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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 51

**[Docket No. OAR–2004–0440; FRL–7960–2]**

**RIN 2060–AN06**

## Stay of the Findings of Significant Contribution and Rulemaking for Georgia for Purposes of Reducing Ozone Interstate Transport

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** In this action, EPA is amending a final rule it issued under section 110 of the Clean Air Act (CAA) related to the interstate transport of nitrogen oxides ($NO_X$). On April 21, 2004, EPA issued a final rule that required the State of Georgia to submit State implementation plan (SIP) revisions that prohibit specified amounts of $NO_X$ emissions—one of the precursors to ozone (smog) pollution—for the purposes of reducing $NO_X$ and ozone transport across State boundaries in the eastern half of the United States. This rule became effective on June 21, 2004.

Subsequently, the Georgia Coalition for Sound Environmental Policy (GCSEP or Petitioners) filed a petition for reconsideration requesting that EPA reconsider the inclusion of the State of Georgia in the $NO_X$ SIP Call Rule and also requested a stay of the effectiveness of the rule as it relates to the State of Georgia only.

In response to this petition, EPA proposed to stay the effectiveness of the April 21, 2004 rule as it relates to the State of Georgia only, while EPA conducts notice-and-comment rulemaking to further address the issues raised by the Petitioners (70 FR 9897; March 1, 2005). Four parties commented on the proposed rule. No requests were made to hold a public hearing. After considering these comments, EPA has determined to finalize, as proposed, the stay of the effectiveness of this rule as it relates to the State of Georgia, only during notice—and comment proceedings for the petition for reconsideration.

**DATES:** This final rule is effective on September 30, 2005.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. OAR–2004–0440. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA West (Air Docket), Attention E-Docket No. OAR–2004–0440, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, 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 fax number is (202) 566–1749.

**FOR FURTHER INFORMATION CONTACT:** General questions concerning today's action should be addressed to Jan King, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, C539–02, Research Triangle Park, NC, 27711, telephone (919) 541–5665, e-mail *king.jan@epa.gov.* Legal questions should be directed to Winifred Okoye, Office of General Counsel, (2344A), 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone (202) 564–5446, e-mail *okoye.winifred@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

This action responds only to comments related to the stay of effectiveness of Phase II of the $NO_X$ SIP Call in the State of Georgia. Comments that we consider out of the scope of the proposed rulemaking or not directly related to the reconsideration proceedings are not addressed in this action, but will be addressed later in the final action on the petition for reconsideration.

**Outline**



### I. Background

On October 27, 1998, EPA found that emissions of $NO_X$ from 22 States and the District of Columbia (23 States) were significantly contributing to downwind areas' nonattainment of the 1-hour ozone national ambient air quality standard (NAAQS). [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 ($NO_X$ SIP Call Rule)]. More specifically, EPA found that the State of Georgia was significantly contributing to 1-hour ozone nonattainment in Birmingham, Alabama and Memphis, Tennessee. (63 FR 57394). The EPA set forth requirements for each of the affected upwind States, including Georgia, to submit SIP revisions prohibiting those amounts of $NO_X$ emissions which significantly contribute to downwind nonattainment. The EPA further required that each State SIP provide for $NO_X$ reductions in amounts that any remaining emissions would not exceed the level specified in EPA's $NO_X$ SIP Call regulations for that State in 2007.

A number of parties, including certain States as well as industry and labor groups, challenged the $NO_X$ SIP Call Rule. More specifically, Georgia and Missouri industry petitioners citing to the Ozone Transport Assessment Group (OTAG), modeling and recommendations, maintained that EPA had record support only for the inclusion of eastern Missouri and northern Georgia, as significantly contributing to downwind nonattainment. In *Michigan* v. *EPA,* 213

F. 3d 663 (D.C. Cir., 2000), cert. denied, 121 S. Ct. 1225 (2001) (*Michigan*), the D.C. Circuit Court vacated and remanded EPA's inclusion of the entire States of Georgia and Missouri, on grounds that OTAG had recommended $NO_X$ controls to reduce transport for areas within the fine grid parts of its modeling but recommended no additional controls for areas within the coarse grid of its modeling. Eastern Missouri and northern Georgia lie within the fine grid. The Court, however, did not question EPA's proposition that eastern Missouri and northern Georgia should be considered as significantly contributing to downwind nonattainment.

