MARICOPA ASSOCIATION of GOVERNMENTS

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March 19, 2015

TO: Members of the MAG Air Quality Technical Advisory Committee

FROM: William Mattingly, Peoria, Chair

SUBJECT: MEETING NOTIFICATION AND TRANSMITTAL OF TENTATIVE AGENDA

Thursday, March 26, 2015 - 1:30 p.m.
MAG Office, Suite 200 - Saguaro Room
302 North 1st Avenue, Phoenix

A meeting of the MAG Air Quality Technical Advisory Committee has been scheduled for the time and place noted above. Members of the Air Quality Technical Advisory Committee may attend the meeting either in person, by videoconference or by telephone conference call. Those attending by videoconference must notify the MAG site three business days prior to the meeting. If you have any questions regarding the meeting, please contact Chair Mattingly or Lindy Bauer at 602-254-6300.

Please park in the garage underneath the building, bring your ticket, and parking will be validated. For those using transit, Valley Metro/Regional Public Transportation Authority will provide transit tickets for your trip. For those using bicycles, please lock your bicycle in the bike rack in the garage.

In 1996, the Regional Council approved a simple majority quorum for all MAG advisory committees. If the MAG Air Quality Technical Advisory Committee does not meet the quorum requirement, members who arrived at the meeting will be instructed a legal meeting cannot occur and subsequently be dismissed. Your attendance at the meeting is strongly encouraged. If you are unable to attend the meeting, please make arrangements for a proxy from your entity to represent you.

Pursuant to Title II of the Americans with Disabilities Act (ADA), MAG does not discriminate on the basis of disability in admissions to or participation in its public meetings. Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting Jason Stephens at the MAG office. Requests should be made as early as possible to allow time to arrange the accommodation.

# TENTATIVE AGENDA

| | COMMITTEE ACTION REQUESTED |
|---|---|
| 1. Call to Order | |
| 2. Call to the Audience<br><br>An opportunity will be provided to members of the public to address the Air Quality Technical Advisory Committee on items not scheduled on the agenda that fall under the jurisdiction of MAG, or on items on the agenda for discussion but not for action. Members of the public will be requested not to exceed a three minute time period for their comments. A total of 15 minutes will be provided for the Call to the Audience agenda item, unless the Air Quality Technical Advisory Committee requests an exception to this limit. Please note that those wishing to comment on action agenda items will be given an opportunity at the time the item is heard. | 2. For information. |
| 3. Approval of the January 22, 2015 Meeting Minutes | 3. Review and approve the January 22, 2015 meeting minutes. |
| 4. Update on the Arizona Center for Law in the Public Interest Lawsuit on the MAG 2012 Five Percent Plan for PM-10<br><br>On February 13, 2015, the Arizona Center for Law in the Public Interest submitted a reply brief in the lawsuit filed by the Center to challenge the Environmental Protection Agency (EPA) approval of the MAG 2012 Five Percent Plan for PM-10. The reply brief is in response to the EPA brief submitted on December 17, 2014 and the Arizona Department of Environmental Quality and MAG briefs submitted on December 31, 2014. Please refer to the enclosed material. | 4. For information and discussion. |

5. CMAQ Annual Report

In accordance with federal guidance, the 2014 Congestion Mitigation and Air Quality Improvement (CMAQ) Funds Annual Report describes how funds have been spent and the expected air quality benefits. The report was prepared by MAG and the Arizona Department of Transportation staff and includes projects for the Maricopa County nonattainment areas and PM-2.5 nonattainment areas in Pinal and Santa Cruz counties. The report is in the electronic format required by the Federal Highway Administration. Please refer to the enclosed material.

5. For information and discussion.

6. EPA Final State Implementation Plan Requirements Rule for the 2008 Ozone Standard (0.075 parts per million)

On March 6, 2015, EPA published a notice of final rulemaking that addresses a range of implementation requirements for the 2008 National Ambient Air Quality Standards for ozone. The attainment date for Marginal Areas has now been revised by EPA from December 31, 2015 to July 20, 2015, which impacts the Maricopa eight-hour ozone nonattainment area. On December 23, 2014, the U.S. Court of Appeals for the District of Columbia had issued a ruling that vacated EPA's extension of the attainment dates for the 2008 eight-hour ozone standard to the end of the calendar year. Please refer to the enclosed material.

6. For information and discussion.

7. Comments on the EPA Proposed Ozone Standards

On December 17, 2014, EPA published a proposed rule to strengthen the National Ambient Air Quality Standards for ozone. For the primary standard, EPA proposed a range of 0.065 to 0.070 parts per million (65 to 70 parts per billion). The current ozone standard established by EPA in 2008 is 0.075 parts per million.

7. For information and discussion.

The Arizona Legislature has been considering SCM 1014 to urge EPA to refrain from reducing the ozone concentration standard. SCM 1014 expresses concern that nine of the eleven counties in Arizona would be out of compliance if EPA reduced the standard to 70 parts per billion. At the national level, legislation has been prepared that would prohibit EPA from setting a more stringent standard until most of the country has complied with the 2008 standard. In addition, comments have been submitted by various entities in Arizona expressing concerns associated with reducing the ozone standard concentration, including comments submitted by the Arizona Department of Environmental Quality. Please refer to the enclosed material.

8. Proposed New Air Quality Project for the MAG FY 2016 Work Program

A new project for Air Quality Technical Assistance On-Call for $100,000 has been proposed for the MAG FY 2016 Unified Planning Work Program. In general, the project would be for consultant expertise in the following technical air quality areas: air quality modeling; air quality monitoring and meteorology; exceptional events; traffic surveys and emissions inventories; dirt road inventories and tracking progress made to pave dirt roads; statistical analysis of data; analysis of control measures; air quality plan preparation; CMAQ evaluation methodologies; and transportation conformity.

8. For information and discussion.

9. Call for Future Agenda Items

The next meeting of the Committee has been tentatively scheduled for **Thursday, April 23, 2015 at 1:30 p.m.** The Chair will invite the Committee members to suggest future agenda items.

9. For information and discussion.

MINUTES OF THE
MARICOPA ASSOCIATION OF GOVERNMENTS
AIR QUALITY TECHNICAL ADVISORY COMMITTEE MEETING

Thursday, January 22, 2015
MAG Office
Phoenix, Arizona

MEMBERS ATTENDING

* William Mattingly, Peoria, Chairman
Tim Conner, Scottsdale, Vice Chair
Paul Lopez for Drew Bryck, Avondale
John Minear, Buckeye
# Jim Weiss, Chandler
# Jamie McCullough, El Mirage
Jessica Koberna, Gilbert
# Sally Melling for Megan Sheldon, Glendale
* Cato Esquivel, Goodyear
# Kazi Haque, Maricopa
# Greg Edwards for Scott Bouchie, Mesa
Joe Giudice, Phoenix
# Antonio DeLaCruz, Surprise
Oddvar Tveit, Tempe
* Youngtown
Ramona Simpson, Queen Creek
* Walter Bouchard, American Lung Association of Arizona
Kristin Watt, Salt River Project
# Rebecca Hudson, Southwest Gas Corporation
Nancy Nesky for Ann Carlton, Arizona Public Service Company
# Gina Grey, Western States Petroleum Association
Amanda Luecker for Robert Forrest, Valley Metro/RPTA
* Dave Berry, Arizona Motor Transport Association
* Jeanette Fish, Maricopa County Farm Bureau
* Steve Trussell, Arizona Rock Products Association
* Claudia Whitehead, Greater Phoenix Chamber of Commerce
# Amanda McGennis, Associated General Contractors
* Spencer Kamps, Homebuilders Association of Central Arizona
# Mannie Carpenter, Valley Forward
* Kai Umeda, University of Arizona Cooperative Extension
Beverly Chenausky, Arizona Department of Transportation
* Arizona Department of Environmental Quality
* Environmental Protection Agency
Corky Martinkovic, Maricopa County Air Quality Department
Scott DiBiase, Pinal County
# Michelle Wilson, Arizona Department of Weights and Measures
# Ed Stillings, Federal Highway Administration
Judi Nelson, Arizona State University
Mangus Slinkey for Stan Belone, Salt River Pima-Maricopa Indian Community

*Members neither present nor represented by proxy.
#Participated via telephone conference call.
+Participated via video conference call.

OTHERS PRESENT

Lindy Bauer, Maricopa Association of Governments
Julie Hoffman, Maricopa Association of Governments
Matt Poppen, Maricopa Association of Governments
Kara Johnson, Maricopa Association of Governments
Dean Giles, Maricopa Association of Governments
Taejoo Shin, Maricopa Association of Governments
Adam Xia, Maricopa Association of Governments
Randy Sedlacek, Maricopa Association of Governments
Joe Gibbs, City of Phoenix
Sam Brown, City of Scottsdale
Timothy Franquist, Arizona Department of Environmental Quality
Bob Huhn, Maricopa County
Philip Loftis, Maricopa County Department of Transportation
Joonwon Joo, Arizona Department of Transportation

1. Call to Order

A meeting of the Maricopa Association of Governments (MAG) Air Quality Technical Advisory Committee (AQTAC) was conducted on January 22, 2015. Tim Conner, City of Scottsdale, Vice Chair, called the meeting to order at approximately 1:35 p.m. Greg Edwards, City of Mesa; Antonio DeLaCruz, City of Surprise; Jamie McCullough, City of El Mirage; Jim Weiss, City of Chandler; Gina Grey, Western States Petroleum Association; Rebecca Hudson, Southwest Gas; Kazi Haque, City of Maricopa; Amanda McGennis, Associated General Contractors; Sally Melling, City of Glendale; Michelle Wilson, Arizona Department of Weights and Measures; Ed Stillings, Federal Highway Administration; and Mannie Carpenter, Valley Forward attended the meeting via telephone conference call.

Lindy Bauer, Maricopa Association of Governments, stated that on January 12, 2015, the MAG Regional Council Executive Committee appointed Mr. Conner as the Vice Chair of the MAG Air Quality Technical Advisory Committee.

Acting Chair Conner indicated that copies of the handouts for the meeting are available. He noted for members attending through audio conference, the presentations for the meeting will be posted on the MAG website under Resources for the Committee agenda, whenever possible. If it is not possible to post them before the meeting, they will be posted after the meeting.

2. Call to the Audience

Acting Chair Conner stated that according to the MAG public comment process, members of the audience who wish to speak are requested to fill out comment cards, which are available on the tables adjacent to the doorways inside the meeting room. Citizens are asked not to exceed a three minute time period for their comments. Public comment is provided at the beginning of the meeting for nonagenda items that fall under the jurisdiction of MAG and nonaction agenda items. Acting Chair Conner noted that no public comment cards had been received.

3. Approval of the December 4, 2014 Meeting Minutes

The Committee reviewed the minutes from the December 4, 2014 meeting. Ms. McGennis requested that the minutes be changed to show her attendance at the meeting through telephone conference call. Ms. McGennis, moved and Joe Giudice, City of Phoenix, seconded and the motion to approve the December 4, 2014 meeting minutes, with the correction, carried unanimously.

4. Update on the Arizona Center for Law in the Public Interest Lawsuit on the MAG 2012 Five Percent Plan for PM-10

Ms. Bauer provided an update on the Arizona Center for Law in the Public Interest (ACLPI) lawsuit on the MAG 2012 Five Percent Plan for PM-10. She stated that MAG had filed a late motion to intervene on October 23, 2014. On October 29, 2014, ACLPI filed an opposition to the MAG motion to intervene. The MAG Washington, D. C. legal counsel noted that the State was in support of the MAG motion to intervene while the Environmental Protection Agency (EPA) was neutral. The MAG Washington, D.C. legal counsel filed a reply brief to the ACLPI opposition on November 7, 2014. On December 9, 2014, the MAG Washington, D. C. legal

counsel informed MAG that the U.S. Ninth Circuit Court of Appeals would allow MAG to submit an intervenor brief for consideration by December 31, 2014. Ms. Bauer stated that the intervenor brief was submitted. The court will review the MAG intervenor brief and decide whether to let it stand as an intervenor brief or if it will become an amicus brief.

Ms. Bauer indicated that the Arizona Center for Law in the Public Interest challenged the EPA approval of the MAG 2012 Five Percent Plan for PM-10. She noted that the briefs may be accessed through links in the agenda. Ms. Bauer summarized the briefs. She stated that the EPA brief, that was submitted December 17, 2014, was thorough in addressing the following points: that EPA had acted reasonably in approving the MAG 2012 Five Percent Plan for PM-10 and the Exceptional Events; the plan met all of the requirements; the contingency measures were appropriate; while the contingency measures were implemented early, this has occurred in the past; and that EPA has expertise in Exceptional Events and the documentation and data were thorough. In addition, the brief included that EPA should have deference since EPA has experts on these issues.

Ms. Bauer discussed the State brief that was also due December 31, 2014. She indicated that the Arizona Department of Environmental Quality (ADEQ) provided history and pointed out that this is the sixth petition filed on PM-10 and that a sue and settle approach is not appropriate and does not reflect the contents of the air quality plans. The brief also mentioned that the EPA Exceptional Events Rule is time barred for a legal challenge. ADEQ also stated within the brief that agriculture is a small portion of the emission inventory and that best available control measures and most stringent control measures do not need to be updated. The brief also included support for the early implementation of continency measures.

Ms. Bauer stated that in the MAG brief, the MAG Washington, D. C. legal counsel emphasized the development of the plan by the MAG member agencies and the State. The brief also included: the thoroughness of the Exceptional Events data; the Clean Air Act does not specify or limit the number of Exceptional Events that EPA is allowed to approve; there is no need to update the best available control measures and most stringent control measures; and that the contingency measures were appropriate and had continuous benefits. The Washington, D. C. legal counsel noted in the brief that the ACLPI brief asks the court to find that the EPA approval was an abuse of discretion and contrary to law, however they do not identify a remedy. The MAG brief requests that the court uphold the EPA approval of the successful plan and deny the petition for review.

Ms. Bauer stated that the MAG Washington, D. C. legal counsel has indicated that they could not provide a timeframe on when the court will decide if the MAG brief is an intervenor brief or an amicus brief. The MAG Washington, D. C. legal counsel could also not provide a specific timeframe on when the lawsuit would come before the court for review or be resolved, but indicated perhaps in the Fall or in a year. Ms. Bauer stated that MAG will keep the Committee updated.

John Minear, City of Buckeye, inquired about the benefit of an intervenor brief compared to an amicus brief. Ms. Bauer replied that the MAG Washington, D. C. legal counsel has indicated that an intervenor becomes a party to the lawsuit and has a seat at the table. She stated that with an amicus brief, one is a friend of the court and does not become a party to the lawsuit.

5. Final Designations for the 2012 PM-2.5 Standard

Ms. Bauer presented the final designations for the 2012 PM-2.5 standard. On December 18, 2014, EPA signed a notice for the final designations for the 2012 PM-2.5 standard for fine particle pollution. The letter from EPA indicated that no area within the State of Arizona violates the 2012 standard or contributes to a nearby violation of the standard. Ms. Bauer stated that EPA designated all of Arizona as unclassifiable/attainment for PM-2.5.

Nancy Nesky, Arizona Public Service, asked if MAG would be submitting a request to EPA for review of the 2012-2014 data. Ms. Bauer responded that MAG will not be submitting a request.

6. Update on the Winter Holiday No Burn Campaign

Bob Huhn, Maricopa County, provided an update on the Winter Holiday No Burn Campaign. He stated that the Committee and each of the agencies represented on the Committee had a part in the success of the No Burn Campaign. Mr. Huhn indicated that there were no exceedances on Christmas Eve, Christmas Day, New Years Eve, and New Years Day. It has been more than a decade since the region has not exceeded the PM-2.5 federal health standard on those four days. He attributed the success of this accomplishment to regional collaboration between MAG member agencies, organizations, and partners of the No Burn Campaign.

Mr. Huhn displayed the PM-2.5 concentration levels for Christmas Eve, Christmas Day, New Years Eve, and New Years Day. He noted that the concentrations are down from previous years, especially last holiday season. Last year, one monitor recorded the highest PM-2.5 concentration level in regional history, however that monitor did not exceed the standard this past holiday season.

Mr. Huhn discussed the Campaign outreach. The goal for Campaign outreach was to: reach more people; gain more partners; and educate more people. Mr. Huhn stated that these goals were reached this year, the Campaign had approximately 93 partners.

Mr. Huhn reported on the success of the website. He mentioned that member agencies and different organizations used their own websites too, however the Maricopa County website had approximately 128,000 page views from December 1st to January 1st which is a 26 percent increase from last year. From December 21st to January 1st, there were over 77,000 views which means that approximately 60 percent of the views were during the peak Campaign time. Mr. Huhn noted that 43 percent of the website visitors were new viewers which is a great success for the Campaign. Approximately 61 percent of viewers were between the ages of 18 to 34; approximately 76 percent for users between the ages of 18 to 44.

Mr. Huhn stated that the mobile application had over 2,300 downloads. He indicated that this number is up from last year. The days that had the largest number of downloads were December 23, 2014 and December 24, 2014.

Mr. Huhn discussed social media use in the Campaign. He indicated that a Channel 3 Facebook re-post of the coughing camel public safety announcement (PSA) had over 20,000 views. Mr. Huhn stated that the Campaign reached more people thanks to the Channel 3 post and everyone who posted about the Campaign on social media. He reported that the Campaign reached

10,768 people on Facebook between December 1st and January 1st in which the post with the highest reach was 1,540 people and 21 shares. There was also a 46 percent increase in Facebook likes during this time. In addition to Facebook, the Campaign Twitter page had a 37 percent increase in followers and 67 re-tweets. Mr. Huhn noted that these are very successful numbers for social media.

Mr. Huhn reported on the Campaign radio spots. He noted that spots were played on 99.9 KEZ, which is the highest rated station during the holiday season. The Campaign spots were also played on many other stations that range in demographics: KTAR News 92.3; The Peak 98.7; KMLE Country 107.9; 101.5 Jamz; 550 KFYI; 94.5 Kool FM; 95.5 KYOT; KZZP 104.7; Mix 96.9; KNIX 102.5; Arizona Sports 620; and KOY AM1230. When surveyed, the most reported spots were heard on KTAR News. The spots on KTAR News were obtained for the Campaign from an anonymous donor. KTAR ran a total of 105 spots during prime time between Christmas Eve and New Years Day. In addition, more than 80 PSAs were run on KTAR Sports and The Peak.

Mr. Huhn stated that billboards are also part of the Campaign outreach. He stated that billboards purchased by ADEQ, the Clean Air Council, or other organizations were matched with another billboard by CBS TV Network who also donated extra billboards to the Campaign. The billboards purchased by ADEQ were spread across the region and billboards purchased by the Clean Air Council and other entities were focused in areas that generally have the highest PM-2.5 concentrations - west and south Phoenix. Mr. Huhn noted that one sign on 7th Street provided a lot of exposure for the Campaign due to visibility on parade routes during the holiday season. Additionally, the Arizona Department of Transportation posted High Pollution Advisories and No Burn Day messages on freeway traffic signs.

Mr. Huhn noted that No Burn Day magnets were also placed on Maricopa County Air Quality vehicles. He added that television stations liked to record the images of the magnets on the vehicles during interviews.

Mr. Huhn discussed new partners of the Campaign. The Bureau of Land Management displayed Campaign information in parks and their offices. Ride Now also placed Campaign information on their website and in offices and dealerships. Additionally, the Phoenix Suns provided space on their game billboard and ran spots before and during the games in the month of December. Mr. Huhn thanked the Grocers Association, as well as, Bashas'. Bashas' published Campaign messaging in their weekly mailing and also had signage by the cash registers and wood. Additionally, he thanked Fry's, Albertsons, AJ's Fine Foods, and Food City. In addition, Walmart placed Campaign signs at their customer service desk in all of their stores valley-wide.

Mr. Huhn reported on the Spanish outreach which was vital. He explained that 196 spots were purchased on Univision Radio using a settlement. In addition, a 30 minute community affairs show was recorded that played 1-2 times a day on weekdays and 2-3 times on the weekend on the stations.

Mr. Huhn stated that La Voz was a big partner of the Campaign. La Voz published quarter page Campaign advertisements in their newspaper for a week during the holiday season. La Voz also published one opinion editorial per week in the month of December. The editorials featured the

following topics: No Burn Campaign; health effects of PM-2.5; No Burn Day tips and information; and Campaign tools such as the website and mobile application. La Voz also provided two full size advertisements in the television portion of La Voz Magazine. Mr. Huhn added that La Voz distributed door hangers, both in English and Spanish, within a mile radius of air quality monitors in west and south Phoenix. He noted that there was a lot of response and it was a great benefit.

Mr. Huhn reported the post-Campaign survey results. He stated that 92 percent of the people surveyed indicated that they were aware of the No Burn Day Campaign which is up from 82 percent last year. Mr. Huhn added that 62 percent of wood-burning households familiar with the Campaign were aware that Christmas Eve was designated as a No Burn Day, while slightly lower percentages were aware that Christmas Day (53 percent), New Years Eve (59 percent), and New Years Day (50 percent) was similarly designated. Each of these results is up from last year. In addition, eight percent or less of wood-burning households familiar with the Campaign used their wood-burning fireplace or outdoor wood-burning appliance on each of the four No Burn Days tested, thus approximately 92 percent of the individuals surveyed did not burn wood.

Mr. Huhn presented the No Burn Day Campaign partners. He thanked the partners for helping to make this year's Campaign successful. Mr. Huhn mentioned that the rainy weather on New Years Eve also aided in the success. Despite the weather, the decrease in wood burning during the holiday season aided to the success as well. It was also reported that there was great success in reaching the audience through weather forecasts on news stations. Many news stations mentioned the No Burn Days or provided information on the subject during weather forecasts. He discussed the outreach to the meterologists, which contributed to this aspect of the Campaign.

Mr. Huhn stated that an exceedance of the PM-2.5 standard did occur on January 4, 2015. He emphasized the importance of keeping air quality in mind all year long.

Ms. Bauer thanked Maricopa County, Arizona Department of Environmental Quality, and everyone who partnered with the Campaign to make it successful. Mr. Huhn commented that this was a regional cooperation.

Ms. McGennis commented on how far the region has come together with regard to improving air quality. She added that it should send a message to EPA on how the region is committed to working together to improve air quality. Ms. McGennis noted that it says a lot for our region. Mr. Huhn added that EPA has commented on the level of regional collaboration with regard to the Campaign.

7. Court Ruling on Ozone Attainment Dates and Transportation Conformity

Ms. Bauer presented the court ruling on ozone attainment dates and transportation conformity. On December 23, 2014, the U.S. Court of Appeals for the District of Columbia issued a ruling that vacated EPA's extension of the attainment dates for the 2008 ozone standard of 0.075 parts per million. The MAG region, classified as a Marginal Nonattainment Area, has had three years from the effective date of designation to reach attainment. EPA designated the MAG region Marginal on May 21, 2012 which became effective June 20, 2012. The region would have an attainment date of July 20, 2015, however EPA extended the attainment date through December

31, 2015. The court has now vacated the extended attainment dates. Ms. Bauer noted that a July 20, 2015 attainment date would be in the middle of an ozone season.

Ms. Bauer stated that the court also ruled that EPA should not have revoked the 1997 ozone standard with respect to the transportation conformity requirements. She explained that transportation conformity requirements apply to nonattainment and maintenance areas. EPA revoked the 1997 ozone standard transportation conformity requirements for the 1997 ozone standard nonattainment and maintenance areas that were initially designated as being in attainment of the 2008 ozone standard. Ms. Bauer indicated that the Court disagreed, which impacts approximately 70 areas around the United States. She stated that MAG is not in this category. The region was designated nonattainment for the 2008 ozone standard. Additionally, Ms. Bauer noted that MAG has approved motor vehicle emission budgets in the MAG 2007 Eight-Hour Ozone Plan and the MAG 2009 Eight-Hour Ozone Redesignation Request and Maintenance Plan that are for the 1997 ozone standard. Both plans have been approved by EPA. She indicated that MAG currently demonstrates conformity against both of the 1997 ozone standard budgets. Ms. Bauer noted that this should not impact the MAG region, however EPA is evaluating the implications of the court ruling. She stated that updates will be provided to the Committee.

8. Call for Future Agenda Items

Acting Chair Conner requested suggestions for future agenda items. He indicated that the next meeting of the Committee has been scheduled for Thursday, February 26, 2015 at 1:30 p.m. With no further comments, the meeting was adjourned at approximately 2:15 p.m.

Agenda Item #4

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

Case No.:14-72327

**SANDRA L. BAHR,** and **DAVID MATUSOW**,

Petitioners,

**v.**

**GINA McCARTHY,** Administrator United States Environmental Protection Agency; **JARED BLUMENFELD,** Regional Administrator, EPA Region IX; and **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**,

Respondents.

**ON PETITION FOR REVIEW OF AGENCY ACTION**

# REPLY BRIEF FOR PETITIONERS

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## INTRODUCTION

There is, by necessity, a tension between actual air quality—the quality of the air that the public breathes—and air quality modeling that permeates the air quality planning process. While modeling is a necessary part of any air quality planning, the fact is that Arizona's track record on modeling is really quite poor. Every state implementation plan ("SIP") that the State has submitted and EPA has approved over the years for the Maricopa County PM-10 Nonattainment Area ("Area") has demonstrated "attainment" by the relevant deadline. And yet, the Area's air quality monitors continue to exceed the NAAQS and in recent years, Phoenix area residents have seen a surge in massive dust storms.

In their briefs both EPA and the State defend EPA's approval of the 2012 Five Percent Plan based on the fact that the State is able to demonstrate "attainment" by December 2012. But the reality is that the State's "attainment" comes with an asterisk, because the State can only demonstrate attainment by excluding 135 exceedances that occurred over 25 days in 2011 and 2012. Moreover, the monitors have continued to record exceedances during 2013 and 2014, which once again the State claims are "exceptional events" and seeks to exclude from the data.

If only it was that easy for Area residents to exclude the dust from their lungs. Because they have to deal with the actual air quality, not what the State

demonstrates on paper, every year they are regularly subjected to the risk of Valley Fever[1], asthma attacks, and traffic accidents caused by the huge dust storms that descend on the Phoenix metropolitan area. Instead of ignoring this regular threat to public health by excluding the data, the State and proposed Respondent-Intervenor Maricopa Association of Governments ("MAG") should be focused on addressing the problem so that the air that the public breathes is as clean as the "attainment" demonstration they submitted to EPA. And instead of concurring in the State's efforts to ignore the exceedances caused by these high wind events and interpreting the Clean Air Act ("CAA") to allow the State to avoid its obligation to implement best available control measures ("BACM") and control out of area sources, EPA should be insisting that the State do everything it can to eliminate, or at least mitigate the impact of these massive dust storms.

In its Answering Brief, the State disparages the Petitioners' long history of seeking recourse from the courts to ensure that the State and EPA comply with the requirements of the Clean Air Act ("CAA"). State Brief at 13-14. However, it is Petitioners' diligence that is responsible for much of the progress that the Area has

[1] Valley Fever (coccidioidomycosis) is a disease caused by a fungus, Coccidiodes, that lives in the soil in the Southwest. *See* Sprigg, W.A., et al. Regional dust storm modeling for health services: The case of valley fever. Aeolian Research (2014), http://dx.doi.org/10.1016/j.aeolia.2014.03.001 (last accessed 2/12/2015).

demonstrated over the past two decades.[2] Since Arizona has historically resisted doing even the bare minimum required under the Act unless it is under threat of sanctions, citizen suits have been critical to ensuring compliance.

