

**G General Information****G000 The USPS and Mailing Standards**

\* \* \* \* \*

**G040 Information Resources**

\* \* \* \* \*

**G043 Address List for Correspondence**

\* \* \* \* \*

**OTHER**

\* \* \* \* \*

*[Add address to read as follows:]*

International Safe Transit Association,  
1400 Abbott Rd Ste 160, East Lansing  
MI 48823-1900, <http://www.ista.org>.

\* \* \* \* \*

**M Mail Preparation and Sortation****M000 General Preparation Standards**

\* \* \* \* \*

**M040 Pallets****M041 General Standards**

\* \* \* \* \*

**5.0 PREPARATION**

\* \* \* \* \*

**5.6 Mail on Pallets**

These standards apply to mail on pallets:

\* \* \* \* \*

*[Add new 5.6j to read as follows:]*

j. High-density parcels (see C010) weighing 25 to 35 pounds must not be placed on the same pallet with machinable parcels.

\* \* \* \* \*

We will publish an appropriate amendment to 39 CFR 111 to reflect these changes if the proposal is adopted.

Neva R. Watson,

Attorney.

[FR Doc. 04-4212 Filed 2-25-04; 8:45 am]

BILLING CODE 7710-12-P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[MI84-01; FRL-7627-1]

**Approval and Promulgation of Implementation Plans: Michigan: Oxides of Nitrogen Rules**

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to conditionally approve a State Implementation Plan (SIP) revision

submitted by the State of Michigan on April 3, 2003. The submittal made by the Michigan Department of Environmental Quality (MDEQ) responds to the EPA's regulation 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," otherwise known as the "NO<sub>x</sub> SIP Call." The rules submitted by MDEQ establish and require nitrogen oxides (NO<sub>x</sub>) emissions reductions through an allowance trading program for large electric generating and industrial units, and reductions from cement kilns, beginning in 2004. The intended effect of the regulations submitted by MDEQ is to reduce emissions of NO<sub>x</sub> in order to help attain the national ambient air quality standard for ozone. We are proposing to conditionally approve Michigan's Oxides of Nitrogen Budget Trading Program because it generally meets the requirements of the Phase I NO<sub>x</sub> SIP Call that will significantly reduce ozone in Michigan and ozone transport in the eastern United States. We deemed the submittal as administratively and technically complete in a letter of completeness sent to MDEQ on April 24, 2003.

**DATES:** We must receive written comments on or before March 29, 2004.

**ADDRESSES:** You should send written comments to: J. Elmer Bortzer, Acting Chief, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

You may inspect copies of the State submittal and EPA's analysis of it at:

Criteria Pollutant Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please contact Douglas Aburano at (312) 353-6960 or [aburano.douglas@epa.gov](mailto:aburano.douglas@epa.gov) before visiting the Region 5 Office.

Comments may also be submitted electronically or through hand delivery/courier; please follow the detailed instructions described in Part(I)(B)(1)(i) through (iii) of the Supplementary Information section.

**FOR FURTHER INFORMATION CONTACT:**

Douglas Aburano, Environmental Engineer, Criteria Pollutant Section (AR-18J), Air Programs Branch, Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-6960, [aburano.douglas@epa.gov](mailto:aburano.douglas@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document, the term "you" refers to the reader of this rule and/or to sources subject to the State rule, and the terms "we", "us", or "our" refer to EPA.

On April 3, 2003, MDEQ submitted a NO<sub>x</sub> emission control plan to the EPA for inclusion in Michigan's SIP to meet the requirements of the Phase I NO<sub>x</sub> SIP Call. The revisions generally comply with the requirements of the Phase I NO<sub>x</sub> SIP Call. Included in this document are Michigan Rules 802 through 817. The information in this proposed conditional approval is organized as follows:

