

**Authority:** 33 U.S.C. 499; 33 CFR 1.05–1(g); Department of Homeland Security Delegation No. 0170.1; § 117.255 also issued under the authority of Public Law 102–587, 106 Stat. 5039.

■ 2. Add new § 117.820 to read as follows:

**§ 117.820 Atlantic Intracoastal Waterway (Alternate Route), Great Dismal Swamp Canal.**

The draw of the Great Dismal Swamp Canal Bridge, mile 28.0 at South Mills, NC, shall operate as follows:

(a) The draw shall remain in the open position for navigation. The draw shall only be closed for pedestrian crossings or periodic maintenance authorized in accordance with Subpart A of this part.

(b) The bridge shall be operated by the Park Service Rangers at the Great Dismal Swamp Visitors Center. Operational information will be provided 24 hours a day on marine channel 13.

(c) The bridge shall not be operated when the operator's visibility is impaired.

(d) Before the bridge closes for any reason, the operator will monitor waterway traffic in the area. The bridge shall only be closed if the operator's visual inspection shows that the channel is clear and there are no vessels transiting in the area. While the bridge is moving, the operator shall maintain constant surveillance of the navigation channel.

(e) Before closing the draw, the horn will sound five short blasts. Five short blasts of the horn will continue until the bridge is seated and locked down to vessels.

(f) When pedestrian traffic has cleared, the horn will sound one prolonged blast followed by one short blast to indicate the draw is opening to vessel traffic.

Dated: July 3, 2006.

**L.L. Hereth,**

*Rear Admiral, United States Coast Guard, Commander, Fifth Coast Guard District.*

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 51 and 93**

[EPA–HQ–OAR–2004–0491; FRL–8197–4]

**RIN 2060–AN60**

**PM<sub>2.5</sub> De Minimis Emission Levels for General Conformity Applicability**

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is taking final action to amend its regulations relating to the Clean Air Act (CAA) requirement that Federal actions conform to the appropriate State, Tribal or Federal implementation plan for attaining clean air (“general conformity”) to add *de minimis* emissions levels for particulate matter with an aerodynamic diameter equal or less than 2.5 microns (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS) and its precursors.

**DATES:** The final rule amendments are effective on July 17, 2006.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2004–0491. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., 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 through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Coda, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–02, Research Triangle Park, NC 27711, phone number (919) 541–3037 or by e-mail at [coda.tom@epa.gov](mailto:coda.tom@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does This Action Apply to Me?*

Today's action applies to all Federal agencies and Federal activities.

**II. Background**

*A. What Is General Conformity and How Does It Affect Air Quality?*

The intent of the General Conformity requirement is to prevent the air quality impacts of Federal actions from causing or contributing to a violation of the NAAQS or interfering with the purpose of a State implementation plan (SIP). For the purpose of this rule, the term “State implementation plan (SIP)” refers to all approved applicable and

enforceable State, Federal and Tribal implementation plans (TIPs).

In the CAA, Congress recognized that actions taken by Federal agencies could affect States, Tribes, and local agencies' abilities to attain and maintain the NAAQS. Section 176(c)(42 U.S.C. 7506) of the CAA requires Federal agencies to ensure that their actions conform to the applicable SIP for attaining and maintaining the NAAQS. The CAA Amendments of 1990 clarified and strengthened the provisions in section 176(c). Because certain provisions of section 176(c) apply only to highway and mass transit funding and approvals actions, EPA published two sets of regulations to implement section 176(c). The Transportation Conformity Regulations, first published on November 24, 1993 (58 FR 62188) and recently revised on July 1, 2004 (69 FR 40004) and May 6, 2005 (70 FR 24280), address Federal actions related to highway and mass transit funding and approval actions. The General Conformity Regulations, published on November 30, 1993 (58 FR 63214) and codified at 40 CFR 93.150, cover all other Federal actions. This action applies only to the General Conformity Regulations.

