary to revise and update the withdrawal provision so that it will function as originally intended.

A. What is EPA's Proposal Related to the SIP Compliance Date?

As discussed in Section III.A. above, EPA interprets the current Section 126 Rule withdrawal provision to operate only when the SIP has a May 1, 2003 compliance date. Because the Section 126 Rule compliance deadline is now May 31, 2004, a NOx SIP to pre-empt or replace the Section 126 Rule requirements would not need to be implemented until May 31, 2004. Therefore, in today's action, EPA is proposing that the section 126 findings for sources in a State will be deemed to be withdrawn, and the corresponding portion of the relevant petition will be denied, if EPA approves a NOx SIP that meets the

US EPA ARCHIVE DOCUMENT

NOx SIP Call requirements of 40 CFR 51.121 and 51.122 (or Phase 1 requirements under the circumstances discussed below) by May 31, 2004 rather than by May 1, 2003.

B. What is EPA's Proposal Related to Withdrawing the Section 126 Rule Based on a Phase 1 SIP?

The current withdrawal provision requires a State to meet the full NOx SIP Call. If a State controls its statewide significant contribution under the NOx SIP Call, it necessarily must have addressed the significant contribution from the section 126 sources in that State. This provided the basis for EPA to revoke the section 126 findings and requirements as to those sources.

At the time EPA promulgated the Section 126 Rule, the NOx SIP Call had not yet been divided into two phases. Therefore, EPA did not address the question of whether something less than a full NOx SIP, that is, a Phase 1 SIP, could adequately substitute for the section 126 requirements. Phase 1 of the NOx SIP Call provides around 90 percent of the SIP Call reductions. States are required to achieve the Phase 1 reductions by May 31, 2004, the same compliance date as the Section 126 Rule. In February of this year, EPA proposed the Phase 2 requirements. The Phase 2 compliance date will be

US EPA ARCHIVE DOCUMENT

established in a future final rule. Because EPA expects that the Phase 2 compliance date will be later than the 2004 ozone season, States will be required to achieve only the Phase 1 reductions in 2004 and not the full NOx SIP Call reductions. Therefore, in order to avoid having sources be subject to two different sets of transport requirements in 2004 under the NOx SIP Call and the Section 126 Rule, EPA is proposing criteria for withdrawing the Section 126 Rule based on a Phase 1 SIP.

Although the Phase 1 SIP would achieve the vast majority of the SIP Call reductions, there is no guarantee that a Phase 1 SIP would, in all cases, control at least the same amount of emissions as the Section 126 Rule in a State or that the State would choose to regulate all the identified Section 126 sources. Therefore, EPA is not proposing that simply meeting the Phase 1 reductions would provide a basis for automatic withdrawal of the Section 126 requirements. Instead, EPA is proposing that the Section 126 Rule be withdrawn in a State under the more limited circumstances where EPA determines that an approved Phase 1 SIP is requiring at least the same total quantity of emissions reductions from the same group of sources as controlled under the

US EPA ARCHIVE DOCUMENT

Section 126 Rule by May 31, 2004. In this situation, the SIP would retain the environmental benefits that section 126 would have provided and the section 126 sources would no longer be significantly contributing to downwind nonattainment problems.

The process for withdrawing the Section 126 Rule based on a Phase 1 SIP would differ slightly from the situation where a State adopts a SIP meeting the full NOx SIP Call requirements in that a second step would be involved. In the latter case, the Section 126 Rule would be automatically withdrawn upon SIP approval. In the case of the Phase 1 SIP, the Section 126 Rule would be withdrawn upon EPA's determination that the approved Phase 1 SIP regulates the group of section 126 sources to the same or greater stringency as the Section 126 Rule.

Based on the review of SIPs to date, EPA believes it is likely that all of the Phase 1 SIPs from States affected by the Section 126 Rule will regulate all of the section 126 sources to the same stringency as the Section 126 Rule. However, not all of the Phase 1 SIPs have been fully approved yet and one affected State has not yet submitted its SIP. Therefore, EPA is still considering whether there are other circumstances under which it

US EPA ARCHIVE DOCUMENT

would be appropriate to withdraw the Section 126 Rule.

The EPA is soliciting comments on alternative approaches for withdrawing the Section 126 Rule based on an approved Phase 1 SIP.

V. What is the Current Status of the NOx SIPs under the NOx SIP Call and EPA's Proposed Action to Withdraw the Section 126 Rule in a State?