**I. General Information****II. Background****A. What is EPA proposing today?****B. What are the NO<sub>x</sub> SIP Call general requirements?****C. What is EPA's NO<sub>x</sub> budget and allowance trading program?****D. EPA's Section 126 Rule in Michigan.****E. What guidance did EPA use to evaluate Michigan's submittal?****F. What is the result of EPA's evaluation of Michigan's program?****G. NO<sub>x</sub> Allowance Allocations****H. NO<sub>x</sub> Budget Permits****I. What deficiencies must be addressed by MDEQ?****J. What happens if MDEQ fails to address these deficiencies?****III. Michigan's Control of NO<sub>x</sub> Emissions****A. When did Michigan submit the SIP revision to EPA in response to the NO<sub>x</sub> SIP Call?****B. When did Michigan hold public hearings and what were the results?****C. What is included in Michigan's NO<sub>x</sub> SIP Call Revision?****D. What is the Compliance Supplement Pool?****E. How does Michigan's NO<sub>x</sub> SIP affect sources subject to EPA's Section 126 Rule in the SIP Call Area?****IV. EPA's Proposal****V. Statutory and Executive Order Reviews****I. General Information****A. How Can I Get Copies Of This Document and Other Related Information?**

1. We have established an official public rulemaking file available for inspection at the Regional Office. EPA has established an official public rulemaking file for this action under "Region 5 Air Docket MI84". The official public file consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public rulemaking file does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public

rulemaking file is the collection of materials that is available for public viewing at the Air Programs Branch, Air and Radiation Division, EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the Regulations.gov Web site located at <http://www.regulations.gov> where you can find, review, and submit comments on federal rules that have been published in the **Federal Register**, the Government's legal newspaper, and are open for comment.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in the official public rulemaking file. The entire printed comment, including the copyrighted material, will be available at the Regional Office for public inspection.

#### *B. How and To Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number by including the text "Public comment on proposed rulemaking Region 5 Air Docket MI84" in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk

or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *E-mail.* Comments may be sent by electronic mail (e-mail) to [bortzer.jay@epa.gov](mailto:bortzer.jay@epa.gov). Please include the text "Public comment on proposed rulemaking Region 5 Air Docket MI84" in the subject line. EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly without going through Regulations.gov, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket.

ii. *Regulations.gov.* Your use of Regulations.gov is an alternative method of submitting electronic comments to EPA. Go directly to Regulations.gov at <http://www.regulations.gov>, then click on the button "TO SEARCH FOR REGULATIONS CLICK HERE", and select Environmental Protection Agency as the Agency name to search on. The list of current EPA actions available for comment will be listed. Please follow the online instructions for submitting comments. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Section 2, directly below. These electronic submissions will be accepted in WordPerfect, Word or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: J. Elmer Bortzer, Acting Chief, Air Programs Branch, (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. Please include the text "Public comment on proposed rulemaking Region 5 Air Docket MI84" in the subject line on the first page of your comment.

#### *3. By Hand Delivery or Courier.*

Deliver your comments to: J. Elmer Bortzer, Acting Chief, Air Programs Branch, (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding federal holidays.

#### *C. How Should I Submit CBI To the Agency?*

Do not submit information that you consider to be CBI electronically to EPA. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the official public regional rulemaking file. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public file and available for public inspection without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

## **II. Background**

#### *A. What Is EPA Proposing Today?*

EPA is proposing to conditionally approve revisions to Michigan's SIP concerning the adoption of its NO<sub>x</sub> Rules, submitted on April 3, 2003. The rules meet the requirements of the Phase I NO<sub>x</sub> SIP Call with certain exceptions. MDEQ is in the process of adopting rules to correct these deficiencies. Once MDEQ has submitted the rule changes to address these deficiencies, we can take action to fully approve the SIP revision.

#### *B. What Are the NO<sub>x</sub> SIP Call General Requirements?*

On October 27, 1998, EPA published a final rule 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,” otherwise known as the “NO<sub>x</sub> SIP Call.” See 63 FR 57356. The NO<sub>x</sub> SIP Call requires 22 states and the District of Columbia to meet NO<sub>x</sub> emission budgets during the five month period from May 1 through September 30 in order to reduce the amount of ground level ozone that is transported across the eastern United States. As the result of court actions, the compliance date for the first year has been changed to May 31, 2004 and the NO<sub>x</sub> SIP Call has been divided into two phases.