On February 22, 2002, EPA proposed the inclusion of only the fine grid parts of Georgia and Missouri in the $NO_X$ SIP Call. (Response to Court Decisions on the $NO_X$ SIP Call, $NO_X$ SIP Call Technical Amendments, and Section 126 Rules, 67 FR 8396; February 22, 2002) (Phase II). The EPA also proposed revised $NO_X$ budgets for Georgia and Missouri that included only these portions of each State.

On April 21, 2004, EPA finalized, as proposed, the inclusion of eastern Missouri and northern Georgia in the $NO_X$ SIP Call Rule, allocated revised $NO_X$ budgets that reflected the inclusion of sources located in only these areas and set revised SIP submittal and full compliance dates of April 1, 2005 and May 1, 2007, respectively. (69 FR 21604).

On June 16, 2004, the GCSEP filed a petition for reconsideration of the inclusion of the State of Georgia in the $NO_X$ SIP Call, under section 307(d) of the CAA (or the Act). Petitioners maintained that grounds that were of central relevance had occurred after the close of the notice-and-comment period for the February 22, 2002 proposal. More specifically, Petitioners cited our March 12, 2004, 1-hour ozone attainment redesignation of Birmingham, Alabama (69 FR 11798; March 12, 2004). Additionally, GCSEP cited our earlier January 17, 1995 Memphis, Tennessee, 1-hour ozone attainment redesignation (60 FR 3352), and maintained that the State of Georgia should not be subject to the $NO_X$ SIP Call Rule because it was no longer significantly contributing to 1-hour ozone nonattainment in any downwind areas. Petitioners also raised other issues such as the effect of EPA's approval and the State of Georgia's implementation, beginning since May 1, 2003, of the Atlanta, Georgia attainment demonstration SIP. Petitioners further requested a stay of the effectiveness of the April 21, 2004, rule as it relates to the State of Georgia, under section 307(d)(7)(B). Finally, GCSEP filed a challenge in the Court of Appeals for the 11th Circuit, which has since been transferred to the D.C. Circuit. Additionally, EPA and GCSEP have requested and the Court has granted the joint request to hold the challenge in abeyance pending completion of the reconsideration proceedings.

## II. Final Rule

In today's action we are amending the Phase II rule by staying the effectiveness of the rule as it relates to the State of Georgia, only, during notice-and-comment rulemaking proceedings for the reconsideration petition. As explained in the proposed rule, EPA expects to provide notice-and-comment opportunity to the general public on the issues raised by GCSEP and several other issues as they relate to the continued applicability of the $NO_X$ SIP Call Rule to the State of Georgia. Additionally, we currently anticipate that we will most likely be proposing to withdraw or rescind our findings that sources in the State of Georgia emit $NO_X$ in amounts that significantly contribute to nonattainment of the 1-hour ozone NAAQS in both the former Birmingham, Alabama and Memphis, Tennessee nonattainment areas. This is a consequence of our redesignation of these downwind receptor areas to attainment. Thus, we expect that after EPA completes notice-and-comment rulemaking, the State of Georgia will likely no longer be subject to the $NO_X$ SIP Call requirements. Given this, we believe that the State of Georgia should not continue implementation efforts for the $NO_X$ SIP Call Rule while EPA initiates notice-and-comment rulemaking that will address the issues raised by GCSEP. Accordingly, in this action, EPA is staying the effectiveness of the April 21, 2004 rule with respect to the State of Georgia only, during the pendency of the notice-and-comment rulemaking proceedings that will address the petition for reconsideration. The effect of this stay would be that the State of Georgia, would have no obligation during the pendency of the stay to regulate $NO_X$ emissions under the $NO_X$ SIP Call Rule for purposes of addressing downwind nonattainment of the 1-hour ozone NAAQS.