When the applicability analysis shows that the action must undergo a conformity determination, Federal agencies must first show that the action will meet all SIP control requirements such as reasonably available control measures, and the emissions from the action will not interfere with the timely attainment of the standard, the maintenance of the standard or the area's ability to achieve an interim emission reduction milestone. Federal agencies then must demonstrate conformity by meeting one or more of the methods specified in the regulation for determining conformity:

1. Demonstrating that the total direct<sup>1</sup> and indirect<sup>2</sup> emissions are specifically identified and accounted for in the applicable SIP,

2. Obtaining written statement from the State or local agency responsible for the SIP documenting that the total direct and indirect emissions from the action along with all other emissions in the

<sup>1</sup> Direct emissions are emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

<sup>2</sup> Indirect emissions are emissions of a criteria pollutant or its precursors that: (1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and (2) the Federal agency can practically control or will maintain control over due to the controlling program responsibility of the Federal action.

area will not exceed the SIP emission budget,

3. Obtaining a written commitment from the State to revise the SIP to include the emissions from the action,

4. Obtaining a statement from the metropolitan planning organization (MPO) for the area documenting that any on-road motor vehicle emissions are included in the current regional emission analysis for the area's transportation plan or transportation improvement program,

5. Fully offset the total direct and indirect emissions by reducing emissions of the same pollutant or precursor in the same nonattainment or maintenance area, or

6. Where appropriate, in accordance with 40 CFR 51.858(4), conduct air quality modeling that can demonstrate that the emissions will not cause or contribute to new violations of the standards, or increase the frequency or severity of any existing violations of the standards.

#### B. Applicability Analysis for General Conformity

The National Highway System Designation Act of 1995, (Pub. L. 104-59) added section 176(c)(5) to the CAA to limit applicability of the conformity programs to areas designated as nonattainment under section 107 of the CAA and areas that had been redesignated as maintenance areas with a maintenance plan under section 175A of the CAA only. Therefore, only Federal actions taken in designated nonattainment and maintenance areas are subject to the General Conformity regulation. In addition, the General Conformity Regulations (58 FR 63214) recognize that the vast majority of Federal actions do not result in a significant increase in emissions and, therefore, include a number of regulatory exemptions, such as *de minimis* emission levels based on the type and severity of the nonattainment problem in an area.

In carrying out this type of applicability analysis, the Federal agency determines whether the total direct and indirect emissions from the action are below or above the *de minimis* levels. If the action is determined to have total direct and indirect emissions for a given pollutant that are at or above the *de minimis* level for that pollutant, Federal agencies must conduct a conformity determination for the pollutant unless the action is presumed to conform under the regulation or the action is otherwise exempt. If the action's emissions are below an applicable *de minimis* level, a

Federal agency does not have to conduct a conformity determination.

#### C. Why Is EPA Establishing De Minimis Levels for PM<sub>2.5</sub> Emissions at This Time?

The EPA has not revised the General Conformity Regulations since they were promulgated in 1993, although EPA expects to promulgate, in a separate rulemaking, proposed revisions to the General Conformity Regulations in the near future. For the purposes of general conformity, the General Conformity Regulations (58 FR 63214) define NAAQS as "those standards established pursuant to section 109 of the Act and include standards for carbon monoxide (CO), Lead (Pb), nitrogen dioxide (NO<sub>2</sub>), ozone, particulate matter (PM<sub>10</sub>) and sulfur dioxide (SO<sub>2</sub>)." Since 1993, EPA has reviewed and revised the NAAQS for particulate matter to include a new PM<sub>2.5</sub> standard (PM<sub>2.5</sub> is particulate matter with an aerodynamic diameter of up to 2.5 μ referred to as the fine particle fraction). Since PM<sub>2.5</sub> was established pursuant to section 109 of the CAA, general conformity requirements are applicable to areas designated nonattainment for this standard although it is not explicitly included in the examples of criteria pollutants in 58 FR 63214.

In July 1997, EPA promulgated two new NAAQS (62 FR 38652), one for an 8-hour ozone standard and one established pursuant to section 109 of the CAA for fine particulate matter known as PM<sub>2.5</sub>. The new 8-hour and old 1-hour ozone NAAQS address the same pollutant but differ with respect to the averaging time, therefore, EPA retained the existing *de minimis* emission levels for ozone precursors.

