



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-HQ-OAR-2013-0671; FRL-9902-55-OAR]**

**Extension of Deadline for Action on the Section 126 Petition from Eliot, Maine**

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

**ACTION:** Final rule.

**SUMMARY:** In this action, the EPA is determining that 60 days is insufficient time to complete the technical and other analyses and public notice-and-comment process required for our review of a petition submitted by the Town of Eliot, Maine pursuant to section 126 of the Clean Air Act (CAA). The petition requests that the EPA make a finding that Schiller Station in Portsmouth, New Hampshire is emitting or would emit air pollutants that contribute significantly to nonattainment and interfere with maintenance of the 1-hour sulfur dioxide (SO<sub>2</sub>) national ambient air quality standards (NAAQS). Under the section 307(d)(10) of CAA, the EPA is authorized to grant a time extension for responding to the petition if the EPA determines that the extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of section 307(d)'s notice-and-comment rulemaking requirements. By this action, the EPA is making that determination. The EPA is therefore extending the deadline for acting on the petition to no later than May 8, 2014.

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

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2013-0671. All documents in the docket are listed on the *www.regulations.gov* website. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the EPA Docket Center (Air Docket), EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., N.W., Washington, D.C. 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.

**FOR FURTHER INFORMATION CONTACT:** Ms. Gobeail McKinley, Office of Air Quality Planning and Standards (C504-04), U.S. EPA, Research Triangle Park, North Carolina 27709, telephone number (919) 541-5246, facsimile number (919) 685-3700, email: *mckinley.gobeail@epa.gov*.

## **SUPPLEMENTARY INFORMATION**

### **I. Background and Legal Requirements for Interstate Air Pollution**

This is a procedural action to extend the deadline for the EPA to respond to a petition from the Town of Eliot, Maine filed under CAA section 126(b). The EPA received the petition on September 3, 2013. The petition requests that the EPA make a finding under section 126(b) of the CAA that two 50 MW coal-fired electricity generating units at Schiller Station in Portsmouth, New Hampshire are emitting air pollutants in violation of the provisions of section 110(a)(2)(D)(i)(I) of the CAA with respect to the 1-hour SO<sub>2</sub> NAAQS.

Section 110(a)(2)(D)(i)(I) of the CAA prohibits emissions of any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any NAAQS. The petition asserts that emissions from Schiller Station impact Eliot's ability to attain and maintain the 1-hour SO<sub>2</sub> NAAQS and that this impact would be mitigated by regulation of SO<sub>2</sub> emissions from the plant. Section 126(b) of the CAA authorizes states or political subdivisions to petition the EPA to find that a major source or group of stationary sources in upwind states emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)(i)<sup>1</sup> by contributing significantly to nonattainment or maintenance problems in downwind states.

Under section 126(b), the EPA must make the finding requested in the petition, or must deny the petition within 60 days of its receipt. Under section 126(c), any existing sources for which the EPA makes the requested finding must cease operations within 3 months of the finding, except that the source may continue to operate if it complies with emission limitations and compliance schedules (containing increments of progress) that the EPA may provide to bring about compliance with the applicable requirements as expeditiously as practical but no later than 3 years from the date of the finding.

Section 126(b) further provides that the EPA must hold a public hearing on the petition. The EPA's action under section 126 is also subject to the procedural

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<sup>1</sup>The text of section 126 codified in the United States Code cross references section 110(a)(2)(D)(ii) instead of section 110(a)(2)(D)(i). The courts have confirmed that this is a scrivener's error and the correct cross reference is to section 110(a)(2)(D)(i). *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001).

requirements of CAA section 307(d). *See* section 307(d)(1)(N). One of these requirements is notice-and-comment rulemaking, under section 307(d)(3)-(6).

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

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

Section 307(d)(10) may be applied to section 126 rulemakings because the 60-day time limit under section 126(b) necessarily limits the period for promulgation of a final rule after proposal to less than 6 months.