EPA identified NO<sub>x</sub> emission reductions by source category that could be achieved by using highly cost-effective measures. The source categories included were large electric generating units (EGUs) and non-electric generating units (non-EGUs), internal combustion (IC) engines and cement kilns. EPA derived state-wide NO<sub>x</sub> emission budgets based on the implementation of these highly cost-effective controls for each affected jurisdiction to be met by the year 2007. Internal combustion engines are not addressed by Michigan in this submittal which responds to Phase I, but will be addressed in a response to EPA’s Phase II requirements. The NO<sub>x</sub> SIP Call allowed states the flexibility to decide which source categories to regulate in order to meet the statewide budgets. In the NO<sub>x</sub> SIP Call notice, EPA suggested that a cap and trade program for EGUs (fossil-fuel fired electric generating boilers and turbines serving a generator greater than 25 MW) and non-EGUs (large fossil-fuel fired industrial boilers and turbines) would provide a highly cost-effective means for states to meet their NO<sub>x</sub> budgets. In fact, the state-specific budgets were set assuming an emission rate of 0.15 pounds NO<sub>x</sub> per million British thermal units (lb. NO<sub>x</sub>/mmBtu) at EGUs, multiplied by the projected heat input (mmBtu) from burning the quantity of fuel needed to meet the 2007 forecast for electricity demand (See 63 FR 57407). The NO<sub>x</sub> SIP Call State budgets also assume a 30 percent NO<sub>x</sub> reduction from cement kilns, and a 60 percent reduction from non-EGUs. The non-EGU control assumptions were applied at units whose maximum design heat input was greater than 250 mmBtu per hour, or in cases where heat input data were not available or appropriate, at units with actual emissions greater than one ton per day. Phase I budgets did not include reductions from IC engines. EPA’s Phase II NO<sub>x</sub> SIP Call will address reductions from these sources.

To assist the states in their efforts to meet the SIP Call, the NO<sub>x</sub> SIP Call final rulemaking notice included a model NO<sub>x</sub> cap and trade regulation, called “NO<sub>x</sub> Budget Trading Program for State Implementation Plans,” (40 CFR part 96), that could be used by states to develop their regulations. The NO<sub>x</sub> SIP Call notice explained that if states developed an allowance trading regulation consistent with the EPA model rule, they could participate in a regional allowance trading program that would be administered by the EPA (See 63 FR 57458–57459).

There were several periods during which EPA received comments on various aspects of the NO<sub>x</sub> SIP Call emissions inventories. On March 2, 2000, EPA published additional technical amendments to the NO<sub>x</sub> SIP Call in the **Federal Register** (65 FR 11222). On March 3, 2000, the DC Circuit issued its decision on the NO<sub>x</sub> SIP Call ruling in favor of EPA on all the major issues. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The DC Circuit denied petitioners’ requests for rehearing or rehearing en banc on July 22, 2000. However, the Circuit Court remanded four specific elements to EPA for further action: The definition of electric generating unit, the level of control for stationary internal combustion engines, the geographic extent of the NO<sub>x</sub> SIP Call for Georgia and Missouri, and the inclusion of Wisconsin. On March 5, 2001, the U.S. Supreme Court declined to hear an appeal by various utilities, industry groups and a number of upwind states from the DC Circuit’s ruling on EPA’s NO<sub>x</sub> SIP Call rule.

On April 11, 2000, in response to the Court’s decision, EPA notified Michigan of the maximum amount of NO<sub>x</sub> emissions allowed for the State during the ozone season. This emission budget reflected adjustments to Michigan’s NO<sub>x</sub> emission budget to reflect the Court’s decision that Georgia and Missouri should not be included in full. Although the Court did not order EPA to modify Michigan’s budget, the EPA believes these adjustments are consistent with the Court’s decision.

On February 22, 2002 (67 FR 8396), EPA published a proposal that addresses the remanded portion of the NO<sub>x</sub> SIP Call Rule. Any additional emissions reductions required as a result of a final rulemaking on that proposal will be reflected in the second phase portion (Phase II) of the State’s emission budget.

### *C. What Is EPA’s NO<sub>x</sub> Budget and Allowance Trading Program?*

EPA’s model NO<sub>x</sub> budget and allowance trading rule, 40 CFR part 96, sets forth an NO<sub>x</sub> emissions trading program for large EGUs and non-EGUs. A state can voluntarily choose to adopt EPA’s model rule in order to allow sources within its borders to participate in regional allowance trading. The October 27, 1998, **Federal Register** notice contains a full description of the EPA’s model NO<sub>x</sub> budget trading program (See 63 FR 57514–57538 and 40 CFR part 96).

