ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52, 70, and 71

[FRL–7147–5]

RIN 2060–AJ36

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to revise one element of a final rule published on January 18, 2000, regarding petitions filed by four Northeastern States under section 126 of the Clean Air Act (CAA). The petitions seek to mitigate interstate transport of nitrogen oxides (NO_X), one of the main precursors of ground-level ozone pollution. The final rule partially approved the four petitions under the 1-hour ozone national ambient air quality standard, thereby requiring certain types of sources located in 12 States and the District of Columbia to reduce their NO_X emissions.

Subsequently, on March 3, 2000, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision on a related EPA regulatory action, the NO_X State implementation plan call (NO_X SIP call), that potentially affects the section 126 Rule. Although the court decision did not directly address the State of Michigan, the reasoning of the court regarding the significance of NO_X emissions from sources in two other States calls into question the inclusion of a portion of Michigan in the area covered by the NO_X SIP call. The section 126 Rule is based on many of the same analyses and information used for the NO_X SIP call and covers part of Michigan. Thus, in light of the court ruling, EPA is proposing to withdraw its section 126 findings and to deny the petitions under the 1-hour ozone standard with respect to sources located in the portion of Michigan that is at issue in the NO_X SIP call, known as the ''coarse grid'' part of that State. Although EPA has not identified any existing section 126 sources located in the coarse grid, this proposal would affect new sources locating in the coarse grid.

The EPA is also proposing to revise the definition of the ''applicable requirement'' for title V operating permit programs by providing expressly 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 though Friday, excluding legal 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 at *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/rto/whatsnew.html* on March 11, 2002 for the announcement of whether the hearing will be held. If there is a public 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/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 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/rto/126.*

The EPA has issued a separate rule on NO_X 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 NO_X 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 NO_X 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. 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 CAA. Each petition requested that EPA make a finding that certain stationary sources located in other specified States are emitting NO_X 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 NO_X. 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 upwind 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 that NO_X emissions from existing and new large electric generating units (EGUs) and large industrial boilers and turbines (non-EGUs) located in certain States identified in the petitions are significantly contributing to nonattainment in, or interfering with maintenance by, one or more of the petitioning States with respect to the 1-hour and/or 8-hour ozone standard. Separate determinations were made under the 1-hour and 8-hour standards.

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 NO_X 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 NO_X 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 CAA 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.3rd 1027 (D.C. Cir.), *modified,* 195 F.3rd 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 CAA 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 NO_X SIP Call Affect the Section 126 Rule?

The NO_X SIP Call required submission of the SIP revisions by September 30, 1999. State Petitioners challenging the NO_X SIP Call filed a motion requesting the Court to stay the submission schedule until April 27, 2000. In response, on May 25, 1999, the D.C. Circuit 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) (May 25, 1999 order granting stay in part).

Because the court had stayed the NO_X SIP call schedule, and there was no explicit and expeditious deadline for compliance with that rule, EPA believed there was no longer a basis for deferring making the section 126 findings based on a failure to meet the SIP call submission requirements. Therefore, in the January 2000 Rule, EPA deleted the automatic trigger mechanism for making findings and instead simply made final findings under the 1-hour standard based on the affirmative technical determinations in the May 1999 Rule. The 1-hour findings were made with respect to the section 126 petitions from Connecticut, Massachusetts, New York, and Pennsylvania. The findings affected large EGUs and large non-EGUs located in the District of Columbia and 12 States, including Michigan. EPA promulgated the Federal NO_X Budget Trading Program as the control remedy and issued NO_X allowance allocations to each source. The rule required sources affected by the 1-hour findings to reduce NO_X emissions by May 1, 2003.[1] (On August 24, 2001, the D.C. Circuit temporarily suspended the section 126 Rule compliance date for EGUs while EPA resolves a remanded issue related to EGU growth factors. The EPA is currently developing its response to the remand. In a January 16, 2002 memorandum from John Seitz, Director of EPA's Office of Air Quality Planning and Standards, to Regional Air Division Directors entitled, ''Deadlines for Electric Generating Units (EGUs) and Non-Electric Generating Units (non-EGUs) under the Section 126 Rule,'' EPA has indicated its intent to reset the compliance date for EGUs and non-EGUs to May 31, 2004, subject to EPA's response to the growth factor remand.)