And that is exactly what Congress intended. The CAA specifically authorizes enforcement by citizens. "[T]he citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." *Natural Resources Defense Council, Inc. v. Train,* 510 F. 2d 692, 700 (D.C. App. 1975). As the Senate Committee responsible for drafting the provision explained, "[t]he courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service. . . ." Senate Committee on Public Works, S. Rep. No. 91-116, 91st Cong., 2d Sess. at 37 (1990); *see also, Friends of the Earth v. Carey,* 535 F. 2d 165, 172 (2d. Cir. 1976)("In enacting § 304 of the 1970 Amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests."). Thus, as the plain language of the statute and its legislative history make clear, Congress intended that where, as here, EPA

[2] Arizona citizens, represented by Petitioners' counsel, have also had to bring district court actions against State officials to compel them to comply with SIP provisions. *See Paisley v. Darwin*, 2011 U.S. Dist. LEXIS 99571, 74 Env't Rep. Cas. (BNA) 1717 (D. Ariz. 2011) and *Sweat v. Hull,* 200 F. Supp. 2d. 1162 (D. Ariz. 2001).

is failing to enforce the provisions of the CAA, Petitions like this one are not only allowed, they are encouraged.

## ARGUMENT

### I. EPA's Concurrence in the State's Request to Exclude 135 Exceedances that Occurred Over Twenty Five Days Within a Two-Year Period As "Exceptional Events" Was Contrary to the Plain Language of the Statute, the Exceptional Events Rule and EPA's Own Guidance.

In concurring in the state's request to exclude the 135 exceedances that occurred over 25 days in 2011 and 2012, EPA acted contrary to the clear intent of the CAA, as reflected in the language of the statute, the Exceptional Events Rule (EER) and EPA's own guidance. As set forth more fully below, the EPA disregarded the statute's admonition that consideration of the public health should be the highest priority and that the exception was only available if an event was not reasonably controllable or preventable.

#### A. In Their Attempts to Minimize the Significance of the 135 Exceedances, EPA and the State Ignore Congress' Admonition that Public Health is the Highest Priority.

In their attempts to minimize the significance of the 135 exceedances, EPA, the State, and MAG all ignore the significant health risks that these events represent. Congress made it clear that in exercising its authority under Section 319, EPA was to follow the principle that "*protection of public health is the highest priority*." 42 U.S.C. § 7619(b)(3)(A)(i) (emphasis added). However, instead of acknowledging the significant health and safety risks that these recurring

dust storms pose to the Phoenix area residents, EPA attempts to minimize the events.

For example, EPA focuses on the fact that the 135 exceedances at issue in this Petition all occurred in 2011 and 2012 and that there was only one exceedance in 2010. EPA Brief at 31. However, EPA ignores the fact that similar high wind events have been occurring with regularity since at least 2006, and have continued to occur up to the present. The State has submitted EER demonstrations for 30 exceedances over 6 days in 2013, and during the pendency of this Petition, has submitted EER demonstrations for 24 exceedances over 6 days in 2014.[3]

Thus, when the 2011 & 2012 exceedances are considered in the appropriate historic context, it is apparent that 2010, with its single exceedance, is, in fact, the exceptional year. [4]

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[3] See http://www.azdeq.gov/environ/air/plan/nee.html (last accessed 2/7/2015). According to the Arizona Department of Environmental Quality's website, the state submitted EER demonstrations for May 11, 2014 (12 exceedances), July 3, 2014 (3 exceedances), July 8, 2014 (1 exceedance), and July 25, 2014 (6 exceedances) on October 8, 2014 and EER demonstrations for September 4, 2014 (1 exceedance) and September 6, 2014 (1 exceedance) on January 8, 2015.

[4] The chart Petitioners included in their Opening Brief at p. 36 is reproduced at the bottom of the following page with the 2014 exceedances included.

*Footnote continued on next page.*

The State also attempts to downplay the significance of the exceedances by arguing that the 135 exceedances that occurred in 2011 and 2012 are only .86% of possible exceedances—that is an exceedance at every monitor every single day of the three year period. State's Brief at 10. This attempt to place the 135 exceedances in the context of a highly improbable worst-case scenario is not only ridiculous, it is not particularly persuasive when one considers the fact that in order to violate the current NAAQS a single monitor need only record four exceedances over a three year period. Thus, a violation occurs with only .025% of all possible exceedances.

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**Exceedances Flagged As Exceptional Events by Month**

Monitors Reporting Exceedances (number of days exceedances reported)

| Year | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sept | Oct | Nov | Dec |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **2014** | | | | | 12(1) | | 10(3) | | 2(2) | | | |
| **2013** | | | | 12(1) | | 10(1) | 2(1) | 5(2) | | 1 | | |
| **2012** | | 1 | | | | 20(2) | 4(1) | 4(2) | 1 | | | |
| **2011** | | 2(1) | | | | | 36(6) | 30(6) | 18(3) | 2(1) | 17(1) | |
| **2010** | | | | | | | | | | | | |
| **2009** | | | 2(2) | 1 | | | 15(2) | | 2(1) | 5(1) | | |
| **2008** | | | 2(2) | 1 | 1 | 3(1) | 2(2) | | | 2(2) | 4(2) | |
| **2007** | | | 1 | 2(1) | 1 | 2(1) | 6(1) | 4(3) | | 2(2) | 2(1) | |
| **2006** | | | 3(1) | 12(2) | 1 | 1 | | | | | | |
| **Total** | | 3(2) | 8(6) | 28(6) | 15(4) | 36(6) | 65(13) | 53(16) | 22(7) | 12(7) | 23(4) | |

The fact that the 135 exceedances excluded by the State exceed that minimum by 131 only enforces how serious and significant these events are to the public health, and how irresponsible it is for both the State and EPA to agree to ignore them by excluding them from the data.

### B. EPA's Guidance Regarding Reasonable Controls and BACM is Clearly Derived from the "Not Reasonably Controllable or Preventable" Requirement Set Forth in Both the CAA and the EER.

EPA's Interim Guidance sets forth a reasonable interpretation of both the exceptional events provision in the CAA and the EER promulgated pursuant to that provision. Unfortunately, in its effort to defend its decision to approve the 2012 Five Percent Plan, EPA seeks to distance itself from and undermine its own interpretation of the law.

In their Briefs, EPA and the State both assert that Petitioners' arguments regarding the role that BACM plays in evaluating the State's EER submissions are "without statutory basis." EPA Brief at 42-43; State Brief at 21. This attempt to divorce the evaluation of exceptional events from BACM, however, ignores that the statute and rule both define an exceptional event as an event that is "not reasonably controllable or preventable." *See* 42 U.S.C. § 7619(b)(1)(A) ("exceptional event" as an event that "(i) affects air quality; (ii) is not *reasonably controllable or preventable*; (iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and (iv) is determined

by the Administrator . . . to be an exceptional event." )(emphasis added) and 40 C.F.R. § 50.1(j) ("'*Exceptional event* means an event that affects air quality, *is not reasonably controllable or preventable*, is an event caused by human activity that is unlikely to recur at a particular location or a natural event, …")(emphasis added). Thus the statute itself raises the issue of "reasonable controls" in evaluating whether an event qualifies as an "exceptional event."

However, because the statute does not define "not reasonably controllable or preventable," the task to do so fell to EPA. The Agency first addressed the issue in the preamble to the EER. EPA explained that "high wind events" would fall under the category of "natural events," (as opposed to "an event caused by human activity that is unlikely to recur at a particular location") and that where high wind events involved windblown dust from anthropogenic sources, the event would only be considered a "natural event" if the state demonstrated that those sources are "reasonably well-controlled at the time that the event occurred ...." 72 Fed. Reg. at 13576. [5]

In the Interim Guidance, EPA further elaborated on what it considers "not reasonably controllable or preventable." Interim Guidance at p.10 ("3.1 Not

[5] In its Brief, MAG accuses Petitioners of reading "or preventable" out of the statute but claims that in its Interim Guidance EPA does not. MAG Brief, pp. 31-32, fn. 7. Inasmuch as Petitioners have accepted EPA's interpretation of the CAA and EER in the guidance and base their challenge on EPA's failure to comply with its own guidance, MAG's assertion has no merit.

Reasonably Controllable or Preventable (nRCP)"), ER 121. It is in this section of the Interim Guidance that EPA discusses BACM, thus leaving no doubt that EPA's consideration of BACM/RACM in evaluating EER submissions is, in fact, derived from the "not reasonably controllable or preventable" requirement in the statute. *See id* at p. 15, 3.1.2.3 ("Consideration of BACM/RACM"), ER 126. Thus there is clearly a "statutory basis" for the consideration of BACM in the context of an EER demonstration.

Next, both EPA and the State latch onto EPA's statement in the guidance that in serious areas BACM is a "reference point," and use that term to argue that BACM is not required in order for an event to qualify as an "exceptional event." However, when read in context, it is clear that the import of EPA's "reference point" statement" is that BACM "may be insufficient." *Id.* Indeed, in that discussion EPA states that in some cases it may be reasonable to require controls more stringent than BACM. *Id.* Finally, EPA instructs that "[i]f an air agency believes that the EPA should not use RACM/BACM as the reference point for reasonable controls, the air agency should provide supporting rationale and an alternative reference point in the demonstration package." *Id.* Neither the State nor MAG did this. Rather, in its submissions the State represented, inaccurately, that BACM were in place within the Area. As Petitioners explained in their Opening Brief, they were not. *See* Opening Brief at 37-44.

In light of this—the lengthy discussion in the guidance of the local list of BACM as a "reference point" for a state's demonstration that an event is "not reasonably controllable or preventable," and EPA's statement that BACM may not be sufficient if the SIP has not been recently reviewed—EPA's assertion in its brief that Petitioners have a "fundamental misconception" of the role of BACM in the context of exceptional event determinations is puzzling. EPA Brief at 42. For example, EPA takes issue with Petitioners' argument that a request to exclude exceedances under EER should "trigger" an updated BACM demonstration.

Notably, Petitioners made this argument in the context of whether the State was obligated to include an updated BACM demonstration in its §189(d) submission. *See* Opening Brief at 53. However, the fundamental premise of Petitioners' position with respect to BACM in the context of EER submissions is completely consistent with the guidance. Since it is the State's responsibility to demonstrate that an event qualifies as an exceptional event, it follows that in the context of that demonstration, the State is obligated to address the reasonableness of its control measures. And where the event occurred in a serious area, that discussion –at least according to EPA's guidance—should address BACM and whether such controls were applied to the contributing sources at the time of the event.

Petitioners' principal objection to the BACM discussion in the State's submission is that it is misleading and fails to address the inadequacy of the Agricultural BMP Rule, which EPA has expressly found no longer constitutes BACM. *See* Opening Brief at 39. The suggestion in EPA's brief that BACM is somehow not a relevant inquiry in evaluating an EER submission is completely inconsistent with its guidance and should be rejected by this Court.

In its brief MAG also takes issue with Petitioners' arguments regarding the frequency and severity of the exceedances that the State seeks to exclude, claiming that Petitioners seek to put a volume limit on exceptional events, and that severity of the exceedances actually supports a finding that they were the result of an "exceptional event." MAG Brief at 26-29. However, once again, it was EPA, not Petitioners, who identified these factors as relevant to the issue of whether an event was "not reasonably controllable or preventable" in the context of an exceptional event determination. Specifically, in the Interim Guidance, EPA stated "[m]ore stringent controls may be reasonable if an area experiences frequent and/or severe exceptional event exceedances due to high winds than if the area has experienced only non-recurring and/or mild isolated exceedances." Interim Guidance at 13, Table 2(2); ER 124.

This reasonable interpretation of what constitutes an event that is "not reasonably controllable or preventable" is entirely consistent with the CAA and the

EER and should be accorded deference by this Court. Unfortunately, as the following discussion establishes, in concurring in the State's request to exclude the 135 exceedances, EPA largely ignored and/or contradicted its own guidance.

### C. EPA's Explanation for Departing from Its Guidance with Regard to the Absence of BACM on Agricultural Emissions is Contrary to the Guidance and Arbitrary and Capricious.

In their Opening Brief, Petitioners asserted that EPA abused its discretion when it departed from its guidance regarding BACM and EER demonstrations, and concurred in the State's request to exclude 135 exceedances even though the BACM demonstration for the Area was well outside the 3 year window described in the guidance, and EPA had advised the State, both in a proposed rulemaking and in correspondence, that the Agricultural BMP Rule was no longer BACM for agricultural emissions. Opening Brief at 37-44. In its Final Rulemaking and its Answering Brief, EPA attempts to justify this departure from its own guidance by claiming that emissions from agricultural sources are no longer a significant part of the emissions inventory in the Area, and it was reasonable for EPA to concur in the EER submissions since the State was able to demonstrate attainment without a reduction of agricultural emissions. EPA Brief at 48-49. Neither of these justifications, however, withstands scrutiny.

First, with respect to agricultural emissions, while it is true that the revised 2008 annual inventory cited by EPA does seem to indicate that agricultural

emissions make up a smaller percentage of the annual emissions, as Petitioners pointed out in their Opening Brief, this focus on the *annual* emissions inventory in the context of exceedances caused by high wind events is misguided. Opening Brief at 43. As Petitioners explained in their Brief, the Interim Guidance makes it clear that in the context of exceptional events, the control measures to be evaluated are determined by the sources of the actual exceedances. Interim Guidance 6.3.2.3 Basic Controls analysis, ER 153. EPA ignored this important distinction in its Answering Brief, as did the State and MAG.

However, even if it were appropriate to rely upon a modeled inventory, as opposed to identifying the sources that actually contributed to the event in question, when evaluating whether an event was "not reasonably controllable or preventable," the emissions inventories for high wind and low wind conditions differ—as the Technical Support Document submitted with the 2012 Five Percent Plan acknowledges. *See* Appendix B, Exhibit 1: "Technical Document in Support of the MAG 2012 Five Percent Plan For PM-10 for the Maricopa County Nonattainment Area," May 2012 ("TDS"), AR. B.1.c. at pp. V-61-v-78. In the high wind inventory included in that document, agricultural emissions are clearly a significant source. *See e.g. Id.,* Figure V-16, p. V-63. *See also,* Appendix A: "Exhibit 1: 2008 PM-10 Periodic Emissions Inventory for the Maricopa County, Arizona, Nonattainment Area. Maricopa County Air Quality Department. Revised

June 2011" AR B.1.b at Table A4-2 "Land use categories associated with the production of windblown dust" at p. A4-10; and Figure A4-3 "Distribution of land use categories capable of producing windblown dust emissions," at p. A4-11.

As these technical documents demonstrate, agriculture is very much a significant source of windblown dust in the Area. Thus, it is no coincidence that monitors with some of the greatest number of exceedances sought to be excluded under the EER are located near agricultural lands. *See* TDS at p. V-59 (describing Salt River domain; active PM-10 monitors include W. 43rd and Durango Complex; surrounding sources include active agricultural land); p. V-63 Figure V-16 (showing sources for windblown dust for West 43rd Avenue monitor including agricultural lands); p. V-60 (describing predominant sources near Higley monitor as including active agricultural fields).

EPA asserts in its Answering Brief that "EPA's reliance on the Agricultural BMP Rules was reasonable because implementation of additional controls on agricultural sources would still not have made the total emissions caused by the high wind speeds reasonably controllable and preventable given the small portion of such emissions coming from agricultural sources." This statement, however, is a bald assertion that has no factual or technical support in the record. EPA Brief at 52. Nor was it offered by EPA as a justification for its concurrence in the Final Rulemaking. *See, e.g. Oregon Natural Desert Assoc. v. BLM,* 625 F. 3d 1092,

1120 (9th Cir. 2010)(rejecting position that BLM never advanced in the EIS itself as impermissible *post hoc* rationalization); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's actions must be upheld, if at all, on the basis articulated by the agency itself.").

Because EPA did not raise the issue with the State and just accepted at face value the State's assertion that "BACM-approved controls were in place," we have no way of knowing whether having actual BACM on agricultural sources would have made some or all of the exceedances reasonably controllable or preventable. Before it concurred in excluding the exceedances, EPA should have required the State to answer that question. Because it failed to do so, it cannot now use pure speculation to justify its action.

Finally, EPA's second justification for not requiring BACM on agricultural emissions—that because the State could demonstrate attainment with the existing agricultural controls, EPA's concurrence in excluding the 135 exceedances from the data was reasonable—is a classic demonstration of circular logic. *See* EPA Brief at 52, n. 10. The State can only demonstrate "attainment" if it is allowed to exclude the 135 exceedances from the data. If the exceedances are included in the

data, the Area continues to violate the NAAQS by a large margin.[6] In this regard, EPA's logic is akin to a judge holding that evidence of a crime should be excluded because when it is excluded, there is no evidence that the defendant committed the crime. Because the State's attainment demonstration is dependent upon EPA's concurrence to exclude the 135 exceedances, it makes no sense whatsoever to justify the concurrence on the alleged "attainment" that is only achieved when the data is excluded.

In sum, both of the reasons offered by EPA as justification for its decision to concur in the exceptional event demonstrations without requiring the State to ensure that BACM level controls were in place in the Area for agricultural emissions are arbitrary and capricious—and as such they are contrary to law.

[6] In fact, this is what happened in 2010 when EPA proposed to disapprove in part the 2007 Five Percent Plan. EPA declined to concur in the State's EER submission for four exceedances that occurred in 2008. EPA explained, "because there have been four exceedances in 2008 at the West 43rd Avenue monitor, the area cannot attain the standard by December 31, 2010 as projected in the 189(d) plan. Therefore, EPA is proposing to disapprove. . . the attainment demonstration in the plan as not meeting the requirements of sections 189(d) and 179(d)(3)." 75 Fed. Reg., 54806, 54814 (Sept. 9, 2010).

### D. EPA's Position Regarding the Reasonableness of Control Measures on Sources Outside the Area is Contrary to the Interim Guidance and By Ignoring the Extreme Conditions in Pinal County, EPA is Abusing its Discretion to the Detriment of the Public's Health and Safety.

In their Opening Brief, Petitioners discuss in some detail the extraordinary conditions in Pinal County, and the relatively lax control measures in place in those portions of Pinal County that are outside the Area. Opening Brief at 46-48. In its Answering Brief, EPA does not even address the fact that western Pinal County has some of the highest monitor readings for PM-10 in the country and instead relies upon the fact that the area has only recently been redesignated moderate nonattainment. EPA Brief at 58 ("Bahr critiques the level of emission controls applicable in Pinal County outside the nonattainment area, but discounts the fact that Pinal County was only redesignated to nonattainment effective July 2, 2012.")

While it is true that the redesignation was not finalized until 2012, EPA proposed to redesignate the area in October 2010. 75 Fed. Reg. 60680 (Oct. 1, 2010). And, in October 2009, EPA notified the Governor that it was initiating the redesignation process. As EPA advised the State at that time, "our decision to initiate the redesignation process stemmed from review of 2006-2008 ambient PM-10 monitoring data from PM-10 monitoring stations within the county that showed

widespread, frequent, and in some instances, severe violation of the PM-10 standard." 77 Fed. Reg. 32024, 32025 (May 31, 2012).

Moreover, well before the formal notification in 2009, as early as April 2007, EPA wrote a letter to ADEQ expressing concern about, among other things, the exceedances occurring outside the Area in western Pinal County. *See* Minutes of the Maricopa Association of Governments Air Quality Technical Advisory Committee Meeting, Thursday, April 26, 2007, pp. 9-10; available at *http://www.azmag.gov/Documents/pdf/cms.agendas/AQTAC_2007_05-22_AGN33122.pdf*. In that letter, EPA noted that western Pinal County had several violations of the PM-10 standard and some of the highest readings in the country. *Id.* at 10. EPA set out several options for dealing with the situation including a possible nonattainment designation, extending the Area's boundaries, issuing a SIP call, or working with the State and local agencies to bring the area back into attainment as expeditiously as possible, with the latter being the preferred approach. *Id.* at 10.

In other words, EPA has been aware of the problem in western Pinal County long before the 2012 redesignation and put the State on notice at least as early as 2007 that the situation needed to be addressed by State and local officials. Under these circumstances, EPA's attempt to hide behind the designation status of the Pinal County nonattainment area to claim that the level of controls—which do not

include any agricultural control measures for high wind events—are reasonable is simply an abdication of its responsibility under the CAA to ensure that data is only excluded under the EER when the State has demonstrated that *reasonable* controls are in place.

## II. Because the Area is a Serious Nonattainment Area that Obtained an Extension Under §188(e), It Continues to be Subject to the BACM and MSM Requirement and EPA Abused its Discretion When it Failed to Require the State to Demonstrate that the 2012 Five Percent Plan Satisfied Those Requirements.

### A. Both EPA and the State Have Previously Acknowledged that BACM and MSM Continue to Be a Requirement For Any SIP Revision Submitted for the Area.

In both its Final Rulemaking and in its Answering Brief, EPA takes the position that in the 189(d) submission, although the State was required to satisfy numerous other CAA requirements for SIPs, it did not have to demonstrate that it continued to satisfy the BACM requirement for serious nonattainment area plans set forth in Section 189(b)(1)(B) or the MSM requirement that was imposed as a result of the extension granted the Area under 188(e) in 2001. In response to Petitioners' argument that an updated BACM and MSM demonstration was required, EPA has taken the position that "BACM and most stringent measure were obligations appropriately imposed at the time they were triggered, and the State added control measures implementing BACM and most stringent measures to the Maricopa Area's PM-10 nonattainment area plan at that time." EPA Brief at

61-62. According to EPA, a BACM determination is only required when "BACM is statutorily triggered, correlated to the 'availability' at the time BACM is triggered." *Id.*at 62. It adopts the same approach for MSM, claiming that Section 188(e) requires "only those measures that are the most stringent when the requirement is triggered." *Id.*

EPA claims that this interpretation regarding the BACM and MSM requirements, published for the first time in the Final Rulemaking for the 2012 Five Percent Plan, is not a departure from EPA's earlier interpretations of the CAA. By way of example, EPA cites to its approval of revisions to Maricopa County Rule 310 and 310.1 into Arizona's SIP because they "'complied with relevant [Act] requirements.'" EPA Brief at 63 quoting 75 Fed. Reg. at 78,167. What EPA neglects to mention, however, is that in the *proposed* rulemaking for that SIP revision, the "relevant Act requirements" were described as including BACM. 75 Fed. Reg. 53907, 53908 (Sept. 2, 2010)(II. EPA's Evaluation and Action). As EPA explained in its proposed rule, "[t]he MCAQD regulates a PM nonattainment area classified as serious (see 40 CFR part 81), so Rule 310 and Rule 310.01 must implement BACM." *Id.*

The Notice of Proposed Rulemaking further states "[w]e believe these rules are consistent with the relevant policy and guidance. Our Technical Support Documents (TSD) on each rule has our detailed review and evaluation." *Id.*

Significantly, included in the Docket are demonstrations that show that the adopted rule is at least as stringent as the SIP approved rule, and in many respects is more stringent.[7] *See* Docket EPA-R09-OAR-2010-0521 Supporting and Related Material, Appendices 9 & 10 available at http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0017 and http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0018 (last accessed 2/11/2015).

In promulgating these Rule revisions at the State level, the Arizona Department of Environmental Quality (ADEQ) made the same representation that the revised rules must satisfy the BACM requirement of the CAA, as well as the MSM requirement. Specifically in its Notice of Proposed Rulemaking for Rules 310 and 310.01, ADEQ explained the Rule revisions in the context of the 189(d) plan:

> On June 6, 2007, the U.S. Environmental Protection Agency (EPA) found that the Phoenix metropolitan area failed to attain the 24-hour PM10 standard by the December 31, 2006, attainment deadline. This failure triggered a special requirement under Section 189(d) of

[7] Prior to EPA's reference to the Final Rulemaking in its Answering Brief, Petitioners did not realize that the docket for the 2010 revisions included an updated BACM demonstration for the revised fugitive dust rules. Although this limited BACM demonstration is still outside the three year window identified in the Interim Guidance, Petitioners acknowledge that with respect to the fugitive dust rules, the State has demonstrated BACM more recently than 2002, as suggested in the Opening Brief at p. 42.

> the Clean Air Act (CAA) to submit a state implementation plan (SIP) revision to EPA by December 31, 2007. Such SIP revision was required to provide for annual reductions of PM10 or PM10 precursors of not less than five percent of the most recent emissions inventory, until the PM10 standard is attained. *In addition, such SIP revision was required to continue to demonstrate that the revisions would meet the best available control measures (BACM) test and the most stringent measures (MSM) test for significant sources and source categories in accordance with CAA § 189(b)(1)(B) and 188(e)*(emphasis added).

Docket EPA-R09-OAR-2010-0521 Supporting and Related Material, Appendix 1, NPR for Maricopa Rules 310 and 301.01[sic] available at http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0009 (last accessed 2/11/2015). The State offered the exact same description of the CAA requirements in the Completeness Checklists it submitted to EPA along with the SIP Revision. *See e.g.* Docket EPA-R09-OAR-2010-0521 Supporting and Related Material, Maricopa County Rule 310 Completeness Checklist available at http://www.regulations.gov/#!documentDetail;D=EPA-R09-OAR-2010-0521-0005 (last accessed 2/11/2015). Thus, the position adopted by EPA in the Final Rulemaking, and by EPA and the State in this proceeding is completely contrary to their earlier pronouncements regarding the State's continuing obligation to demonstrate BACM under the CAA.

Further, the State's reliance on this Court's holding in *Ass'n of Irritated Residents v. U.S E.P.A,*. 423 F.3d 989 (9th Cir. 2005) as support for its newfound

position that its §189(d) plan does *not* have to "continue to demonstrate that the revisions would meet the best available control measures (BACM) test and the most stringent measures (MSM) test for significant sources and source categories in accordance with CAA § 189(b)(1)(B) and 188(e)" is misplaced. State Brief at 24. That case does not address the issue raised here, which is whether a serious area that fails to meet its attainment deadline continues to be subject to the BACM requirement of 189(b)(1)(B) in addition to the requirements of §189(d). The issue raised in *Ass'n of Irritated Residents* was whether the State could use control measures implemented in response to the BACM requirement to also satisfy the emission reduction requirements of §189(d). 423 F. 3d at 995. Petitioners do not dispute that the State is free to use BACM to achieve the reductions required by Section 189(d). Rather, the Petitioners contend that the State cannot avoid its obligation to continue to implement BACM because it is able to achieve the 5% reduction using less stringent control measures (and, of course, by excluding 135 exceedances).

In this regard, it is worth noting that the State's assertion that Petitioners' arguments regarding an updated demonstration of BACM and MSM "fail in light of ...Arizona's ability to achieve attainment with the PM-10 NAAQS without implementing updated BACM and/or MSM" suffers from the same flawed logic demonstrated by EPA when it used the State's demonstrated "attainment" as

justification for its concurrence in excluding the 135 exceedances. State Brief at 26. The only reason the State is able to demonstrate attainment is because EPA has allowed it to exclude virtually all of its exceedances and thereby eliminate numerous violations of the NAAQS from the data. However, even if that were not true, it is well-established that the BACM requirement is to be independent from attainment. *Vigil v. Leavitt,* 381 F. 3d 826, 844 (9th Cir 2004)(rejecting EPA's justification for not requiring CARB diesel as BACM because "EPA has stated that the BACM analysis should be conducted generally independent of attainment.") Thus, demonstrated attainment is not a proper justification for not implementing BACM.

### B. EPA's Argument that the State Can Avoid the BACM Requirement Simply by Declining to Submit SIP Revisions Is Contrary to the Goal of the CAA.