Air emissions trading, in general, uses market forces to reduce the overall cost of compliance for pollution sources, such as power plants, while achieving emission reductions and environmental benefits. One type of market-based program is an emissions budget and allowance trading program, commonly referred to as a “cap and trade” program.

In an emissions cap and trade program, the state or EPA sets a regulatory limit, or emissions budget or cap, for total mass emissions from a specific group of sources. The budget limits the total number of allowances for all sources covered by the program during a particular control period. When the budget is set at a level lower than the current emissions, the effect is to reduce the total amount of emissions during the control period. After setting the budget, the state or EPA then assigns, or allocates, allowances up to the level of the budget. Each allowance authorizes the emission of a quantity of pollutant, e.g., one ton of airborne NO<sub>x</sub>.

At the end of the control period, each affected source must demonstrate that its actual emissions during the control period were less than or equal to the number of available allowances it holds. Sources that reduce their emissions below their allocated allowance level may sell or bank their extra allowances. Sources that emit more than the amount of their allocated allowance level may buy allowances from the sources with extra reductions. In this way, the budget is met and in the most cost-effective manner.

### *D. EPA’s Section 126 Rule in Michigan*

In a rulemaking separate from the NO<sub>x</sub> SIP Call, EPA placed requirements directly on sources in Michigan, and many other states in the eastern half of the country, to reduce NO<sub>x</sub> emissions that adversely affect downwind areas in other states. This rule is known as EPA’s Section 126 Rule (65 FR 2764). The Section 126 Rule is similar to the NO<sub>x</sub> SIP Call in that it is designed to address

the problem of downwind transport and many of the sources that would be affected by states' NO<sub>x</sub> SIPs are also affected by the Section 126 Rule. The sources that are required to reduce emissions under the Section 126 Rule are EGUs (units serving a generator with nameplate capacity greater than 25 MW) and non-EGUs (units with maximum design heat input greater than 250 mmBtu/hr). These rules are different in that the NO<sub>x</sub> SIP Call is a requirement placed upon states to develop rules that will reduce NO<sub>x</sub> emissions but it is up to the state to determine what sources to control.

EPA issued the Section 126 rulemaking based on petitions filed by eight Northeastern States seeking to mitigate interstate transport of NO<sub>x</sub>. These petitions requested EPA to require NO<sub>x</sub> reductions from specific upwind NO<sub>x</sub> sources or source categories. EPA based its section 126 findings on the same technical work that was used in the NO<sub>x</sub> SIP Call.

#### *E. What Guidance Did EPA Use To Evaluate Michigan's Submittal?*

The final NO<sub>x</sub> SIP Call rule included a model NO<sub>x</sub> budget trading program regulation (See 40 CFR part 96). EPA used the model rule and 40 CFR 51.121–51.122 to evaluate Michigan's Oxides of Nitrogen Budget Trading Program for EGUs and non-EGUs. A cement kiln rule was included as part of a Federal Implementation Plan (FIP) that EPA proposed on October 28, 1998 (See 63 FR 56393). We used this proposed FIP cement kiln rule to evaluate Michigan's cement kiln rule.

#### *F. What Is the Result of EPA's Evaluation of Michigan's Program?*

EPA has evaluated Michigan's April 3, 2003, SIP submittal and finds the majority of it approvable. The Michigan Oxides of Nitrogen Budget Trading Program is basically consistent with EPA's guidance and almost meets all of the requirements of the Phase I NO<sub>x</sub> SIP Call. EPA finds the NO<sub>x</sub> control measures in the Michigan's Oxides of Nitrogen Budget Trading Program generally approvable. If it becomes fully approved, the April 3, 2003, submittal will strengthen Michigan's SIP for reducing ground level ozone by providing NO<sub>x</sub> reductions beginning in 2004. EPA finds that the submittal contained the information necessary to demonstrate that Michigan has the legal authority to implement and enforce the control measures, and to demonstrate their appropriate distribution of the compliance supplement pool. Furthermore, EPA finds that the submittal demonstrates that the

compliance dates and schedules, and the monitoring, recordkeeping and emission reporting requirements will be met.

We identified certain deficiencies during our review but because MDEQ has been made aware of these problems and is currently in the process of addressing them, we are proposing to conditionally approve the submittal made by MDEQ on April 3, 2003. MDEQ requested this conditional approval of its April 2003 submittal in a letter dated January 9, 2004. In this letter, MDEQ has committed to submit fully adopted rules addressing the identified deficiencies by May 31, 2004. Upon receipt of these newly adopted rules eliminating all deficiencies, we can take action to fully approve Michigan's NO<sub>x</sub> SIP.