The January 2000 Section 126 Rule affected sources located in the District of Columbia and the following 12 States: Delaware, Indiana, Kentucky, Maryland, Michigan, New Jersey, New York, North Carolina, Pennsylvania, Ohio, Virginia, and West Virginia.[6] All of these States are required to submit Phase 1 SIPs under the NOx SIP Call. To date, EPA has given final approval to NOx SIPs from ten of the thirteen jurisdictions (all but Michigan, Ohio, and Virginia).

The District of Columbia, Maryland, New Jersey, and New York voluntarily adopted SIPs that meet the original full NOx SIP Call budgets (65 FR 11222; March 2, 2000) and include a May 1, 2003 compliance date. Therefore, these SIPs meet the criteria for the current Section 126

---

[6]Indiana, Kentucky, Michigan, and New York were only partially covered by the Section 126 Rule.

US EPA ARCHIVE DOCUMENT

withdrawal provision and the Section 126 Rule already has been automatically withdrawn for sources in those four jurisdictions.[7]

North Carolina adopted a SIP meeting the original full NOx SIP Call budget with a May 31, 2004 compliance date. If EPA finalizes today's action as proposed, the Section 126 Rule under the 1-hour standard will be automatically withdrawn for sources in that State upon the effective date of the final rule.

The EPA is today proposing that the approved Phase 1 SIPs from Delaware, Indiana, Kentucky, Pennsylvania, and West Virginia regulate the total group of section 126

---

[7]The EPA is currently revising certain portions of the NOx SIP Call in response to a March 3, 2000 decision by the U.S. Court of Appeals for the D.C. Circuit. See Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). In this decision, the court upheld the NOx SIP Call on all major issues, but remanded four narrow issues to EPA for further rulemaking. The EPA expects to complete the rulemaking by the end of the year, which will slightly modify the NOx SIP budgets based on the court's holding. In light of the changes necessary to respond to the court decision, EPA anticipates that the final NOx SIP budgets would be no more stringent than the original SIP budgets as modified by the March 2, 2000 technical amendment (65 FR 11222). Therefore, a SIP meeting the March 2, 2000 budgets and providing for reductions by May 1, 2003, should fully address the significant NOx transport from that State, and the current section 52.34(i) withdrawal provision applies to automatically withdraw the section 126 requirements for sources in that State.

US EPA ARCHIVE DOCUMENT

sources in the respective States to the same stringency as the Section 126 Rule and include a compliance date no later than May 31, 2004. If EPA finalizes today's rule revision as proposed, the Section 126 Rule under the 1-hour standard will be withdrawn for sources in those States upon the effective date of the final rule.

The EPA proposed to conditionally approve the Virginia and Ohio SIPs. In today's action, EPA is proposing that once Virginia and Ohio satisfy the conditions identified in their respective SIP proposal actions and EPA fully approves the SIPs, each SIP would regulate the total group of section 126 sources in the respective State to the same stringency as the Section 126 Rule. If EPA finalizes today's rule revision as proposed and fully approves the Virginia and Ohio SIPs, the Section 126 Rule under the 1-hour standard will be withdrawn for sources in those States upon the later of the effective date for the final rule based on today's proposal and the effective date for final SIP approval.

We expect Michigan to submit a Phase 1 SIP shortly. The EPA will address the removal of the Section 126 Rule in Michigan in a separate rulemaking action once EPA receives and proposes action on the Michigan SIP.

US EPA ARCHIVE DOCUMENT

The EPA notes that this proposal to withdraw the Section 126 Rule only affects the portion of the Section 126 Rule based on the 1-hour ozone standard. In evaluating the section 126 petitions, EPA made separate determinations under the 1-hour and 8-hour standards. In light of the litigation on the 8-hour standard, EPA previously stayed the 8-hour portion of the Section 126 Rule. Recently, EPA issued its final response to a U.S. Court of Appeals for the D.C. Circuit remand of the 8-hour standard. After a careful review, EPA has reaffirmed the 8-hour ozone standard and is moving forward to implement the standard. Therefore, EPA will be initiating a rulemaking to lift the 8-hour stay on the Section 126 Rule. In that rulemaking, EPA will complete its action on the 8-hour petitions.