In its effort to explain away its proposed partial disapproval of the 2007 Five Percent Plan because the Agricultural BMP Rule approved as BACM in 2002 no longer satisfied BACM in 2010 (See Opening Brief at 25), EPA adopts a curious interpretation of the CAA in its Answering Brief. According to EPA, it is only required to evaluate whether a SIP meets the BACM requirement when an area is first designated serious. EPA Brief at 62. Its position is that neither the State nor EPA have an obligation to ensure that the SIP continues to include control measures that represent BACM, even after the area fails to meet its attainment

deadline. *Id*. EPA claims that after it has approved the initial BACM demonstration, it will *only* revisit BACM if and when a state submits a SIP revision that affects a BACM-approved control measure. EPA Brief at 63-64

This interpretation offered by EPA is at odds with the CAA's overarching goal that areas achieve the NAAQS as expeditiously as possible. *See Ass'n of Irritated Residents,* 423 F. 3d at 997 (citing 42 U.S.C. §§ 7502(c)(1); 7513(c)(2)). If, after the initial BACM demonstration, EPA is only required to consider whether a control measure continues to satisfy BACM at the initiative of the state, a state that wants to avoid the BACM requirement for a particular source can do so by excluding it from any future SIP revision. This is precisely what happened in the case of Arizona's revised agricultural BMP Rule. Because it had been advised by EPA that even the revised rule did not qualify as BACM, the State simply did not include the revised Rule in the 2012 Five Percent Plan. *See* Opening Brief at 51; EPA Brief at 64. Because the revised Rule was not included in the State's SIP submittal, EPA claims it was not an abuse of discretion on its part to ignore the fact that the State's control measures for agricultural sources were no longer BACM.

Thus, instead of encouraging states to continually strengthen their control measures to reflect the current BACM and, thereby, achieve the NAAQS as expeditiously as possible, EPA has adopted an interpretation of the BACM requirement that allows serious nonattainment areas that fail to meet their

attainment deadline to avoid implementing the strongest possible control measures. This Court should reject EPA's interpretation as contrary to the Act.

### III. EPA, the State, and MAG All Mischaracterize Petitioners' Objections to EPA's Policy of Allowing States to Satisfy the Requirement for Contingency Measures with Existing Control Measures.

In their Opening Brief, the Petitioners challenged EPA's policy of allowing states to satisfy the requirement to include contingency measures by designating already implemented control measures as "contingency measures" as long as they do not rely upon the emission reductions from those measures in the attainment demonstration. Opening Brief at 53-57. As Petitioners have explained, the problem with this approach is that it elevates the paper demonstration over actual experience so that the public is not protected if the attainment demonstration proves wrong and a milestone or deadline is missed.

In their Answering Briefs, EPA and the State rely upon *LEAN v. EPA,* 382 F. 3d 575 (5th Cir. 2004) to misconstrue the Petitioners' argument. EPA Brief at 72; State Brief at 26-28. Contrary to their arguments, the Petitioners are not suggesting that states be "penalized" for early implementation of control measures. We are asserting that CAA requires states to have meaningful contingency measures that are available as *additional* interim measures when the implemented measures fail to achieve the emission reductions predicted.

Both EPA and the State claim that EPA's policy is supported by the General Preamble. EPA Brief at 70; State Brief at 28. However, they are simply wrong. The General Preamble makes clear that contingency measures are measures that will be implemented in the event a milestone or deadline is missed—as an interim measure—to protect the public health while the state undertakes SIP revisions to address the inadequacy. 57 Fed. Reg. 13,498, 13,511 (Apr. 16, 1992)(" The EPA believes that the contingency measures should, at a minimum, ensure that an appropriate level of emissions reduction progress continues to be made if attainment of RFP is not achieved and additional planning by the State is needed.").

The discussion in the General Preamble about the early implementation of measures does not address the situation presented here, where measures are labeled "contingency" measures but in fact are implemented well in advance of any missed deadline. Rather, the General Preamble refers to the situation where to satisfy the requirement for contingency measures, the state identifies particular control measures that it will implement earlier than otherwise scheduled *if a deadline is missed:*

> One way that contingency measures could meet this requirement is by requiring the early implementation of measures *scheduled for implementation at a later date in the SIP*. For example, a State could include as a contingency measure the requirements that measures which would take place in later years if the area met its

> RFP target or attainment deadline, *would take effect earlier if the area did not meet its RFP target or attainment deadline.* Within 1 year of the triggering of a contingency requiring the early implementation of control measures, the State must submit a revision to the SIP containing whatever additional measures will be needed to backfill the SIP with replacement measures to cure any eventual shortfall that would occur as the result of the early use of the contingency measure.

*Id.* It is significant that if such early implementation occurs, the General Preamble then requires the state to "backfill" and identify new contingency measures. *Id.*

The General Preamble's approach is entirely consistent with the purpose of contingency measures—the implementation of additional measures to continue to reduce emissions and protect the public health while the state engages in the SIP revision required by the failure to make RFP or meet its attainment deadline. It is the difference between true contingency measures, which are not implemented but are available to address an actual threat to public health, and measures which are labeled "contingency measures" based on modeling not their implementation status. The latter offers no interim protection to the public if the modeling proves flawed and the deadline is missed. Consequently, by allowing the State to rely solely upon already implemented control measures to satisfy the requirements of Section 172(c)(9), EPA has acted contrary to intent of the CAA and the interpretation articulated in the General Preamble,. As a result, it has abused its discretion.

## CONCLUSION AND RELIEF REQUESTED

Petitioners respectfully request a determination by this Court that for all of the foregoing reasons, EPA's approval of the 2015 Five Percent Plan, including the finding of attainment based upon the exclusion of 135 "exceptional events," was an abuse of discretion and contrary to law. Petitioners further ask that they be awarded attorneys' fees pursuant to 42 U.S.C. § 7607(f).

Dated this 13th day of February 2015

Arizona Center for Law
in the Public Interest
P.O. Box 41835
Tucson, Arizona 85717

_s/Joy E. Herr-Cardillo__
Joy E. Herr-Cardillo
Timothy M. Hogan
Counsel for Petitioners

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Reply Brief for Petitioners is proportionately spaced, has a typeface of 14 points, and contains 6241 words.

_2/13/2015_____ _s/Joy E. Herr-Cardillo_____

Date Joy E. Herr-Cardillo

## CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015. I electronically transmitted the Petitioners' Reply Brief to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

s/Joy E. Herr-Cardillo
Joy E. Herr-Cardillo

# CMAQ DETAILED PROJECT LISTING REPORT ( FY 2014 )

16-March-2015

Fiscal Year = '2014' and Status Selection Criteria = 'Approved by Division' and State = 'Arizona'

| STATE | Apportionments | APPORTION. AMOUNT | OBLIGATED AMOUNT | OBLIG. % | PROJECT AMOUNT | PROJECT TYPE | PROJECT TITLE & DESCRIPTION | VOC (Kg/Day) | CO (Kg/Day) | NOx (Kg/Day) | PM 10 (Kg/Day) | PM 2.5 (Kg/ | CO2 (MT/Day) | CONTINUING PROJECT? |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Arizona | 2/12/2015 | $0 | $24,832,906 | 0 % | | | | | | | | | | |
| Arizona | | | | | $2,389,672 | I/M and Other TCMs | Maricopa Association of Governments: PM-10 Certified Street Sweepers<br>Purchase PM-10 certified street sweepers region wide | | | | 384 | | | |
| Arizona | | | | | $1,267,904 | I/M and Other TCMs | Scottsdale: Paved Unpaved Roads<br>Pave various Dirt Roads on Via Dona Rd from Scottsdale to Pima Rd; on Hayden Rd from Dynamite to Via Dona; and Pinnacle Vista Dr from 64th St to 69th St | | | | 2,831 | | | |
| Arizona | | | | | $1,033,934 | I/M and Other TCMs | Phoenix: Pave Unpaved Alleys<br>Pave unpaved various alleys | | | | 1,023 | | | |
| Arizona | | | | | $900,000 | I/M and Other TCMs | City of Nogales: AZ Street Sweeper<br>I/M or Other TCM Project - Other - Purchase PM-2.5 certified Street Sweepers used to sweep various streets in the City of Nogales | | | | 1,859 | 465 | | |
| Arizona | | | | | $872,275 | I/M and Other TCMs | Surprise: Pave Unpaved Road<br>Pave unpaved road on Dove Valley Rd from 187th Ave to 203rd Ave | | | | 116 | | | |
| Arizona | | | | | $264,040 | I/M and Other TCMs | Pinal County: Pave Unpaved Roads<br>Design pave unpaved roads on Barnes Rd and Fuqua Rd located in the West Central Pinal PM-2.5 Nonattainment Area | | | | 1,380 | 138 | | |
| Arizona | | | | | $233,225 | I/M and Other TCMs | Buckeye: Pave Unpaved Road<br>Construct pave unpaved road project on Lower Buckeye Rd from Watson Rd to Sundance Park | | | | 25 | | | |

# CMAQ DETAILED PROJECT LISTING REPORT ( FY 2014 )

16-March-2015

**Fiscal Year = '2014' and Status Selection Criteria = 'Approved by Division' and State = 'Arizona'**

| STATE | Apportionments | APPORTION. AMOUNT | OBLIGATED AMOUNT | OBLIG. % | PROJECT AMOUNT | PROJECT TYPE | PROJECT TITLE & DESCRIPTION | VOC (Kg/ Day) | CO (Kg/ Day) | NOx (Kg/ Day) | PM 10 (Kg/ Day) | PM 2.5 (Kg/ | CO2 (MT/ Day) | CONTINUING PROJECT? |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Arizona | | | | | $3,857,670 | Pedestrian/Bicycle | Tempe: Multi-use Path Acquire right-of-way and construct pedestrian and bicycle facilites and safety improvements on Broadway Rd from Rural Rd to Mill Ave | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $1,809,018 | Pedestrian/Bicycle | Mesa: Pedestrian Improvements Construct pedestrian refuge and shelters for the Fiesta Pathway located south of Southern Ave from Extension to Tempe Canal | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $1,323,000 | Pedestrian/Bicycle | Tempe: Multi-use Path Construct multi-use path on Rural Rd to Kiwanis Park | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $845,485 | Pedestrian/Bicycle | Buckeye: Pedestrian Improvements Construct Pedestrian Corridor Project on Alarcon Blvd and Kino Place | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $777,975 | Pedestrian/Bicycle | Surprise: Multi-use Path Design and acquire right-of-way and construct multi-use path on Bell Rd from US 60 to 114th Ave | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $700,000 | Pedestrian/Bicycle | Peoria: Multi-use Path Construct multi-use path on New River Pathway at Northern Ave and Olive Ave with extension to connect to Glendale path at Northern | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $445,568 | Pedestrian/Bicycle | Phoenix: Bicycle Improvements Construct bike lanes on 32nd St from SR 51 to Reach 11 | 1 | 2 | 1 | 1 | | | |
| Arizona | | | | | $315,721 | Pedestrian/Bicycle | Glendale: Pedestrian Improvements Construct pedestrian improvements on Glendale Ave from Glenn Dr and 58th Ave to 57th Ave | 1 | 1 | 1 | 1 | | | |

# CMAQ DETAILED PROJECT LISTING REPORT ( FY 2014 )

16-March-2015

**Fiscal Year = '2014' and Status Selection Criteria = 'Approved by Division' and State = 'Arizona'**

| STATE | Apportionments | APPORTION. AMOUNT | OBLIGATED AMOUNT | OBLIG. % | PROJECT AMOUNT | PROJECT TYPE | PROJECT TITLE & DESCRIPTION | VOC (Kg/Day) | CO (Kg/Day) | NOx (Kg/Day) | PM 10 (Kg/Day) | PM 2.5 (Kg/ | CO2 (MT/Day) | CONTINUING PROJECT? |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Arizona | | | | | $188,600 | Pedestrian/Bicycle | Phoenix: Multi-use Path<br>Design Phase for Nevitt Park bicycle and pedestrian bridge crossing at the Western Canal | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $832,993 | Shared Ride | Maricopa Association of Governments:Trip Reduction Program<br>Maricopa County Trip Reduction Program | 103 | 1,481 | 244 | 154 | | | |
| Arizona | | | | | $500,032 | Shared Ride | Maricopa Association of Governments: Regional Rideshare and Telework Program<br>Regional Rideshare and Telework Program | 59 | 853 | 141 | 89 | | | |
| Arizona | | | | | $135,000 | Shared Ride | Maricopa Association of Governments: Travel Reduction Program<br>Capitol Rideshare Program | 1 | 11 | 2 | 1 | | | |
| Arizona | | | | | $2,592,624 | Traffic Flow Improvements | Arizona Department of Transportation: Freeway Management System<br>Construct Freeway Management System on Loop 101 (Agua Fria Fwy) from Interstate-10 to Interstate-17 | 1 | 0 | 1 | 1 | | | |
| Arizona | | | | | $1,730,596 | Traffic Flow Improvements | Maricopa County: Intelligent Transportation Systems project<br>Construct and install ITS traffic management capabilities along MC 85 from 75th Ave to Litchfield Rd | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $700,649 | Traffic Flow Improvements | Peoria: Intelligent Transportation Systems project<br>Install conduit and pull boxes; fiber and CCTV cameras on 83rd Ave from Lone Cactus and continuing north to Jomax Rd | 1 | 2 | 1 | 1 | | | |

# CMAQ DETAILED PROJECT LISTING REPORT ( FY 2014 )

16-March-2015

**Fiscal Year = '2014' and Status Selection Criteria = 'Approved by Division' and State = 'Arizona'**

| STATE | Apportionments | APPORTION. AMOUNT | OBLIGATED AMOUNT | OBLIG. % | PROJECT AMOUNT | PROJECT TYPE | PROJECT TITLE & DESCRIPTION | VOC (Kg/Day) | CO (Kg/Day) | NOx (Kg/Day) | PM 10 (Kg/Day) | PM 2.5 (Kg/ | CO2 (MT/Day) | CONTINUING PROJECT? |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Arizona | | | | | $499,790 | Traffic Flow Improvements | Goodyear: Intelligent Transportation Systems project<br>Design and construct fiber-optic interconnection for traffic signals and video on McDowell Rd from Citrus Rd to PebbleCreek Parkway; and Cotton Lane intersections with Van Buren Street and the Interstate-10 eastbound front | 1 | 1 | 1 | 1 | | | |
| Arizona | | | | | $282,900 | Traffic Flow Improvements | Buckeye: Intelligent Transportation Systems project<br>Interconnect traffic signals on Miller Rd from Hazen Rd to I-10 and on Monroe Rd (MC-85) from Miller Rd to Apache Rd | 1 | 8 | 1 | 1 | | | |
| Arizona | | | | | $173,924 | Traffic Flow Improvements | Maricopa County: Intelligent Transportation Systems project<br>Upgrade the Regional Archive Data Center Equipment and Systems to enhance archiving capacity and the utility of real time traffic data | 1 | 5 | 1 | 1 | | | |
| Arizona | | | | | $160,311 | Traffic Flow Improvements | Goodyear: Intelligent Transportation Systems project<br>Design and construction of fiber optic interconnect in existing conduit for traffic management through video surveillance and data collection | 1 | 10 | 1 | 1 | | | |
| | | | | | | | | | | | | | | |
| Nationwide Totals . . . . | | $0 | $24,832,906 | 0 % | | | | | | | | | | |

† States without ozone or CO Nonattainment or maintenance areas QA - Qualitative Assessment PR - Previously Reported c - Changed benefit from previous year r

# FACT SHEET

## Final Rule - Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan (SIP) Requirements

### Action

- On February 13, 2015, the U.S. Environmental Protection Agency issued a final rule that addresses a range of implementation requirements for the 2008 National Ambient Air Quality Standards (NAAQS) for ground-level ozone. The EPA set the final primary and secondary standards at 0.075 ppm on March 12, 2008.

- Implementation of the ozone standards is a shared responsibility of the EPA and states and tribes. This final rule interprets the requirements of the Clean Air Act (CAA) and includes provisions that give the EPA's partners flexibility to minimize administrative burdens while still ensuring the public health protections achieved by meeting the 2008 ozone standards.
    - The EPA will continue to work closely with states, tribes and communities to provide assistance in implementing the 2008 ozone standards.

- This final action specifically:
    - Establishes due dates for air agencies to submit state implementation plans (SIPs) demonstrating how areas designated as nonattainment for the 2008 ozone NAAQS will meet the standards by the appropriate attainment date;
    - Clarifies attainment dates for each nonattainment area according to its classification (established based on air quality thresholds);
    - Provides guidance on nearly all aspects of the attainment planning requirements for designated nonattainment areas;
    - Revokes the 1997 ozone NAAQS; and
    - Establishes anti-backsliding requirements for areas remaining nonattainment for the 1997 ozone NAAQS.

- The state planning and emissions control requirements addressed in this rule include: attainment demonstrations; reasonable further progress emissions reduction plans; reasonably available control technology; reasonably available control measures; nonattainment new source review; emission inventories; and other implementation-related topics.

- This final rule clarifies the attainment dates for each ozone nonattainment area classification in light of a December 2014 decision by the U.S. Court of Appeals for the D.C. Circuit (the court) vacating the deadlines previously established in the Agency's 2012 Classifications Rule for the 2008 ozone NAAQS.
    - There are 46 areas designated nonattainment for the 2008 ozone NAAQS nationwide. Of those, 36 areas are classified as "Marginal" nonattainment.

- This final rule revokes the 1997 NAAQS for all purposes, including transportation conformity, upon its effective date, which will occur 30 days after publication in the *Federal Register*. The EPA's 2012 Classifications Rule for the 2008 ozone NAAQS previously revoked the 1997 NAAQS for purposes of transportation conformity only. However, that portion of the Classifications Rule was vacated by the court in December 2014.

- In this rule, the EPA is finalizing a number of anti-backsliding measures for areas that remain nonattainment for the 1997 8-hour ozone NAAQS after the 1997 standard is revoked. These anti-backsliding measures will ensure that certain emission controls remain in place and air quality in the nonattainment areas does not get worse after the 1997 standard is revoked, while at the same time minimizing administrative and planning burdens associated with the transition to the more stringent 2008 standard.

- This final rule is focused on implementation-related activities for the 2008 ozone NAAQS. Implementation activities undertaken to meet the 2008 ozone NAAQS are expected to help many areas make progress toward meeting any future revised ozone standards.
    - On November 25, 2014, the EPA proposed to strengthen the ozone NAAQS in order to ensure that the standards meet the requirements of the CAA. The EPA will complete that proposed rulemaking in 2015. In the event EPA takes final action to revise the current (2008) NAAQS, EPA would issue a new implementation rule specific to that future revised NAAQS.

- Ozone pollution has been declining in recent years. From 1990 to 2013, the U.S. has experienced a 23% decline in national average ozone concentrations.
    - Though there is more work to be done, national rules now in place, such as the Tier 3 Vehicle Emission and Fuel Standards Program, will continue to improve air quality and help the states meet the NAAQS.

**For Further Information:**

- To download a copy of the notice, visit: http://www.epa.gov/air/ozonepollution/actions.html#impl.

- Today's final rule and other background information are also available either electronically at http://www.regulations.gov, EPA's electronic public docket and comment system, or in hardcopy at the EPA Docket Center's Public Reading Room.

- The Public Reading Room is located at EPA Headquarters, room number 3334 in the William Jefferson Clinton West Building, 1301 Constitution Avenue, NW, Washington, D.C. Hours of operation are 8:30 a.m. to 4:30 p.m. eastern standard time, Monday through Friday, excluding federal holidays.
    - Visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor materials will be processed through an X-ray machine as well. Visitors will be provided a badge that must be visible at all times.

- Materials for this final action can be accessed using Docket ID No. EPA-HQ-OAR-2010-0885.

- Additional information on the 2008 ozone nonattainment areas is available on the EPA Green Book at http://www.epa.gov/airquality/greenbook/hindex.html

- For more information on the final rule, contact either Dr. Karl Pepple at (206) 553-1778 or email at pepple.karl@epa.gov or Mr. Butch Stackhouse at (919) 541-5208 or email at stackhouse.butch@epa.gov.

# FINAL STATE IMPLEMENTATION PLAN (SIP) REQUIREMENTS RULE FOR THE 2008 OZONE NAAQS

February 26, 2015

Office of Air and Radiation



## PURPOSES OF THE RULEMAKING

Provide state and local air management agencies with final rules and guidance for planning to meet the 2008 ozone NAAQS in designated nonattainment areas.

- Translate ozone implementation requirements contained in the 1990 Clean Air Act Amendments (written when ozone was a 1-hour standard) into meaningful requirements for the 2008 8-hour ozone NAAQS.

Revoke the 1997 8-hour ozone NAAQS in order to provide additional flexibility to areas still working to complete the control requirements of that NAAQS.

New rules will be found in Subpart AA of 40 CFR sections 51.1100 through 51.1119.

- Essentially replaces Subpart X, 40 CFR sections 51.900 through 51.918

3

# RELATED RULEMAKINGS

## Classifications Rule

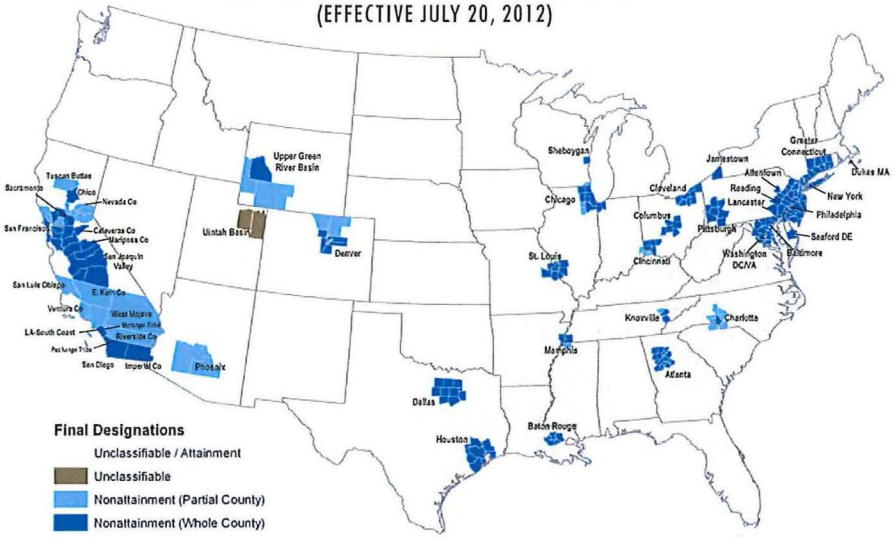
- Signed by Administrator April 30, 2012.
- Published in Federal Register May 21, 2012 (77 FR 30160).
- Established air quality thresholds for each ozone nonattainment area classification.
- Other aspects of the final rule were vacated by DC Circuit Court in *NRDC* decision (12/23/2014).

## Initial Area Designations

- 46 initial nonattainment areas.
  - 36 Marginal areas
  - 3 Moderate areas
  - 2 Serious areas
  - 3 Severe areas
  - 2 Extreme areas
- Signed by Administrator April 30, 2012 (May 31, 2012 for Chicago).
- Published in Federal Register May 21, 2012 (77 FR 30088).
- Effective date July 20, 2012.

4

## AREA DESIGNATIONS FOR 2008 OZONE NAAQS (EFFECTIVE JULY 20, 2012)




**Notes:**
EPA has not designated as nonattainment any areas outside the Continental US.

5

# RULEMAKING TIMELINE

Final O3 SRR signed by the Administrator on February 13, 2015.

Anticipated publication in the Federal Register: about two weeks after signature

Official title: "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements"

- Shorthand title: O3 SRR
- Docket number: EPA–HQ–OAR–2010–0885

Effective date: 30 days after publication, approximately end of March 2015

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# MAXIMUM ATTAINMENT DATES

A 12/23/14 D.C. Circuit Court decision vacated the portion of the Classifications Rule that established December 31 of the applicable year as the maximum attainment date for each classification.

The final O3 SRR modifies Table 1 of existing 40 CFR 51.1103 (established by the Classifications Rule) to indicate the maximum attainment date is **X** years from the effective date of designations, where **X** is the same number in CAA section 181 Table 1.

Years after effective date of designation:

- Marginal 3 years
- Moderate 6 years
- Serious 9 years
- Severe 15 years
- Extreme 20 years

7

# IMPACT OF NEW ATTAINMENT DATES

Effectively shortens by 1 ozone season the maximum allowable attainment date for all classifications.

Moderate and above area attainment demonstrations must ensure emissions controls are implemented no later than the beginning of the ozone season that is prior to the attainment date (e.g., beginning of the 2017 ozone season for Moderate areas).

Marginal area attainment determinations and 1-year attainment date extensions will be based on 2012-2014 air quality data rather than 2013-2015 data.

8

# ATTAINMENT DATE EXTENSIONS

An area that fails to attain the 2008 ozone NAAQS by its attainment date would be eligible for the first 1-year extension if, for the attainment year, the area's 4th highest daily maximum 8-hour average is at or below 0.075 ppm.

- Area must also meet other applicable requirements per CAA §181(a)(5)

The area would be eligible for the second 1-year extension if the area's 4th highest daily maximum 8-hour value, averaged over both the original attainment year and the first extension year, is at or below 0.075 ppm.

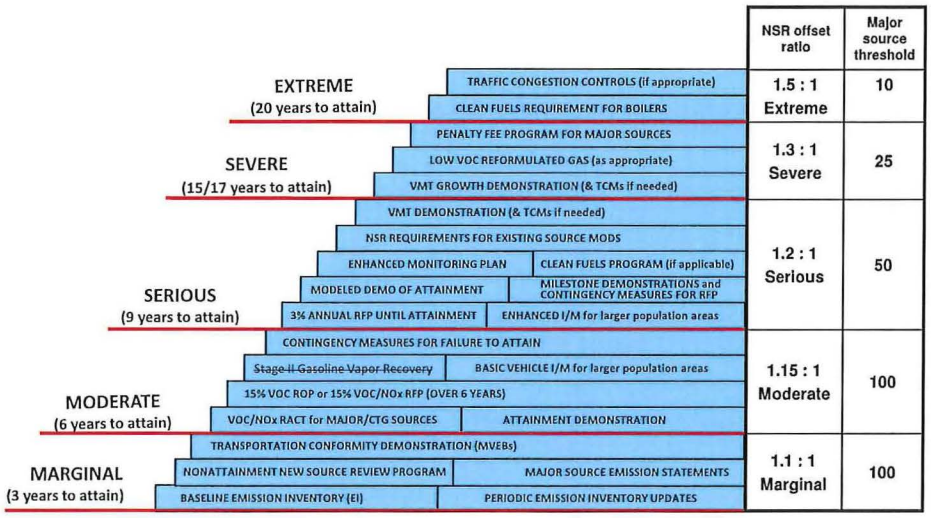
9

# BASIC SIP COMPONENTS FOR NONATTAINMENT AREAS

- ❑ Emissions inventory and emissions reporting statement rule
- ❑ Reasonable further progress (RFP) plan
- ❑ Reasonably available control technology (RACT)
- ❑ Reasonably available control measures (RACM)
- ❑ Attainment demonstration
- ❑ Contingency measures
- ❑ Nonattainment new source review (NSR) program
- ❑ Motor vehicle emissions budget (MVEB) (CAA §176(c))
- ❑ As applicable, a variety of area-wide mobile source and stationary source control programs

10

# Overview of CAA Ozone Nonattainment Area Planning & Control Requirements by Classification



11

# SIP SUBMITTAL DEADLINES

**Maximum CAA timeframe associated with each element (from effective date of designation)**

Emission inventories and emission statement SIPs are due from states with Marginal and higher areas no later than **2 years** (July 20, 2014).

Reasonably Available Control Technology (RACT) SIPs for Moderate and higher areas, and all states in the Ozone Transport Region (OTR), are due no later than **2 years** (July 20, 2014).

15% Reasonable Further Progress (6-year ROP/RFP) SIPs for Moderate and higher areas are due no later than **3 years** (July 20, 2015).

Nonattainment NSR (NNSR) SIPs are due no later than **3 years** (July 20, 2015).

Attainment plan with Reasonably Available Control Measures (RACM) and attainment demonstration SIPs are due no later than **3 years** (Moderate) or **4 years** (Serious and higher) (July 20, 2015 or July 20, 2016).

