

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2009-0017; FRL-]

Extension of Deadline for Action on Section 126 Petition From Delaware**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The EPA is extending by 6 months the deadline for EPA to take action on a petition submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC). The petition requests that EPA make a finding under section 126(b) of the Clean Air Act (CAA) that electric generating units (EGUs) in nine upwind states are emitting air pollutants in violation of the provisions of section 110(a)(2)(D)(i) of the CAA. Under the CAA, EPA is authorized to grant a time extension for responding to the petition if EPA determines that the extension is necessary, among other things, to meet the purposes of the CAA's rulemaking requirements. By this action, EPA is making that determination.

DATES: This action is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID number EPA-HQ-OAR-2009-0017. All documents in

the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: For further information, contact Tim Smith, Air Quality Planning Division, Office of Air Quality Planning and Standards, mail code C539-04, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: 919-541-4718; fax number: 919-541-0824; email address: smith.tim@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

This is a procedural action to extend the deadline for EPA to respond to a petition from Delaware filed under CAA section

126. EPA received the section 126 petition on December 18, 2008. The petition requests that EPA make a finding that EGUs in Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia are emitting air pollutants in violation of the provision of section 110(a)(2)(D)(i) of the CAA. That section provides that each state's State Implementation Plan (SIP) shall contain adequate provisions prohibiting emissions of any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any national ambient air quality standard (NAAQS). The petition asserts that EGUs in the nine named states have a significant impact on Delaware's air quality and that this impact would be mitigated by further regulation of nitrogen oxide and sulfur dioxide emissions from those sources.

Section 126(b) authorizes states or political subdivisions to petition EPA to find that a major source or group of stationary sources in upwind states emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D), by contributing significantly to nonattainment or maintenance problems in downwind states. If EPA makes such a finding, EPA is authorized to establish federal emissions limits for the sources which so contribute.

Under section 126(b), EPA must make the finding requested

in the petition, or must deny the petition within 60 days of its receipt. Under section 126(c), any existing sources for which EPA makes the requested finding must cease operations within three months of the finding, except that those sources may continue to operate if they comply with emission limitations and compliance schedules that EPA may provide to bring about compliance with the applicable requirements.

Section 126(b) further provides that EPA must allow a public hearing for the petition. EPA's action under section 126 is also subject to the procedural requirements of CAA section 307(d). See section 307(d)(1)(N). One of these requirements is notice-and-comment rulemaking, under section 307(d)(3).

In addition, section 307(d)(10) provides for a time extension, under certain circumstances, for rulemaking subject to section 307(d). Specifically, section 307(d)(10) provides:

Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of the subsection.

Section 307(d)(10) applies to section 126 rulemakings because the 60-day time limit under section 126(b) necessarily limits the period after proposal to less than six months.

II. Final Action

A. Rule

In accordance with section 307(d)(10), EPA is determining that the 60-day period afforded by section 126(b) for responding to the petition from the Delaware DNREC is not adequate to allow the public and the Agency adequate opportunity to carry out the purposes of section 307(b). Specifically, the 60-day period is insufficient for EPA to develop an adequate proposal and allow time for notice and comment on whether the EGUs identified in the section 126 petition contribute significantly to nonattainment or maintenance problems in Delaware.

EPA is in the process of determining what would be an appropriate schedule for action on the section 126 petition from Delaware. This schedule must afford EPA adequate time to prepare a proposal that clearly elucidates the issues to facilitate public comment and must provide adequate time for the public to comment prior to issuing the final rule.

As a result of this extension, the deadline for EPA to act on the petition is August 13, 2009.

B. Notice-and-Comment Under the Administrative Procedures Act (APA)

This document is a final agency action, but may not be subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553(b). The EPA believes that, because of the limited time provided to make a determination that the deadline for action on the section 126 petition should be extended, Congress

may not have intended such a determination to be subject to notice-and-comment rulemaking. However, to the extent that this determination otherwise would require notice and opportunity for public comment, there is good cause within the meaning of 5 U.S.C. 553(b)(3)(B) not to apply those requirements here. Providing for notice-and-comment would be impracticable because of the limited time provided for making this determination, and would be contrary to the public interest because it would divert Agency resources from the substantive review of the section 126 petition.

C. Effective Date Under the APA

This action is effective on **[INSERT DATE PUBLICATION IN THE FEDERAL REGISTER]**. Under the APA, 5 U.S.C. 553(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the Federal Register if the agency has good cause to mandate an earlier effective date. This action--a deadline extension--must take effect immediately because its purpose is to extend by 6 months the deadline for action on the petition. It is important for this deadline extension action to be effective before the original 60-day period for action elapses. As discussed above, EPA intends to use the 6-month extension period to develop a proposal on the petition and provide time for public comment before issuing the final rule. These reasons support an immediate effective date.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320(b). This action simply extends the date for EPA to take action on a petition and does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Therefore, it does not impose an information collection burden.

C. Regulatory Flexibility Act

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice-and-comment requirements under the APA or any other statute because, although the rule is subject to the APA, the Agency has invoked

the "good cause" exemption under 5 U.S.C. 553(b). Therefore, it is not subject to the notice-and-comment requirement.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (URMA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state local or tribal governments or the private sector. This action simply extends the date for EPA to take action on a petition and does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of URMA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action simply extends the date for EPA to take action on a petition and does not impose any new obligations or enforceable duties on any small governments.

E. 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."

This 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. This rule simply extends the date for EPA to take action on a petition and does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). 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. This action does not significantly or uniquely affect the communities of indian tribal governments. As discussed above, this action imposes no new requirements that would impose compliance burdens. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

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

This action is not subject to EO 13045 (62 F.R. 19885, April 23, 1997) because the Agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This rule simply extends the deadline for EPA to take action on a petition and does not impose any regulatory requirements.

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

This action is not a "significant energy action" as defined in Executive Order 13211(66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse

effects because this action simply extends the deadline for EPA to take action on a petition

I. National Technology Transfer and Advancement Act

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it simply extends the deadline for EPA to take action on a petition and does not impose any regulatory requirements.

K. Congressional Review Act

The Congressional Review Act (CRA), 5 U.S.C. §801 et seq.,

as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 of the CRA provides an exception to this requirement. For any rule for which an agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest, the rule may take effect on the date set by the Agency. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. §804(2).

L. Judicial Review

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

determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

Under CAA section 307(b)(1), a petition to review this action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**Page 14 of 14 - Extension of Deadline for Action on Section 126
Petition From Delaware**

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Electric utilities, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated:

Lisa P. Jackson,
Administrator.