The EPA designated areas as nonattainment for PM<sub>2.5</sub> on April 5, 2005. Subsequently, EPA has proposed regulations to implement the new particulate matter standard (70 FR 65984; November 1, 2005). Currently, there are no *de minimis* emission levels for PM<sub>2.5</sub>. Although PM<sub>2.5</sub> is a subset of PM<sub>10</sub>, it differs from the rest of PM<sub>10</sub>. While the majority of ambient PM<sub>10</sub> results from direct emissions of the pollutant, a significant amount of the ambient PM<sub>2.5</sub> can result not only from direct emissions but also from transformation of precursors and condensing of gaseous pollutants in the atmosphere. In the preamble to the proposed regulation to implement the new particulate matter standard, EPA included a discussion about the key pollutants potentially contributing to PM<sub>2.5</sub> concentrations in the atmosphere which are direct PM<sub>2.5</sub> emissions, SO<sub>2</sub>, NO<sub>x</sub>, VOC and ammonia (70 FR 65998). The discussion also included EPA's

intent to issue a separate rulemaking to establish *de minimis* levels for Federal actions covered by the General Conformity program (70 FR 66033). At that time, EPA said it expected the levels would be identical to the nonattainment area major source levels for the New Source Review (NSR) program. While EPA recognized that SO<sub>2</sub>, NO<sub>x</sub>, VOC and ammonia are precursors of PM<sub>2.5</sub> in the scientific sense because these pollutants can contribute to the formation of PM<sub>2.5</sub> in the ambient air, the degree to which these individual precursors and pollutants contribute to PM<sub>2.5</sub> formation in a given location is complex and variable. For ammonia, there is uncertainty about emissions inventories and the potential efficacy of control measures from location to location. For VOC, the role and relationship of gaseous organic material in the formation of organic PM remains complex and further research and technical tools are needed to better characterize emissions inventories for specific VOC compounds. In light of these factors, EPA proposed in its rule to implement the PM<sub>2.5</sub> NAAQS that States are not required to address VOC's or ammonia as PM<sub>2.5</sub> nonattainment plan precursors, unless the State or EPA makes a finding that VOC's or ammonia significantly contribute to a PM<sub>2.5</sub> nonattainment problem in the State or to other downwind air quality concerns. For NO<sub>x</sub> EPA proposed that States are required to address NO<sub>x</sub> as a PM<sub>2.5</sub> nonattainment precursor, unless the State and EPA makes a finding that NO<sub>x</sub> emissions from sources in the State do not significantly contribute to the PM<sub>2.5</sub> problem in a given area or to other downwind air quality concerns.

Section 176(c)(6) states that the general conformity requirements of section 176(c) do not apply to an area newly designated nonattainment for a new NAAQS until 1 year after such designation. The EPA made PM<sub>2.5</sub> designations on April 5, 2005; thus, the applicable general conformity requirements were not effective in these areas until April 5, 2006. Many Federal actions result in little or no direct or indirect emissions and EPA believes that non-exempt Federal actions that have covered emissions below the equivalent major source thresholds should not be required to prepare an applicability analysis under the general conformity rule. The general conformity rule should only apply to major sources, not *de minimis* sources. A different interpretation could result in an extremely wasteful process that generates vast numbers of useless

applicability analyses with no environmental benefit.

#### *D. How Does EPA Determine the De Minimis Threshold?*

The EPA has previously considered options and taken comment on how to set *de minimis* levels to determine applicability of general conformity requirements. The following is a summary of the options previously considered and the methodology used in setting *de minimis* levels. In this final rule, the EPA is using the same methodology to set PM<sub>2.5</sub> *de minimis* levels that the Agency previously used for other NAAQS pollutants.

In the preamble to the proposal for General Conformity Regulations (58 FR 13841), EPA recognized that the very broad definition of Federal action in the statute and the number of Federal agencies subject to the conformity requirements could create a requirement for individual conformity decisions in the thousands per day. To avoid creating an unreasonable administrative burden, EPA considered options for mechanisms to focus the efforts of affected agencies on key actions with significant environmental impact, rather than all actions. Prior to that proposal, EPA consulted with numerous Federal agencies, environmental groups, State and local air quality agencies, building industry representatives, and others. Following consultation, EPA initially proposed a *de minimis* level similar to that specified by EPA for modifications to major stationary sources under the CAA preconstruction review programs. Consequently, the *de minimis* levels proposed for general conformity were chosen to correspond to the emission rates defined in 40 CFR 51.165 (NSR) and 51.166 (prevention of significant deterioration) as "significant."

Activities with emissions impacts below the proposed *de minimis* levels would not require conformity determinations.