RFP SIPs showing an average of 3% reduction in emissions per year after the initial 6-year period for Serious and higher areas are due no later than **4 years** (July 20, 2016).

Vehicle I/M program SIP, where applicable, due no later than an area's attainment demonstration deadline.

Stationary source penalty fee program SIPs (§185) are due for Severe and Extreme areas no later than **10 years** (July 20, 2022).

12

# EMISSION INVENTORIES

States may use the 3-year cycle inventory described by the AERR to meet the inventory requirement.

Reporting requirements of the AERR should be applied to determine the data elements required.

Modifications were made to address reporting of an ozone season day and partial county emissions.

- If the ozone season day emissions were not reported as part of the AERR, they must be reported for ozone nonattainment area SIP submissions.
- Definitions of "base year inventory" and "ozone season day" were modified based on comments.
- Inventories for partial county areas must include <u>only</u> emissions from that portion of the county.

13

# REASONABLE FURTHER PROGRESS (RFP)

2011 is the baseline year for RFP.

- Corresponds to periodic emissions inventory submission year closest to the 2012 designation year.

States may also choose any year from 2008-2012 (i.e., the year the NAAQS was established to the designation year).

- Allows areas that achieved reductions in 2008 to count those reductions toward meeting RFP requirements.
- When a year earlier than 2011 is selected, the area must achieve RFP of 15% for the first 6 years after the baseline year and 3% per year thereafter (the general RFP requirement). For example, an area selecting 2009 as a base year would plan for reductions of 15% over the first 6 years 2010-2015, and 3% per year for both 2016 and 2017 for a total reduction of 21%.

Reductions from sources outside the nonattainment area do not count toward meeting the RFP requirements.

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# RFP (CONTINUED)

Reductions from all SIP-approved or federally promulgated measures implemented after the baseline year can be applied toward fulfilling RFP requirements.

An area that has a previously approved 15% VOC ROP plan is considered to have already met that CAA requirement, and must instead meet a more flexible 15% RFP requirement where both NOx and VOC reductions are creditable.

Alternative approaches to RFP may be considered on a case-by-case basis.

"Pre-1990 adjustments" calculation for RFP is waived.

- States no longer need to calculate and deduct emissions related to pre-1990 motor vehicle standards (per CAA section 182(b)(1)(D)(i)).

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# REASONABLY AVAILABLE CONTROL TECHNOLOGY

EPA has defined RACT as:

- "...the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." (44 FR 53762; September 17, 1979)

States should refer to existing CTGs and ACTs, and other relevant information for purposes of meeting RACT requirements.

In some cases states may conclude that sources already implementing RACT for a previous ozone NAAQS do not need to implement additional controls.

States may consider area-wide average emissions rates and conduct a technical assessment to show that cap-and-trade emissions controls satisfy RACT for EGUs.

New RACT measures must be implemented by no later than January 1, 2017.

EPA solicited comment on modifying existing guidance on "reasonably available" to allow states to consider the "negligible effect" of VOC on ozone concentrations in determining RACT. EPA did not finalize a modification, but is willing to explore in the future.

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# REASONABLY AVAILABLE CONTROL MEASURES

EPA interprets the Clean Air Act's RACM provision to require a demonstration that:

- the state has adopted all reasonable measures (including RACT) to meet RFP requirements and to demonstrate attainment as expeditiously as practicable, and
- no additional measures that are reasonably available will advance the attainment date or contribute to RFP for the area.

States should consider all available measures, including those being implemented in other areas, but must adopt measures for an area only if those measures are economically and technologically feasible and will advance the attainment date or are necessary for RFP.

To meet RACM requirements, states may require beyond-RACT controls.

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# MODELING ATTAINMENT DEMONSTRATIONS

When an attainment demonstration is necessary, states are required to use photochemical grid modeling, or an Administrator-approved alternative, to demonstrate attainment.

Model results are used to determine the amount of VOC and/or NOx emission reductions that are needed for the area to attain the NAAQS.

EPA has issued guidance on the use of models:

- Draft Modeling Guidance for Demonstrating Attainment of Air Quality Goals for Ozone, PM2.5, and Regional Haze (December 2014). Comments due to EPA by March 13, 2015. www.epa.gov/ttn/scram/guidance/guide/Draft_O3-PM-RH_Modeling_Guidance-2014.pdf
- This is an update to the April 2007 guidance. http://epa.gov/scram001/guidance_sip.htm

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# CONTINGENCY MEASURES

Contingency measures must represent 1 year's worth of emissions reduction progress.

Earlier EPA policy interpretations indicating that a percentage of these contingency measures had to be VOC controls has changed – now there is no such restriction.

In Extreme areas when the attainment demonstration relies on the anticipated development of new control technologies, the state can make a commitment to adopt contingency measures in the future, but not later than 3 years before such measures might be triggered (e.g., by failure to attain by the attainment date).

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# NONATTAINMENT NSR (NNSR)

Appendix S Clarifications

Preamble clarifies that the 2009 NRDC decision that vacated the extension of the 18-month time limit for Appendix S only applies to the Section VI offset waiver provision—not to the continued use of Appendix S to issue NNSR permits until the SIP is revised.

Inter-precursor Offset Substitution

The policy on inter-precursor offset substitution is not changed, but minor clarifying amendments to both 51.165 and Appendix S were made to affirm the policy.

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# CLEAN DATA DETERMINATIONS AND REDESIGNATIONS

Clean Data Policy

The O3 SRR applies the same approach as under the 1997 ozone NAAQS.

If EPA determines that an area has attained, the planning SIP submittal requirements can be suspended for as long as the area attains.

See 40 CFR 51.1118 for the list of submission requirements that can be suspended.

Redesignations

No changes to existing redesignation requirements and guidance.

If EPA determines that an area attains before a specific SIP is due, the SIP submittal requirement is not considered a deficiency for redesignation for as long as the area attains (1992 Calcagni memo).

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# MISCELLANY

NOx Waivers (CAA §182(f))

Waivers issued for the 1997 ozone NAAQS do not automatically apply to the 2008 ozone NAAQS.

Rural Transport Areas

Clarity provided on the U.S. Bureau of the Census terms that govern the Clean Air Act's "adjacency" test.

The Act's terms "MSA" and "CMSA" are interpreted to mean what the Census Bureau now defines as "Metropolitan Statistical Area."

- This means a Census-defined "Micropolitan Statistical Area" could qualify for RTA status even if part of a larger Census-defined "Core Based Statistical Area" (CBSA)

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# REVOKING 1997 NAAQS AND "ANTI-BACKSLIDING" REQUIREMENTS

O3 SRR revokes the 1997 ozone NAAQS for all purposes *including transportation conformity* effective 30 days after the date the final O3 SRR is published in the Federal Register.

Areas designated nonattainment for the 2008 ozone NAAQS and still designated nonattainment for the 1997 NAAQS on that date will be subject to a list of "applicable" anti-backsliding requirements.

- Also applies to areas that were nonattainment for the 1-hour NAAQS when it was revoked on June 15, 2005 that have not been redesignated for the 1997 NAAQS.
- Lists of relevant areas is provided in Appendix B to the preamble.

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# ANTI-BACKSLIDING SUMMARY

Requirements reflect past court decisions on anti-backsliding.

All prior control requirements and associated triggering mechanisms apply.

Section 185 fee programs, contingency measures for failure to make RFP or attain, and NNSR provisions that EPA previously sought to waive also apply.

There are two paths for establishing that anti-backsliding requirements have been fulfilled:

- Redesignation to attainment for the 2008 ozone NAAQS, or
- EPA approval of a 'redesignation substitute' for the revoked NAAQS.

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# ANTI-BACKSLIDING FOR NNSR/PSD AND TITLE V

NNSR with regard to ozone will no longer apply in an area that is designated attainment for the current standard. PSD will apply and NNSR provisions may be removed from the SIP.

A nonattainment area is not subject to simultaneous application of NNSR for one standard and PSD for a prior revoked standard [revisions to 40 CFR 51.166(i)(2) and 52.21(i)(2)].

The historical designations and classifications resulting from the revoked 1997 ozone NAAQS will continue to serve to identify nonattainment NSR anti-backsliding requirements (i.e., major source thresholds and emissions offset ratios) that need to be taken into account in issuing nonattainment NSR permits for major stationary sources and major modifications [see exception under 'redesignation substitute'].

Title V: The major source threshold for Title V purposes in 2008 NAAQS nonattainment areas will be the same as the threshold that applies consistent with the NNSR-related anti-backsliding provisions.

# WHEN/HOW ANTI-BACKSLIDING APPLIES

| Designation for 2008 Ozone NAAQS | Designation for previous Ozone NAAQS (at time of revocation) | NNSR/PSD obligations | Other transition obligations |
|---|---|---|---|
| 1. Attainment | Attainment/ Maintenance | PSD remains in effect | - Requirements in the approved SIP and, where applicable, the section 175A maintenance plan are deemed to satisfy the general section 110(a)(1) maintenance requirement for prior NAAQS.<br>- Any revisions to the SIP must be consistent with sections **110(l) and 193.** |
| 2. Attainment | Nonattainment for 1997 NAAQS only;<br>or<br>Nonattainment for 1997 and 1-hour NAAQS | NNSR in effect until revocation of the 1997 NAAQS; then state can request that nonattainment NSR be replaced by PSD | - Requirements in the approved SIP for the area, plus the state's approved PSD SIP are deemed to satisfy the general section 110(a)(1) maintenance requirement for prior NAAQS.<br>- Any revisions to the SIP must be consistent with sections **110(l) and 193.** |



# WHEN/HOW ANTI-BACKSLIDING APPLIES

| Designation for 2008 Ozone NAAQS | Designation for previous Ozone NAAQS (at time of revocation) | NNSR/PSD obligations | Other transition obligations |
|---|---|---|---|
| 3. Nonattainment | Attainment/ Maintenance | NNSR applies based on 2008 NAAQS classification | - Area remains subject to requirements in the approved SIP, including the section 175A maintenance plan where applicable.<br>- Any revisions to the SIP must be consistent with sections **110(l) and 193.** |
| 4. Nonattainment | Nonattainment for 1997 NAAQS only;<br>or<br>Nonattainment for 1997 and 1-hour NAAQS | NNSR applies based on highest applicable classification | - Area subject to all **applicable anti-backsliding** requirements for 1997 NAAQS and, where applicable, 1-hr NAAQS<br>- Area also remains subject to requirements in the approved SIP and any revisions to the SIP must be consistent with sections **110(l) and 193**<br>- Anti-backsliding obligations for specific revoked standard deemed fulfilled when either a) the area is redesignated to attainment for the 2008 NAAQS, or b) the EPA approves a redesignation substitute for the revoked 1-hour or 1997 NAAQS. |

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# REDESIGNATION SUBSTITUTE

This showing for a revoked NAAQS is based on the familiar redesignation criteria in CAA §107(d)(3)(E), and is now codified at 40 CFR 51. 1105(b).

- States must demonstrate: 1) that the specific revoked NAAQS has been attained, 2) that this is due to permanent and enforceable measures, and 3) that the area will continue to maintain the standard over the next 10 years.
- EPA will conduct notice-and-comment rulemaking on the showing; no formal SIP submittal process.

Effect on NNSR Requirements

- After a successful showing, NNSR requirements in the area for that specific revoked NAAQS would no longer apply and may be removed from the SIP.
- The remaining governing NNSR provisions (i.e., major source thresholds and offset ratios) would be set by the highest classification to which the area is still subject; could be another revoked ozone NAAQS or the 2008 ozone NAAQS.

Effect on §185 Fee Program Requirements

- A successful showing terminates the requirement to implement a §185 fee program for that specific revoked NAAQS.

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# RELATED RULES/PROGRAMS

Rules affecting Ozone Implementation:

- Transportation Conformity Rules
- General Conformity Rules
- Exceptional Events Rule

Other emissions control programs that impact Ozone Precursors

- Regional Haze
- PM2.5 NAAQS Implementation
- Greenhouse Gas Clean Power Plan
- Cross State Air Pollution Rule

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# EPA REGIONAL OFFICE OZONE SIP CONTACTS

Region 1: Anne Arnold

Region 2: Rick Ruvo

Region 3: Maria Pino

Region 4: Jane Spann

Region 5: Kathleen D'Agostino

Region 6: Guy Donaldson

Region 7: Josh Tapp

Region 8: Jody Ostendorf

Region 9: John Kelly

Region 10: Claudia Vaupel

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# TIME FOR QUESTIONS

Please keep your questions focused on the new Ozone SIP Requirements Rule.

We will attempt to answer as many as we can, but can not guarantee that we will get to all of them.

You may experience periods of silence while we review the questions that are coming in.

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# SUPPLEMENTAL SLIDES

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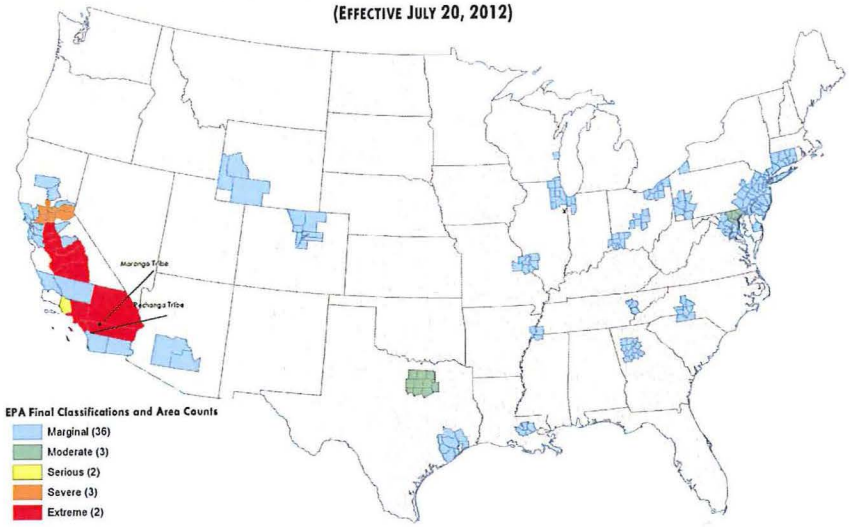
## NONATTAINMENT AREAS FOR 2008 OZONE NAAQS BY CLASSIFICATION (EFFECTIVE JULY 20, 2012)




**Notes:**

- EPA did not designate as nonattainment any areas outside the Continental U.S.
- Map reflects classifications following requests for voluntary "bump-ups"

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TABLE 1
CLASSIFICATIONS AND ATTAINMENT DATES FOR 2008 8-HOUR OZONE NAAQS (0.075 PPM) FOR AREAS SUBJECT TO CFR SECTION 51.1102

| Area class | | 8-hour design value (ppm ozone) | Primary Standard Attainment Date (years after the effective date of designation for 2008 primary NAAQS) |
|---|---|---|---|
| Marginal | from | 0.076 | 3 years |
| | up to* | 0.086 | |
| Moderate | from | 0.086 | 6 years |
| | up to* | 0.100 | |
| Serious | from | 0.100 | 9 years |
| | up to* | 0.113 | |
| Severe-15 | from | 0.113 | 15 years |
| | up to* | 0.119 | |
| Severe-17 | from | 0.119 | 17 years |
| | up to* | 0.175 | |
| Extreme | equal to or above | 0.175 | 20 years |

* but not including

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# EXAMPLE: ATTAINMENT DATE EXTENSIONS

| | | 2012 | 2013 | 2014 | 2015 | 2nd Extension Average |
|---|---|---|---|---|---|---|
| **Area A** | Annual 4th Max (ppm) | 0.079 | 0.078 | **0.074** | 0.076 | **0.075** |
| | 3-year DV (ppm) | - | - | **0.077** | **0.076** | |
| **Area B** | Annual 4th Max (ppm) | 0.084 | 0.078 | **0.072** | 0.080 | **0.076** |
| | 3-year DV (ppm) | - | - | **0.078** | **0.077** | |

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# FEDERAL REGISTER

Vol. 80 Friday,
No. 44 March 6, 2015

Part II

## Environmental Protection Agency

40 CFR Parts 50, 51, 52, et al.
Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 50, 51, 52, 70, and 71**

**[EPA–HQ–OAR–2010–0885; FRL–9917–29–OAR]**

**RIN 2060–AR34**

# Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is establishing a final rule for implementing the 2008 ozone national ambient air quality standards (NAAQS) (the "2008 ozone NAAQS") that were promulgated on March 12, 2008. This final rule addresses a range of nonattainment area state implementation plan (SIP) requirements for the 2008 ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology (RACT), reasonably available control measures (RACM), major new source review (NSR), emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP. Other issues also addressed in this final rule are the revocation of the 1997 ozone NAAQS and anti-backsliding requirements that apply when the 1997 ozone NAAQS are revoked. If the primary or secondary ozone NAAQS are revised in the future, the EPA expects that this rule will help facilitate implementation of any new standards.

**DATES:** This final rule is effective on April 6, 2015.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2011–0885. All documents in the docket are listed in *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *i.e.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Room Number 3334 in the EPA William Jefferson Clinton West Building, located at 1301 Constitution Avenue NW., Washington, DC 20004. 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:** For further general information on this rulemaking, contact Dr. Karl Pepple, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, by phone at (206) 553–1778, or by email at *pepple.karl@epa.gov;* or Mr. Butch Stackhouse, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, phone number (919) 541-5208, or by email at *stackhouse.butch@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

Entities potentially affected directly by this final rule include state, local and tribal governments. Entities potentially affected indirectly by this final rule include owners and operators of sources of emissions [volatile organic compounds (VOCs) and nitrogen oxides ($NO_X$)] that contribute to ground-level ozone formation.

### *B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this notice will be posted at *http://www.epa.gov/air/ozonepollution/actions.html#impl* under "recent actions."

### *C. How is this notice organized?*

The information presented in this notice is organized as follows:

I. General Information
- A. Does this action apply to me?
- B. Where can I get a copy of this document and other related information?
- C. How is this notice organized?

II. Background

III. What are the SIP requirements for the 2008 ozone NAAQS?
- A. What are the applicable deadlines for nonattainment areas under the 2008 ozone NAAQS?
- B. What are the requirements for modeling and attainment demonstration SIPs?
- C. What are the RFP requirements for the 2008 ozone NAAQS?
- D. How do RACT and RACM requirements apply for 2008 ozone NAAQS nonattainment areas?
- E. Does the 2008 ozone NAAQS result in any new vehicle I/M programs?
- F. How does transportation conformity apply to the 2008 ozone NAAQS?
- G. What requirements for general conformity apply to the 2008 ozone NAAQS?
- H. What are the requirements for contingency measures in the event of failure to meet a milestone or to attain?
- I. How do the NSR requirements apply for the 2008 ozone NAAQS?
- J. What are the emission inventory and emission statement requirements?
- K. What are the ambient monitoring requirements?
- L. How can an area qualify for a 1-year attainment deadline extension?
- M. How will the EPA identify whether a potential rural transport area is adjacent to an urban area?
- N. What are the special requirements for multi-state nonattainment areas?
- O. How will the EPA address interstate and international ozone transport?
- P. How will the CAA section 182(f) $NO_X$ provisions be handled?
- Q. Emissions Reduction Benefits of Energy Efficiency/Renewable Energy Policies and Programs, Land Use Planning and Travel Efficiency
- R. Efforts to Encourage a Multi-pollutant Approach When Developing 2008 Ozone SIPs
- S. What are the requirements for the Ozone Transport Region (OTR)?
- T. Are there any additional requirements related to enforcement and compliance?
- U. What are the requirements for addressing emergency episodes?
- V. How does the "Clean Data Policy" apply to the 2008 ozone NAAQS?
- W. How does this final rule apply to tribes?
- X. What collaborative program has the EPA implemented for the 2008 ozone NAAQS?

IV. What are the anti-backsliding requirements for the revoked 1997 ozone NAAQS?
- A. What is the effective date of the revocation of the 1997 ozone NAAQS?
- B. What are the applicable requirements for anti-backsliding purposes following the revocation of the 1997 ozone NAAQS?
- C. Application of Transition Requirements to Nonattainment and Attainment Areas
- D. Satisfaction of Anti-backsliding Requirements for an Area
- E. How will the EPA's determination of attainment ("Clean Data") regulation apply for purposes of the anti-backsliding requirements?
- F. What is the relationship between implementation of the 2008 ozone NAAQS and the CAA title V permits program?

V. Environmental Justice Considerations

VI. Statutory and Executive Order Reviews
- A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
L. Determination Under CAA Section 307(d)
M. Judicial Review
Appendix A to Preamble—Glossary of Terms and Acronyms
Appendix B to Preamble—List of Areas Nonattainment for the 2008 Ozone NAAQS in Addition to a Prior Ozone NAAQS
Statutory Authority
List of Subjects

## II. Background

On March 12, 2008,[1] the EPA announced revisions to the primary and secondary NAAQS for ozone to a level of 0.075 parts per million (ppm) (annual fourth-highest daily maximum 8-hour concentration, averaged over 3 years).[2] Since the 2008 primary and secondary NAAQS for ozone are identical, for convenience, we refer to both as "the 2008 ozone NAAQS" or "the 2008 ozone standards." The 2008 ozone NAAQS retains the same general form and averaging time as the 0.08 ppm NAAQS set in 1997, but is set at a more stringent level.

When the EPA revises a NAAQS for a particular criteria pollutant, it considers the extent to which existing EPA regulations and guidance are sufficient to implement the standard and whether any revisions or updates to those regulations and guidance would be helpful or appropriate in facilitating the implementation of the revised standard by states, tribes, and local agencies. The Clean Air Act (CAA or Act) does not require that the EPA promulgate new implementing regulations every time that a NAAQS is revised. Likewise, the CAA does not require the issuance of additional implementing regulations or guidance by the EPA before a revised NAAQS becomes effective. The plain language of the CAA and existing EPA regulations may be sufficient in many cases to enable the EPA and the states to begin working together to implement a revised NAAQS. However, where the nature of revisions to a NAAQS indicate that additional regulations or guidance (or revisions to existing regulations or guidance) may be helpful, the EPA endeavors to provide those regulations and guidance to facilitate preparation of SIPs. It is important to note, however, that the existing EPA regulations in 40 CFR part 51 applicable to SIPs generally and to particular pollutants continue to apply even without such updates. This rule revises existing regulations and guidance as appropriate to aid in the implementation of the 2008 ozone NAAQS.

Promulgation of a NAAQS triggers a requirement for the EPA to designate areas as nonattainment, attainment, or unclassifiable, and to classify the areas at the time of designation. The EPA has already completed area designations and associated classifications for the 2008 NAAQS, and they were effective July 20, 2012 (May 21, 2012; 77 FR 30088). The EPA also issued a Classifications Rule at the same time which established air quality thresholds for each nonattainment classification (May 21, 2012; 77 FR 30160).

The EPA also undertook notice and comment rulemaking on the CAA nonattainment area provisions as they apply to the 2008 ozone NAAQS and appropriate rules to implement those provisions, which is complete with this final rule. The public comment period on the June 6, 2013, notice of proposed rulemaking (NPRM) (78 FR 34178) for the SIP Requirements Rule ran from June 6, 2013, to September 4, 2013. The EPA received 54 comment submissions on the NPRM. The preamble to this final rule discusses the comments received and how they were considered by the EPA in general terms. The Response to Comments document provides more detailed responses to the comments received. The public comments received on the NPRM and the EPA's Response to Comment document are posted in the docket at *www.regulations.gov* (Docket ID No. EPA–HQ–OAR–2011–0885).

We are taking multiple actions in this rule pertaining to submittal deadlines and specific CAA requirements for the content of SIPs for the 2008 ozone NAAQS. As a general matter, this final rule follows the same basic principles and approach that the EPA applied to interpreting the CAA's part D, subpart 2 ozone nonattainment area requirements in the EPA's development of the implementation rules for the 1997 ozone NAAQS.[3] Additionally, we are revoking the 1997 ozone NAAQS for all purposes and establishing anti-backsliding requirements for areas that remain designated nonattainment for the revoked NAAQS.

Regarding the format of the following sections of this preamble, on topics where we proposed an action, we include detailed information about what we proposed, what we are finalizing and our rationale, as well as responses to significant comments. With topics where we did not propose any action, we provide guidance on that topic in the preamble. For a comprehensive look at all comments received and responses to those comments, please refer to the Response to Comment document in the docket.

## III. What are the SIP requirements for the 2008 ozone NAAQS?

### *A. What are the applicable deadlines for nonattainment areas under the 2008 ozone NAAQS?*

1. What is the deadline for submitting nonattainment area SIP revisions for the 2008 ozone NAAQS?

a. Summary of the Proposal

For purposes of the 2008 ozone NAAQS, the EPA proposed two alternatives regarding the deadlines for submitting the various elements of an ozone nonattainment area SIP, including emission inventories, RACT SIPs and emission statement SIPs, Ozone Transport Region (OTR) RACT, 15 percent rate-of-progress (ROP) plans and Moderate area attainment demonstrations, and the 3 percent per year RFP plans and attainment demonstrations for Serious and higher areas. The two proposed alternatives for SIP due dates were (1) the period of time provided by CAA section 182, and (2) a state's choice of either submitting all elements in accordance with the timeframe provided by CAA section 182 or submitting all elements under a consolidated approach, no later than 30 months after the effective date of designation. The consolidated SIP approach would provide more time for some SIPs, and less time for others.

The EPA also proposed a timeframe, for Serious and higher areas, of 4 years for states to develop their attainment demonstrations and 3 percent per year RFP plans. This was a proposed change from the approach used in the implementation of the 1997 ozone NAAQS, but is consistent with the timeframe allowed under CAA section 182.

Additionally, the EPA requested comment on its proposal to align the due date of the vehicle inspection and maintenance (I/M) program SIP with the

[1] *See* 73 FR 16436.

[2] For a detailed explanation of the calculation of the 3-year 8-hour average, *see* 40 CFR part 50, Appendix I.

[3] *See* the Phase 1 (69 FR 23951, April 30, 2004) and Phase 2 (70 FR 71612, November 29, 2005) Rules.

due date of the attainment demonstration SIP so that both are due at the same time. This was similarly a proposed change from the current I/M SIP deadline for ozone nonattainment areas (1 year after the effective date of designation and classification under a revised ozone standard).

We proposed that states with areas initially classified as Severe or Extreme for the 2008 ozone NAAQS would be required to submit a CAA section 185 SIP no later than 10 years after the effective date of designation and classification for the 2008 ozone NAAQS.

Finally, the EPA proposed that all SIP due date timeframes would run from the effective date of nonattainment designations for the 2008 ozone NAAQS.

b. Final Action

We are finalizing the approach that the SIP elements listed in the proposal are due based on the timeframes provided in CAA section 182. That is, states with areas designated nonattainment have 2 years from the effective date of nonattainment designation [4] to submit emission inventories (required by CAA section 182(a)(1)), RACT SIPs (CAA section 182(b)(2)) and emission statement SIPs [5] (CAA section 182(a)(3)(B)); 3 years to submit 15 percent ROP plans (CAA section 182(b)(1)) and Moderate area attainment demonstrations (CAA section 182(b)(1)); and 4 years to submit 3 percent per year [6] RFP plans (CAA section 182(c)(2)) and attainment demonstrations (CAA section 182(c)(2)) for Serious and higher areas. This approach conforms to the manner in which the 1997 ozone NAAQS was implemented, with the exception of the 4th year provided to areas classified Serious and higher to develop attainment demonstration SIPs for the 2008 ozone NAAQS. Additionally, we note that OTR states that owe SIPs due to CAA section 184 must meet the same SIP due dates listed previously.

The EPA is also finalizing the alignment of the vehicle I/M program SIP due date with the due date for the attainment demonstration SIP for the area. This will be achieved by revising 40 CFR 51.372(b)(2) of the vehicle I/M rule [7] to replace the current 1-year deadline for vehicle I/M program SIP submissions with a deadline of no later than the due date for submitting the area's attainment demonstration SIP.