## III. Response to Comments

Four commenters submitted comments on our March 1, 2005 proposal. The comments are summarized herein below along with EPA's responses. We believe that the comments set forth in section III, D-F, below, are beyond the scope of the proposed rulemaking, which was to stay the effectiveness of Phase II in the State of Georgia, only, in order to address a Petition for reconsideration. We believe that these comments raise more substantive issues that are directly related to the reconsideration proceedings, which we anticipate will be proposed very shortly. Therefore, in today's action, we are not addressing or responding to any of them. Rather, we intend to address them in full in the context of that rulemaking action.

### *A. Comments on the Stay of the $NO_X$ SIP Call in Georgia*

*Comment:* One commenter raised the issue of our authority or lack thereof, under the CAA, to stay the effectiveness of our April 21, 2004 rule. The commenter argued that a proposal to stay the effectiveness of a rule during reconsideration proceedings is not authorized under the Act and maintained that our failure to indicate the section of the Act that allows for the proposed stay resulted in ''obscuring the legal justification,'' for the stay. The commenter claimed we had provided ''absolutely no justification for the stay,'' and argued that our action, to stay the rule, must neither be arbitrary nor capricious but based on reasoned explanation of the basis for the stay. The commenter further asserted that we had provided no discussion of the likelihood of success of the petition for reconsideration or the benefits and burdens of granting a stay. The commenter, citing to various decisions by the U.S. Court of Appeals for the District of Columbia, then argued that we should not grant the stay unless the proponent could demonstrate a likelihood of success on the merits. Another commenter argued in contrast that our authority to subject the State of Georgia to the $NO_X$ SIP Call was now questionable, in light of our redesignation of the downwind nonattainment areas, and a failure to stay the effectiveness of our April 21, 2004, rule during the reconsideration proceeding would be unreasonable, an abuse of discretion, and unlawful. The commenter further maintained that staying the rule pending the reconsideration proceedings would not only be proper but also prevent the State of Georgia from expending scarce resources and time on implementing the requirements especially because ''the validity'' of the rule was ''in such significant doubt.''

*Response:* We are taking this action under Section 553 of the Administrative Proceedings Act (APA), and not under section 307(d)(7)(B) of the CAA, which is clearly inapplicable. We had duly

informed petitioners of our authority in our letter of October 22, 2004, from Jeffrey Holmstead, Assistant Administrator for Office of Air and Radiation to Margaret C. Campbell, Troutman Sanders LLP, Counsel for Georgia Coalition for Sound Environmental Policy, granting the request for reconsideration. (A copy of this letter is in the Docket for this rulemaking). Further, as a general matter, the public is charged with knowledge of applicable laws. We also believe that we have the authority to stay the effectiveness of Phase II in the State of Georgia during the pendency of the reconsideration proceedings and that our failure to clearly cite our authority to do so in the proposal has no effect on the outcome of the proposed action.

It is also incorrect to state that Petitioners have failed to show a likelihood of success on the merits. To the contrary, as stated in the proposed rule, Petitioners have alleged that our prior basis for including the State of Georgia in the $NO_X$ SIP Call Rule evanesced with the attainment redesignation of the downwind receptor areas, Memphis, Tennessee and Birmingham, Alabama.[1] Thus, in response to the Petition for reconsideration, we now expect to propose a rescission or withdrawal of our findings that sources and emitting activities in the State of Georgia emit $NO_X$ in amounts that significantly contribute to nonattainment of the 1-hour ozone standard in both Birmingham, Alabama and Memphis, Tennessee, both of which are now in attainment of the 1-hour standard. If we ultimately finalize, the rescission or withdrawal of the $NO_X$ SIP Call findings, we anticipate that the State of Georgia would no longer have an obligation to reduce $NO_X$ emissions under the $NO_X$ SIP Call Rule, for purposes of addressing downwind nonattainment of the 1-hour ozone NAAQS. Therefore, it is now most likely that after notice-and-comment rulemaking the State of Georgia will not be subject to the $NO_X$ SIP Call requirements. Given this position, it would appear counterproductive and inappropriate to require the State of Georgia to continue implementation efforts for the $NO_X$ SIP Call requirements, during the pendency of the reconsideration petition. In fact, we agree with the comment that such an action on our part would be unreasonable. It could also be construed as both arbitrary and capricious.

