

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[FRL-XXXX-X]

**Stay of the Eight-Hour Portion of the Findings of
Significant Contribution and Rulemaking for Purposes of
Reducing Interstate Ozone Transport**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In today's action, EPA is proposing to amend a final rule it issued under section 110 of the Clean Air Act (CAA) related to interstate transport of pollutants. The EPA is proposing to stay its finding in the nitrogen oxides State Implementation Plan Call¹ (NOx SIP Call) related to the 8-hour ozone standards.

In the final NOx SIP Call, EPA found that emissions of NOx from 22 States and the District of Columbia (23 States) significantly contribute to downwind areas' nonattainment of the 1-hour ozone National Ambient Air Quality Standards (NAAQS). The EPA also separately found that NOx emissions from the same 23 States significantly contribute to downwind nonattainment of the 8-hour ozone NAAQS. The EPA's findings

¹"Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 FR 57354, October 27, 1998.

under the 8-hour standards were completely separate from its 1-hour findings and were an independent basis for the rule.

Subsequently, the revised 8-hour ozone standards were remanded in American Trucking Associations, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999). On October 29, 1999, a panel of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) granted in part and denied in part EPA's rehearing request in that case, and the full Court denied EPA's request for rehearing en banc. The panel granted rehearing as to certain parts of its original opinion which address EPA's authority to implement the 8-hour ozone NAAQS. The rehearing decision continues to create uncertainty with respect to EPA's ability to rely upon the 8-hour standards as an alternative basis for the NOx SIP Call at this time.

DATES: The comment period on this notice of proposed rulemaking (NPR) ends on [INSERT 45 DAYS FROM PUBLICATION]. 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). The EPA must receive requests for a hearing by [INSERT 10 DAYS FROM PUBLICATION]. Please refer to SUPPLEMENTARY INFORMATION for additional information on the comment period and public hearing.

ADDRESSES: Comments may be submitted to the Air and Radiation Docket and Information Center (6102), Attention: Docket No. A-96-56, U.S. Environmental Protection Agency, 401 M Street SW, room M-1500, Washington, DC 20460, telephone (202) 260-7548. Comments and data may also be submitted electronically by following the instructions under SUPPLEMENTARY INFORMATION of this document. No confidential business information (CBI) should be submitted through e-mail.

Documents relevant to this action are available for inspection at the Air and Radiation Docket and Information Center (6102), Attention: Docket No. A-96-56, at the above address between 8:00 a.m. and 5:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Questions concerning today's action should be addressed to Kimber Scavo, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, MD-15, Research Triangle Park, NC, 27711, telephone (919) 541-3354, e-mail at scavo.kimber@epa.gov.

SUPPLEMENTARY INFORMATION:

Public Hearing

If you contact EPA requesting a public hearing, it will

be held at Research Triangle Park, NC. If you wish to attend the hearing or wish to present oral testimony, you should notify Ms. Joann Allman, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, MD-15, Research Triangle Park, NC 27711, telephone (919) 541-1815, e-mail allman.joann@epa.gov. The EPA will publish a notice of a hearing if a hearing is requested, in the Federal Register. Any 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-96-56 at the above address. A verbatim transcript of the hearing, if held, and written statements will be made available for copying during normal working hours at the Air and Radiation Docket and Information Center at the above address.

Availability of Related Information

The official record for the NOx SIP Call rulemaking as well as the public version of the record, has been established under docket number A-96-56 (including comments and data submitted electronically as described below). The EPA has added new sections to that docket for purposes of today's proposed rulemaking. The public version of this

record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The rulemaking record is located at the address in ADDRESSES at the beginning of this document. In addition, the Federal Register rulemakings and associated documents are located at <http://www.epa.gov/ttn/rto/>.

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I. Background

A. Findings under Section 110 to Reduce Interstate Ozone Transport

On September 24, 1998 (63 FR 57356, October 27, 1998), EPA took final action to prohibit specified amounts of emissions of one of the main precursors of ground-level ozone, NOx, from transporting across State boundaries in the eastern half of the United States. The EPA found that sources and emitting activities in 23 States emit NOx in amounts that significantly contribute to nonattainment of the 1-hour and 8-hour ozone NAAQS downwind. The EPA set forth requirements for each of the affected upwind States to

submit SIP revisions prohibiting those amounts of NOx emissions which significantly contribute to downwind air quality problems. The reduction of those NOx emissions will bring NOx emissions in each of those States to within the resulting statewide NOx emissions budget levels established in the rule.