After EPA received comments on this proposal, we responded in the preamble to the final General Conformity Regulations (58 FR 63228) and stated:

"Given the need to choose a threshold based on air quality criteria and one that avoids coverage of less significant projects, and in response to certain comments, the *de minimis* levels for conformity analyses in the final rule are based on the Act's major stationary source definitions—not the significance levels as proposed—for the various pollutants. Use of the *de minimis* levels assures that the conformity rule covers only major Federal actions. Under the major source definition, for example, the levels for ozone would range from 10 tons/year (VOC and NO<sub>x</sub>) for an extreme ozone nonattainment area to 100 tons/year for marginal and moderate areas, not from 10

tons/year to 40 tons/year as proposed. The *de minimis* levels proposed were generally those used to define when modifications to existing stationary sources require preconstruction review. It was pointed out to EPA in comments on the proposal that these thresholds would result in the need to perform a conformity analysis and determination for projects that constituted a 'modification' to an existing source but not a 'major' source in some cases. The EPA agrees that conformity applies more appropriately to 'major' source and after careful consideration has decided to revise its original proposal in the final rule to use the emissions levels that define a major source, except as described above for lead. The definition of a major source under the amended Act is explained in more detail in the April 16, 1992 **Federal Register** in the EPA's General Preamble to Title I (57 FR 13498). Section 51.853(b)(3) of the rule has also been revised to remove the provisions that would automatically lower the *de minimis* levels to that established for stationary sources by the local air quality agency. In keeping with its conclusion that only major sources should be subject to conformity review, EPA agrees that a zero emissions threshold as established by some local agencies, should not be required by this rule."

The EPA adopts this rationale for the *de minimis* levels we are setting for PM<sub>2.5</sub> in this final action.

This mechanism of relying on the major stationary source levels in the statute as *de minimis* levels for conformity has worked well over the last 12 years to lessen the administrative burden of Federal agencies for actions that emit relatively low emissions while addressing actions with significant emissions that could affect attainment of the NAAQS. The EPA believes it is appropriate to continue to use major stationary source levels as *de minimis* levels for the PM<sub>2.5</sub> NAAQS in line with past practice and recognizing that Congress generally concluded it was appropriate to apply more stringent air quality review requirements to major sources. For this reason, EPA has decided to use this reasonable and effective mechanism for setting *de minimis* levels for PM<sub>2.5</sub>.

The EPA proposed regulations to implement the new particulate matter standard (70 FR 65984) on November 1, 2005). In the preamble to that proposal, EPA included a discussion about the key pollutants potentially contributing to PM<sub>2.5</sub> concentrations in the atmosphere which are direct PM<sub>2.5</sub> emissions, SO<sub>2</sub>, NO<sub>x</sub>, VOC and ammonia (70 FR 65998). While EPA recognized that SO<sub>2</sub>, NO<sub>x</sub>, VOC and ammonia are precursors of PM<sub>2.5</sub> in the scientific sense because these pollutants can contribute to the formation of PM<sub>2.5</sub> in the ambient air, the degree to which

these individual precursors and pollutants contribute to PM<sub>2.5</sub> formation in a given location is complex and variable. For ammonia, there is uncertainty about emissions inventories and the potential efficacy of control measures from location to location. For VOC, the role and relationship of gaseous organic material in the formation of organic PM remains complex and further research and technical tools are needed to better characterize emissions inventories for specific VOC compounds. In light of these factors, EPA proposed in its rule to implement the PM<sub>2.5</sub> NAAQS that States are not required to address VOC's or ammonia as PM<sub>2.5</sub> nonattainment plan precursors, unless the State or EPA makes a finding that VOC's or ammonia significantly contribute to a PM<sub>2.5</sub> nonattainment problem in the State or to other downwind air quality concerns. For NO<sub>x</sub> EPA proposed that States are required to address NO<sub>x</sub> under all aspects of the program, unless the State and EPA makes a finding that NO<sub>x</sub> emissions from sources in the State do not significantly contribute to the PM<sub>2.5</sub> problem in a given area or to other downwind air quality concerns. For SO<sub>2</sub> EPA proposed that States are required to address SO<sub>2</sub> as a PM<sub>2.5</sub> nonattainment precursor. Therefore, for the purposes of general conformity applicability, VOC's and ammonia emissions are only considered PM<sub>2.5</sub> precursors in nonattainment areas where either a State or EPA has made a finding that they significantly contribute to the PM<sub>2.5</sub> problem in a given area or to other downwind air quality concerns; NO<sub>x</sub> emissions are considered a PM<sub>2.5</sub> precursor unless the State and EPA makes a finding that NO<sub>x</sub> emissions from sources in the State do not significantly contribute to the PM<sub>2.5</sub> problem in a given area or to other downwind air quality concerns; and SO<sub>2</sub> are always considered a PM<sub>2.5</sub> precursor. The EPA's proposed implementation strategy for the PM<sub>2.5</sub> standard included options for addressing PM<sub>2.5</sub> precursors in other air quality planning programs (e.g., New Source Review for stationary sources). The public has had the opportunity to comment on these options during the comment period for that rulemaking. The EPA will consider those comments in its final PM<sub>2.5</sub> implementation rule. Today's final rule should not be interpreted as prejudging our decision on the PM<sub>2.5</sub> precursor requirements that will be finalized in the PM<sub>2.5</sub> implementation rulemaking. Our final rule for the implementation proposal will reflect how PM<sub>2.5</sub> precursors should