#### *G. NO<sub>x</sub> Allowance Allocations*

Because the vast majority of the SIP submitted by MDEQ has been found approvable by EPA and because MDEQ has committed to address the deficiencies identified by EPA, by no later than May 31, 2004, EPA will allocate NO<sub>x</sub> allowances to the affected sources in Michigan per the allocation methodology found in the Michigan SIP after finalization of this conditional approval.

#### *H. NO<sub>x</sub> Budget Permits*

State rules currently require the MDEQ to issue NO<sub>x</sub> Budget permits. Following EPA's final conditional approval of the Michigan NO<sub>x</sub> Rules into the Michigan SIP, the terms of any NO<sub>x</sub> Budget permit issued under the SIP-approved program are federally enforceable pursuant to the SIP.

#### *I. What Deficiencies Must Be Addressed by MDEQ?*

In the review of Michigan's NO<sub>x</sub> SIP, EPA identified six deficiencies that need to be corrected before these rules can be fully approved. These deficiencies have been communicated to MDEQ and now, MDEQ is in the process of changing its rules to address these problems.

Following is a list of the identified deficiencies:

1. Rule 802(5) states, "An oxides of nitrogen budget unit that is subject to a rule promulgated under section 126 of the Clean Air Act shall not be subject to this rule until the section 126 requirements no longer apply." Under this language, those oxides of nitrogen budget units that are subject to the Section 126 Rule and that would be subject to controls under the Michigan SIP are not covered by the SIP. The Section 126 Rule remains in place and

will remain effective until EPA approves the Michigan SIP. The EPA cannot approve the Michigan SIP, and move forward to remove the Section 126 requirements, unless the SIP has in place regulations to achieve the necessary emissions reductions to meet the Phase I budget. In evaluating the SIP, EPA cannot take into consideration the emissions reductions required by the Section 126 Rule. Because the Section 126 Rule would still be in place at the time EPA takes action on the Michigan SIP, oxides of nitrogen budget units that would otherwise be subject to controls under the Michigan SIP would not be covered at that time. Therefore, the SIP would not be providing sufficient emissions reductions to meet the Phase I budget and would not be approvable. This language must be removed from the State's rules. EPA will then take action to ensure that no unit is subject to both trading programs.

2. The applicability of these rules is based on named counties in the southern portion of Michigan. While this applicability is sufficient to meet the requirements found in the SIP Call, it is not enough to remove all of the Section 126 requirements from the State. This is because there is one source, Detroit Edison's Harbor Beach unit, that is affected by Section 126 requirements, but is not in one of the counties affected by Michigan's NO<sub>x</sub> SIP call rule. Michigan has indicated a desire to include the Harbor Beach unit in the trading program in order to satisfy the Section 126 requirements for this source. To address this situation and enable EPA to remove all of the Section 126 requirements from Michigan after the Michigan NO<sub>x</sub> SIP has been approved, MDEQ must extend the applicability of the Michigan NO<sub>x</sub> SIP to that one source.

3. Twenty-five ton exemption—States may develop alternative 25-ton NO<sub>x</sub> exemptions to the one included in the model rule provided they are based on permit restrictions that limit a unit's potential to emit during an ozone season to 25 tons or less and are not inconsistent with 40 CFR part 75 monitoring requirements. Michigan's regulation, Part 8. Emissions Limitations and Prohibitions—Oxides of Nitrogen, includes in Rule 802(2) the 25-ton exemption. The rule language is based on the model rule but provides additional options for qualifying for the exemption that involve emission monitoring or testing that is inconsistent with part 75.

In addition, when a unit receives a 25-ton exemption, the unit's potential emissions (reflected as an equivalent number of allowances) must be removed

from the trading budget to avoid double counting. An exempt unit's emissions are included in the state's large EGU or large non-EGU emissions budget and therefore as allowances in the state's trading budget. EPA is concerned that Michigan's rule does not account for potential emissions from the exempt units. Neither the rule nor the SIP submittal specifies a procedure for removing from the trading budget the allowances reflecting the exempt unit's potential emissions. To address the deficiencies related to the 25-ton exemption provisions including the related budget adjustments, Michigan must modify its regulations to ensure an exempt source's emissions are less than 25 tons in each ozone season and provide a process for adjusting the trading budget accordingly. EPA provided MDEQ suggested language modifying the regulations.