VI. Statutory and Executive Order Reviews

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

US EPA ARCHIVE DOCUMENT

"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. The January 2000 Section 126 Rule (65 FR 2674) establishes control requirements for certain sources in 12 States and the District of Columbia. The Section 126 Rule contains a provision

US EPA ARCHIVE DOCUMENT

under which EPA would withdraw the control requirements in a State if EPA approves a State plan to control the NOx transport in response to the NOx SIP Call. As the result of court actions, the compliance dates for the Section 126 Rule and the NOx SIP Call have now been delayed until May 31, 2004. In addition, the NOx SIP Call has been divided into two phases. Therefore, EPA is proposing to revise and update the Section 126 withdrawal provision so that it will operate under these new circumstances.

This proposed action would 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. Paperwork Reduction Act

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

C. 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

US EPA ARCHIVE DOCUMENT

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.

For purposes of assessing the impacts of the proposed rule on small entities, small entity is defined as: (1) a small business according to the U.S. Small Business Administration size standards for the NAICS codes listed in the following table;

NAICS CODE	ECONOMIC ACTIVITY OR INDUSTRY	SIZE STANDARD IN NUMBER OF EMPLOYEES, MILLIONS OF DOLLARS OF REVENUES, OR OUTPUT
322121 322122	Pulp mills	750
325211	Plastics materials, synthetic resins, and nonvulcanized elastomers	750
325188 325199	Industrial organic chemicals	1,000
324110	Petroleum refining	1,500
331111	Steel works, blast furnaces, and rolling mills	1,000

US EPA ARCHIVE DOCUMENT

333611	**Steam, gas, and hydraulic turbines**	**1,000**
333618	**Stationary internal combustion engines**	**1,000**
333415	**Air-conditioning and warm-air heating equipment and commercial and industrial refrigeration equipment**	**750**
222111 222112	**Electric utilities**	**4 million megawatt hrs.**
486210	**Natural gas transmission**	**$6.0**
221330	**Steam and air conditioning supply**	**$10.5**

(2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Today's proposal, if promulgated, would not create new requirements for small entities or other sources. Instead, this action is proposing to revise the Section 126 Rule to withdraw the

US EPA ARCHIVE DOCUMENT

section 126 requirements under specified circumstances. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. <u>Unfunded Mandates Reform Act</u>

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(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

US EPA ARCHIVE DOCUMENT

Federal assistance" (2 U.S.C. 658(5)(A)(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 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 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.

E. <u>Executive Order 13132: Federalism</u>

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

US EPA ARCHIVE DOCUMENT

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 would not impose any additional burdens beyond those imposed by the January 2000 Rule. Thus, the requirements of section 6

US EPA ARCHIVE DOCUMENT

of the Executive Order do not apply to this rulemaking action.

F. 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. If promulgated, 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

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Indian tribes, as specified in Executive Order 13175. Today's action does not significantly or uniquely affect the communities of Indian tribal governments. As discussed above, today's proposed action would not impose any new requirements that would impose compliance burdens beyond those that would already apply under the January 2000 rule. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

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

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

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

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions 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

US EPA ARCHIVE DOCUMENT

regulatory requirements.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Transfer and Advancement Act of 1995 ("NTTAA," Public Law 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 specifying circumstances under which the Section 126 requirements would be withdrawn.

US EPA ARCHIVE DOCUMENT

List of Subjects in 40 CFR Part 52

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

____

Dated:

____

Christine Todd Whitman,
Administrator

US EPA ARCHIVE DOCUMENT

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 paragraph (i) to read as follows:

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

* * * * *

(i) Withdrawal of section 126 findings. Notwithstanding any other provision of this subpart, a finding under paragraphs (c), (e)(1) and (e)(2), (g), and (h)(1) and (h)(2) of this section as to a particular major source or group of stationary sources in a particular State will be deemed to be withdrawn, and the corresponding part of the

US EPA ARCHIVE DOCUMENT

relevant petition denied, if the Administrator issues a final action approving implementation plan provisions that:

(1)Comply with the applicable requirements of §§51.121 and 51.122 of this chapter for such State, modified to require achievement of the emission reductions under §51.121 of this chapter starting no later than May 31, 2004; or

(2)(A) Comply with the applicable requirements of §§51.121 and 51.122 of this chapter, except for §51.121(e) of this chapter, for such State, modified to require achievement of the emission reductions under §51.121 of this chapter starting no later than May 31, 2004, and

(B) Achieve emissions reductions, from the large EGUs and large non-EGUS subject to paragraph (j) of this section in such State, that equal or exceed the emissions reductions otherwise required under Part 97 of this chapter for such State.

* * * * *

US EPA ARCHIVE DOCUMENT