*Comment:* A commenter argued that our proposal was of ''indeterminate length [because] [i]f EPA fails to complete the reconsideration process, the stay will last indefinitely.''

*Response:* Although we are only obligated to give ''[p]rompt notice'' of the denial of a petition for reconsideration, under Section 555(e) of the APA, our failure over time to respond to this petition may be subject to judicial review under Section 706(1) of the APA. See for example, In re: American Rivers and Idaho Rivers United, 372 F.3d 413 (D.C. Cir., 2004); In re: Int'l Chemical Workers Union, 958 F.2d 1144 (D.C. Cir., 1992). Therefore, EPA does not agree that the stay could be of infinite length.

*Comment:* A commenter viewed our redesignation of the downwind receptors as an inadequate justification for staying this rule. The commenter also stated that our redesignation of Birmingham, Alabama nonattainment area ''did not take effect until after the Phase II Rule was finalized.'' (Emphasis in original). The commenter further argued that the stay was arbitrary and capricious and therefore unlawful ''because it does not treat similarly situated sources similarly.'' According to the commenter, the stay will result in sources in the State of Georgia not being subject to the $NO_X$ SIP Call requirements, even though we found that these sources contribute significantly to ozone nonattainment, while similar sources have been subject to the $NO_X$ SIP Call requirements since May 31, 2004.

*Response:* In the $NO_X$ SIP Call, we determined that a downwind area should be considered

> ''nonattainment,'' for purposes of section 110(a)(2)(D)(i)(I), under the 1-hour ozone NAAQS if the area (as of 1994–96 time period) had nonattainment air quality and if the area was modeled to have nonattainment air quality in the year 2007, after implementation of all measures specifically required of the area under the CAA as well as implementation of Federal measures required or expected to be implemented by that date.

(63 FR 57386; see also, 63 FR 57373). We explained that ''nonattainment [areas] includes areas that have monitored violations of the standard and areas that 'contribute to ambient air quality in a nearby area' that is violating the standard.'' (63 FR 57386; see, 63 FR 57385–87 for our discussion on the determination of downwind nonattainment receptors).

We also determined at that time that sources in the State of Georgia were significantly contributing to the 1-hour standard nonattainment in Birmingham, Alabama and Memphis, Tennessee (63 FR 57394). Thus, as earlier explained, given that we have redesignated both Memphis, Tennessee and the Birmingham, Alabama nonattainment areas, we anticipate proposing to rescind or withdraw our finding that sources and emitting activities in the State of Georgia emit $NO_X$ in amounts that significantly contribute to nonattainment of the 1-hour ozone standard in both Birmingham, Alabama and Memphis, Tennessee. Therefore, we believe that our redesignation of the downwind receptors is sufficient justification for staying the effectiveness of our April 21, 2004, rule with regard to the State of Georgia. For the same reason, we also do not believe that this stay results in not treating ''similarly situated sources similarly.'' All other areas subject to the $NO_X$ SIP Call are currently contributing significantly to downwind nonattainment.

As to the comment that our Birmingham, Alabama redesignation became effective after our finalization of the Phase II rule, this is also incorrect. The effective dates of regulations appear in the ''effective date'' section of the **Federal Register** document. 1 CFR 18.17 (2004). See also, *Safety-Kleen Corp.* v. *EPA*, No. 92–1629 (D.C. Cir., Jan. 1996). The effective dates for the redesignation of Birmingham, Alabama and Phase II of the $NO_X$ SIP Call were April 12, 2004, and June 21, 2004, respectively.

*B. Delay in Finalizing Phase II of the $NO_X$ SIP Call*

*Comment:* Two commenters claimed that our delay in finalizing the April 21, 2004, rule resulted in the redesignation of the Birmingham, Alabama nonattainment area. These commenters maintained that other partial States, similar to Georgia, and for example, the State of Alabama, have fully complied with the $NO_X$ SIP Call requirements. And one commenter argued that despite the fact that the same argument, made by Petitioners, could be made for other southeastern States with already adopted and approved $NO_X$ SIP Call SIPs, we would be requiring these States to continue with full implementation. Other commenters also contended that our delay in finalizing Phase II resulted in detrimental air quality for several downwind areas and therefore, urged us not to further delay implementation by the proposed stay.