4. New source set-aside—The new source set-aside provisions of § 811(1)(a) specify the set-aside pool allocation. The rule contains a typographical error regarding the number of allowances to be set-aside after 2006. A footnote in the Michigan SIP submittal highlights this error and indicates the correct number. This error should be corrected since the official regulations are the basis for all allocations. Also, Section 811(2) appears to address the issue of adjusting a new source's allowances to account for reduced utilization, but is incomplete and, for example, lacks the adjustment formula. This section also appears to specify how remaining set-aside allowances are determined, but that matter is also addressed in Section 811(3). Michigan must clarify these provisions. EPA provided MDEQ suggested language to clarify these provisions.

5. Language in § 802(1)(a) appears to allow the State to exempt an EGU for which applicability has not been determined. EPA cannot approve any exemption that is solely at the discretion of the State and does include EPA approval as well. The language relating to exemptions based solely on the State's discretion must be removed as a condition of final approval.

6. Language in § 804 relating to retired unit exemptions must be modified to include the requirement that a unit that qualifies for this exemption, is not required to have a permit, and subsequently resumes operation will lose the exemption at the time of resumption of operation. EPA provided MDEQ suggested language modifying this section of the regulations.

#### *J. What Happens if MDEQ Fails To Address These Deficiencies?*

In a letter dated, January 9, 2004, MDEQ committed to submit fully adopted rules addressing the deficiencies by May 31, 2004. If a submittal is not made by this date, this conditional approval will automatically revert to a disapproval of the Michigan NO<sub>x</sub> SIP.

### **III. Michigan's Control of NO<sub>x</sub> Emissions**

#### *A. When Did Michigan Submit the SIP Revision to EPA in Response to the NO<sub>x</sub> SIP Call?*

On April 3, 2003, MDEQ submitted a final revision to its SIP to meet the requirements of the Phase I NO<sub>x</sub> SIP Call.

#### *B. When Did Michigan Hold Public Hearings and What Were the Results?*

Public hearings were held on December 3, 2001 and January 22, 2003. MDEQ holds public hearings on rules at the end of a 30-day public comment period. MDEQ either modified its rules to accommodate the comments received or explained why the rules were not changed in light of the comments.

#### *C. What Is Included in Michigan's NO<sub>x</sub> SIP Call Revision?*

Michigan allows, as in the model rule, EGUs and non-EGUs to participate in the multi-state cap and trade program. Cement kilns are not included in the trading program, but will be required to install low NO<sub>x</sub> burners, mid-kiln firing system or technology that achieves the same emission decreases (a 30% reduction). Michigan's SIP revision to meet the requirements of the NO<sub>x</sub> SIP Call consists of the revision of Michigan Rules 802 through 817. The regulations 802 through 816 affect EGUs and non-EGUs. Rule 817 applies requirements to cement manufacturing facilities.

Michigan's SIP revision to meet the requirements of the NO<sub>x</sub> SIP Call consists of the following Michigan Rules:

- 802 Applicability under oxides of nitrogen budget trading program
- 803 Definitions for oxides of nitrogen budget trading program
- 804 Retired unit exemption from oxides of nitrogen budget trading program
- 805 Standard requirements of oxides of nitrogen budget trading program
- 806 Computation of time under oxides of nitrogen budget trading program
- 807 Authorized account representative under oxides of nitrogen budget trading program