The EPA is also finalizing the due date of the CAA section 185 penalty fee program SIPs from areas initially classified as Severe or Extreme for the 2008 ozone NAAQS as 10 years from the effective date of designations. For areas that are reclassified to Severe or Extreme after the original 2008 designations and classifications, the EPA will establish an appropriate fee program SIP submission deadline as part of the reclassification action.

We note that in the proposed SIP Requirements Rule, the EPA did not include a specific due date for nonattainment NSR SIPs for the 2008 ozone NAAQS. This final rule includes a due date of 3 years from the effective date of designation for states with nonattainment areas for the 2008 ozone NAAQS to submit their nonattainment NSR SIPs as a logical outgrowth of the proposed rule and the comments submitted. Additional discussion of this due date and our rationale for that date are provided in the following *Comments and Responses* section, which discusses NSR requirements in greater detail.

As proposed, the EPA is finalizing that these various SIP due dates are established based on the effective date of designations for the 2008 ozone NAAQS. For areas initially designated nonattainment, this effective date was July 20, 2012.[8]

c. Rationale

After considering comments questioning the legal supportability of the consolidated approach, the EPA has concluded that we do not have a sufficient statutory basis to provide this flexibility.[9] Therefore, the EPA is finalizing the approach that the various SIP elements are due based on the timeframes provided in CAA section 182.

When implementing the 1997 ozone NAAQS, the EPA provided areas classified as Serious and higher only 3 years to develop and submit attainment demonstration SIPs. The EPA is now providing the maximum of 4 years to develop and submit these SIPs, consistent with the CAA. The policy reasons that existed at the time the Phase 2 rule was developed (*i.e.*, the need for timing consistency between subpart 1 and subpart 2 areas within the same region, the timing of the large-scale interstate transport modeling underway at the time, and the option of coordinated planning with the similarly timed $PM_{2.5}$ SIPs) are not generally circumstances faced currently by the Serious and higher areas. Thus, the EPA concludes that it is not appropriate to shorten the time period allowed by the Act to submit these SIPs.

Regarding the alignment of due dates for attainment demonstration SIPs and vehicle I/M program SIPs, the EPA believes this allows the best use of state resources. Areas need to determine together the total amount of emissions reductions needed for attainment and the amount of emissions reductions to achieve from different sectors and strategies (including vehicle I/M), before designing a vehicle I/M program capable of achieving the necessary reductions to demonstrate attainment. Requiring submittal of a vehicle I/M program in advance of an attainment demonstration for the current or future ozone standard could result in significant unnecessary work on modeling and SIP revisions if revisions to the vehicle I/M program are later deemed necessary to integrate with the overall attainment strategy. Although no new vehicle I/M programs are required under the initial designations and classifications for the 2008 ozone NAAQS, this change will apply to any current Marginal areas that may be required to adopt vehicle I/M as a result of missing an attainment deadline and being reclassified to a higher nonattainment classification in the future.

We believe the submittal date for the CAA section 185 penalty fee program SIPs is consistent with section 182(d)(3) of the CAA, which provided slightly more than 10 years for submission of the fee program SIP revision for areas designated as nonattainment and classified as Severe or Extreme by operation of law in 1990 for the 1-hour ozone NAAQS.

The EPA has historically based the due date of the SIPs discussed previously from the effective date of designations and sees no reason to depart from that practice here.

d. Comments and Responses

*Comment:* Several commenters supported the idea of a consolidated SIP submittal, but thought that the 30 months provided in the proposal for the consolidated submittal was not sufficient to entice any states to take advantage of the option. Many commenters expressed a concern that the EPA did not have a sufficiently firm legal basis to allow states to delay any of the required SIP submissions beyond

[4] The effective date of designations was July 20, 2012. *See* 77 FR 30088.

[5] *See* section III.J.2 of this rule for additional information on emission statements.

[6] Typically submitted in 3-year increments, thus as 9 percent RFP plans that produce average reductions of 3 percent per year.

[7] *See* 71 FR 17705, April 7, 2006.

[8] *See* 77 FR 30088, May 21, 2012; and 77 FR 34221, June 11, 2012.

[9] The EPA believes that the recent ruling by the D.C. Circuit Court on the Classifications Rule (77 FR 30160, May 21, 2012) impacts the level of flexibility EPA is able to provide regarding SIP due dates. *See NRDC* v. *EPA* (D.C. Cir. No. 12–1321, Dec 23, 2014).

the timeframes provided in the statute, nor to require early submittal of any SIPs.

*Response:* The EPA proposed the consolidated approach in an attempt to provide flexibility and a potential burden reduction option to states. After considering the comments questioning the legal supportability of this approach, we concluded that at this time we do not have a sufficient basis to support this flexibility. Thus, we are not finalizing the consolidated approach.

*Comment:* One commenter disagreed with the EPA's proposal that the SIP submittal due dates in subpart 2 should run from the effective date of designations. The commenter believed that the SIP due dates must run from the date the designations are signed.

*Response:* We disagree with the commenter that the CAA mandates the SIP submittal due dates in subpart 2 must run from the date the designations are signed instead of the effective date of designations. The EPA believes that its historic practice of establishing SIP due dates that run from the effective dates of designations, as it did for the 1997 ozone NAAQS, is appropriate and legally supportable. Therefore, we are not deviating from this practice.

*Comment:* Two commenters supported the EPA's proposal to align the vehicle I/M program SIP and attainment SIP deadlines, while two other commenters stated that any change to the vehicle I/M program SIP deadline needs to be consistent with the deadlines prescribed in the CAA and not delay implementation of required I/M programs.

*Response:* The EPA's decision to align the I/M SIP submittal deadline with the deadline for submitting the attainment demonstration will not impact the emission reductions achieved through the vehicle I/M program requirement because we are not changing the deadline by which affected areas must begin testing and repairing vehicles. Further, the EPA believes that it must, of necessity, provide a reasonable interpretation of the CAA's vehicle I/M program SIP submission deadline because the Act's basic vehicle I/M program SIP submission requirement of "immediately upon enactment" of the CAA is impossible to meet. Lastly, given the degree to which the overall attainment demonstration will rely on emission reductions derived from vehicle I/M, it is reasonable and cost-effective to allow states to coordinate these two planning requirements.

*Comment:* One commenter noted that the proposal was silent about the due date of the nonattainment NSR SIP. The commenter stated that the EPA should clearly establish the associated due dates for nonattainment NSR SIP submittals.

*Response:* The commenter is correct that the discussion of SIP submittal deadlines in the proposed SIP Requirements Rule did not include the date on which states must submit for the EPA's approval the required nonattainment NSR SIP applicable to the 2008 ozone NAAQS. This final rule includes a deadline of 3 years from the date of designation for states to submit their nonattainment NSR program SIPs for the 2008 ozone NAAQS. This date is consistent with the submittal date that the EPA provided states to develop an approvable nonattainment NSR program for the 1997 ozone NAAQS in the Phase 2 Rule, and is consistent with CAA section 172(b), which states that the EPA shall establish a date no later than 3 years from the date of the nonattainment designation.[10] Consequently, the EPA does not believe it has discretion to set a date longer than 3 years, and also concludes that states may need up to 3 years to develop and submit any necessary SIPs.

In the Phase 2 Rule, we indicated that the 3-year SIP deadline facilitates coordination of NSR program changes with the submission of the attainment plan, which was also due within 3 years. We recognize that CAA section 182(a)(2)(C)(i), under the heading "Corrections to the State implementation plans—Permit programs" contains a requirement for states to submit NSR SIP revisions to meet the requirements of CAA sections 172(c)(5) and 173 within 2 years after the date of enactment of the 1990 CAA Amendments. As explained in our Phase 2 rulemaking, we believe the submission of NSR SIPs due on November 15, 1992, fulfilled this CAA requirement.[11] Accordingly, we do not believe that the 2-year deadline contained in CAA section 182(a)(2)(C)(i) applies to subsequent NSR SIPs for revised ozone standards, including the nonattainment NSR SIPs for implementing the 8-hour ozone NAAQS. In addition, we note that while CAA section 182 specifies the offset ratios or major source thresholds to be included in the revised NSR SIP, it is silent as to the SIP submission deadline (*see, e.g.*, CAA section 182(a)(4), CAA section 182(b)(5) and CAA section 182(c)). Given this gap in CAA section 182, we believe it is reasonable to look to CAA section 172(b) in establishing a deadline for submission of the nonattainment NSR SIP. While the EPA did not propose a date on which states must submit for the agency's approval the required nonattainment NSR SIP, stakeholders could have anticipated that we would continue our prior practice unless we proposed to take a different course. In this rule, we are continuing our prior practice, as reflected in the Phase 2 rule for the 1997 ozone NAAQS, of including a deadline of 3 years from the date of designation for states to submit their nonattainment NSR program SIPs.

2. What are the attainment dates for the 2008 ozone NAAQS?

a. Background

For purposes of the 2008 ozone NAAQS, the EPA proposed two options for establishing the maximum attainment dates for areas in each nonattainment classification in its separate Classifications Rule issued on May 21, 2012.[12] Under the first option, the attainment dates would be the precise number of years specified in Table 1 with such time period running from the effective date of designation. Under the second option, the attainment dates would be December 31 of the year that is the specified number of years in Table 1 after designation. The first option was the same approach we took for the 1997 NAAQS, where we would interpret "year" in the subpart 2 classification table to mean consecutive 365-day periods,[13] and we would substitute "after the effective date of designation" for the "after November 15, 1990" language in the subpart 2 classification table. Under this approach the attainment deadline would fall a precise number of years after the effective date of designation. Specifically, the initial area designations for the 2008 ozone NAAQS became effective on July 20, 2012, and the attainment dates would run from July 20, 2012, such that the 3-year attainment deadline for Marginal areas would be July 20, 2015.

For the second option, which the EPA promulgated in the final May 2012 Classification Rule (77 FR 30160), the attainment date would be specified as a certain number of years from the end of the calendar year in which an area's nonattainment designation is effective. In other words, since the effective date of designations for the 2008 ozone NAAQS is July 20, 2012, the 3-year

[10] *See* 70 FR 71612 at 71672 and 71683 (November 29, 2005).

[11] *Ibid.*

[12] *See* the proposal (77 FR 8197; February 14, 2012) and the final (77 FR 30160; May 21, 2012) Classifications Rule for the 2008 ozone NAAQS.

[13] Except in the case of a leap year, where the year would be a rolling 366 day period.

attainment deadline for Marginal areas would be December 31, 2015.

The end of calendar year attainment date in the May 2012 Classifications Rule was challenged in NRDC v. EPA (D.C. Cir. No. 12–1321). On December 23, 2014, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion holding that the EPA's decision to run the attainment periods from the end of the calendar year in which areas were designated was unreasonable. While recognizing that there is a "gap" in the statute since the CAA runs the attainment periods from the date of enactment of the CAA Amendments of 1990, the Court concluded that nothing in the statute or congressional intent authorized the EPA to establish the attainment dates for designated ozone nonattainment areas as December 31st of the relevant calendar years, but rather that such deadlines are more appropriately calculated as annual periods running from the date of designation and classification as the EPA had done in past ozone implementation rules.

b. Action on Attainment Dates

To provide clarity to states after the DC Circuit court decision, the EPA is modifying 40 CFR 51.1103 consistent with that decision to establish attainment dates that run from the effective date of designation, *i.e.*, July 20, 2012.[14] This is the same approach the EPA used in past ozone implementation rules and the approach the court indicated was consistent with Congressional intent.[15] The maximum attainment dates for nonattainment areas in each classification under the 2008 NAAQS based on the July 20, 2012, effective date are as follows: Marginal—3 years from effective date of designation; Moderate—6 years from effective date of designation; Serious—9 years from effective date of designation; Severe—15 years (or 17 years) from effective date of designation; and Extreme—20 years from effective date of designation. In addition to being consistent with the court decision, this outcome was supported by several commenters on the EPA's February 2012 proposed Classifications Rule (77 FR 8197, February 14, 2012). These supporting commenters believed this outcome to be a plain reading of the CAA, and less likely to result in further delays in implementing controls in nonattainment areas (*see* 77 FR 30160 at 30166, May 21, 2012).

*B. What are the requirements for modeling and attainment demonstration SIPs?*

1. Marginal Areas

Under CAA section 182(a), Marginal areas have up to 3 years from the effective date of designation to attain the NAAQS, and are not required to submit an attainment demonstration SIP. The EPA offers assistance to states as they consider the most appropriate course of action for Marginal areas that may be at risk of failing to meet the NAAQS within the applicable 3 year timeframe. States can choose to adopt additional controls for such areas or they can seek a voluntary reclassification to a higher classification category. The EPA believes that voluntary reclassification for areas that are not likely to attain by their attainment date is an appropriate action that will facilitate focus on developing the attainment plans required of Moderate and above areas.

2. Moderate Areas

a. Summary of the Proposal

The EPA proposed to continue to require states with an area classified as Moderate to submit an attainment demonstration,[16] due no later than 3 years from the effective date of an area's designation, based on photochemical modeling or another equivalent analytical method that is determined to be at least as effective as that which is required under the Act for Serious and above areas and multi-state nonattainment areas.[17] This is the same approach used in the implementation rules for the 1997 ozone NAAQS. 40 CFR 51.908(c).

b. Final Action and Rationale

The EPA is finalizing requirements for Moderate areas as proposed. The EPA continues to believe the requirements for Moderate areas are reasonable, primarily because photochemical modeling is generally available and reasonable to employ. However, this requirement also explicitly allows for alternative analytical methods to be substituted for or used to supplement a photochemical modeling-based assessment of an emissions control strategy. Any alternative analysis should be based on technically credible methods and provide for the timely submittal of the attainment demonstration and implementation of SIP controls. States should review the EPA modeling guidance[18] and consult their appropriate EPA Regional Office before proceeding with alternative analyses.

c. Comments and Responses

*Comment:* Some commenters believed that the EPA exceeds its authority to require states with Moderate nonattainment areas to use photochemical modeling and thus, undermines states' discretionary options allowed under the statute.

*Response:* The EPA disagrees with the commenters and believes that we have the authority to require states to use appropriate modeling to predict the effect of emissions on air quality of any NAAQS as we did for the 1997 ozone NAAQS. CAA section 182(c)(2)(A) contains specific requirements for states to use photochemical modeling or another similarly effective equivalent modeling method in their SIPs for

[14] We are finalizing this approach without additional notice-and-comment. As noted, we took comment in the original proposal on two approaches: The option we promulgated and which the court rejected, and the option we are promulgating here. Moreover, the court decision strongly indicates that the approach we are promulgating here is the only approach that is consistent with Congressional intent. In light of the need for certainty for the states and regulated parties, the fact that we previously solicited comment on the approach we are adopting here, and the limited discretion the court believes EPA has been provided under the Act, we believe additional comment is unnecessary and contrary to the public interest.

[15] We note that during the comment period on the May 2012 rule establishing the attainment dates, a few commenters claimed that the attainment period should run from the time the designations actions were signed by the Administrator rather than the effective date of designation. In the final May 2012 rule, we responded to this comment explaining why we believed the arguments the commenters raised were not supported by the statute. Regardless we note that whether the attainment date runs from the date of signature or the effective date of designation, the attainment year will be the same, as an attainment showing is based on the most recent three full years of ozone data available. Thus, for example, under either approach, the relevant years for demonstrating attainment for a Marginal area will be 2012–2014 and for a Moderate area, 2015–2017.

[16] An attainment demonstration consists of: (1) Technical analyses, such as base year and future year modeling of emissions which identifies sources and quantifies emissions from those sources that are contributing to nonattainment; (2) analyses of future year emissions reductions and air quality improvement resulting from existing (*i.e.*, already-adopted or "on the books") national, regional and local programs, and potential new local measures needed for attainment, including RACM and RACT for the area; (3) a list of adopted measures (including RACT) with schedules for implementation and other means and techniques necessary and appropriate for demonstrating attainment as expeditiously as practicable but no later than the outside attainment date for the area's classification; and (4) a RACM analysis to determine whether any additional RACM measures could advance attainment by 1 year.

[17] State plans for single nonattainment areas that include more than one state (multi-state nonattainment areas) are also required to have photochemical modeling (*see* CAA section 182(j)(1)(B)).

[18] The modeling guidance can be found in the EPA's "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze," at the following Web site: *http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf.*

Serious and above nonattainment areas. Additionally, CAA section 182(b)(1)(A)(i) requires RFP plans for Moderate areas to provide for such specific annual reductions in emissions of VOC and $NO_X$ as necessary to attain the NAAQS by the applicable attainment date. The EPA has interpreted this as a requirement for Moderate areas to submit an attainment demonstration. Since photochemical modeling is the most scientifically rigorous technique to determine $NO_X$ and/or VOC emissions reductions needed to show attainment of the NAAQS and is readily available, we are requiring photochemical modeling (or a similarly effective equivalent modeling method) for all attainment demonstrations (including Moderate areas). The authority for this requirement for Moderate areas is derived from CAA section 110(a)(2)(k), which gives the Administrator the authority to require air quality modeling for the purpose of predicting the effect on ambient air quality of emissions of any air pollutant for which there is an established NAAQS.

*Comment:* One commenter stated that allowing up to 3 years to submit an attainment demonstration is not sufficient time to allow for the emissions inventory development and modeling required for an attainment demonstration. The commenter wanted the EPA to allow "the original four year timeline" to submit attainment demonstrations.

*Response:* CAA Section 182 contains two attainment demonstration submittal dates that depend on an area's classification. For Moderate areas, CAA section 182(b)(1)(A) requires a plan within 3 years of the designation date. For Serious and above areas, CAA section 182(c)(2) requires a plan within 4 years of the designation date. In the Phase 2 Rule, 70 FR 71612, at 71639, the EPA required all attainment demonstrations to be submitted within 3 years of designation. However, for this rule, the EPA proposed to allow the original CAA deadlines of up to 3 years for Moderate areas and up to 4 years for Serious areas, 78 FR 34178, at 34183. While the EPA agrees that the development of emissions inventories and modeling for attainment demonstrations can be a lengthy process, the statute does not allow for more than 3 years for a Moderate area attainment demonstration. However, since the statute does allow up to 4 years to submit a Serious (and above) area attainment demonstration, in this rule we are allowing the maximum amount of time provided by the statute for such areas. Therefore, the EPA is finalizing the attainment demonstration submittal dates as proposed; up to 3 years from the effective date of designation for Moderate areas and up to 4 years from the effective date of designation for Serious and above areas.

*Comment:* One commenter stated that there are now a number of rural areas in the country with wintertime ozone attainment issues, and recommended that the EPA exempt rural wintertime ozone nonattainment areas from this requirement because a wintertime photochemical grid model or proven alternative analytical method has not been developed. The commenter argued that it is the EPA's responsibility to develop and test models that can be used consistently across the nation.

*Response:* The EPA recognizes that the causes of rural wintertime ozone exceedances are different than typical summer exceedances. However, the CAA does not distinguish between summer and winter ozone areas. Areas with wintertime violations are designated as nonattainment based on the same classification thresholds as all other nonattainment areas. They therefore must meet all of the appropriate CAA requirements for their particular nonattainment classification. Nonattainment areas classified as Moderate and above, even those that may experience wintertime ozone problems, are required to submit an attainment demonstration. However, there is flexibility in determining analytical methods to be used in developing the demonstration. The EPA will consider the nature of the ozone problem in reviewing available models and potential alternative methods for demonstrating attainment. There is also ongoing research that has successfully identified enhancements in modeling science which have improved photochemical model performance in wintertime ozone situations. Some of these science updates may be available for states to use in their attainment demonstrations by the time modeling is needed for areas with wintertime ozone problems.

3. Serious and Above Areas

For Serious and higher-classified areas, CAA section 182(c)(2)(A) states that attainment demonstrations must be submitted within 4 years of the designation date and be based on photochemical grid modeling or an equivalent effective method. We continue to believe that photochemical modeling is the most technically credible method of estimating future year ozone concentrations based on projected VOC and $NO_X$ precursor emissions. Therefore, consistent with the CAA and previous implementation rules, states with areas classified as Serious and higher are required to submit attainment demonstrations within 4 years of the effective date of designation, based on photochemical modeling or an alternative analytical method determined by the Administrator to be at least as effective.

4. What guidance is there for using models to demonstrate attainment?

The procedures for modeling ozone as part of an attainment demonstration are well developed and described in the EPA's "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze." [19] This guidance document, as it currently exists, can be used by states for purposes of developing attainment demonstration SIPs for the 2008 ozone NAAQS.

Commenters requested that the EPA update its modeling guidance pertinent to ozone and that it be made available in advance of SIP submission deadlines. The EPA agrees with this comment and is therefore currently updating the modeling guidance, and we intend to issue the updated guidance prior to the attainment demonstration SIP deadlines.

5. Capturing High Emissions Days in Inventories

In the proposed SIP Requirements Rule, the EPA did not propose changes to modeling requirements for modeling high emissions days. The current modeling guidance addresses, among many other considerations, episode selection and accounting for variability in emissions and meteorology.

The EPA recognizes that there are time periods with relatively higher $NO_X$ emissions from electric utilities during high energy demand periods, *i.e.*, High Electricity Demand Days (HEDD). Since $NO_X$ emissions from electric power generation are a significant contributor to the total $NO_X$ emissions for many ozone nonattainment areas, states that experience these situations should ensure that these emissions are included in photochemical modeling of episode days on which the HEDD situations occurs. In order to properly account for HEDD emissions in the modeling, careful attention should be paid to the temporalization of emissions to the specific day and hour of the day when these emissions occur. We note that the

[19] The modeling guidance can be found at the following Web site: *http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf.*

EPA's current modeling guidance[20] already addresses episode selection and development of accurate emissions input information during peak ozone periods. Some commenters urged the EPA to update the current modeling guidance. The EPA is in the process of updating the current modeling guidance and intends to more specifically address modeling of HEDD in that guidance.

The EPA did not propose changes in this rule to the emission inventory requirements for capturing high emissions days but received many comments on the rule requirements that should have been directed to EPA guidance documents under development for ozone emission inventories (*see* section III.J of this preamble). They will be considered when these guidance documents are reviewed. The EPA does address the comments referring to the emission inventory guidance in the Response to Comments document for this rule. The comments do not directly impact the outcome of this rule. The EPA responses are provided for completeness and to provide these commenters with more information regarding the EPA's intentions for guidance development related to HEDD emissions.

6. Modeled Attainment Test

The EPA's attainment demonstration modeling guidance addresses the modeled attainment test for ozone, which uses a combination of ambient ozone data and modeled ozone concentrations to estimate future year air quality. The attainment test is applied at each monitor location within or near a designated nonattainment area. Models are used in a relative sense to estimate the response of measured air quality to anticipated future changes in emissions. Future air quality is estimated by adjusting recent monitored values by the modeled relative response to projected future changes in emissions.[21] The EPA additionally recommends application of an attainment test to be performed in unmonitored areas. The recommended attainment test methodology for unmonitored areas has been used in 8-hour ozone SIPs developed for the 1997 ozone NAAQS. To make it easier for states to apply the attainment tests, both the monitor-based test and the unmonitored area test have been incorporated in a software package called the "Modeled Attainment Test Software" (MATS). The MATS is available for no charge at: *http://www.epa.gov/scram001/modelingapps_mats.htm.*

7. What future year(s) should be modeled in attainment demonstrations?

a. Summary of the Proposal

The EPA proposed that for the 2008 ozone NAAQS, control measures relied upon to demonstrate attainment should be implemented by the beginning of the last full ozone season prior to the area's attainment date. Accordingly, the future year attainment modeling should not extend beyond that time period.

b. Final Action and Rationale

The EPA is finalizing this action as proposed. The EPA stated in the proposal that the future modeling year should be selected such that all emissions control measures relied on for attainment will have been implemented by that year. This same approach was used for the 1997 ozone NAAQS and we continue to believe it is an appropriate approach for modeling of control measures. To demonstrate attainment, the modeling results for the nonattainment area must predict that emissions reductions implemented by the beginning of the last full ozone season preceding the attainment date will result in ozone concentrations that meet the level of the standard.[22]

Because an area must attain "as expeditiously as practicable," additional considerations are necessary before a future attainment date can be established. For example, although the latest attainment date under the CAA for a Moderate area designated in 2012 would be 6 years after the effective date of designation, July 20, 2018, under the Classifications Rule, *see NRDC* v. *EPA*, the state would need to conduct an analysis of reasonably available control measures (RACM) (CAA section 172(c)(1)) to determine if it can advance the area's attainment date by at least a year.[23] Results of the RACM analysis may indicate attainment can be achieved earlier through implementation of reasonably available control measures prior to July 20 of an earlier year. For instance, if emission reductions sufficient to demonstrate attainment are implemented prior to July, 2016, then in this example the attainment year and the future projection year should be 2016. The proposal for this rulemaking also stated[24] that, in determining the attainment date that is as expeditious as practicable, the state should consider impacts on the nonattainment area of intrastate transport of pollution from sources within its jurisdiction, and potential reasonable measures to reduce emissions from those sources.

We strongly recommend that the state discuss the selection of the future year(s) to model with the appropriate EPA Regional Office as part of the modeling protocol development process.

c. Comments and Responses

*Comment:* Many commenters supported the EPA's proposal; however, one commenter believed that it should not matter when the control measure is implemented if the demonstration shows attainment by the attainment date. The commenter provided a specific example of when a large point source plans to shut down in the middle of an ozone season.

*Response:* The EPA continues to believe that modeling the emission reductions implemented by the beginning of the last full ozone season preceding the final year of the statutory attainment date is reasonable. The effect on attainment of the NAAQS of emissions reductions that may occur sometime after the start of an ozone season is necessarily uncertain, and

[20] *http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf.*

[21] The EPA recommends using ambient design values that are consistent with the official design values as calculated according to 40 CFR part 50 Appendix N ($PM_{2.5}$ NAAQS) and Appendix P (8-hour ozone NAAQS). This includes flagging and removing event-influenced data that meet the requirements set forth in the Exceptional Events Rule (40 CFR 50.14). In general, air agencies flag data that they believe may qualify for removal as an exceptional event and are then responsible for developing and providing documentation to the EPA to support these requests for exclusion. EPA Regional Offices review exceptional events claims and decide whether to concur with each individual claim. Once the EPA concurs with an air agency's request, the event-influenced data are officially noted and removed from the data set used to calculate official design values. In some cases, historical ambient data may meet the requirements of the Exceptional Events Rule, but remain in the data set used to calculate official design values. Air agencies may not have flagged these data as being potentially influenced by exceptional events, or may have flagged these data but not submitted the required documentation. Air agencies sometimes do not closely examine potential event-influenced data that do not affect attainment/nonattainment decisions. However, the influence of potential event-influenced data may affect future year projections that are part of the modeled attainment demonstration. If potential exceptional event-influenced data from the historical record are likely to affect the outcome of the modeled attainment demonstration, we encourage air agencies to consult with their EPA regional office to determine how best to handle this situation.

[22] Note that for purposes of the 2008 ozone NAAQS, a determination of attainment (or failure to attain), which the EPA is required to make after the attainment date has passed, is based on the most recent 3 complete years of ambient data prior to the area's attainment date. Attainment date extensions are only available if the 4th maximum 8-hour average ozone concentration in the attainment year is below the level of the standard.

[23] *See* section III.D.2 of this proposal for a discussion of RACM analysis requirements.

[24] *See* 78 FR 34178 at p. 34191 (June 6, 2013).

cannot be reliably counted on to ensure modeled attainment in that year. Information about source shutdowns or other emissions reductions that are not accounted for in the modeling can be used as part of a weight of evidence demonstration (*i.e.*, qualitative adjustment based on reductions from additional measures) if necessary to demonstrate timely attainment.