## **II. Final Rule**

### *A. Rule*

In accordance with section 307(d)(10), the EPA is determining that the 60-day period afforded by section 126(b) for responding to the petition from the Town of Eliot is not adequate to allow the public and the agency the opportunity to carry out the purposes of section 307(d). Specifically, the 60-day period is insufficient for the EPA to complete the necessary technical review, develop an adequate proposal and allow time for notice and comment, including an opportunity for public hearing, on a proposed finding regarding whether Schiller Station identified in the section 126 petition contributes significantly to nonattainment or maintenance problems in Eliot, Maine. Moreover, the 60-day period is insufficient for the EPA to review and develop response to any public

comments on a proposed finding, or testimony supplied at a public hearing and to develop and promulgate a final finding in response to the petition. The EPA has not yet established a proposal date for this action. The schedule must afford the EPA adequate time to prepare a proposal that clearly elucidates the issues to facilitate public comment and must provide adequate time for the public to comment and for the EPA to review and develop responses to those comments prior to issuing the final rule. As a result of this extension, the deadline for the EPA to act on the petition is May 8, 2014.

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

This document is a final agency action, but may not be subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553(b). The EPA believes that, because of the limited time provided to make a determination that the deadline for action on the section 126 petition should be extended, Congress may not have intended such a determination to be subject to notice-and-comment rulemaking. However, to the extent that this determination otherwise would require notice and opportunity for public comment, there is good cause within the meaning of 5 U.S.C. 553(b)(3)(B) not to apply those requirements here. Providing for notice and comment would be impracticable because of the limited time provided for making this determination and would be contrary to the public interest because it would divert agency resources from the substantive review of the section 126 petition.

*C. Effective Date Under the APA*

This action is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Under the APA, 5 U.S.C. 553(d)(3), agency rulemaking may

take effect before 30 days after the date of publication in the *Federal Register* if the agency has good cause to mandate an earlier effective date. This action – a deadline extension – must take effect immediately because its purpose is to extend by 6 months the deadline for action on the petition. It is important for this deadline extension action to be effective before the original 60-day period for action elapses. As discussed above, the EPA intends to use the 6-month extension period to develop a proposal on the petition and provide time for public comment before issuing the final rule. It would not be possible for the EPA to complete the required notice and comment and public hearing process within the original 60-day period noted in the statute. These reasons support an immediate effective date.

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

#### *A. Executive Orders 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory*

This action is not a significant regulatory action under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

#### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This good cause final action simply extends the date for the EPA to take action on a petition and does not impose any new obligations or enforceable duties on

any state, local or tribal governments or the private sector. It does not contain any recordkeeping or reporting requirements.

*C. Regulatory Flexibility Act*

This good cause final action is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice-and-comment requirements under the APA or any other statute because although the rule is subject to the APA, the agency has invoked the “good cause” exemption under 5 USC 553(b); therefore it is not subject to the notice and comment requirement.

*D. Unfunded Mandates Reform Act*

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This good cause final action simply extends the date for the EPA to take action on a petition.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This good cause final action simply extends the date for the EPA to take action on a petition. Thus, Executive Order 13132 does not apply to this action.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. This good cause final action simply extends the date for the EPA to take action on a petition. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d), (15 U.S.C. 272 note) directs the 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 the EPA to provide Congress, through the Office of Management and Budget, with explanations when the agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and

adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This good cause final action simply extends the date for the EPA to take action on a petition.

*K. Congressional Review Act*

The Congressional Review Act (CRA), 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, the EPA has made such a good cause finding, including the reasons therefore, and established an effective date of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C.

804(2).

**IV. Statutory Authority**

The statutory authority for this action is provided by sections 110, 126 and 307 of the Act as amended (42 U.S.C. 7410, 7426 and 7607).

**V. Judicial Review**

Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Under section 307(b)(2) of the CAA, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

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

Environmental protection, Administrative practices and procedures, Air pollution control,  
Electric utilities, Incorporation by reference, Intergovernmental relations, Sulfur dioxide.

Dated: October 30, 2013.

Gina McCarthy,  
Administrator.

[FR Doc. 2013-26642 Filed 11/07/2013 at 8:45 am; Publication Date: 11/08/2013]