- 808 Permit requirements under oxides of nitrogen budget trading program
  - 809 Compliance certification under oxides of nitrogen budget trading program
  - 810 Allowance allocations under oxides of nitrogen budget trading program
  - 811 New source set-aside under oxides of nitrogen budget trading program
  - 812 Allowance tracking system and transfers under oxides of nitrogen budget trading program
  - 813 Monitoring and reporting requirements under oxides of nitrogen budget trading
  - 814 Individual opt-ins under oxides of nitrogen budget trading program
  - 815 Allowance banking under oxides of nitrogen budget trading program
  - 816 Compliance supplement pool under oxides of nitrogen budget trading program
  - 817 Emission limitations and restrictions for Portland cement kilns
- Michigan's Oxides of Nitrogen Budget Trading Program (Rules 802 through 816) establishes and requires a NO<sub>x</sub> allowance trading program for large EGUs and non-EGUs. These rules establish a NO<sub>x</sub> cap and allowance trading program for the ozone control seasons beginning May 31, 2004. Michigan Rule 817, not part of the trading program, applies to cement kilns and also requires control during the ozone season starting on May 31, 2004. Beginning in 2005, the ozone control period is May 1 through September 30. The State of Michigan voluntarily chose to follow EPA's model NO<sub>x</sub> budget and allowance trading rule, 40 CFR part 96, that sets forth a NO<sub>x</sub> emissions trading program for EGUs and non-EGUs. Michigan's Oxides of Nitrogen Budget Trading Program is based upon EPA's model rule, therefore, Michigan sources are allowed to participate in the interstate NO<sub>x</sub> allowance trading program that EPA is administering for the participating states. The State of Michigan has adopted regulations that, revised consistent with the conditions noted above, are substantively identical to 40 CFR part 96. Therefore, with the conditions noted, pursuant to 40 CFR 51.121(p)(1), Michigan's SIP revision is being proposed for a conditional approval as satisfying the State's NO<sub>x</sub> emission reduction obligations. Under Rule 810, Michigan allocates NO<sub>x</sub> allowances to the EGU and non-EGU units that are affected by these requirements. The NO<sub>x</sub> trading program applies to EGUs (fossil fuel fired boilers

and turbines serving a generator with a nameplate capacity greater than 25 MW or more that sell any amount of electricity) as well as non-EGUs (industrial boilers and turbines that have a maximum design heat input greater than 250 mmBtu per hour). Each NO<sub>x</sub> allowance permits a source to emit one ton of NO<sub>x</sub> during the seasonal control period. NO<sub>x</sub> allowances may be bought or sold. Unused NO<sub>x</sub> allowances may also be banked for future use, with certain limitations.

Source owners will monitor and report their NO<sub>x</sub> emissions by using methodologies that meet the requirements of 40 CFR part 75, subpart H, and report resulting data to EPA electronically. Each budget source complies with the program by demonstrating at the end of each control period that actual emissions do not exceed the amount of allowances held for that period. However, regardless of the number of allowances a source holds, it cannot emit at levels that would violate other federal or State limits, for example, reasonably available control technology (RACT), new source performance standards, or Title IV (the Federal Acid Rain program).

Michigan's Oxides of Nitrogen Budget Trading Program establishes requirements for cement manufacturing facilities, however, these sources are subject to NO<sub>x</sub> reduction requirements but do not participate in the NO<sub>x</sub> trading program. Michigan's submittal does not rely on any additional reductions beyond the anticipated federal measures in the mobile and area source categories.

Michigan's submittal demonstrates that the Phase I NO<sub>x</sub> emission budgets established by EPA will be met because MDEQ agrees with all of the assumptions, projections, etc. used by EPA to determine the 2007 budgets. Because Michigan has adopted all of the same controls assumed by EPA in developing the State's NO<sub>x</sub> budget, the actual emissions in 2007 should be the same as those EPA has projected to be the State's 2007 budget.

#### *D. What Is the Compliance Supplement Pool?*

To provide additional flexibility for complying with emission control requirements associated with the NO<sub>x</sub> SIP Call, the final NO<sub>x</sub> SIP Call rule provided each affected state with a "compliance supplement pool." The compliance supplement pool is a quantity of NO<sub>x</sub> allowances that may be used to cover excess emissions from sources that are unable otherwise to meet control requirements during the 2004 and 2005 ozone season.

Allowances from the compliance supplement pool will not be valid for compliance past the 2005 ozone season. The NO<sub>x</sub> SIP Call included these voluntary provisions in order to address commenters' concerns about the possible adverse effect that the control requirements might have on the reliability of the electricity supply or on other industries required to install controls as the result of a state's response to the NO<sub>x</sub> SIP Call.