best be considered in those air quality planning programs and the comments received on that proposal. While EPA's final decisions on PM<sub>2.5</sub> precursors must be legally consistent, EPA could take differing positions with respect to various precursors in other programs (e.g., New Source Review for stationary sources) as appropriate to the programmatic needs, technical information, legal requirements and pollution sources relevant to the differing programs.

The EPA notes, however, that if in the future we change our legal rationale or technical basis for considering PM<sub>2.5</sub> precursors among the various air quality planning programs from the positions currently under consideration as a result of comments received on the PM<sub>2.5</sub> implementation strategy proposal, such changes could necessitate a subsequent revision to the general conformity rule. In the case where an amendment to the General Conformity regulations is needed to reflect an alternative approach to considering PM<sub>2.5</sub> precursors, EPA would conduct such a revision through full public notice and comment rulemaking.

### III. Response to Comments

The proposed rule published on April 5, 2006 solicited comments on establishing 100 tons per year of PM<sub>2.5</sub> direct or precursor emissions as the *de minimis* threshold for General Conformity applicability. Three comments were received, one in support of the proposed *de minimis* level, and two other comments suggesting lower levels. Responses to these comments follow.

#### A. De Minimis Level for Prescribed Burning

##### 1. Comment

A commenter stated that "leaving out prescribed burning with its release of fine particulate matter and mercury is absolutely wrong." In addition, the commenter stated that he does not understand why EPA does not address the way certain Federal agencies, like the National Park Service, engage in prescribed burning on Federal lands and that EPA needs to address this "wrongdoing."

##### 2. Response

To the extent that this comment is stating that prescribed burning should be regulated as an activity by the General Conformity rule, such comment is beyond the scope of this action since this rulemaking does not concern any substantive requirements for any Federal activities nor does it address

ways in which a Federal activity such as prescribed burning can be found to conform to an applicable implementation plan. EPA is currently considering whether to promulgate proposed revisions to the General conformity rule, including ways in which activities can be found to conform, and if such a rule were proposed in the future, EPA encourages the commenter to submit comments at that time. To the extent that the commenter intended his comment to mean that EPA should not promulgate a *de minimis* level for prescribed burning activities, EPA notes that the General Conformity regulations are not structured to provide differing *de minimis* levels for different types of Federal activities. The EPA has proposed uniform *de minimis* emission rates for all Federal activities independent of their source because pollution is pollution, whether caused by prescribed burning or any other Federal activity. In other words, all of the *de minimis* levels are based on levels of pollution impact from all types of federal activities, whatever they may be. Prescribed burning activities do not produce any new type of pollution which would necessitate a different type of *de minimis* level or no level at all. The EPA believes that the General Conformity rule's *de minimis* thresholds should provide for the uniform treatment of air pollution emissions regardless of their source.

#### B. De Minimis Level for Direct PM<sub>2.5</sub> Emissions

##### 1. Comment

One commenter suggested lower *de minimis* levels for directly emitted PM<sub>2.5</sub>. The commenter proposed that the *de minimis* level for emissions of direct PM<sub>2.5</sub> should be set significantly lower than 100 tons per year—in the range of 25–50 tons per year in areas that are likely to attain the PM<sub>2.5</sub> NAAQS within 5 years, and a level of 10–25 tons per year in areas that are likely to take more than five years to achieve the NAAQS.