*Response:* None of the States, southeastern or otherwise, subject to the $NO_X$ SIP Call are similarly situated with

[1] On March 12, 2004, we redesignated Birmingham, Alabama, to attainment of the 1-hour ozone NAAQS. In addition, since 2001, the Memphis, Tennessee nonattainment area, which was redesignated in 1995 has had monitored attainment air quality data.

the State of Georgia. All other States subject to the $NO_X$ SIP Call do contribute to nonattainment in downwind States. Further, although we first proposed the Phase II rule on February 21, 2002, and ultimately finalized it on April 21, 2004, during the intervening period, we had to juggle competing rulemaking demands on our limited scientific and legal staff. Any delay in finalizing Phase II did not contribute to adverse air quality in Birmingham or Memphis since these areas were able to attain the 1-hour ozone standard and be redesignated during that time.

*C. Stay of the 8-Hour Basis for the $NO_X$ SIP Call*

*Comment:* One commenter argued that any decision to stay Phase II in the State of Georgia should factor in our finding that sources in the State of Georgia were significantly contributing to the 8-hour ozone standard nonattainment areas in the States of Alabama, Illinois, Indiana, Kentucky, Michigan, Missouri, North Carolina, South Carolina, Tennessee and Virginia.[2] The commenter further argued that a stay would be prejudicial to other downwind States, and primarily the State of North Carolina, because we have required this State to adopt a SIP to achieve attainment of the 8-hour ozone standard by 2009. According to the commenter, under our proposed schedule, sources in the State of Georgia would have been subject to controls on May 31, 2004, which would have assisted the downwind nonattainment areas in meeting their various statutory deadlines. The commenter also argued that our exclusion of the State of Georgia from the $NO_X$ SIP Call requirements would ''punish downwind areas,'' and further result in their not attaining the 8-hour standard ''as expeditiously as practicable,'' under section 7502(a)(2) of the Act. Another commenter urged us to finalize the stay as proposed because we had determined that emissions from the State of Georgia were not impacting any downwind 8-hour ozone nonattainment areas in the recently promulgated Clean Air Interstate Rule, [70 FR 25162; May 12, 2005 (CAIR)].

*Response:* In the $NO_X$ SIP Call Rule, we had also found that sources in the State of Georgia were significantly contributing to the 8-hour ozone standard nonattainment areas in the States of Alabama, Illinois, Indiana, Kentucky, Michigan, Missouri, North Carolina, South Carolina, Tennessee and Virginia. (63 FR 57395). But because of the various legal challenges to our promulgation of the 8-hour ozone NAAQS (62 FR 38856; July 18, 1997), *American Trucking Ass'ns, Inc.* v. *EPA,* 175 F. 3d 1027 (D.C. Cir., 1999), *reh'g granted in part, denied in part,* 195 F.3d 4 (D.C. Cir., 1999), *aff'd in part, rev'd in part and remanded sub nom., Whitman* v. *EPA,* 531 U.S. 457 (2001), we requested and the Court, in *Michigan* v. *EPA,* 213 F. 3d 663, 670–671 (D.C. Cir., 2000), cert. denied, 121 S. Ct. 1225 (2001) (*Michigan*), granted our motion to stay consideration of issues regarding the 8-hour basis for the $NO_X$ SIP Call. Additionally, in a separate rulemaking action, we stayed the 8-hour basis for the $NO_X$ SIP Call indefinitely. (65 FR 56245; September 18, 2000). See, also 40 CFR 51.121(q). Thus, at this time all of the affected States, which include the States of Georgia and North Carolina, remain under no obligation to comply with the 8-hour basis for the $NO_X$ SIP Call. Also, we would need to lift the stay through notice-and-comment rulemaking. Further, we note that, in the recently promulgated CAIR, we found that sources and emitting activities in the entire State of Georgia do not significantly contribute to 8-hour nonattainment in any downwind State (70 FR 25249).

