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Office of the General Counsel

B-281398

November 12, 1998

The Honorable John H. Chafee  
Chairman  
The Honorable Max Baucus  
Ranking Minority Member  
Committee on Environment and Public Works  
United States Senate

The Honorable Thomas J. Bliley, Jr.  
Chairman  
The Honorable John D. Dingell  
Ranking Minority Member  
Committee on Commerce  
House of Representatives

Subject: Environmental Protection Agency: Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Environmental Protection Agency (EPA), 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" (RIN: 2060-AH10). We received the rule on October 1, 1998. It was published in the Federal Register as a final rule on October 27, 1998. 63 Fed. Reg. 57356.

The final rule requires 22 states and the District of Columbia to submit state implementation plan (SIP) revisions to prohibit specified amounts of emissions of oxides of nitrogen (NO<sub>x</sub>). The purpose is to reduce NO<sub>x</sub> and ozone transport across state boundaries in the eastern half of the United States. EPA finds that sources and emitting activities in each of the 23 jurisdictions emit NO<sub>x</sub> in amounts that significantly contribute to nonattainment of the 1-hour and 8-hour ozone national ambient air quality standards (NAAQS) or will interfere with maintenance of the 8-hour NAAQS in one or more downwind states.

Enclosed is our assessment of the EPA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that the EPA complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Environmental Protection Agency is Peter Guerrero, Director, Environmental Protection Issues. Mr. Guerrero can be reached at (202) 512-6111.

Robert P. Murphy  
General Counsel

Enclosure

cc: Mr. Thomas E. Kelly  
Director, Office of Regulatory  
Management and Information  
Environmental Protection Agency

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE  
ISSUED BY  
THE ENVIRONMENTAL PROTECTION AGENCY  
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"  
(RIN: 2060-AH10)

(i) Cost-benefit analysis

EPA complied a Regulatory Impact Analysis which includes an assessment of the costs, benefits, and economic impacts associated with potential state implementation strategies. EPA found that the national annual costs of possible state actions to comply with the SIP call are approximately \$1.7 billion (1990 dollars). The associated benefits, in terms of improvements in health, crop yields, visibility, and ecosystems protection, that EPA has quantified and monetized range from \$1.1 billion to \$4.2 billion. EPA has not been able to monetize all of the benefits.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

In the preamble to the final rule, EPA's Administrator certifies that the final rule will not have a significant impact on a substantial number of small entities because, according to EPA's interpretation, the rule does not establish requirements applicable to small entities.

EPA states that the final rule requires states to develop, adopt, and submit SIP revisions that would achieve the emissions reductions. It also leaves to the states the task of determining how to obtain the reduction, including which entities to regulate.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

EPA has not reached a final conclusion as to whether the requirements of the Unfunded Mandates Reform Act (UMRA) applies to the instant rulemaking. EPA states that it is questionable whether a requirement to submit a SIP revision would constitute a federal mandate. According to EPA, the obligation for a state to revise its SIP that arises out of sections 110(a) and 110(k)(5) of the Clean Air Act is not legally enforceable by a court of law and at most is a condition for continued

receipt of highway funds. Therefore, EPA finds that such a submittal may not create an enforceable duty within the meaning of section 421(5)(9a)(I) of UMRA. If it did create such a duty, the duty could fall within the exception for a condition of federal assistance under section 421(5)(a)(i)(I) of UMRA.

However, EPA has prepared the written statement under section 202 of UMRA as if the Act's requirements did apply, placed the statement in the rulemaking docket, and consulted with governmental entities as also required by UMRA.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

Instead of the notice and comment procedures in the Administrative Procedure Act, EPA promulgated this rule using the procedures, which have similar notice and comment requirements, contained in section 307(d) of the Clean Air Act, as amended. 42 U.S.C. § 7607(d).

On November 7, 1997, EPA issued an notice of proposed rulemaking, 62 Fed. Reg. 60318, and on May 11, 1998, issued a supplemental notice of proposed rulemaking, 63 Fed. Reg. 25902. EPA responds to the comments received and the action it took in response to them in the preamble to the final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains an information collection which is subject to review by the Office of Management and Budget under the Paperwork Reduction Act. The preamble to the final rule contains a description of the collection, including the reason for the collection and the number of respondents and the estimated annual burden imposed.

The respondents are the 23 jurisdictions and the annual burden of reporting the emissions data is estimated to be 6,197 hours annually at a total cost of \$164,190.

Statutory authorization for the rule

The final rule was issued under the authority of the Clean Air Act, as amended, 42 U.S.C. §§ 7401-7671q, and more specifically, sections 110(a)(1) and 110(a)(2)(D)(i)(I), 42 U.S.C. §§ 7410(a)(1) and 7410(a)(2)(D)(i)(I).

Executive Order No. 12866

The final rule was reviewed by the Office of Management and Budget under Executive Order No. 12866 as an "economically significant" regulatory action and approved as complying with the requirements of the order.

Executive Order No. 13045 (Protection of Children from Environmental Health Risks and Safety Risks)

EPA has found that the final rule is not subject to this order because it does not involve decisions on environmental health risks or safety risks that disproportionately affect children. While the rule does not separately address any age groups, EPA has conducted a general analysis of the potential changes in ozone and particulate matter levels experienced by children as a result of the SIP call and included it in the Regulatory Impact Analysis. The analysis contains a census-derived subdivision for the under 18 age group.

Executive Order No. 12898 (Environmental Justice)

EPA has conducted a general analysis of the potential changes in the ozone and particulate matter levels that may be experienced by minority and low-income populations as a result of the SIP call and includes population-weighted exposure characterizations for projected ozone and particulate matter concentrations. The population includes census-driven subdivisions for whites and non-whites and low-income groups.

Executive Order No. 12875 (Enhancing the Intergovernmental Partnerships)

Since the final rule, according to EPA, does not create a mandate on state, local, or tribal governments, the requirements of the order do not apply.

Executive Order No. 13084 (Consultation and Coordination with Indian Tribal Governments)

The final rule does not significantly or uniquely affect the communities of Indian tribal governments and does not require the governments to take any action. Therefore, the requirements of the order are not applicable.