C. March 3, 2000 Court Decision on the NO_X SIP Call

1. What Is the Relevance of the NO_X SIP Call Court Decision to the Section 126 Rule?

On March 3, 2000, the United States Court of Appeals for the District of Columbia Circuit Court issued its decision on the NO_X SIP call, ruling in favor of EPA on all major issues. *Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000).

However, the Court ruled against EPA on several points, one of which is relevant to today's proposal on the section 126 Rule. Specifically, the court vacated the inclusion of Georgia and Missouri in the NO_X SIP call in light of the Ozone Transport Assessment Group (OTAG) conclusions that emissions from coarse grid portions of States did not merit controls. The court remanded this issue concerning Georgia and Missouri to EPA for further consideration. The section 126 Rule is based on NO_X SIP call analyses and also affects sources located in the coarse grid. (See section II.C.2 below for an explanation of coarse versus fine grid areas of States.)

What Is the NO_X SIP Call Litigation Decision Regarding Coarse Grid Sources?

In the NO_X SIP call, Georgia and Missouri industry petitioners challenged EPA's decision to calculate NO_X budgets for these two States based on NO_X emissions throughout the entirety of each State. The petitioners maintained that the record supports including only eastern Missouri and northern Georgia as contributing to downwind ozone problems.

The challenge from these petitioners generally stems from the OTAG recommendations. The OTAG recommended NO_X controls to reduce transport for areas within the ''fine grid'' of the air quality modeling domain, but recommended that areas within the ''coarse grid'' not be subject to additional controls, other than those required by the CAA.[2]

In its modeling, OTAG used grids drawn across most of the eastern half of the United States. The ''fine grid'' has grid cells of approximately 12 kilometers on each side (144 square kilometers). The ''coarse grid'' extends beyond the perimeter of the fine grid and has cells with 36 kilometer resolution. As shown in Figure F–10, Appendix F of part 52.34, the fine grid includes the area encompassed by a box with the following geographic coordinates: Southwest Corner: 92 degrees West longitude, 32 degrees North latitude; Northeast Corner: 69.5 degrees West longitude, 44 degrees North latitude (OTAG Final Report Chapter 2). The OTAG could not include the entire Eastern U.S. within the fine grid because of computer hardware constraints.

It is important to note that there were two key factors directly related to air quality that OTAG considered in determining the location of the fine grid-coarse grid line.[3] (See OTAG Technical Supporting Document, Chapter 2, page 6; *www.epa.gov/ttn/otag/finalrpt/.*) Specifically, the fine grid-coarse grid line was drawn to: (1) Include within the fine grid as many of the 1-hour ozone nonattainment problem areas as possible and still stay within the computer and model run time constraints, (2) avoid dividing any individual major urban area between the fine grid and coarse grid, and (3) be located along an area of relatively low emissions density. As a result, the fine grid-coarse grid line did not track State boundaries, and Missouri and Georgia were among several States that were split between the fine and coarse grids.

[1] The EPA notes that on June 22, 2000, the Court lifted the stay of the SIP submittal date for the NO_X SIP call and ordered that the SIP submissions be due 128 days from the June 22, 2000 date of the order. At the time of the May 25, 1999 stay of the SIP submittal date, States had 128 days left to submit their SIPs. Thus, the new SIP submittal date became October 30, 2000. The EPA has established a two-phased process for submitting the NO_X SIPs; the October 30, 2000 date is for the phase I SIP. The EPA will be establishing the due date for the phase II NO_X SIP through notice-and-comment rulemaking. Therefore, the deadline for States to meet their full NO_X SIP call obligation has not yet been set. For further details, see the proposal on the NO_X SIP call that is being issued in the same general timeframe as today's proposal. Because EPA delinked the making of the section 126 findings from the NO_X SIP call SIP submittal date, the lifting of the stay of the SIP submittal date did not affect the section 126 action.