B. Court Decisions

1. 8-Hour NAAQS

On May 14, 1999, the D.C. Circuit issued an opinion questioning the constitutionality of the CAA authority to review and revise the NAAQS, as applied in EPA's revision to the ozone and particulate matter NAAQS. See American Trucking Ass'ns v. EPA No. 97-1441 and consolidated cases (D.C. Cir. May 14, 1999). The Court stopped short of finding the statutory grant of authority unconstitutional, instead providing EPA with another opportunity to develop a determinate principle for promulgating NAAQS under the statute. The Court continued by addressing other issues, including EPA's authority to classify and set attainment dates for a revised ozone standard. Based on the statutory provisions regarding classifications and attainment dates under sections 172(a) and 181(a), the Court's ruling curtailed EPA's ability to require States to comply with a more stringent ozone NAAQS. In response to EPA's petition

for rehearing, the D.C. Circuit on October 29, 1999 granted in part and denied in part EPA's rehearing request. The panel granted rehearing as to certain parts of its original opinion, which address EPA's authority to implement the 8-hour ozone NAAQS. The rehearing decision continues to create uncertainty with respect to EPA's ability to rely upon the 8-hour standards as an alternative basis for the NOx SIP Call at this time. The EPA has asked the Department of Justice to seek Supreme Court review of the American Trucking decision in light of the rehearing decision.

2. Stay of SIP Submittal Schedule for NOx SIP Call

On May 25, 1999, the D.C. Circuit stayed the deadline for submission of the SIP revisions required under the NOx SIP Call. The NOx SIP Call had required submission of the SIP revisions by September 30, 1999. State Petitioners challenging the NOx SIP Call moved to stay the submission schedule until April 27, 2000. The D.C. Circuit issued a stay of the SIP submission deadline pending further order of the Court. Michigan v. EPA, No. 98-1497 (D.C. Cir. May 25, 1999) (order granting stay in part).

II. Proposal

The EPA is proposing in this action to amend the final NOx SIP Call to address the issues raised by the Court's rulings on the 8-hour NAAQS. The EPA is only soliciting

comment on the specific changes proposed here in response to the Court's rulings. The EPA is not reopening the remainder of the final NOx SIP Call for public comment and reconsideration.

The EPA's belief is that EPA should not continue implementation efforts under section 110 with respect to the 8-hour standard that could be construed as inconsistent with the Court's ruling. In light of the uncertainty, EPA believes the most prudent course -- and one respectful of the Court's conclusions in American Trucking - is to stay the findings in the SIP Call that emissions in certain States contribute significantly to nonattainment of the 8-hour ozone standards in certain downwind States.² The effect of such a stay would be to remove the 8-hour findings as an independent basis for the SIP Call. Given this position, EPA believes that the Agency should not continue to move forward with findings under section 110 based on the 8-hour standard. Thus, EPA is proposing to stay indefinitely the findings of significant contribution based on the 8-hour standard, pending further developments in the NAAQS litigation. The requirements of the SIP Call,

²The EPA's approach here is consistent with its action on a rule related to the NOx SIP Call, commonly referred to as the "Section 126 Rule." On December 17, 1999, EPA took final action on the section 126 petitions. This action indefinitely stayed its technical findings on the 8-hour ozone standards.

including the findings of significant contribution by the 23 States, the emissions reductions that must be achieved, and the requirement for States to submit SIPs meeting statewide NOx emissions budgets, are fully and independently supported by EPA's findings under the 1-hour NAAQS alone. Since the rule was based independently on the 1-hour standards, a stay of the findings based on the 8-hour standards would have no effect on the required remedy. Therefore, this stay does not affect EPA's findings based on the 1-hour standards and the requirements of the SIP Call remain in effect.