*Comment:* One commenter supported the proposal to allow modeling of up to the last year of the statutory attainment date, but disagreed with the RACM requirement to evaluate if attainment can be advanced. The commenter disagreed with anything that would require the demonstration of attainment to be earlier than is required by statute.

*Response:* The EPA disagrees with the commenter. A demonstration of attainment would not be required earlier than is required by statute. The statute provides maximum dates by which attainment must be achieved, but in all cases the statute requires that attainment must be achieved as expeditiously as practicable but no later than the maximum date. Therefore, a RACM analysis to examine whether the attainment date can be advanced is required by the statute as part of all attainment demonstrations. Note that a RACM analysis is not required for Marginal nonattainment areas since an attainment demonstration is not required for those areas.

8. Multi-State Nonattainment Areas

Under CAA section 182(j), each state located in a portion of a multi-state ozone nonattainment area is required to use photochemical grid modeling (or any other analytic method determined by the Administrator to be at least as effective) and to take all reasonable steps to coordinate, substantively and procedurally, the development, submittal and implementation of SIPs applicable to the various states within the nonattainment area. The EPA interprets CAA section 182(j) to require coordination on all aspects of nonattainment SIPs, including the development of an attainment demonstration. The EPA did not propose any changes to this longstanding policy, and we did not receive adverse comments on this item.

*C. What are the RFP requirements for the 2008 ozone NAAQS?*

1. Overview of RFP Requirements

Areas that are designated nonattainment for ozone must achieve RFP toward attainment of the ozone NAAQS. Part D of the CAA contains three separate provisions regarding RFP. Under CAA subpart 1, section 172(c)(2) contains a general requirement that nonattainment SIPs must provide for reasonable further progress; RFP is defined in CAA section 171(1) as "such annual incremental reductions in emissions" as required by CAA part D or as required by the Administrator for ensuring attainment of the NAAQS. CAA sections 182(b)(1) and 182(c)(2)(B) under subpart 2 contain specific percent reduction targets for ozone nonattainment areas classified as Moderate and above and Serious and above, respectively. For Moderate and above areas, CAA section 182(b)(1) requires a 15 percent reduction in VOC emissions from the baseline anthropogenic emissions within 6 years after November 15, 1990. We often refer to this RFP requirement as rate-of-progress (ROP). For Serious and above areas, CAA section 182(c)(2)(B) requires an additional 3 percent per year reduction in VOC emissions, averaged over consecutive 3-year periods, starting within 6 years after November 15, 1990 and until the attainment date. CAA section 182(c)(2)(B) allows $NO_X$ reductions to be substituted for VOC reductions under certain conditions to meet this RFP requirement. Note that the 15 percent requirement must be met by the end of the 6-year period regardless of when the nonattainment area attains the NAAQS. The 3 percent per year RFP requirement for Serious and above areas applies each year until the attainment date.

The EPA previously interpreted the requirements of subpart 2 as they would apply to areas for the 1997 ozone NAAQS, and we proposed to follow essentially the same interpretation with regard to the 2008 ozone NAAQS. With respect to RFP requirements, we interpret the 15 percent VOC emission reduction requirement in CAA section 182(b)(1) such that an area that has already met the 15 percent requirement for VOC under either the 1-hour ozone NAAQS or the 1997 ozone NAAQS (for the first 6 years after the RFP baseline year for the prior ozone NAAQS) would not have to fulfill that requirement again. Instead, such areas would be treated like areas covered under CAA section 172(c)(2) if they are classified as Moderate for the 2008 ozone NAAQS, and would need to meet the RFP requirements under CAA section 182(c)(2)(B) if they are classified as Serious or above for the 2008 ozone NAAQS.[25] For the purposes of the 2008 ozone NAAQS, the EPA is interpreting CAA section 172(c)(2) to require such Moderate areas to obtain 15 percent ozone precursor emission reductions over the first 6 years after the baseline year for the 2008 ozone NAAQS, and is interpreting CAA section 182(c)(2)(B) to require such Serious and above areas to obtain 18 percent ozone precursor emission reductions in that 6 year period. Under the CAA section 172(c)(2) and CAA section 182(c)(2)(B) RFP requirements, $NO_X$ emission reductions could be substituted for VOC reductions.

With the intent of providing direction and/or flexibility to states in satisfying RFP requirements, we proposed a number of provisions to address issues relevant to implementing RFP under the 2008 ozone NAAQS: (1) Allowing states the option of selecting either the EPA's recommended baseline year or an alternate baseline year, if justifiable and appropriate; (2) restricting emission reduction measures that can be used to fulfill the RFP requirements; (3) fulfilling ROP/RFP requirements with emission reductions from sources located outside the nonattainment area; (4) removing RFP creditability determination requirements for certain pre-1990 control measures that currently achieve *de minimis* reductions; (5) requiring 15 percent VOC reductions from the nonattainment area emissions inventory baseline during a 6-year period after designation; (6) providing that areas that had previously met the 15 percent requirement for the 1-hour or 1997 ozone NAAQS would be subject to the RFP requirement of CAA section 172(c)(2) (if classified as Moderate) or 182(c)(2)(B) (if classified as Serious or above) and consistent with those provisions could substitute $NO_X$ for VOC; and (7) satisfying ROP/RFP requirements when a 2008 NAAQS nonattainment area is comprised of portions that have an EPA-approved RFP plan for a previous NAAQS. Through this rulemaking, the EPA is finalizing actions that address the aforementioned issues.

2. What baseline year may states use for the emission inventory for the RFP requirement?

a. Summary of Proposal

The baseline year inventory for RFP is used as the starting point from which creditable reductions are determined to meet RFP requirements. For the 2008 ozone NAAQS, the EPA proposed that states should use as the baseline year for

[25] Similar interpretations were made for the 1997 ozone NAAQS in the Phase 2 Ozone Implementation Rule, (70 FR 71615, November 29, 2005) and were upheld in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

RFP the calendar year for the most recently available triennial emission inventory at the time ROP/RFP plans are developed. As discussed in section III.C.3 of the proposal, ROP plans for areas designated nonattainment in 2012 would be due in 2015, and we proposed the baseline year would be 2011 for these areas. We explained that this approach was analogous to the approach provided for RFP in the CAA. 78 FR 34178, at 34190 (June 6, 2013). The CAA required a 1990 baseline for the 15 percent ROP requirement which lined up with the 1996 attainment date for Moderate areas under the 1-hour NAAQS. For the 2008 ozone NAAQS, initial area designations were effective in 2012 and the 6-year RFP period from a baseline of 2011 (*i.e.,* January 1, 2012–December 31, 2017) would line up reasonably well with the Moderate attainment date of 2018.

However, we also proposed that states have the option of selecting an appropriate and justifiable alternate year as a baseline year for RFP. In the proposal, we proposed that if states choose a pre-2011 baseline year, the 6-year period for achieving the 15 percent reduction starts in January of the year following the selected baseline year. When a year prior to 2011 is chosen as the baseline year, the 6-year period thus concludes more than 1 year prior to the start of the attainment year for the area. In this situation, the EPA proposed that the area is responsible for an additional 3 percent emissions reduction each year after the initial 6-year period has concluded up to the beginning of the attainment year.

The EPA also proposed that for a multi-state nonattainment area, all states associated with the nonattainment area must consult and agree on the same year to use as the baseline year for RFP.

b. Final Action and Rationale

For the 2008 ozone NAAQS, the EPA is providing that states should use as the baseline year for RFP, the calendar year for the most recently available triennial emission inventory at the time ROP/RFP plans are developed, which in the case of areas designated nonattainment in 2012 translates to 2011. We finalized this same interpretation for purposes of implementing the 1997 ozone NAAQS. 40 CFR 51.910(d). We are also allowing an alternate year to be used. In determining the appropriate alternate years, the EPA recognizes that some states may have initiated certain control strategies between the year the standard was finalized (2008) and the most recently available triennial emission inventory year (2011), and that it would be appropriate to recognize these investments in implementing early reductions to achieve improved air quality. We also believe that allowing alternate baseline years prior to 2008 (*e.g.,* 1990 and 2007) would not be appropriate because we believe that it is necessary for RFP credit for attainment planning to be tied as directly as possible to promulgation of the 2008 ozone NAAQS. Emission reduction measures adopted into the SIP prior to promulgation of the 2008 NAAQS are certainly helpful for improving air quality, and consequently may lower the nonattainment classification of an area and the baseline inventory. However, they are not readily tied to attainment planning for the specific standard and associated nonattainment designation that did not yet exist when the measures were adopted, and therefore are not appropriate to be credited for fulfilling nonattainment area RFP requirements for the 2008 ozone NAAQS. We also recognize that since we designated most areas on April 30, 2012, with an effective date 60 days after publication in the **Federal Register**, that 2012 (the designation year) is an appropriate alternative baseline year consistent with the subpart 2 structure. With these considerations, the EPA is finalizing that states may use an alternate year (*i.e.,* other than 2011) between the years of 2008 to 2012 that the state justifies as appropriate. We are also finalizing as proposed that states selecting a pre-2011 alternate baseline year must achieve 3 percent emission reductions each year after the initial 6-year period has concluded up to the beginning of the attainment year. For example, if 2009 is chosen as a baseline year for a Moderate area that has an attainment date of July 20, 2018, the 15 percent reductions cover the period from January 1, 2010, to December 31, 2015. The state would need to generate an additional 3 percent emissions reduction per year for the area for the years 2016 and 2017.

We are also finalizing that for a multi-state nonattainment area, all states associated with the nonattainment area must consult and agree on the same year to use as the baseline year for RFP.

c. Comments and Responses

*Comment:* We received mixed comments regarding the appropriate baseline year for RFP. Some commenters believed that 2011 would be the most suitable year to use as a baseline year for ROP/RFP plans and others urged the EPA to allow states the option of justifying an alternative baseline year, including 2012, 2008, 2007 and 1990. One commenter argued that the CAA does not provide flexibility in allowing a choice of baseline year for RFP and that the EPA must set the baseline year as 2012.

*Response:* While 2011 may be the most suitable year for many areas, we believe it is appropriate to provide some flexibility to choose an alternate year that falls between the year the NAAQS was established (2008) and the year of designation (2012 for the initial area designations). The EPA disagrees with the comment suggesting that the CAA does not provide the flexibility to allow states to choose the appropriate baseline year and that the EPA must set the baseline year as 2012. While the CAA does identify a specific year to use as the baseline for purposes of the 1-hour NAAQS that was in place when the CAA Amendments of 1990 were enacted, we believe use of that year (1990) as the baseline would produce absurd results if used for a revised NAAQS that is being implemented more than 20 years later. Thus, the EPA has discretion in determining how to interpret this provision of the statute for purposes of implementing the 2008 ozone NAAQS. Nothing in the statute explicitly or implicitly suggests that all areas must use the same baseline year. The purpose of the RFP requirement is to ensure areas achieve percentage reductions in emissions that will help an area attain the NAAQS and to not delay emission reductions until close to the attainment date. Thus, we believe a baseline year that is reasonably close to the designation date and within the implementation timeframe of the revised NAAQS will ensure that the goal of the RFP provisions is met. We note also, that regardless of the baseline year selected, the final regulations provide that areas must continue to achieve annual percentage reductions up to the attainment year. This will further ensure that the purpose of the RFP provisions is fulfilled. We do not believe it is reasonable to select as a baseline year for RFP purposes a year that predates both the revisions to the NAAQS in 2008 and the nonattainment designations in 2012.

*Comment:* One commenter noted that the EPA's proposal would require areas selecting a pre-2011 baseline, to achieve 3 percent emission reduction each year after the initial 6-year period has concluded up to the beginning of the attainment year. The commenter urged the EPA to apply the same requirement to Moderate areas selecting 2011 as a baseline year and require an additional 3 percent emissions reduction for the final year before the attainment deadline. Comments varied on our proposal for areas to achieve 3 percent emission reductions when selecting a

pre-2011 baseline year. Commenters generally supported the alternate baseline year proposal, however, opposing commenters stated the proposed 3 percent reduction requirement seemed to penalize states selecting a pre-2011 baseline year.

*Response:* The first commenter correctly identifies that the EPA's selection of the 2011 baseline year creates a gap period of up to 12 months between the end of the 6 year ROP period and the latest attainment date for Moderate areas. The final rule specifies that RFP for this 1-year gap period is whatever additional emissions reductions are needed to achieve the goal of attainment. We believe that requiring Moderate areas using 2011 as a base year to obtain an additional 3 percent per year during the 2018 attainment year where doing so is not necessary to attainment would be more than Congress intended to require through the RFP requirements under Part D of Subchapter 1 of the CAA Amendments of 1990. However, because a pre-2011 baseline would be voluntarily selected by a state and would create a larger gap period before the attainment date than a 2011 baseline (as much as 2 to 4 years), we believe the language "whatever additional emissions reductions are needed for attainment" is not specific enough to ensure annual incremental progress through the latest attainment date. Therefore, we are finalizing as proposed an additional 3 percent per year as a reasonable RFP reduction requirement for a state that chooses to take advantage of the regulatory flexibility this regulation offers by selecting a pre-2011 baseline. CAA section 171(1) defines reasonable further progress under Subpart D to include such annual reductions as "may reasonable be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." Consistent with that, if a state chooses to use an earlier baseline year, its total RFP emission reduction obligation should be to ensure that additional reductions averaging 3 percent per year for each year beyond the first 6 years until the year before the attainment year are provided for in the RFP plan. However, the EPA continues to believe the 2011 NEI reporting year is the preferred baseline year for RFP planning purposes.

*Comment:* Comments were mixed in relation to the proposal that states associated with multi-state nonattainment areas must consult and agree on the same alternate year to use as the baseline year for RFP. Commenters generally agreed with our proposal, however, several commenters indicated that RFP demonstrations are state specific and do not necessarily rely on a regional inventory.

*Response:* The EPA believes that the CAA requires that RFP be demonstrated for a nonattainment area as a whole. Thus, in order to effectively analyze RFP reductions and ensure that the entire nonattainment area achieves the RFP requirements, it is critical that the same baseline be used for all portions of the area. We note that CAA section 182(j), requires that states in a multi-state nonattainment area take all reasonable steps to coordinate their plan.

3. Can emission reductions from sources located outside the nonattainment area boundary apply toward ROP and RFP?

a. Summary of Proposal

The EPA proposed that for the 2008 ozone NAAQS states may not take credit for VOC or $NO_X$ reductions occurring outside the nonattainment area for purposes of meeting the 15 percent ROP requirement and 3 percent RFP requirements of CAA sections 172(c)(2), 182(b)(1) and (c)(2)(B). In the preamble to the proposal, the EPA noted that it would be sound policy to allow areas to use reductions coming from outside the area to meet ROP/RFP requirements, but concluded that in light of the reasoning used in *Natural Resources Defense Council (NRDC)* v. *EPA,* 571 F.3d 1245 (D.C. 2009), and the language of the CAA, there is no legal basis for states to credit emissions reductions from sources outside the nonattainment area for satisfying ROP/RFP requirements. In the proposed rule, we also stated that if the EPA received comment providing a clear legal justification for allowing areas to take credit in their RFP plan for reductions outside the nonattainment area, we would consider adopting that approach in the final rule.

b. Final Action and Rationale

The EPA is finalizing the interpretation that states may not take credit for VOC or $NO_X$ reductions occurring from sources outside the nonattainment area for purposes of meeting the 15 percent ROP and 3 percent RFP requirements of CAA sections 172(c)(2), 182(b)(1) and (c)(2)(B). This approach means that ROP credit for meeting the 15 percent VOC requirement for Moderate and above ozone nonattainment areas in CAA section 182(b)(1), and the additional 3 percent per year RFP requirement for Serious and above ozone nonattainment areas in CAA section 182(c)(2)(B), or for meeting the RFP requirement of CAA section 172(c)(2) for Moderate areas that met the 15 percent requirement for a previous NAAQS, can come only from emission reductions from sources located within the nonattainment area.

The ROP/RFP requirements in CAA sections 182(b)(1)(A)(i) and 182(c)(2)(B) require that nonattainment SIPs provide for emission reductions from "baseline emissions." CAA section 182(b)(1)(B) defines baseline emissions as "the total amount of actual VOC or $NO_X$ emissions from all anthropogenic sources *in the area.*" (emphasis added) The ROP/RFP language in 182(b)(1)(B) and 182(c)(2)(B) is almost identical to the language in the CAA's RACT provision that the D.C. Circuit Court has interpreted as requiring emission reductions to come from within the nonattainment area and not "from sources outside the nonattainment area." *NRDC* v. *EPA,* 571 F.3d 1245, 1256 (D.C. Cir. 2009). Accordingly, for reasons explained more fully in the proposal, 78 FR 34178, at 34191 (June 6, 2013), the EPA has concluded that there is no legal basis allowing states to credit reductions achieved at sources outside the nonattainment area toward meeting ROP/RFP requirements.

c. Comments and Responses

*Comment:* Several commenters suggested that the EPA allow credit toward meeting ROP/RFP for emission reductions from an area larger than the nonattainment area but related to or affecting it, such as the same airshed or an air quality control region or a "transport couple area." These comments emphasized the close connection between air quality within the nonattainment area and emissions from outside that area and argued that controlling emissions from an area outside a nonattainment area may be a very effective way to improve air quality within the nonattainment area. They argued that statutory references to "the area" do not necessarily refer only to the "nonattainment area." A commenter suggested that CAA section 107(c) provides the EPA the authority to allow outside-the-area reduction credits for satisfying RFP requirements. Other commenters note that CAA section 182(b)(1)(B), viewed in isolation, does not directly refer to sources in the nonattainment area, but rather to "sources in the area," and that *NRDC* v. *EPA* addresses sources in the nonattainment area only for purposes of meeting RACT nonattainment SIP requirements under CAA section 172(c)(1). Other commenters took the opposite view, arguing that the EPA had no legal basis for allowing states to use

out of area reductions to meet RFP requirements.

*Response:* As explained more fully in the Response to Comments document in the docket, to some extent, the comments in support of allowing out-of-area credits were either policy arguments or suggestions about how best to implement a program allowing such credits. The EPA agrees that some of these are good policy arguments, but does not see a legal basis to allow this approach. While some commenters did provide legal arguments, upon examination the EPA does not believe they overcome the restrictions in the combined language of CAA section 182(b)(1)(B) with CAA sections 182(b)(1)(A)(i) and 182(c)(2)(B), and the reasoning in *NRDC* v. *EPA* concerning reductions within the nonattainment area. (*See* the Response to Comments document, located in the docket, for detailed responses to all of the arguments presented and explaining why the EPA believes the statutory provisions taken as a whole clearly support the interpretation that these RFP reductions must occur within the nonattainment area).

4. Restrictions on Emission Reduction Measures That Can Fulfill the ROP/RFP Requirement

a. Summary of Proposal

The EPA proposed that, except as specifically provided in CAA section 182(b)(1)(D) of the CAA, all SIP-approved or federally promulgated emissions reductions that occur after the baseline emissions inventory year are creditable for purposes of the ROP/RFP requirements, provided that the reductions meet the standard requirements for creditability. That is, to receive SIP credit, the reductions must be enforceable, quantifiable, permanent and surplus.

b. Final Action and Rationale

We are finalizing, as proposed, that all SIP-approved or federally promulgated emissions reductions that occur after the baseline emissions inventory year from sources located in the nonattainment area are creditable for purposes of the ROP/RFP requirements, provided the reductions meet the standard requirements for creditability and are not prohibited by section 182(b)(1)(D) of the CAA.

For the reasons provided in the preamble to the proposed rule, 78 FR 34178, at 34187 (June 6, 2013), the EPA believes it is appropriate to credit emissions reductions that actually occur during the relevant ROP/RFP period and after the baseline year. We promulgated a regulatory provision adopting this same interpretation for purposes of implementing the 1997 ozone NAAQS. 40 CFR 51.910(a)(2). No significant comments were received.

5. How should states account for non-creditable reductions when determining compliance with the ROP/RFP emission reduction requirements?

a. Summary of Proposal

CAA Section 182(b)(1)(D) specifies four categories of control measures that are not creditable toward the 15 percent ROP requirement under CAA section 182(b)(1)(A): (i) Measures related to motor vehicle exhaust or evaporative emissions promulgated by January 1, 1990; (ii) regulations concerning Reid vapor pressure (RVP) promulgated by November 15, 1990; (iii) measures to correct previous RACT requirements; and (iv) measures required to correct I/M programs. As noted in the proposal, with the exception of the first category, reductions from these measures were achieved many years ago, so the question of creditability is moot for RFP credits for the 2008 ozone NAAQS. Citing an assessment that at this point in history the ongoing emissions reductions from pre-1990 control measures in the first category are *de minimis* the EPA proposed that states would no longer need to perform the complicated calculations for these control measures to ensure that they are not credited toward the 15 percent ROP requirements under CAA section 182(b)(1)(D). (*See* 78 FR 34178 at 34189)

b. Final Action and Rationale

Consistent with the proposal, the EPA is finalizing the approach that eliminates any obligation for states to continue to perform emissions reduction calculations for the pre-1990 control measures listed under CAA section 182(b)(1)(D)(i).

The CAA section 182(b)(1)(D)(i) provides that motor vehicle emission reductions resulting from measures promulgated "by January 1, 1990," (which can only come from pre-1990 vehicles), are "not creditable." The EPA is aware that making the calculations necessary to ensure a state does not take credit for these measures would be "a very resource intensive process requiring multiple modeling runs and extensive staff time," as we stated in the proposal for this rulemaking. [26] Furthermore, the EPA recognizes that emissions from pre-1990 vehicles are a very small and diminishing part of the total emissions inventory for any RFP-related year associated with implementation of the 2008 ozone NAAQS (which under the final implementation rules could start, at earliest, in 2008). This final action will relieve states of the burden of doing the calculations "based on the *de minimis* nature" of the potential credits.[27]

c. Comments and Responses

*Comment:* A majority of commenters supported removing the calculations requirement. However, one commenter argued that the EPA cannot remove the calculation requirement because the provision in 182(b)(1)(D) that certain emission reductions are "not creditable" toward RFP reductions "is the sort of extraordinarily rigid statutory provision that does not allow for *de minimis* exceptions." The commenter further asserts that the EPA has not demonstrated that the non-creditable reductions will always be *de minimis* because the EPA failed to review the impact of this exception on any specific nonattainment areas, relying instead on national modeling from which the EPA has claimed that local results may vary.

*Response:* The EPA thanks the commenters that support this approach. The EPA disagrees, however, with the commenter who argued that the EPA cannot relieve states of this burden based on the *de minimis* impact of the measures.

CAA section 182(b)(1)(C) established a general rule *allowing* credit toward RFP requirements for emission reductions under a SIP that would occur within the 6 years following November 1990. CAA section 182(b)(1)(D) established four narrow exceptions to that general rule, three of which are currently entirely moot because they have already occurred and are not ongoing reductions for future RFP purposes. The comment concerns the motor vehicle emission reduction measures imposed on pre-1990 motor vehicles. The EPA has concluded that these reductions are ever diminishing as each year the motor vehicle fleet continues to replace older vehicles with new vehicles. The EPA estimates that by 2017 the control measures that apply to the pre-1990 portion of the nationwide vehicle fleet would account for only between 0.2 and 0.6 percent of total on-road VOC or $NO_X$ emissions, or between about 0.1 and 0.3 percent of total VOC or $NO_X$ emissions inventories. Because calculating those emissions reductions would be very resource intensive, the EPA proposed not to require states to calculate them based on the *de minimis* nature of the reductions. Courts recognize that agencies generally have

[26] *See* 78 FR 34178, at 34190 (June 6, 2013).

[27] *Ibid.*

discretion to overlook circumstances that in context can fairly be considered *de minimis* such as requirements whose literal application would mandate pointless expenditures "when the burdens of regulation yield a gain of trivial or no value." [28] The EPA does not believe that the creditability exemption in 182(b)(1)(D)(i) is so "extraordinarily rigid" as to preclude a *de minimis* exception.

The comment also claims that the EPA has not demonstrated that these circumstances are *de minimis*. Without disputing the EPA's conclusions as to either the share of the emissions inventory or the resource burdens of the calculations, the comment nevertheless claims that "local results may vary," and the EPA must assess reductions in "specific nonattainment areas." The comment does not identify any area where, or any evidence that, the impact of the credits anywhere would be more than *de minimis*. Moreover, the EPA implicitly accounted for local variations when it concluded in the proposal that reductions associated with pre-1990 vehicles "everywhere" will be "a very small fraction of the total on-road VOC emissions inventory by 2017."

6. What are the RFP plan requirements for 2008 ozone nonattainment areas for which no portion of the area has previously been required to meet the 15 percent ROP requirement for VOC in section 182(b)(1) of the CAA?

a. Summary of Proposal

We proposed that newly designated 2008 nonattainment areas,[29] namely 2008 ozone nonattainment areas for which a state has never adopted and implemented a SIP providing for the CAA section 182(b) 15 percent VOC emission reductions, will be subject to the 15 percent ROP requirement in CAA section 182(b)(1).

We also proposed that for any 2008 ozone nonattainment area, a state could meet the 15 percent ROP requirement in whole or in part with $NO_X$ reductions in lieu of VOC reductions if that state could demonstrate that the area had in fact achieved a 15 percent reduction in VOC emissions within 6 years from a 1990 baseline.

We also proposed that if we did not finalize the proposal to allow *any* area to substitute $NO_X$ reductions for VOC reductions where a state can demonstrate that the area achieved a 15 percent reduction in VOC emissions from a 1990 baseline, then we would allow such substitution only for new 2008 nonattainment areas located in the OTR that would be subject to the 15 percent ROP requirement for the first time.

b. Final Action and Rationale

We are finalizing that the ROP plan for a 2008 nonattainment area that has not previously adopted and implemented a SIP providing for a 15 percent reduction in VOC emissions consistent with CAA section 182(b)(1) must provide for a 15 percent reduction in VOC emissions from the area's baseline emissions in the 6 years following the baseline emissions inventory year. This is consistent with the CAA section 182(b)(1) requirement and the prior approach for the 1997 ozone NAAQS. 40 CFR 51.910(a)(1)(i). The EPA is not finalizing either of the additional approaches that would have allowed areas to meet the 15 percent ROP requirement in whole or in part with $NO_X$ reductions in lieu of VOC reductions. After reviewing all comments submitted the EPA does not believe that it has the authority under the CAA to allow $NO_X$ substitution for VOC emissions reductions for the 15 percent ROP requirement in any area that has not previously met the 15 percent reduction requirement, including an area in the OTR.

c. Comments and Responses

*Comment:* Several commenters raised objections to the EPA's proposal that would allow only areas in the OTR to meet the RFP requirements by allowing $NO_X$ substitutions. The commenters argued that it would be better to allow all areas to take advantage of this alternative.

*Response:* Although attainment areas in the OTR were not required to adopt 15 percent RFP plans under section 184 of the CAA, we discussed certain VOC reduction measures in the proposal. We expected that the VOC reductions from those measures would account for a significant portion of the 15 percent requirement for areas designated nonattainment. We reasoned that since attainment areas in the OTR are required to adopt and implement many of the same measures applied in nonattainment areas such areas should be treated as having met the 15 percent VOC reduction requirement if they can demonstrate that they did, in fact, achieve a 15 percent reduction in VOC emissions during the relevant time period, even though they of course would not have submitted a 15 percent plan as they were not subject to the 15 percent requirement at that time. The EPA has reconsidered its proposal and now believes it does not have authority under the CAA to allow $NO_X$ substitution for VOC emissions reductions for the 15 percent ROP in any area, including an area located in the OTR, unless the area has previously submitted, adopted and implemented a SIP providing for a 15 percent VOC reduction in emissions from the area's baseline emissions. These emissions reductions would have to have been produced in the 6 years following the baseline emissions inventory year consistent with the requirement in CAA section 182(b)(1) and the prior approach for the 1997 ozone NAAQS. 40 CFR 51.910(a)(1)(i).