A state may issue some or all of the compliance supplement pool via two mechanisms. First, a state may issue some or all of the pool to sources with credits from implementing NO<sub>x</sub> reductions beyond all applicable requirements after September 30, 1999, but before May 31, 2004 (*i.e.*, early reductions). This allows sources that cannot install controls prior to May 31, 2004, to purchase other sources' early reduction credits in order to comply. Second, a state may issue some or all of the pool to sources that demonstrate a need for an extension of the May 31, 2004, compliance deadline due to undue risk to the electricity supply or other industrial sectors, and where early reductions are not available (*See* 40 CFR 51.121(e)(3)). Michigan has opted to issue the State's compliance supplement pool through the Early Reduction Credit program only.

#### *E. How Does Michigan's NO<sub>x</sub> SIP Affect Sources Subject to EPA's Section 126 Rule in the SIP Call Area?*

All of the existing sources in the SIP Call area that are subject to EPA's Section 126 Rule are also subject to Michigan's NO<sub>x</sub> rules. There is, however, one Section 126 affected source that falls outside of the SIP Call affected area. This source is Detroit Edison's Harbor Beach unit and it is located in Huron County. While Huron County falls outside of the area covered by the Michigan's NO<sub>x</sub> SIP rules, MDEQ is in the process of modifying the applicability of the NO<sub>x</sub> Rules to include this one source. Detroit Edison requested inclusion of the Harbor Beach unit in the State trading program because it would then be able to take advantage of the trading provisions that are not otherwise available. Since Michigan adopted the same applicability thresholds for EGU and non-EGU sources as those found in EPA's Section 126 Rule, all of the same sources will be covered once MDEQ has adopted rules to include the Harbor Beach unit. The Michigan trading budget was not increased as a result of adding the Harbor Beach unit.

## **IV. EPA Proposal**

EPA is proposing to conditionally approve the Michigan's SIP revision consisting of its Oxides of Nitrogen Budget Trading Program and its rule that affects cement kilns, which was submitted on April 3, 2003. EPA finds that Michigan's submittal is conditionally approvable because it meets the requirements of the Phase I NO<sub>x</sub> SIP Call with some exceptions.

## **V. Statutory and Executive Order Reviews.**

### *Executive Order 12866; Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget.

### *Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001).

### *Regulatory Flexibility Act*

This action merely approves state regulations as meeting Federal requirements and imposes no additional requirements beyond those imposed by state regulations. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

### *Unfunded Mandates Reform Act*

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

### *Executive Order 13175 Consultation and Coordination With Indian Tribal Governments*

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, 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 by Executive Order 13175 (65 FR 67249, November 9, 2000).

*Executive Order 13132 Federalism*

This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

*Executive Order 13045 Protection of Children from Environmental Health and Safety Risks*

This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

*National Technology Transfer Advancement Act*

In reviewing plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a plan submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a plan submission, to use VCS in place of a plan submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

*Paperwork Reduction Act*

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

*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. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules

of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 26, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: February 17, 2004.

**Bharat Mathur,**

*Acting Regional Administrator, Region 5.*

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**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

**RIN 1018-AT57**

**Endangered and Threatened Wildlife and Plants; Proposed Rule To Designate Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Santa Ana sucker (*Catostomus santaanae*) pursuant to the Endangered Species Act of 1973, as amended (Act). This threatened species is now restricted to three noncontiguous populations in three different stream systems in southern California: The lower and middle Santa Ana River in San Bernardino, Riverside, and Orange counties; the East, West, and North Forks of the San Gabriel River in Los

Angeles County; and lower Big Tujunga Creek in Los Angeles County. When final, this rulemaking would replace the critical habitat designation for Santa Ana sucker as promulgated today by a rule that amends 50 CFR 17.11(h) and 17.95(e).

**DATES:** We will accept comments from all interested parties until April 26, 2004. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by April 12, 2004.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92009 (telephone 760/431-9440 or facsimile 760/431-9618).

If you wish to comment, you may submit your comments and materials concerning this proposed rule by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92009.

2. You may hand-deliver written comments to our Office, at the address given above.

3. You may send comments by electronic mail (e-mail) to [fw1sasur@r1.fws.gov](mailto:fw1sasur@r1.fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel at the address listed above (telephone 760/431-9440 or facsimile 760/431-9618).

**SUPPLEMENTARY INFORMATION:****Public Comments Solicited**

We solicit your comments on the proposed designation of critical habitat for the Santa Ana sucker. Comments particularly are sought concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of Santa Ana sucker habitat, and what habitat is essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic or other potential impacts resulting from the