III. Administrative Requirements

A. Executive Order 12866: Regulatory Impact Analysis

Under Executive Order (E.O.) 12866, (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget (OMB) because this action is simply proposing to stay its finding in the NOx SIP Call related to the 8-hour ozone standards. The final NOx SIP Call was submitted to OMB for review. The EPA prepared a regulatory impact analysis (RIA) for the final NOx SIP Call titled "Regulatory Impact Analysis for the NOx SIP Call, FIP, and Section 126 Petitions." The RIA and any written comments from OMB to EPA and any written EPA responses to those comments are included in the docket. The

docket is available for public inspection at the EPA's Air Docket Section, which is listed in the ADDRESSES section of this preamble. This proposed action does not create any additional impacts beyond what was promulgated in the final NOx SIP Call; therefore, no additional RIA is needed.

B. Unfunded Mandates Reform Act

This proposed action also does not impose any additional enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). The EPA did not reach a final conclusion as to the applicability of the requirements of the UMRA to the final NOx SIP Call. The EPA prepared a statement that would be required by UMRA if its statutory provisions applied and has consulted with governmental entities as would be required by UMRA. Because today's action does not create any additional mandates, no further UMRA analysis is needed.

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 action does not impose an enforceable duty on these entities. This action proposes to stay its finding in the NO_x SIP Call related to the 8-hour ozone standards and imposes no additional burdens beyond those imposed by the final NO_x SIP

Call. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

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

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's action does not significantly or uniquely affect the communities of Indian tribal governments. The

EPA stated in the final NOx SIP Call that Executive Order 13084 did not apply because the final rule does not significantly or uniquely affect the communities of Indian tribal governments or call on States to regulate NOx sources located on tribal lands. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Executive Order 12898: Environmental Justice

In addition, this action does not involve special consideration of environmental justice related issues as required by E.O. 12898 (59 FR 7629, February 16, 1994). For the final NOx SIP Call, the Agency conducted a general analysis of the potential changes in ozone and particulate matter levels that may be experienced by minority and low-income populations as a result of the requirements of the rule. These findings are presented in the RIA. Today's action does not affect that analysis.

F. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 USC 601 et. seq.

The 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.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business as defined in the Small Business Administration's (SBA) regulations at 13 CFR 12.201; (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 technical amendment on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

This proposed action will not impose any requirements on small entities. This action proposes to stay its finding in the NOx SIP Call related to the 8-hour ozone standards and does not itself establish requirements applicable to small entities.

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

This proposed action also is not subject to E.O. 13045 (Protection of Children from Environmental Health Risks and

Safety Risks) (62 FR 19885, April 23, 1997) because EPA interprets E.O. 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 action is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks and is not economically significant under E.O. 12866.

H. National Technology Transfer and Advancement Act

In addition, the National Technology Transfer and Advancement Act of 1997 does not apply because today's proposed action does not require the public to perform activities conducive to the use of voluntary consensus standards under that Act. The EPA's compliance with these statutes and Executive Orders for the underlying rule, the final NOx SIP Call, is discussed in more detail in 63 FR 57477-81 (October 27, 1998).

I. Paperwork Reduction Act

The EPA stated in the final NOx SIP Call that an information collection request was pending. Today's action imposes no additional burdens beyond those imposed by the final NOx SIP Call. Any issues relevant to satisfaction of the requirements of the Paperwork Reduction Act will be resolved during review and approval of the pending information collection request for the NOx SIP Call.

List of Subjects

40 CFR Part 51

Air pollution control, Administrative practice and procedure, Carbon monoxide, Environmental protection, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

Dated:

Carol M. Browner,
Administrator

For the reasons set forth in the preamble, part 51 of chapter 1 of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 51-REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart G - Control Strategy

2. Section 51.121 is amended by adding paragraph (q) to read as follows:

§51.121 Findings and requirements for submission of State implementation plan revisions relating to emissions of oxides of nitrogen.

* * * * *

(q) Stay of Findings of Significant Contribution with respect to the 8-hour standards. Notwithstanding any other provisions of this subpart, the effectiveness of paragraph (a)(2) of this section is stayed.