[2] The OTAG recommendation on Utility NO_X Controls approved by the Policy Group, June 3, 1997 (62 FR 60318, Appendix B, November 7, 1997).

[3] In addition to these two factors, OTAG considered three other factors in establishing the geographic resolution, overall size, and the extent of the fine grid. These other factors dealt with the computer limitations and the resolution of available model inputs.

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.[4]

The Court vacated EPA's determination of significant contribution for all of Georgia and Missouri. *Michigan* 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 NO_X 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 NO_X 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 NO_X SIP Call Court Decision?

The EPA is preparing a rulemaking on the NO_X SIP call to address issues remanded by the court in the March 3, 2000 decision. Among other issues, the proposal addresses the geographic applicability of the NO_X 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 NO_X 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 NO_X SIP call.

II. Section 126 Proposal

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

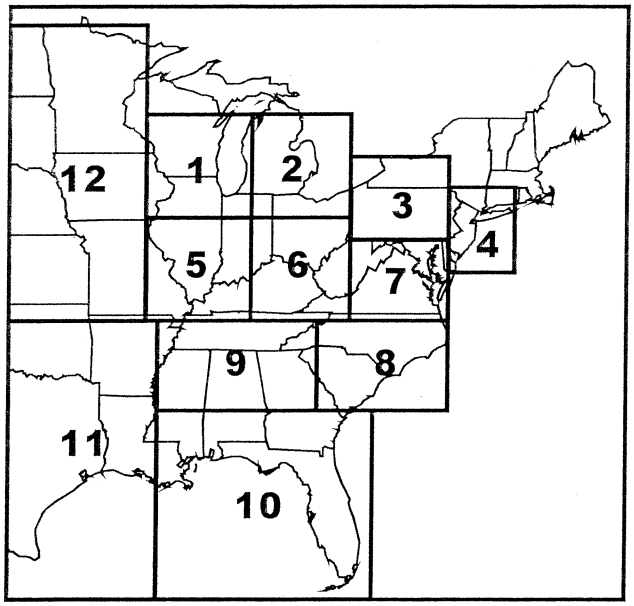
In light of the court ruling, EPA is proposing to withdraw its section 126 findings and to deny the Connecticut and New York petitions under the 1-hour ozone standard with respect to sources that are or will be located in the coarse grid portion of Michigan. There are no other coarse grid areas covered 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.)

[4] OTAG recommendation on Major Modeling/Air Quality Conclusions approved by the Policy Group, June 3, 1997 (62 FR 60318, Appendix B, November 7, 1997).

Figure 1. Location of Ozone Transport Assessment Group (OTAG) Subregions



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 NO_X 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 []''. *Id.* In response to the court opinion, EPA is proposing to include only the fine grid portion of Michigan in the NO_X 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]

[5] The EPA is taking a different approach to interpreting the fine-coarse grid split for purposes of a new NO_X SIP call proposal. Under the NO_X 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 NO_X SIP call, would no longer be affected. The NO_X 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 NO_X 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 NO_X 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.

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.

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 NO_X 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 NO_X 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 NO_X 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.'' [6]

Despite the erroneous discussion in the preamble of the January 18, 2000 section 126 Rule, that rule expressly requires that title V operating permits include the requirements of the NO_X 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 NO_X 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 NO_X 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(6)). A ''Federal intergovernmental mandate,'' in turn, is defined to include a regulation that

[6] The conclusion that the requirements of the NO_X Budget Trading Program under section 126 are an ''applicable requirement'' under § 70.2 was based on the assumption that, since section 126 is part of title I, these section 126 requirements are ''provided for in the applicable implementation plan approved or promulgated by EPA through a rulemaking under title I.'' 40 CFR 70.2 (definition of ''applicable requirement'', paragraph (1)). In fact, however, section 126 requirements promulgated by EPA are not part of an implementation plan under section 110. *See* CAA section 302(q), 42 U.S.C. 7603(q) (definition of ''applicable implementation plan'').

''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)). 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, 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 imposes no 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.

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 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.

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.

Dated: February 12, 2002.

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.