##### 2. Response

The intent of the *de minimis* levels is to assure that the General Conformity rule covers only major Federal actions that are major sources of emission. The Act in section 302(j) defines a major source as meaning "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the

Administrator)." This definition provides a Congressional threshold for a major source. As discussed in the preamble of the proposal, EPA is using the same methodology to set the *de minimis* level for PM<sub>2.5</sub> as it did for the other NAAQS pollutants (with the exception of lead). This methodology is based on a level found in statute as defining major stationary sources of air pollution. The commenter suggests a sliding scale for the direct PM<sub>2.5</sub> *de minimis* level based on the severity of the attainment problem which is akin to a classification scheme. A classification scheme was constructed for PM<sub>10</sub> non-attainment areas and the Act provides for a lower major sources definition threshold of 70 tons per year in section 189(b)(3) for PM<sub>10</sub> areas classified as serious. The EPA designated all PM<sub>2.5</sub> nonattainment areas under subpart 1 of the Act. Subpart 1 does not mandate a classification scheme for nonattainment areas based on the severity of an area's air quality problem. Therefore, there is no basis for EPA to determine in this rulemaking what would constitute a serious PM<sub>2.5</sub> nonattainment problem and set different *de minimis* levels based on seriousness of the air quality problem. Absent a classification scheme for PM<sub>2.5</sub>, EPA does not believe that basing the *de minimis* levels on differing air quality levels is warranted at this time. If a different classification approach is taken in the PM<sub>2.5</sub> implementation rule, we may consider addressing this issue differently.

### IV. Summary of the Action

The EPA is revising the tables in subparagraphs (b)(1) and (b)(2) of 40 CFR 51.853 and 40 CFR 93.153 by adding the *de minimis* emission levels for PM<sub>2.5</sub>. The EPA is establishing the proposed 100 tons per year as the *de minimis* emission level for direct PM<sub>2.5</sub> and each of its precursors as defined in revised section 91.152. The precursors for the purposes of general conformity applicability are, VOC's and ammonia emissions are only considered PM<sub>2.5</sub> precursors in nonattainment areas where either a State or EPA has made a finding that they significantly contribute to the PM<sub>2.5</sub> problem in a given area or to other downwind air quality concerns; NO<sub>x</sub> emissions are considered a PM<sub>2.5</sub> precursor unless the State and EPA makes a finding that NO<sub>x</sub> emissions from sources in the State do not significantly contribute to the PM<sub>2.5</sub> problem in a given area or to other downwind air quality concerns; and SO<sub>2</sub> emissions are always considered a PM<sub>2.5</sub> precursor. Since EPA did not propose any classifications for the PM<sub>2.5</sub> nonattainment areas, EPA is not

establishing PM<sub>2.5</sub> *de minimis* emission levels for higher classified nonattainment areas. This action will maintain the consistency between the conformity *de minimis* emission levels and the size of a major stationary source under the Act (section 302(j) and the NSR program (70 FR 65984). These levels are also consistent with the levels proposed for VOC and NO<sub>x</sub> emissions in subpart 1 areas under the 8-hour ozone implementation strategy (68 FR 32843).

## V. 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 regulation 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.

Pursuant to the terms of Executive Order 12866, it has been determined that these revisions to the regulations are considered a “significant regulatory action” because although they do not impose any additional requirements on other Federal agencies, they do affect the process Federal agencies use to determine applicability of existing requirements. As such, this action was submitted to OMB for review.

### B. Paperwork Reduction Act

This action does not directly impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, on non-Federal entities. The General Conformity Regulations require Federal agencies to determine that their actions conform to the SIPs or TIPs. However,

depending upon how Federal agencies implement the regulations, non-Federal entities seeking funding or approval from those Federal agencies may be required to submit information to that agency.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an Agency to prepare a regulatory flexibility analysis of any regulation subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the Agency certifies 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 action on small entities, small entity is defined as:

1. A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards. (See 13 CFR 121.201);
2. A 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 regulation revisions, I certify that this action will not have a significant economic impact on a substantial number of small entities. Today’s action will not impose any

requirements on small entities. The General Conformity Regulations require Federal agencies to conform to the appropriate State, Tribal or Federal implementation plan for attaining clean air.

### 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 proposed and final regulations with “Federal mandates” that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA regulation 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 to adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the regulation. 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 regulations 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 actions with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that these revisions to the regulations do not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Thus, today’s regulation revisions are not subject to the requirements of sections 202 and 205 of the UMRA.

The EPA has determined that these regulation revisions contain no

regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132, entitled "Federalism" (64 FR 43255; August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have Federalism implications. The regulations 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. Previously, EPA determined the costs to States to implement the General Conformity Regulations to be less than \$100,000 per year. Thus, Executive Order 13132 does not apply to these regulation revisions.