Therefore, today's action only stays the requirements of Phase II of the $NO_X$ SIP Call, which relate to the 1-hour basis for the $NO_X$ SIP Call, in the State of Georgia. Additionally, in the soon-to-be proposed Petition for Reconsideration rule, we expect to solicit comments on the impact of the continued stay of the 8-hour $NO_X$ SIP Call basis on the Petitioners request that we not subject the State of Georgia to the $NO_X$ SIP Call Rule.

*D. Effect of Stay on the $NO_X$ SIP Call Trading Program*

*Comment:* Three commenters also opposed the stay on grounds that the exclusion of the State of Georgia would compromise the integrity of the $NO_X$ SIP Call trading program. They claimed that the sources in the State of Georgia, although now regulated by the State, are not subject to a cap on $NO_X$ emissions, unlike similar sources that are covered by the $NO_X$ SIP Call requirements. According to the commenters, one consequence of the absence of a cap is that these sources are under no requirement to purchase allowances for exceedances of $NO_X$ SIP Call emissions levels and they argued that this, lack of a cap, could result in future exceedances of the 1-hour standard and hinder maintenance of the standard in downwind areas. One commenter noted that it was unclear whether $NO_X$ emissions from these sources were restricted either through the State SIP or permit conditions.

*Response:* As stated earlier, we believe that this comment and the comments set forth in section III, E–F below, are beyond the scope of the proposed rulemaking. We believe that these comments raise more substantive issues that are directly related to the reconsideration proceedings, which we anticipate will be proposed very shortly. Therefore, we are not addressing these comments at this time, rather we intend to address them in full in the context of that rulemaking action.

*E. Comments on Modeling Assumptions*

*Comment:* One commenter noted that the modeling studies conducted in the southeastern States and nationwide, such as CAIR and the Gulf Coast Ozone Study, assumed the full implementation of the $NO_X$ SIP Call in all affected States, including northern Georgia. The commenter then pointed out that the various assumptions would be rendered incorrect by excluding the State of Georgia from $NO_X$ SIP Call requirements.

*Response:* As stated earlier above, we believe that this comment and the comments set forth in section III. D and F are beyond the scope of the proposed rulemaking. We believe that these comments raise more substantive issues that are directly related to the reconsideration proceedings, which we anticipate will be proposed very shortly. Therefore, we are not addressing these comments at this time, rather we intend to address them in full in the context of that rulemaking action.

*F. General Comments*

*Comment:* Another commenter argued that there were several compelling reasons to stay the effectiveness of our April 21, 2004 rule, such as our June 15, 2005, revocation date for the 1-hour ozone standard, and the revisions and implementation of the Atlanta, Georgia SIP, which requires $NO_X$ and volatile organic compounds emissions from both stationary and mobile sources.

*Response:* As stated earlier above, we believe that this comment and the comments set forth in section III, D–E above, are beyond the scope of the proposed rulemaking. We believe that these comments raise more substantive issues that are directly related to the reconsideration proceedings, which we anticipate will be proposed very shortly. Therefore, we are not addressing these comments at this time, rather we intend to address them in full in the context of that rulemaking action.

[2] 63 FR 57395; October 27, 1998.

## IV. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''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.

The OMB has exempted this regulatory action from Executive Order 12866 review. This action stays EPA's finding in Phase II of the $NO_X$ SIP Call related to Georgia and does not impose any additional control requirements or costs.

### *B. Paperwork Reduction Act*

Today's action does not add any information collection requirements or increase burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and therefore is not subject to these requirements.

### *C. Regulatory Flexibility Act (RFA)*

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 Procedures 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 rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This final action neither imposes requirements on small entities nor will there be impacts on small entities beyond those, if any, required by or resulting from the $NO_X$ SIP Call and the Section 126 Rules. We have therefore concluded that today's rule will relieve regulatory burden for all small entities affected by this rule. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

### *D. 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, 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 to State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The EPA prepared a statement for the final $NO_X$ SIP Call that would be required by UMRA if its statutory provisions applied. Today's action does not create any additional requirements beyond those of the final $NO_X$ SIP Call, therefore, no further UMRA analysis is needed. This rule stays the portion of the $NO_X$ SIP Call that would require the State of Georgia to implement $NO_X$ emissions controls requirements.