* * * * *

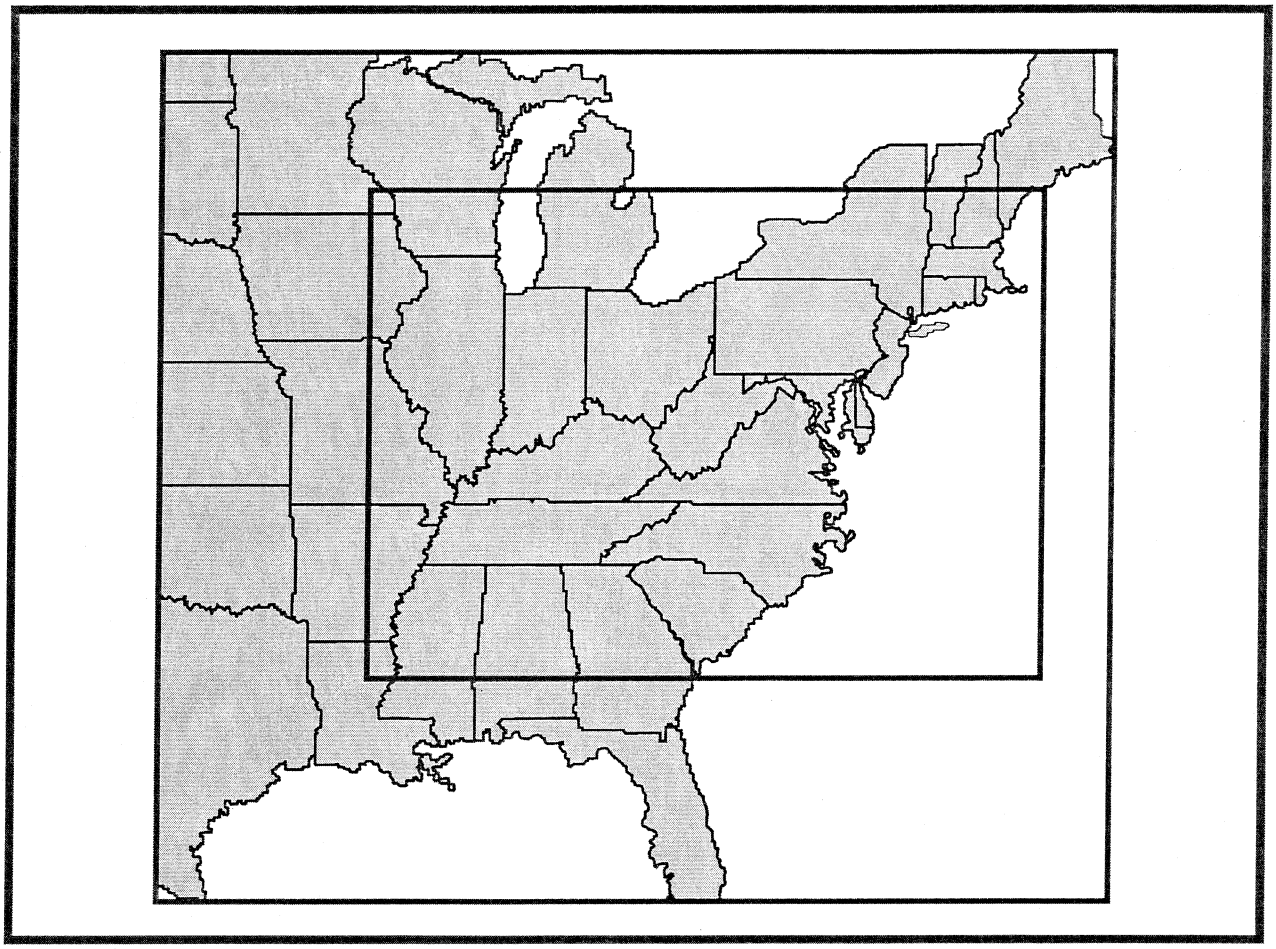
Appendix F—[Amended]

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

* * * * *

Figure F-10. Ozone Transport Assessment Group Modeling Domain



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;

* * * * *

[FR Doc. 02–3918 Filed 2–21–02; 8:45 am]

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