#### *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 determination is stated below.

These regulation revisions do not have Tribal implications as defined by Executive Order 13175. They do not have a substantial direct effect on one or more Indian Tribes, since no Tribe has to demonstrate conformity for their actions. Furthermore, these regulation revisions do not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the Tribal Air Rule establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. Because these regulation revisions do not have

Tribal implications, Executive Order 13175 does not apply.

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

Executive Order 13045: "Protection of Children from Environmental Health 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 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.

These revisions to the regulations are not subject to Executive Order 13045 because they are not economically significant as defined in Executive Order 12866 and because EPA does not have reason to believe the environmental health or safety risk addressed by the General Conformity Regulations present a disproportionate risk to children. The General Conformity Regulations ensure that Federal agencies comply with the SIP, TIP or FIP for attaining and maintaining the NAAQS.

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

These revisions to the regulations are not considered a "significant energy action" as defined in Executive Order 13211, "Actions That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### *I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB,

explanations when the Agency decides not to use available and applicable VCS.

This revision to the regulations does not involve technical standards. Therefore, EPA is not considering the use of any VCS.

However, EPA will encourage the Federal agencies to consider the use of such standards, where appropriate, in the implementation of the General Conformity Regulations.

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

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health environmental effects of its programs, policies, and activities on minorities and low-income populations.

The EPA believes that these revisions to the regulations should not raise any environmental justice issues. The revisions to the regulations would, if promulgated revise procedures for other Federal agencies to follow. They do not disproportionately affect the health or safety of minority or low income populations. The EPA encourages other agencies to carefully consider and address environmental justice in their implementation of their evaluations and conformity determinations.

#### *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. It requires that 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). Therefore this rule will be effective July 17, 2006.

#### **List of Subjects**

##### *40 CFR Part 51*

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

40 CFR Part 93

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

Dated: July 11, 2006.

**Stephen L. Johnson,**  
Administrator.

■ For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

**PART 51—[AMENDED]**

■ 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 W—[Amended]**

■ 2. Section 51.852 is amended by removing the “; and” at the end of paragraph (1) and adding a period in its place and adding paragraph (3) to definition of “Precursors of criteria pollutant” to read as follows:

**§ 51.852 Definitions.**

\* \* \* \* \*

*Precursors of a criteria pollutant are:*

\* \* \* \* \*

(3) For PM<sub>2.5</sub>:

(i) Sulfur dioxide (SO<sub>2</sub>) in all PM<sub>2.5</sub> nonattainment and maintenance areas,

(ii) Nitrogen oxides in all PM<sub>2.5</sub> nonattainment and maintenance areas unless both the State and EPA determine that it is not a significant precursor, and

(iii) Volatile organic compounds (VOC) and ammonia (NH<sub>3</sub>) only in PM<sub>2.5</sub> nonattainment or maintenance areas

where either the State or EPA determines that they are significant precursors.

\* \* \* \* \*

■ 3. Section 51.853 is amended by revising paragraph (b) to read as follows:

**§ 51.853 Applicability.**

\* \* \* \* \*

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAA's):

	Tons/year
Ozone (VOC's or NO <sub>x</sub> ):	
Serious NAA's .....	50
Severe NAA's .....	25
Extreme NAA's .....	10
Other ozone NAA's outside an ozone transport region .....	100
Other ozone NAA's inside an ozone transport region:	
VOC .....	50
NO <sub>x</sub> .....	100
Carbon monoxide: All NAA's .....	100
SO <sub>2</sub> or NO <sub>2</sub> : All NAA's .....	100
PM-10:	
Moderate NAA's .....	100
Serious NAA's .....	70
PM <sub>2.5</sub> :	
Direct emissions .....	100
SO <sub>2</sub> .....	100
NO <sub>x</sub> (unless determined not to be a significant precursor) .....	100
VOC or ammonia (if determined to be significant precursors) .....	100
Pb: All NAA's .....	25

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

	Tons/year
Ozone (NO <sub>x</sub> , SO <sub>2</sub> or NO <sub>2</sub> ):	
All Maintenance Areas .....	100
Ozone (VOC's):	
Maintenance areas inside an ozone transport region .....	50
Maintenance areas outside an ozone transport region .....	100
Carbon monoxide: All Maintenance Areas .....	100
PM-10: All Maintenance Areas .....	100
PM <sub>2.5</sub> :	
Direct emissions .....	100
SO <sub>2</sub> .....	100
NO <sub>x</sub> (unless determined not to be a significant precursor) .....	100
VOC or ammonia (if determined to be significant precursors) .....	100
Pb: All Maintenance Areas .....	25



\* \* \* \* \*

**PART 93—[AMENDED]**

■ 4. The authority citation for part 93 continues to read as follows:

Authority: 21 U.S.C. 101; 42 U.S.C. 7401–7671q.