### *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 rule 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 to stay the $NO_X$ SIP Call requirements as they relate to Georgia, imposes no additional burdens beyond those imposed by the final $NO_X$ SIP Call. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 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.'' This rule does not have Tribal implications, as specified in Executive Order 13175. 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. The EPA stated in the final $NO_X$ SIP Call Rule that Executive Order 13084 did not apply because that final rule does not significantly or uniquely affect the communities of Indian Tribal governments or call on States to regulate $NO_X$ sources located on Tribal lands. The same is true of today's action. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action does not impose requirements beyond those, if any, required by or resulting from the $NO_X$ SIP Call and Section 126 Rules.

*H. Executive Order 13211: Actions 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.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 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. This rulemaking does not involve technical standards, therefore, EPA is not considering the use of any voluntary consensus standards.

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

This action does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). For the final $NO_X$ 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 that rule. These findings were presented in the regulatory impact analysis for the $NO_X$ SIP Call. Today's action does not affect this analysis.

*K. Congressional Review Act*

The Congressional Review Act, 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. 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective September 30, 2005.

*L. Judicial Review*

Section 307(b)(1) of the Act specifies which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in pertinent part, that petitions must be filed in the Court of Appeals for the District of Columbia Circuit if the agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) 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.''

Any final action related to the $NO_X$ SIP Call is ''nationally applicable within the meaning of section 307(b)(1).'' The Administrator has also determined that any final action regarding the $NO_X$ SIP Call is of nationwide scope and effect for purposes of section 307(b)(1). See, 63 FR 57480. Thus, any petition for review of today's final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the **Federal Register**.

**List of Subjects in 40 CFR Part 51**

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Dated: August 18, 2005.

**Jeffrey R. Holmstead,**

*Assistant Administrator for Air and Radiation.*

■ For the reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is 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:** 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

### Subpart G—Control Strategy

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

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

* * * * *

(s) Stay of Finding of Significant Contribution with respect to the 1-hour standard. Notwithstanding any other provisions of this subpart, the effectiveness of paragraph (a)(1) of this section is stayed as it relates to the State of Georgia, only as of September 30, 2005.

[FR Doc. 05–17031 Filed 8–30–05; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[OPP–2005–0224; FRL–7732–3]**

### Methoxyfenozide; Pesticide Tolerances for Emergency Exemptions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes time-limited tolerances for residues of methoxyfenozide in or on sorghum grain, sorghum grain forage, and sorghum grain stover. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on sorghum grain. This regulation establishes a maximum permissible level for residues of methoxyfenozide in these food commodities. These tolerances will expire and are revoked on December 31, 2007.

**DATES:** This regulation is effective August 31, 2005. Objections and requests for hearings must be received on or before October 31, 2005.

**ADDRESSES:** To submit a written objection or hearing request follow the detailed instructions as provided in Unit VII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under docket identification (ID) number OPP–2005–0224. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI 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 form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall#2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Stacey Milan Groce, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–2505; e-mail address: *milan.stacey@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Access Electronic Copies of this Document and Other Related Information?*

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available on E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

#### II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(e) and 408 (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, is establishing tolerances for residues of the insecticide methoxyfenozide, benzoic acid, 3-methoxy-2-methyl-2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl)hydrazide, in or on sorghum grain at 0.05 parts per million (ppm), sorghum grain forage at 15 ppm, and sorghum grain stover at 125 ppm. These tolerances will expire and are revoked on December 31, 2007. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

Section 408(l)(6) of the FFDCA requires EPA to establish time-limited tolerances or exemptions from the requirement of a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related tolerances to set binding precedents for the application of section 408 of the FFDCA and the new safety standard to other tolerances and exemptions. Section 408(e) of the FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, i.e., without having received any petition from an outside party.

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of the FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes