

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 63**

[FRL-7229-4]

RIN 2060-AE44

National Emission Standards for Hazardous Air Pollutants From Phosphoric Acid Manufacturing Plants and Phosphate Fertilizers Production Plants**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule; amendment.

SUMMARY: The EPA received adverse comment on the direct final action published on December 17, 2001 (66 FR 65072) to amend the national emission standards for hazardous air pollutants from phosphoric acid manufacturing plants and phosphate fertilizers production plants. We stated in that direct final action that, if we received adverse comment by January 16, 2002, we would publish a timely withdrawal in the **Federal Register**. We, however, did not publish the withdrawal prior to the February 15, 2002 effective date of the direct final rule as we did not receive the comment until February 12, 2002. (As explained further below, the comment was dated within the time period specified for submitting comments, and we assume that our late receipt of the comment resulted from problems with mail delivery in the Washington, DC area in the aftermath of the events of September 11, 2001.) In this action, we are removing one of the amendments (an emission limit) that was published in the December 17, 2001 direct final rule for phosphoric acid manufacturing plants and reinstating the corresponding emission limit in existence prior to the effective date of the direct final rule. We will address the adverse comment in a subsequent final action based on the parallel proposal also published on December 17, 2001. Notice of that final action should be published in the **Federal Register** in the very near future.

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making this rule final without notice and comment procedures because under the terms of the December 17,

2001 direct final action, this amendment to the national emission standards for phosphoric acid manufacturing plants should not have occurred. Thus, notice and comment are contrary to the public interest and unnecessary. We find that the circumstances described constitute good cause under 5 U.S.C. 553(b)(3)(B) and 553(d)(3) which authorizes an agency to make a rule immediately effective where it finds that there is good cause for doing so.

EFFECTIVE DATE: June 12, 2002.

ADDRESSES: Docket No. A-94-02, containing information relevant to the direct final action being withdrawn, is available for public inspection between 8:00 a.m. and 5:30 p.m., Monday through Friday (except for legal holidays) at the following address: Air and Radiation Docket and Information Center (6102), U.S. EPA, 401 M Street, SW., Room M-1500, Waterside Mall (ground floor), Washington, DC 20460 or by phoning the Air Docket Office at (202) 260-7548. Refer to Docket No. A-94-02. The Docket Office may charge a reasonable fee for copying docket materials.

FOR FURTHER INFORMATION CONTACT:

Tanya Medley, Environmental Protection Agency, Office of Air Quality Planning and Standards, at (919) 541-5422, e-mail: medley.tanya@epa.gov, facsimile (919) 541-5600.

SUPPLEMENTARY INFORMATION: On June 10, 1999 (64 FR 31358), we published the final national emission standards for hazardous air pollutants (NESHAP) for phosphoric acid manufacturing plants (40 CFR 63, subpart AA) and the NESHAP for phosphate fertilizers production plants (40 CFR 63, subpart BB). Subsequent to that publication, The Fertilizer Institute (TFI) filed a petition with the United States Court of Appeals for the District of Columbia Circuit challenging several aspects of the NESHAP for phosphoric acid manufacturing plants and phosphate fertilizers production plants.

The EPA entered into discussions with TFI on their issues and reached a Settlement Agreement on June 26, 2001. The NESHAP for phosphoric acid manufacturing plants and phosphate fertilizers production plants were subsequently amended to clarify our intent regarding the daily averaging of monitored operating parameters of air pollution control devices and the establishment of baseline average values for the monitored parameters; and to revise the particulate matter emission limit for phosphate rock calciners subject to the NESHAP for phosphoric acid manufacturing plants.

These amendments were accomplished through a direct final action (66 FR 65072) and a parallel proposal (66 FR 65079) published in the **Federal Register** on December 17, 2001.

We stated in the direct final action that if we received adverse comment by January 16, 2002, we would publish a withdrawal in the **Federal Register** that this direct final rule will not take effect. We received one adverse comment that addressed only the revised emission limit for particulate matter emissions from phosphate rock calciners that are subject to the NESHAP for phosphoric acid manufacturing plants. This comment letter was dated January 11, 2002, but EPA's Air Docket marked the letter as being received on February 12, 2002. For purposes of today's action, we assume that the comment was received after the official close of the comment period due to continuing delays in U.S. mail delivery to all EPA offices in Washington DC, including EPA's Air Docket, due to concerns about possible contamination. As a result, we are rescinding the change to the emission limit in 40 CFR 63.602 (d) established by the direct final rule and reinstating the emission limit in existence prior to the effective date of the direct final rule. That will give us an opportunity to further evaluate the merits of the comment and respond to it in the context of final action on the parallel proposal that was published along with the direct final rule.

Because we received an adverse comment on one of the amendments to the NESHAP for phosphoric acid manufacturing plants, the direct final rule effecting that amendment, by its terms, should not have become effective. We, therefore, are hereby removing that amendment in today's action, and reinstating the corresponding provision previously in existence.

This removal action is simply a ministerial correction of one provision (i.e. the revised emission limit for particulate emissions from phosphate rock calciners) in the prior direct final rulemaking, which by its terms should not have become effective because a party commented adversely on this amendment to the NESHAP for phosphoric acid manufacturing plants. Therefore, we are invoking the good cause exception under the APA, 5 U.S.C. 553(b)(3)(B) because we believe that notice-and-comment rulemaking of this removal action is contrary to the public interest and unnecessary. This removal action merely restores the regulatory text for the cited provision that existed prior to the direct final rule. We stated in the December 17, 2001

direct final action that should adverse comment be received, the rule would not take effect. The rule took effect because we did not publish a timely withdrawal in the **Federal Register** prior to the rule's effective date due to our late receipt of the adverse comment. It would be contrary to the public interest to keep the cited provision of the direct final rule in effect when it should not have taken effect in the first instance due to our receipt of an adverse comment.

Additionally, further notice-and-comment on this action is unnecessary because we are merely restoring the regulatory text of the provision as it existed prior to the amendment. We, therefore, find that there is good cause for making this action final without opportunity for notice and comment.

For the reasons described in the preceding paragraph, we find there is good cause, in accordance with the APA, 5 U.S.C. 553(d)(3), for the removal of the amended emission limit and reinstatement of the preexisting emission limit to become effective upon publication.

We will address the single public comment in a subsequent final action on the parallel proposed rule amendment.

Administrative Requirements

Under Executive Order 12866, Regulatory Planning and Review, (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is, therefore, not subject to review by the Office of Management and Budget. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, does not apply to this action. Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) or sections 202 and 205 of

the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). 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 EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This rule is not subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use because it is not a significant regulatory action under Executive Order 12866. This rule does not have any federalism implications under Executive Order 13132, Federalism. The Paper Reduction Act, and the National Technology Transfer and Advancement Act do not apply here. 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 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, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of June 12,

2002. 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).

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 5, 2002.

Christine Todd Whitman,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended to read as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

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

2. Section 63.602 is amended by revising paragraph (d) to read as follows:

§ 63.602 Standards for existing sources.

* * * * *

(d) *Phosphate rock calciner.* On or after the date on which the performance test required to be conducted by §§ 63.7 and 63.606 is required to be completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected source any gases which contain particulate matter in excess of 0.1810 gram per dry standard cubic meter (g/dscm)(0.060 grains per dry standard cubic foot (gr/dscf)).

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