**Subpart B—[Amended]**

■ 5. Section 93.152 is amended by removing the “; and” at the end of paragraph (1) and adding a period in its place and adding paragraph (3) to definition of “Precursors of criteria pollutant” to read as follows:

**§ 93.152 Definitions.**

\* \* \* \* \*

*Precursors of a criteria pollutant are:*

\* \* \* \* \*

(3) For PM<sub>2.5</sub>:

(i) Sulfur dioxide (SO<sub>2</sub>) in all PM<sub>2.5</sub> nonattainment and maintenance areas,

(ii) Nitrogen oxides in all PM<sub>2.5</sub> nonattainment and maintenance areas unless both the State and EPA determine that it is not a significant precursor, and

(iii) Volatile organic compounds (VOC) and ammonia (NH<sub>3</sub>) only in PM<sub>2.5</sub> nonattainment or maintenance areas where either the State or EPA determines that they are significant precursors.

\* \* \* \* \*

■ 6. Section 93.153 is amended by revising paragraph (b) to read as follows:

**§ 93.153 Applicability.**

\* \* \* \* \*

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAA's):

	Tons/year
Ozone (VOC's or NO <sub>x</sub> ):	
Serious NAA's .....	50
Severe NAA's .....	25
Extreme NAA's .....	10
Other ozone NAA's outside an ozone transport region .....	100
Other ozone NAA's inside an ozone transport region:	
VOC .....	50
NO <sub>x</sub> .....	100
Carbon monoxide: All NAA's .....	100

	Tons/year
SO <sub>2</sub> or NO <sub>2</sub> : All NAA's .....	100
PM-10:	
Moderate NAA's .....	100
Serious NAA's .....	70
PM <sub>2.5</sub> :	
Direct emissions .....	100
SO <sub>2</sub> .....	100
NO <sub>x</sub> (unless determined not to be a significant precursor) .....	100
VOC or ammonia (if determined to be significant precursors) ..	100
Pb: All NAA's .....	25

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

	Tons/year
Ozone (NO <sub>x</sub> , SO <sub>2</sub> or NO <sub>2</sub> ):	
All Maintenance Areas .....	100
Ozone (VOC's):	
Maintenance areas inside an ozone transport region .....	50
Maintenance areas outside an ozone transport region .....	100
Carbon monoxide: All Maintenance Areas .....	100
PM-10: All Maintenance Areas ....	100
PM <sub>2.5</sub> :	
Direct emissions .....	100
SO <sub>2</sub> .....	100
NO <sub>x</sub> (unless determined not to be a significant precursor) .....	100
VOC or ammonia (if determined to be significant precursors) ..	100
Pb: All Maintenance Areas .....	25

\* \* \* \* \*

[FR Doc. E6-11241 Filed 7-14-06; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 174**

[EPA-HQ-OPP-2006-0554; FRL-8076-5]

**Bacillus Thuringiensis Cry1A.105 Protein and the Genetic Material Necessary for Its Production in Corn in or on All Corn Commodities; Temporary Exemption From the Requirement of a Tolerance**

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

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes a temporary exemption from the requirement of a tolerance for residues of the *Bacillus Thuringiensis* Cry1A.105 protein and the genetic material necessary for its production in corn on field corn, sweet corn, and popcorn when applied/used as a plant-incorporated protectant. Monsanto Company submitted a petition to EPA

under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting the temporary/tolerance exemption. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus Thuringiensis* Cry1A.105 protein and the genetic material necessary for its production in corn. The temporary tolerance exemption will expire on June 30, 2009.

**DATES:** This regulation is effective July 17, 2006. Objections and requests for hearings must be received on or before September 15, 2006, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2006-0554. All documents in the docket are listed in the index for the docket. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. The 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:** Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-8715; e-mail address: [mendelsohn.mike@epa.gov](mailto:mendelsohn.mike@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)