*Comment:* One commenter supported the proposed alternative that would allow areas to substitute $NO_X$ for VOC, in part or in whole, in the 15 percent ROP plans because the scientific understanding of the relative roles of VOC and $NO_X$ control has improved. However, numerous commenters stated their understanding that new nonattainment areas become subject to CAA section 182(b)(1) and are therefore subject to the 15 percent VOC-only ROP emission reduction requirement which does not provide for any $NO_X$ substitution.

*Response:* The EPA agrees that the current understanding of the role of $NO_X$ reductions in reducing ozone would suggest that, in some areas, it would be relatively more efficient to focus attainment planning efforts on achieving reductions in $NO_X$ rather than VOC emissions. However, for new nonattainment areas, CAA section 182(b)(1) expressly requires the 15 percent ROP plans to reduce emissions of VOC. It does not provide discretion to meet these requirements by reducing emissions of other pollutants. Where Congress intended to allow such a substitution, it specifically provided so, such as in CAA section 182(c)(2)(C) which allows $NO_X$ to be substituted for VOC in the 3 percent annual RFP plans for Serious and above areas. Absent a showing of absurd results which the record for this action does not support, the EPA does not believe it has discretion to allow $NO_X$ substitution in this case.

[28] *See Alabama Power Co.* v. *Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979).

[29] Hereafter in the discussion of RFP requirements within this section, when we use the term "2008 nonattainment area" we mean "nonattainment area classified as Moderate or higher under the 2008 ozone NAAQS."

7. What are the ROP/RFP plan requirements for 2008 ozone NAAQS nonattainment areas that consist entirely of one or more areas that fulfilled the 15 percent ROP plan requirement for VOC for a former ozone NAAQS?

a. Summary of Proposal

We proposed that any 2008 nonattainment area which consists entirely of a nonattainment area, or portions of nonattainment areas, for which we previously approved an RFP plan as meeting the 15 percent ROP plan requirement for VOC in section 182(b)(1) of the CAA would not need to submit such an ROP SIP. Such a 2008 nonattainment area could consist of one or more 1-hour nonattainment areas, one or more nonattainment areas under the 1997 ozone NAAQS, or a combination of nonattainment areas for either the 1-hour or 1997 ozone NAAQS.[30] Consistent with our approach for the 1997 ozone NAAQS, we proposed to interpret the CAA's RFP provisions to mean that a 2008 nonattainment area that had already achieved a 15 percent reduction in VOC emissions per an approved 182(b)(1) ROP SIP, would instead be subject to the RFP requirement of CAA section 172(c)(2) (which the EPA has interpreted to represent 15 percent emissions reductions over the first 6-year period) if classified as Moderate, or the 3 percent per year requirement of CAA section 182(c)(2)(B), if classified as Serious or above, and under those requirements could substitute $NO_X$ emission reductions for VOC emission reductions.

b. Final Action and Rationale

We are finalizing as proposed, such that 2008 nonattainment areas that have previously met the CAA requirement for a 15 percent ROP VOC reduction plan for the entire area are not required to fulfill that requirement again. This is consistent with the approach we used for the 1997 NAAQS, and the D.C. Circuit Court's decision in *NRDC* v. *EPA*.[31] In that case, concerning the EPA's same interpretation for implementing the 1997 ozone NAAQS, the Court held that CAA section 182(b)(1) is ambiguous under these circumstances and that it was reasonable for the EPA to interpret it not to require areas that had already met the 15 percent VOC emission reduction requirement to obtain another 15 percent reduction in VOC emissions. Instead, for purposes of the 1997 ozone NAAQS and for purposes of the 2008 ozone NAAQS, the EPA interprets the RFP requirement of CAA section 172(c)(2) to require an area classified as Moderate to achieve an average 3 percent annual reduction in VOC and/or $NO_X$ emissions for the first 6 years following the baseline year, and the RFP requirement in CAA section 182(c)(2)(B) to require the same thing for areas classified as Serious or higher. Under these circumstances, RFP requirements may be satisfied with reductions in either $NO_X$ or VOC emissions. As explained in the proposal, we believe there are two policy reasons for interpreting this ambiguous provision in this manner. First, both our understanding of the effects of reductions of VOC and $NO_X$ on ambient ozone levels and the technical tools to help predict what combinations of reductions of ozone precursors will be most effective for ozone reduction in any area have improved. Since the purpose of the RFP provisions in CAA sections 172 and 182 is to foster the achievement of reasonable further progress toward attainment, we believe that it makes the most sense to allow states to credit toward the RFP requirement those reductions that an area most needs to reach attainment. Second, as explained more fully in the proposal, the mix of emissions across the country and in specific areas is very different than it was in 1990 because of various measures and developments that have substantially reduced the anthropogenic VOC emissions inventory such that additional area-specific VOC reductions will be increasingly difficult to achieve.

c. Comments and Responses

*Comment:* Numerous commenters agreed with the EPA's proposal that 2008 nonattainment areas that have already met the CAA requirement for a 15 percent VOC reduction plan are not required to fulfill that VOC requirement again. Two commenters generally supported the EPA's approach but argued for reducing the showing a state must make or giving states more latitude in determining how to treat new nonattainment areas. However, one commenter stated that although the Court in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009), held that the EPA could permissibly read the statute as requiring SIPs to provide for the 15 percent VOC reduction only once, the Court did not address the question of whether mere EPA approval of a prior 15 percent ROP SIP would satisfy the 15 percent requirement for a subsequent NAAQS, or whether the area would have to show it actually achieved the 15 percent VOC reduction within the 6 years required by the statute. The commenter stated that to be creditable, the 15 percent reduction must have actually occurred within 6 years of November 15, 1990, due to implementation of measures required under the SIP, rules promulgated by the EPA, or title V permits. Accordingly, the commenter believed the EPA cannot treat previously approved ROP plans as satisfying the 15 percent ROP requirement unless the state also shows that the required VOC reductions were actually achieved as required by CAA section 182(b)(1)(C).

*Response:* The EPA thanks the commenters for their supporting comments. The EPA disagrees, however, that states must demonstrate that they achieved the 15 percent reduction within 6 years of the baseline for a previous NAAQS. We have consistently maintained that if an area has already met the requirement to submit for approval and to implement a plan for reducing VOC emissions by 15 percent within 6 years of the baseline year for either the 1-hour or the 1997 ozone NAAQS, then the area should not be required to meet that requirement a second time for the 2008 ozone NAAQS but instead will be subject to the other applicable RFP provisions of the CAA.

8. What are the RFP plan requirements for 2008 ozone NAAQS nonattainment areas that include portions consisting of all or a piece of one or more nonattainment areas for a previous NAAQS that fulfilled the 15 percent ROP plan requirement for VOC for that previous NAAQS and portions that have never been subject to or have never submitted the 15 percent ROP plan for VOC for a previous NAAQS?

a. Summary of Proposal

For those areas that include all or part of a nonattainment area under a former ozone NAAQS that fulfilled the 15 percent ROP plan requirement for VOC and all or part of an area that was not subject to or did not meet the 15 percent requirement for a former ozone NAAQS, we proposed that a state may choose between two approaches for addressing the 15 percent ROP requirement. First, the state could choose to treat the entire area as an area that never met the 15 percent requirement and submit a new

[30] The following nonattainment areas were nonattainment for both the 1-hour and the 1997 ozone NAAQS, and remained the same size under the 2008 ozone NAAQS compared to the 1997 ozone NAAQS: Baltimore, MD; Los Angeles-San Bernardino Counties (West Mojave Desert), CA; Los Angeles-South Coast Air Basin, CA; Riverside County (Coachella Valley), CA; Sacramento Metro, CA; San Joaquin Valley, CA; and Ventura County, CA.

[31] *See NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

15 percent plan for the entire area. Second, the state could choose to treat the 2008 nonattainment area as divided into two portions: The non-ROP plan portion and the former ROP plan portion. For the non-ROP plan portion of the 2008 nonattainment area, the plan would establish a separate 15 percent ROP VOC reduction requirement under CAA section 182(b)(1) of subpart 2. However, VOC emissions reductions to meet the 15 percent requirement could come from across the entire 2008 nonattainment area, provided that the former ROP plan portion of the area also has a VOC reduction target as part of its ROP plan for the 2008 ozone NAAQS. If the 2008 ozone NAAQS ROP plan for the former ROP plan nonattainment area relies solely on $NO_X$ reductions, then the portion of the nonattainment area never before subject to nonattainment requirements is still responsible for the full 15 percent VOC reductions. We also stated in the proposal that for the former RFP plan portion of the 2008 nonattainment area, the RFP requirements in CAA section 172(c)(2) will apply to Moderate nonattainment areas and the RFP requirements of CAA section 182(c)(2) apply to areas classified as Serious and above. These areas may both substitute $NO_X$ for the VOC reductions in the manner specified in CAA section 182(c)(2)(C).

b. Final Action and Rationale

We are finalizing the two proposed approaches that a state may choose between for addressing the 15 percent ROP requirement where a portion of the area submitted and implemented a 15 percent ROP plan for a previous ozone NAAQS and a portion did not. First, the state may choose to treat the entire area as an area that never met the 15 percent ROP VOC reduction requirement in CAA section 182(b)(1). Second, the state may choose to treat the 2008 nonattainment area as divided into two portions: The non-ROP plan portion and the former ROP plan portion. For the non-ROP plan portion of the 2008 nonattainment area, the plan would establish a separate 15 percent VOC reduction requirement under CAA section 182(b)(1) of subpart 2. However, divergent from our proposal that would have allowed creditable VOC reductions to come from across the entire 2008 nonattainment area, the final rule requires that VOC emission reductions to satisfy the CAA section 182(b)(1) 15 percent requirement must come entirely from within the non-ROP plan area.

For the former ROP plan portion of the 2008 nonattainment area, the RFP requirements in CAA section 172(c)(2) apply if the 2008 nonattainment area is classified as Moderate. CAA section 182(c)(2)(B) RFP requirements apply if the 2008 ozone NAAQS nonattainment area is classified as Serious or higher.

The EPA believes that nonattainment areas with a previously approved 15 percent plan developed to satisfy previous ozone NAAQS standards are not required to adopt a second 15 percent VOC ROP plan under CAA section 182(b)(1) for purposes of the 2008 ozone NAAQS. The EPA believes that if a portion of the nonattainment area was not subject to an approved 15 percent plan for previous ozone standards, then CAA section 182(b)(1) applies to that portion of the 2008 nonattainment area. We are offering two options, as described previously, and states can select the appropriate option to meet the RFP requirements. However, due to significant comments received regarding the source of reductions to satisfy the 15 percent requirement for the non-ROP portion of the area, we are requiring that VOC emissions reductions to meet the 15 percent requirement must come from within the boundaries of the non-ROP plan portion rather than from across the entire nonattainment area as we proposed. Additionally, the ROP plan for the 2008 ozone NAAQS for the new non-ROP plan portion must provide for 15 percent VOC reductions.

c. Comments and Responses

*Comment:* One commenter opposed both of the EPA's proposed options, believing that they are not permissible under the CAA because a prior ROP plan for just part of a 2008 nonattainment area cannot be deemed to satisfy the ROP plan requirement—that "area" is different from the area encompassed by the prior ROP plan. The commenter argued that the prior ROP plan could not have provided the 15 percent baseline emissions reduction in an "area" that was not even defined at the time of the prior ROP plan. The commenter also argued that the statute does not allow the EPA to divide up "the area" into multiple sub-areas with separate ROP plans or requirements. The commenter also argued that it would be illegal and arbitrary to allow a sub-area to claim credit for emission reductions from outside the sub-area without having to also add emissions from outside the sub-area to its baseline. The commenter stated that unless the EPA is proposing to require that the non-former ROP sub-area assure a net 15 percent cut from new baseline emissions for the entire 2008 nonattainment area, it cannot allow the sub-area to claim credit for reductions outside the sub-area. The commenter believed that for sub-areas within the nonattainment area, each with its own 15 percent reduction obligation, that the required VOC emission reductions must come from inside each sub-area respectively.

*Response:* The EPA recognizes that a prior ROP plan would not necessarily encompass the newly designated portion of a 2008 nonattainment area and that the newly designated portion may not have previously been covered by an approved 15 percent ROP VOC plan. In light of this comment, the EPA has reconsidered the proposal and now believes that if a portion or portions of a nonattainment area for the 2008 ozone NAAQS was/were not subject to an approved 15 percent ROP VOC-only plan for either the 1-hour or the 1997 ozone NAAQS, then CAA section 182(b)(1) requirements apply to that new portion of the 2008 NAAQS nonattainment area.

The EPA disagrees with the commenter's assertion that the statute does not allow areas to be divided into former ROP plan areas and new non-ROP areas. Consistent with the reasoning in the Phase 2 Rule, upheld in *NRDC* v. *EPA,* we believe that an area, or a sub-area that has never met the 15 percent requirement must do so, but that an area (or sub-area) that has previously met the requirement need not be subjected to it for a second time. Based on similar reasoning, we have reconsidered our proposal that would have allowed emission reductions from across the entire nonattainment area to be creditable toward achieving the 15 percent ROP VOC reductions for the non-ROP portion(s) of the area. We now believe it is important to recognize that VOC emissions reductions to meet the 15 percent ROP VOC reduction requirement must come from within the boundaries of the non-ROP plan portion. Accordingly, the ROP plan for the 2008 ozone NAAQS for the new non-ROP plan portion must demonstrate achievement of 15 percent VOC reductions from that sub-area's baseline.

9. Alternative Approaches to Achieving RFP

a. Summary of Proposal

We requested comment on two alternative approaches to achieve RFP: (1) An air quality-based approach that would measure RFP in terms of ambient air quality improvements tied to an area's percent emission reduction; and, (2) an approach that would adjust (or "weight") the amount of RFP credit given for reductions of individual species (or similar groups) of VOC based

on their ozone forming potential (*i.e.*, photochemical reactivity).

For each of these alternative approaches, the EPA sought comment on the usefulness and practicality of the approach, and specifically on whether there is an adequate legal basis under the CAA to approve SIPs that would employ it.

b. Final Action and Rationale

The EPA is not taking final action on these alternative approaches. The EPA may further consider such alternatives in the future. The EPA believes that more time is needed to better understand the scientific and legal issues involved in allowing and implementing these approaches. In the meantime, use of these approaches may be considered on a case-by-case basis. If states wish to pursue either of these approaches, then we encourage them to work closely on developing such an approach with their respective EPA Regional Offices. If a state submits an alternative approach to achieving RFP, then the EPA will address the submittal in a separate notice and comment rulemaking action.

c. Comments and Responses

*Comment:* Some commenters, while supporting the approaches, believed that the EPA must provide more information on how both the VOC-weighted approach and the air quality-based approach would be implemented, a stronger legal justification for allowing these alternatives, and more scientific support for practical implementation. There were commenters that supported the air quality-based approach. One commenter stated that the air quality alternative would better reflect the air quality progress being made in areas adjacent to an upwind nonattainment area, whereby the downwind areas must rely on large upwind emission reductions to attain the ozone standard. The commenter also argued that states should have the opportunity to demonstrate that such an approach is equivalent to or better than an emission reduction target and believes it would qualify as an equivalent planning procedure under CAA section 172(c)(8) and should be included in the final rule. The commenter indicated a similar approach was included in the implementation rules that govern SIP development for the $PM_{2.5}$ NAAQS (40 CFR 51.1009(g) and (h)). Other commenters pointed out that the VOC-weighted reactivity method has already been adopted in other national, state and local ozone regulations, such as the current national aerosol coatings rule and a highly-reactive VOC emissions cap-and-trade program and these may serve as legal and administrative precedents for other reactivity-based standards. Commenters also cautioned the EPA that such approaches should not be mandated, and must be left to the state's discretion.

There were commenters that did not support these alternative approaches, stating that the CAA clearly requires a percentage reduction from baseline emissions for purposes of RFP.

*Response:* The EPA appreciates the comments it has received on these alternative approaches. As noted above, the EPA believes more time is needed to better understand the scientific and legal issues involved before finalizing any alternative approaches to achieving RFP. We encourage states interested in an alternative approach to work closely with their respective EPA Regional Offices, who may consider these approaches on a case-by-case basis. Any such actions would be addressed through separate notice and comment rulemaking including analysis of appropriate legal and technical justifications.

*D. How do RACT and RACM requirements apply for 2008 ozone NAAQS nonattainment areas?*

1. Reasonably Available Control Technology

a. Summary of the Proposal

The EPA indicated in the proposal that RACT SIPs must contain adopted RACT regulations, certifications where appropriate that existing provisions are RACT,[32] and/or negative declarations that there are no sources in the nonattainment area covered by a specific CTG source category. The EPA also indicated that states must provide notice and opportunity for public comment on their RACT submission even where the state determines it is appropriate to certify that the existing provisions remain RACT or where the state submits a negative declaration. States must also submit appropriate supporting information for their RACT submission as described in the Phase 2 Rule. *See* 70 FR 71652.

The EPA proposed a number of items regarding RACT submittals. First, the EPA proposed that states should use current EPA guidance [including existing control techniques guidelines (CTGs) and alternative control techniques (ACTs)] and any other information available in making RACT determinations.[33] The EPA recognized in the proposal that existing CTGs and ACTs for many source categories have not been revised in a number of years. However, in many cases, more recent technical information is available in other forms. The EPA proposed that as part of their RACT SIP submission, states should provide adequate documentation that they have considered control technology that is economically and technologically feasible. The analysis of economic and technological feasibility should be based on information that is current as of the time of development of the RACT SIP for the 2008 ozone NAAQS. Additionally, the EPA noted that states should consider information submitted as part of the public comment period associated with the RACT SIP.

The EPA proposed that in some cases, states may conclude that sources already addressed by RACT determinations for the 1-hour and/or 1997 ozone NAAQS may not need to implement additional controls to meet the 2008 ozone NAAQS RACT requirement.

The EPA proposed to follow the EPA's existing policy with respect to "area wide average emission rates." This policy recognizes that states may demonstrate as part of their $NO_X$ RACT SIP submittal that the weighted average $NO_X$ emission rate from all sources in the nonattainment area subject to RACT meets $NO_X$ RACT requirements.

The EPA proposed that as part of their RACT submissions, states have the option of conducting a technical analysis for a nonattainment area considering the emissions controls required by a regional cap-and-trade program, and demonstrating that compliance by certain sources participating in the cap-and-trade program results in actual emission reductions in the particular nonattainment area that are equal to or greater than the emission reductions that would result if RACT were applied to an individual source or source category within the nonattainment area.

[32] The EPA has defined RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (December 9, 1976 memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, to Regional Administrators, "Guidance for Determining Acceptability of SIP Regulations in Non-Attainment Areas" and also in 44 FR 53762; September 17, 1979). Availability and feasibility may differ across sources in the same category (June 9, 1985, memorandum from John Calcagni, Chief, Economic Analysis Branch, to G.T. Helms, "Criteria for Determining RACT in Region IV.")

[33] The EPA's CTGs and ACTs are located at *http://www.epa.gov/air/ozonepollution/SIPToolkit/ctgs.html.*

The EPA provided legal reasoning for this approach.

The EPA proposed to follow its current policy that for VOC sources subject to MACT standards, states would be allowed to streamline their RACT analysis by including a discussion of the MACT controls and considerations relevant to VOC RACT. Historically, in many cases, states have been able to rely on MACT standards for purposes of showing that a source has met VOC RACT.

The EPA also noted that a state has discretion to require beyond-RACT reductions from any source, and has an obligation to demonstrate attainment as expeditiously as practicable. Thus, states may require VOC and $NO_X$ reductions that are "beyond RACT" if such reductions are needed in order to provide for timely attainment of the ozone NAAQS.

The EPA solicited comment on modifying existing guidance to provide additional flexibility in implementing the CAA section 182(b)(2) RACT requirements. In particular, the EPA solicited comments on whether it would be appropriate for states, as part of their RACT determinations regarding what is "reasonable," to consider the effect (or lack thereof) of VOC emission reductions on reductions in ozone concentrations when assessing economic feasibility. The EPA solicited comments on this approach because in some nonattainment areas, additional reductions of anthropogenic VOC emissions have been scientifically demonstrated to have a limited impact on reducing ozone concentrations.

The EPA took comments on the following: (1) Whether state RACT determinations could take into consideration, in the evaluation of what is economically feasible, the potential air quality benefit (or lack thereof) of further VOC controls; (2) the specific circumstances and limitations to which an air quality benefit factor would apply; (3) specific examples of where modeling has demonstrated that anthropogenic VOC reductions have "negligible effect, " (commenters were also asked to provide a defensible threshold for defining "ineffective," and define a test for concluding that the effect of additional VOC reductions would be "negligible."); (4) input regarding whether this flexibility should be provided on an individual source basis, or also on a source category basis; (5) that any approaches suggested by commenters should also address how public health and welfare will be impacted; and (6) an explanation as to the specific legal basis for supporting the suggested approach.

Finally, the EPA proposed a specific deadline by which RACT measures are to be implemented for the 2008 ozone NAAQS, which is consistent with the timeline specified in CAA section 182(b)(2). For the 2008 ozone NAAQS, we proposed that areas must implement RACT measures as expeditiously as practicable, but no later than January 1 of the 5th year after the effective date of a nonattainment designation. Nonattainment designations for all areas of the country were effective July 20, 2012. RACT measures for areas classified Moderate or above and all areas of the OTC would be required to be implemented by January 1, 2017. This would allow a comparable amount of time for sources to meet RACT requirements as originally anticipated under the 1990 CAA Amendments, consistent with the Moderate area attainment date of July 20, 2018.

b. Final Action and Rationale

The EPA is finalizing the approach where states should refer to the existing CTGs and ACTs for purposes of meeting their RACT requirements, as well as all relevant information (including recent technical information and information received during the public comment period) that is available at the time that they are developing their RACT SIPs for the 2008 ozone NAAQS. We believe that there is sufficient information available to states to inform their RACT determinations.

The EPA is finalizing the approach allowing in some cases for states to conclude that sources already addressed by RACT determinations for the 1-hour and/or 1997 ozone NAAQS do not need to implement additional controls to meet the 2008 ozone NAAQS RACT requirement. We believe that, in some cases, a new RACT determination under the 2008 standard would result in the same or similar control technology as the initial RACT determination under the 1-hour or 1997 standard because the fundamental control techniques, as described in the CTGs and ACTs, are still applicable.[34] In cases where controls were applied due to the 1-hour or 1997 NAAQS ozone RACT requirement, we expect that any incremental emissions reductions from application of a second round of RACT controls may be small and, therefore, the cost for advancing that small additional increment of reduction may not be reasonable. In contrast, a RACT analysis for uncontrolled sources would be much more likely to find that new RACT-level controls are economically and technically feasible.

The EPA is finalizing the proposed approach with respect to "area wide average emission rates." This approach is consistent with the EPA's existing policy.

The EPA is finalizing the proposed approach, where states have the option of conducting a technical analysis for a nonattainment area considering the emissions controls required by a regional cap-and-trade program, and demonstrating that compliance by certain sources participating in the cap-and-trade program results in actual emission reductions in the particular nonattainment area that are equal to or greater than the emission reductions that would result if RACT were applied to an individual source or source category within the nonattainment area. This approach is consistent with the Court's reasoning in *NRDC* v. *EPA* regarding the $NO_X$ SIP Call. Additionally, we note that in August 2013, the Court granted EPA's request for voluntary vacatur of the CAIR–RACT presumption for the 1997 ozone NAAQS. The approach we are finalizing is not inconsistent with the vacatur decision.

The EPA is finalizing the proposed approach for VOC sources subject to MACT standards, such that states would be allowed to streamline their RACT analysis by including an assessment of the MACT controls and how they relate to VOC RACT considerations. This approach is consistent with the EPA's current policy.

The EPA is finalizing the proposed approach to provide states with the discretion to require beyond-RACT reductions from any source, and that states have an obligation to demonstrate attainment as expeditiously as practicable. We believe it may be necessary in some cases for states to achieve "beyond RACT" reductions in order to demonstrate attainment as expeditiously as practicable.

The EPA is not modifying existing guidance for meeting the 182(b)(2) RACT requirements for the 2008 ozone NAAQS through this action. There is scientific information available that indicates that in some locations ozone formation is $NO_X$-limited, and changes in anthropogenic VOC emissions will have little effect on ozone concentrations. However, the EPA is not prepared at this time to establish a specific definition of "negligible effect," and believes that legal support for modifying the existing RACT guidance needs to be further explored. States, therefore, will continue to conduct

[34] See existing guidance in RACT Questions and Answers 2006 (May 18, 2006, Note from William Harnett to Regional Air Division Directors), Questions 17 and 18, regarding RACT certifications.

RACT determinations as they historically have. Additionally, we do not anticipate that any current $NO_X$-limited nonattainment areas will immediately need to develop substantive new VOC RACT SIP submissions. Therefore, we do not expect that retaining the current RACT guidance will have any near-term impact on states or VOC sources in current $NO_X$-limited nonattainment areas. However, the EPA received potentially useful information from commenters regarding the definition of "negligible effect," which we will consider in the future as we further assess whether to modify the existing RACT guidance.

The EPA is finalizing the proposed approach that areas must implement RACT measures as expeditiously as practicable, but no later than January 1 of the 5th year after the effective date of a nonattainment designation. For the nonattainment designations that were effective July 20, 2012, RACT measures (for areas where they are required) must be implemented by January 1, 2017. This allows a comparable amount of time for sources to meet RACT requirements as originally anticipated under the 1990 CAA Amendments, and ensures that RACT measures are required to be in place no later than the last ozone season prior to the Moderate area attainment date of July 20, 2018.

c. Comments and Responses

*Comment:* Several commenters supported the proposed approach that in some cases, states may conclude that sources already addressed by RACT determinations for the 1-hour and/or 1997 ozone NAAQS may not need to implement additional controls to meet the 2008 ozone NAAQS RACT requirement. Several other commenters generally did not support this conclusion. One commenter requested clarification regarding situations where a state may conclude that existing RACT controls meet RACT for the 2008 ozone NAAQS.

*Response:* The EPA generally agrees with the supporting comments. The EPA disagrees with the comments opposing the proposed approach. In areas previously subject to the RACT requirement under the 1-hour and/or 1997 ozone NAAQS, states have previously addressed the RACT requirement with respect to these NAAQS. We believe that, in some cases, a new RACT determination under the 2008 standard would result in the same or similar control technology as the initial RACT determination under the 1-hour or 1997 standard because the fundamental control techniques, as described in the CTGs and ACTs, are still applicable.

We appreciate the commenter's request for more information regarding the specific situations where this approach may be reasonable. In cases where controls were applied due to the 1-hour or 1997 ozone NAAQS RACT requirement, the incremental emissions reductions from application of updated RACT controls may be small and, therefore, the cost for advancing that small additional increment of reduction may not be reasonable. In contrast, a RACT analysis for uncontrolled or partially controlled sources would be more likely to find that updated RACT-level controls under the 2008 ozone NAAQS are economically and technically feasible.

In portions of 2008 nonattainment areas where control technologies for major sources or source categories were previously reviewed and controls applied to meet the RACT requirement under the 1-hour or the 1997 ozone NAAQS, states should review and, if appropriate, accept the initial RACT analysis as meeting the RACT requirements for the 2008 ozone NAAQS. Absent data or public comments indicating that the previous RACT determination is no longer appropriate, the state need not adopt additional SIP controls to meet the new RACT requirement for these sources. In such cases, the state's SIP revision submitted after notice and comment should contain a certification, with appropriate supporting information (including consideration of new data), indicating that these sources are already subject to SIP-approved requirements that still meet the RACT obligation. There are cases where the initial RACT analysis under the 1-hour standard or the 1997 standard for a specific source or source category concluded that no additional controls were necessary. In such cases, a new RACT determination is needed to consider whether more cost effective control measures have become available for sources that were not previously regulated. A re-analysis may determine that controls are now economically and technically feasible and are necessary to meet the RACT requirement. Please refer to the Response to Comments document for additional detail on this topic.

*Comment:* A commenter expressed the concern that a nonattainment area-wide weighted $NO_X$ averaging demonstration would exempt EGUs used primarily on high electricity demand days from $NO_X$ control. The commenter also expressed that the exemption of HEDD EGUs from $NO_X$ control does not reduce $NO_X$ emissions when and where such reductions are necessary to attain the ozone NAAQS. Another commenter asserted that the EPA's definition of RACT plainly requires each individual source to apply control technology to achieve the lowest emission limitation that each particular source is capable of meeting considering technology and economic feasibility. The commenter argued that substitution of area-wide averaging for source-specific RACT does not meet the language of section 182(b)(2) of the Act, which requires SIPs for Moderate and above areas to require implementation of RACT "with respect to . . . [a]ll VOC sources in the area covered by any CTG issued before November 15, 1990," and "[a]ll other major stationary sources of VOCs that are located in the area." 42 U.S.C. 7511a(b)(2). The commenter argued that the EPA is supplanting these statutory directives with an area-wide averaging program that allows some sources to avoid installing RACT controls.

*Response:* The EPA's existing policy recognizes that states can meet $NO_X$ RACT requirements by submitting as part of their $NO_X$ RACT SIP submittal a demonstration that the weighted average $NO_X$ emission rate from sources in the nonattainment area subject to RACT achieves RACT-level reductions. We note, however, that this policy does not include an exemption for HEDD EGUs from $NO_X$ control.

Additionally, the EPA disagrees with the comment that "area-wide averaging is not a legally permissible method for complying with" RACT and that RACT requires reductions from "each and every source" in an area. The EPA believes that the statute, as interpreted by the court in *NRDC* v. *EPA,* provides a state with the option of demonstrating that its program achieves RACT level reductions by showing emission reductions greater than or equal to reductions that would be achieved through a source-specific application of RACT in the nonattainment area. *NRDC* v. *EPA* interprets the CAA as requiring that each nonattainment area must achieve "RACT-level reductions," which is to say the reductions that would be achieved "if RACT-level controls were installed in the area." 571 F.3d at 1258. In sum, nothing in the CAA or in *NRDC* v. *EPA* requires that "each and every" source in the area employ RACT or achieve RACT-level reductions. Consistent with previous guidance, the EPA continues to believe that RACT can be met on average by a group of sources within a nonattainment area rather than at each individual source. Therefore, states can show that SIP provisions for these sources meet

the ozone RACT requirement using the averaging approach.

*Comment:* Several commenters expressed general support for the proposed policy that would allow states to demonstrate that compliance with a regional trading program by affected sources within a nonattainment area will satisfy RACT requirements for those sources. Several commenters additionally expressed that it may be appropriate for states to rely on a cap-and-trade program that is limited to a nonattainment area for purposes of meeting RACT for sources located in the nonattainment area.

Other commenters did not support the proposed approach. A few of these commenters expressed concerns that by providing states with an option to rely on trading programs, the EPA is allowing for sources to turn off their controls in upwind states. Commenters additionally suggested that RACT should apply on an individual basis to every affected stationary source in a nonattainment area. Commenters implied that the EPA should specifically require controls to be operational at all times at these sources.

*Response:* The EPA appreciates, and generally agrees with, the supporting comments pertaining to the proposed policy allowing states to rely on a regional cap-and-trade program to comply with RACT if they provide an appropriate technical demonstration. The EPA also agrees that states may rely on a cap-and-trade program that is limited to a nonattainment area for purposes of meeting RACT for sources located in the nonattainment area. The EPA disagrees, however, with those commenters that say that states should not have the option to demonstrate that compliance with a regional trading program by sources in a nonattainment area achieves RACT-level reductions within the nonattainment area. In *NRDC* v. *EPA,* the Court noted that a determination that RACT was satisfied by compliance with a regional trading program might be permissible for an area if accompanied by a technical analysis demonstrating that the program in fact "results in greater emissions reductions in a nonattainment area than would be achieved if RACT-level controls were installed in that area." [35] In other words, the Court rejected the notion that a regional trading program intended to eliminate interstate transport of emissions consistent with CAA section 110(a)(2)(D)(i) could automatically constitute the RACT-level of control required by CAA section 172(c)(1), but held open the possibility that an analysis could be conducted to determine whether such a program would result in the same, or higher level of emissions reductions in individual nonattainment areas.

The EPA additionally disagrees with any implication by the commenters that the proposal should address whether controls are required to be operational at all times at sources in the nonattainment area. The EPA's $NO_X$ RACT guidance (Nitrogen Oxides Supplement to the General Preamble, 57 FR 55625; November 25, 1992) includes a policy where states may develop RACT programs that are based on "area wide average emission rates." Additional guidance on area-wide RACT provisions is provided by the EPA's January 2001 economic incentive program guidance titled, "Improving Air Quality with Economic Incentive Programs." Thus, the EPA's existing policy recognizes that states may demonstrate as part of their $NO_X$ RACT SIP submittal that the weighted average $NO_X$ emission rate from a group of sources in the nonattainment area subject to RACT meets $NO_X$ RACT requirements.

*Comment:* The EPA received several supporting and opposing comments regarding whether the EPA should modify the RACT guidance to allow for states to consider the ozone air quality benefits of reductions in VOC emissions for purposes of RACT determinations. Supporting comments provided examples where photochemical modeling appears to show that in some areas VOC reductions have a limited effect on reductions in ozone concentrations. These commenters also provided information that may be useful in evaluating the potential definition of "negligible effect." Several commenters also provided potential legal justifications for modifying the RACT guidance in this respect.

*Response:* The EPA recognizes that modification of the existing guidance on determining RACT could add flexibility that would be beneficial to the efficiency of ozone controls in some states. In addition, it appears that there is available science suggesting that ozone formation in some areas is $NO_X$-limited, such that changes in anthropogenic VOC emissions will have little effect on ozone concentrations. However, the EPA does not believe that the legal arguments provided by the commenters are sufficient to address potential statutory restrictions. The main legal argument presented by commenters in support of flexibility is that the EPA has "discretion" to determine what constitutes "reasonably" available control technology. However, the EPA may not have sufficient discretion to support this modification of the existing RACT guidance. CAA section 182(b)(2) provides that SIPs must "require the implementation of reasonably available control technology" with respect to "VOC sources." It does not clearly authorize consideration of whether technology that is "reasonably available" is also reasonably effective with respect to improving air quality or reducing ozone formation, and it does not specify criteria for discerning a level of air quality improvement below which available technology does not need to be implemented.

*Comment:* Some opposing comments raised equity concerns with modifying the RACT guidance, while other comments raised legal concerns. Several commenters stated the EPA has issued $NO_X$ waivers in the past under CAA section 182(f) and the proposed approach would appear to establish a VOC waiver scheme, which the commenters do not support and is not expressly provided by the statute. Several commenters stated that the CAA requires RACT on all major sources of VOC in nonattainment areas and the commenters do not believe that the EPA has the authority to eliminate this requirement. One commenter also stated that not only has Congress made clear that CAA section 182(b)(2)'s mandates for VOC RACT are not limited by any sort of air quality benefit test, but the plain meaning of "economic feasibility" does not have anything to do with air quality benefits, citing several cases.

*Response:* Given these concerns about whether the CAA authorizes such an approach, and as is discussed above, the EPA is not at this time revising our long-standing RACT determination guidance. However, the EPA may continue to explore this option and potential legal support for it in the future.

*Comment:* The EPA received one supporting comment regarding the proposed approach that for VOC sources subject to MACT standards, states would be allowed to streamline their RACT analysis by including a discussion of the MACT controls and considerations relevant to VOC RACT. The EPA received one additional comment suggesting that, before requiring states to apply $NO_X$ RACT to all combustion sources, the EPA should study certain MACT rules and specifically recommend the SIP credit for federal MACT measures in SIP planning.

*Response:* The EPA thanks the commenter for their support. Regarding the issue of whether to specifically recommend the SIP credit for federal

[35] 571 F.3d at 1258.

MACT measures in SIP planning, the EPA is not planning at this time to develop specific recommendations for SIP credit for Federal MACT measures. Additionally, the commenter seems to imply that the EPA should not require compliance with RACT until such a study is completed. The EPA disagrees with the commenter. Regardless of whether or not the EPA conducts such a study, the RACT requirements remain requirements that must be met under the CAA, whether through reliance on MACT or otherwise.

*Comment:* One commenter expressed concern that the EPA's proposed requirement to have RACT in place by January 1, 2017, may not provide enough time for implementation. The commenter noted that if the EPA needs to develop additional CTGs for the current ozone NAAQS, states may not have ample time to develop regulations that provide sufficient time for sources to implement RACT for sources covered by additional CTGs.

*Response:* The EPA disagrees with the commenter that a requirement for RACT to be in place by January 1, 2017, for areas designated nonattainment effective July 20, 2012, (and all areas of the OTR), does not allow enough time for implementation. The EPA believes that the January 1, 2017, date allows a sufficient amount of time for states to make RACT determinations and for sources to meet RACT requirements on the time-table originally anticipated under the 1990 CAA Amendments, and ensures that RACT measures are required to be in place throughout the last ozone season prior to the Moderate area attainment date of July 20, 2018.

Given the comment received, we wish to provide further clarification regarding the RACT implementation deadline. The EPA notes that the requirement to develop a RACT SIP applies only to nonattainment areas that are classified as Moderate or above (*i.e.*, Serious, Severe, or Extreme). Therefore, for such areas that were designated effective July 20, 2012, RACT SIPs are due within 2 years of the effective date of designation, by July 20, 2014. Sources subject to RACT in those areas would then need to implement RACT by January 1, 2017.[36] If an area is reclassified from Marginal to Moderate at some later date, then that area would become subject to a new RACT requirement, and the EPA would set new SIP submission and RACT compliance dates on a reasonable schedule that the Administrator will establish in the applicable notice and comment rulemaking reclassifying the area. For areas newly redesignated to nonattainment, the RACT SIP is due 2 years from the effective date of designation, and the implementation deadline is January 1st of the 5th year after the effective date of designation.

Additionally, the January 1, 2017, RACT implementation deadline, would not automatically apply to sources covered by future CTGs. If a new CTG is developed, all current Moderate or above areas would be required to revise their SIPs for the sources covered by the CTG within the period set forth by the EPA in issuing the CTG document (*see* section 182(b)(2) of the CAA), which would occur through notice and comment rulemaking. This will give sources lead time to comply with the new requirement.

*Comment:* With regard to the EPA's proposed requirement to have RACT in place by January 1, 2017, one commenter asserted that it was not Congress's intention to require another round of RACT revisions in the short period of time between ozone NAAQS revisions. The commenter claims the short period of time would not allow a facility to recoup the investment in the original pollution control before the requirement to reconsider if the next round RACT determinations requires newer controls. The commenter also believes that it would be burdensome for states to adopt new RACT SIPs and resubmit them for EPA approval.

*Response:* The EPA disagrees with the commenter that Congress did not realize the implication that the 5-year NAAQS review cycle would potentially require new RACT determinations each time a NAAQS is revised. The EPA has offered flexibilities in applying the RACT requirements for areas that have previously met requirements for the 1-hour or the 1997 8-hour ozone NAAQS.

2. Reasonably Available Control Measures (RACM)

a. Summary of the Proposal

The EPA proposed to continue to apply to the 2008 ozone NAAQS, existing RACM guidance that interprets the RACM provision to require a demonstration that the state has adopted all reasonable measures (including RACT) to meet RFP requirements and to demonstrate attainment as expeditiously as practicable and thus that no additional measures that are reasonably available will advance the attainment date or contribute to RFP for the area.[37] [38] [39] The EPA also proposed that although states should consider all available measures, including those being implemented in other areas, a state must adopt measures for an area only if those measures are economically and technologically feasible and will advance the attainment date or are necessary for RFP.

b. Final Action and Rationale

The EPA is finalizing the proposed approach of continuing to apply existing RACM guidance to the 2008 ozone NAAQS, such that we interpret the RACM provision to require a demonstration that the state has adopted all reasonable measures (including RACT) to meet RFP requirements and to demonstrate attainment as expeditiously as practicable and thus that no additional measures that are reasonably available will advance the attainment date or contribute to RFP for the area. Additionally the EPA is finalizing the interpretation of the CAA requirements that states should consider all available measures, including those being implemented in other areas, and that a state must adopt measures for an area only if those measures are economically and technologically feasible and will advance the attainment date or are necessary for RFP. This interpretation has been upheld by several courts. *See, e.g., Sierra Club* v. *EPA*, et al., 294 F.3d 155 (D.C. Circuit, 2002).

Significant tracts of land under federal management may also be included in nonattainment area boundaries. The role of fire in these areas should be assessed and emissions budgets developed in concert with those federal land management agencies. Where appropriate, states may consider developing plans for addressing wildland fuels in collaboration with land managers and owners. Information is available from the Department of the Interior (DOI) and USDA Forest Service on smoke management programs and

[36] We note that the RACT compliance date does not change relative to the RACT SIP submission. This compliance date is fixed, such that if a state submits a RACT SIP past the deadline, then sources would still have to comply with the RACT requirements by January 1, 2017.

[37] "State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas" 44 FR 20372 at 20375 (April 4, 1979). "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Proposed Rule." 57 FR 13498 at 13560 (April 16, 1992).

[38] "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas." John S. Seitz, Director, Office of Air Quality Planning and Standards. November 30, 1999. *http://www.epa.gov/ttn/oarpg/t1/memoranda/revracm.pdf.*

[39] Memorandum of December 14, 2000, from John S. Seitz, Director, Office of Air Quality Planning and Standards, re: "Additional Submission on RACM from States with Severe One-Hour Ozone Nonattainment Area SIPs." *http://www.epa.gov/ttn/caaa/t1/memoranda/121400_racmmemfin.pdf.*

basic smoke management practices and may be considered as potential mitigation measures to lessen the impacts of wildfires.[40]

Wildfire emissions are a component of background ozone[41] and can significantly contribute to periodic high ozone levels.[42] Besides their effect on air quality, wildfires pose a direct threat to public safety—a threat that can be mitigated through management of wildland vegetation. Attempts to suppress wildfires have resulted in unintended consequences, including increased risks to both humans and ecosystems.[43] The use of wildland prescribed fire can influence the occurrence, behavior and effects of catastrophic wildfires which may help manage the contribution of wildfires to background ozone levels and periodic peak ozone events. Additionally prescribed fires can have benefits to those plant and animal species that depend upon natural fires for propagation, habitat restoration, and reproduction, as well as myriad ecosystem functions (*e.g.*, carbon sequestration). The EPA understands the importance of prescribed fire which mimics a natural process necessary to manage and maintain fire-adapted ecosystems and climate change adaptation, while reducing risk of uncontrolled emissions from catastrophic wildfires, and is committed to working with federal land managers, tribes, and states to effectively manage prescribed fire use to reduce the impact of wildfire related emissions on ozone.

If wildfire impacts are significant, contributing to exceedances of the standard, states should consider RACM for this source. Fires play an important ecological role across the globe, benefiting those plant and animal species that depend upon natural fires for propagation, habitat restoration, and reproduction. Fires are one tool that can be used to reduce fuel load, unnatural understory, and tree density, helping to reduce the risk of catastrophic wildfires. Some wildfires and the use of prescribed fire can influence the occurrence of catastrophic wildfires which may reduce the probability of fire-induced ozone impacts and subsequent public health effects. RACM for wildfire may include addressing the wildland fuels through fuels management, including the use of prescribed fire and possibly allowing some wildfire to occur naturally, in systems that are ecologically fire dependent. Where appropriate, states, land managers and land owners may consider developing plans to ensure that fuel accumulations are addressed and fuel management efforts are not delayed. RACM for prescribed fires should also be considered. Information is available from DOI and the USDA Forest Service on the ecological role of fire, smoke management programs and basic smoke management practices, and fuels management strategies, and may be considered when determining RACM for prescribed fires. RACM must be determined for each area on a case-by-case basis.

c. Comments and Responses

*Comment:* One commenter suggested amending RACM guidance to follow the same common-sense approach proposed for RACT; *i.e.*, if studies show that reducing anthropogenic VOC emissions in an area has little effect on ground-level ozone concentrations, RACM analyses should not be required for that pollutant.

*Response:* We note that existing EPA guidance already provides some assistance to states with identifying the type of measures that might be considered for RACM (*See* General Preamble, 57 FR 13549, April 16, 1992). If a state demonstrates that implementation of VOC emission reduction measures will not contribute to an area's reasonable further progress or to attainment, then additional control of VOC emissions does not need to be further considered for RACM purposes. Thus, the EPA concludes that it need not amend RACM guidance to address this comment.

*E. Does the 2008 ozone NAAQS result in any new vehicle I/M programs?*

Based on current designations and classifications for the 2008 ozone NAAQS, no new vehicle I/M programs are currently required. In the proposal for this rulemaking, the EPA provided information on potential ways a state could design and implement an I/M program, either because it was required to implement a program due to a future reclassification for the 2008 ozone NAAQS, as a result of a nonattainment designation and classification under a future standard, or because an area decided to implement an I/M program even though it was not otherwise required. That discussion is not repeated here; therefore, please refer to the proposal (78 FR 34194–34196). Although the EPA is finalizing its proposal to revise the I/M SIP due date to align it with other SIP due dates (*see* section III.A of this preamble), no other changes are being made to the EPA's existing regulations and guidance on vehicle I/M programs.

*F. How does transportation conformity apply to the 2008 ozone NAAQS?*

1. What is transportation conformity?

Transportation conformity is required under CAA section 176(c) to ensure that transportation plans, transportation improvement programs (TIPs) and federally supported highway and transit projects are consistent with ("conform to") the purpose of the SIP. Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant NAAQS or interim reductions and milestones. Transportation conformity applies to areas that are designated nonattainment, and to those former nonattainment areas that have been redesignated to attainment since 1990 and have a CAA section 175A maintenance plan ("maintenance areas") for transportation-related criteria pollutants: carbon monoxide, ozone, nitrogen dioxide and particulate matter.

The EPA's Transportation Conformity Rule (40 CFR 51.390 and part 93, subpart A) establishes the criteria and procedures for determining whether transportation activities conform to the SIP. The EPA first promulgated the Transportation Conformity Rule on November 24, 1993 (58 FR 62188), and subsequently published several amendments. For example, the EPA published a final rule on July 1, 2004 (69 FR 40004) that provided transportation conformity procedures for state and local agencies under the 1997 ozone NAAQS, among other things. Parties involved in implementing transportation conformity include state and local transportation and air quality agencies, metropolitan planning organizations (MPOs) and the U.S. Department of Transportation (the DOT) (40 CFR 93.102). For further information on transportation conformity rulemakings, policy guidance and outreach materials, *see* the

[40] USDA Forest Service and Natural Resources Conservation Service, Basic Smoke Management Practices Tech Note, October 2011, *http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1046311.pdf.*

[41] Jaffe, DA; Wigder, NL. (2012). Ozone production from wildfires: A critical review. Atmos Environ 51: 1–10. *http://dx.doi.org/10.1016/j.atmosenv.2011.11.063.*

[42] Emery, C; Jung, J; Downey, N; Johnson, J; Jimenez, M; Yarwood, G; Morris, R. (2012). Regional and global modeling estimates of policy relevant background ozone over the United States. Atmos Environ 47:206–217. *http://dx.doi.org/10.1016/j.atmosenv.2011.11.012.*

[43] Indeed, "Fire policy that focuses on [wildfire] suppression only, delays the inevitable, promising more dangerous and destructive future . . . fires." Stephens, SL; Agee, JK; Fule, PZ; North, MP; Romme, WH; Swetnam, TW. (2013). Managing Forests and Fire in Changing Climates. Science 342:41–42.

EPA's Web site at *http://www.epa.gov/otaq/stateresources/transconf/index.htm.*

2. When would transportation conformity apply to areas designated nonattainment for the 2008 ozone NAAQS?

Transportation conformity for the 2008 ozone NAAQS applied 1 year after the effective date of nonattainment designations for the NAAQS. CAA section 176(c)(6) and 40 CFR 93.102(d) provide a 1-year grace period from the effective date of an initial designation of nonattainment before transportation conformity applies in the area for a particular pollutant and standard. For areas designated nonattainment effective July 20, 2012, the 1-year grace period ended on July 20, 2013. For any area subsequently redesignated to nonattainment (from unclassifiable or attainment), the 1-year grace period runs from the effective date of the redesignation. The grace period requirements differ depending on whether the nonattainment area is a metropolitan area or an isolated rural area.

In metropolitan areas, which are defined as urbanized areas that have a population greater than 50,000 and a designated MPO responsible for transportation planning per 23 U.S.C. 134, within 1 year after the effective date of the nonattainment designation, the area's MPO and the DOT must make a conformity determination with regard to the area's transportation plan and TIP for the 2008 ozone NAAQS under the transportation conformity regulations (40 CFR 51.390 and part 93, subpart A). The conformity requirements for "donut areas," [44] including the application of the 1-year conformity grace period, are generally the same as those for metropolitan areas. If, at the end of the grace period, the MPO and the DOT have not made a transportation plan and TIP conformity determination for the relevant pollutant and standard, the area would be in a conformity "lapse." During a conformity lapse, only certain projects can receive additional federal funding or approvals to proceed. The practical impact of a conformity lapse will vary from area to area.

Isolated rural nonattainment areas are areas that do not contain or are not part of an MPO (40 CFR 93.101). Conformity requirements for isolated rural nonattainment areas can be found at 40 CFR 93.109(g). An isolated rural area would be required to make a conformity determination only at the point when a new transportation project needs funding or approval. This point may occur significantly after the 1-year grace period has ended. *See* the EPA's July 1, 2004, final rule for further background on how the EPA has implemented this conformity grace period for the 1997 ozone NAAQS in metropolitan, donut and isolated rural areas (69 FR 40008–40014).[45]

3. Does transportation conformity apply for the 1997 ozone NAAQS once that NAAQS is revoked?

The CAA only requires transportation conformity in areas that are designated nonattainment or maintenance for a given pollutant and standard. Therefore, transportation conformity would no longer apply for purposes of the 1997 ozone NAAQS as of the time that standard (and thus an area's designation for that standard) is revoked. Accordingly, existing 1997 ozone NAAQS nonattainment and maintenance areas, regardless of their designation for the 2008 ozone NAAQS, would no longer be required to demonstrate transportation conformity for the 1997 ozone NAAQS after the 1997 ozone NAAQS is revoked. The D.C. Circuit ruled that the EPA violated the CAA when it partially revoked the 1997 ozone NAAQS for transportation conformity purposes only in the Classifications Rule for the 2008 ozone NAAQS (*NRDC* v. *EPA*, D.C. Cir. No. 12–1321, December 23, 2014). The partial revocation had been in effect since July 20, 2013, 1 year after the effective date of designations for the 2008 ozone NAAQS. (77 FR 30160). The D.C. Circuit Court of Appeals vacated this aspect of the Classifications Rule but said nothing to suggest that the EPA could not revoke the standard for all purposes, as it is doing today. *See South Coast,* (upholding revocation of standard so long as anti-backsliding measures are introduced). Under our current Transportation Conformity Rule, the latest approved or adequate emission budgets for a previous ozone NAAQS (*i.e.,* the 1997 or the 1-hour ozone NAAQS) would continue to be used in conformity determinations for the 2008 ozone NAAQS until emission budgets are established and found adequate or are approved for the 2008 ozone NAAQS. (77 FR 14981–2).

4. What impact will the implementation of the 2008 ozone NAAQS have on a state's Transportation Conformity SIP?

States with previously approved Transportation Conformity SIPs should not need to revise those SIPs, unless they need to do so to ensure that existing state regulations apply in areas newly designated nonattainment for the 2008 ozone NAAQS. However, if this is the first time that transportation conformity will apply in a state, such a state is required to submit a SIP revision within 12 months of the effective date of the nonattainment designation that covers the three specific transportation conformity requirements that are delineated in CAA section 176(c)(4)(E). These specific requirements are consultation procedures and written commitments to control or mitigation measures associated with conformity determinations for transportation plans, TIPs or projects. 40 CFR 51.390. Additional information and guidance can be found in EPA's "Guidance for Developing Transportation Conformity State Implementation Plans" (*http://www.epa.gov/otaq/stateresources/transconf/policy/420b09001.pdf*).

*G. What requirements for general conformity apply to the 2008 ozone NAAQS??*

1. Summary of the Proposal

The EPA did not propose to make revisions to the General Conformity Regulations.[46] However, we did recommend that as areas develop their SIPs for the 2008 ozone NAAQS, state and local air quality agencies work with federal agencies with major facilities that are subject to the General Conformity Regulations to establish an emissions budget for those facilities in order to facilitate future conformity determinations. Significant tracts of land under federal management may also be included in nonattainment area boundaries. The role of fire in these areas should be assessed and emissions budgets developed in concert with those federal land management agencies. Where appropriate, states may consider developing plans for addressing wildland fuels in collaboration with land managers and owners. Information is available from DOI and USDA Forest Service on the ecological role of fire, smoke management programs and basic

[44] For the purposes of transportation conformity, a "donut" area is the geographic area outside a metropolitan planning area boundary, but inside a designated nonattainment or maintenance area boundary that includes an MPO (40 CFR 93.101).

[45] Also, *see* the EPA's transportation conformity Web site for more information, including EPA's "Transportation Conformity Guidance for 2008 Ozone NAAQS Nonattainment Areas" at: *http://www.epa.gov/otaq/stateresources/transconf/2008naaqs.htm.*

[46] Information on what federal actions are covered and how to demonstrate conformity are found in 40 CFR part 93 subpart B. On March 24, 2010, former Administrator Lisa P. Jackson signed the General Conformity Final Rule "Revisions to the General Conformity Regulations," which was published April 5, 2010 (75 FR 17254–17279). More information on the general conformity program is available at *http://www.epa.gov/air/genconform/.*

smoke management practices, and fuels management strategies (including prescribed fire), and may be considered as potential mitigation measures to lessen the impacts of wildfires.[47] We also stated in the proposal that for the ozone precursors VOC and $NO_X$, the existing *de minimis* emission levels contained in 40 CFR 93.153(b)(1) will continue to apply to the 2008 ozone NAAQS. We also stated in the proposal that general conformity for the 2008 ozone NAAQS would apply 1 year after the effective date of nonattainment designations for that NAAQS because section 176(c)(6) provides a 1-year grace period from the effective date of initial designations before general conformity determinations are required in areas newly designated nonattainment for a particular pollutant and standard. In such areas, we encourage states to consider in any baseline inventory used and/or submitted to include emissions expected from projects subject to general conformity, including emissions from wildland fire that may be reasonably expected in the area.

Since we proposed to revoke the 1997 ozone NAAQS at the time the final SIP Requirements Rule is published in the **Federal Register**, we stated in the proposal that general conformity requirements under the 1997 ozone NAAQS would end after the 2008 ozone NAAQS general conformity requirements begin.

2. Final Action and Rationale

The EPA is taking no action to revise General Conformity Regulations. For reasons explained in section IV of this rule, we are revoking the 1997 ozone NAAQS 30 days after publication of this final rule. Accordingly, the general conformity requirements for the 1997 ozone NAAQS will end when the NAAQS is revoked, and the general conformity requirements for the 2008 ozone NAAQS are applicable 1 year after the effective date of nonattainment designations for the 2008 NAAQS.[48] The EPA believes the existing General Conformity Regulations (40 CFR part 93) remain appropriate for the 2008 ozone NAAQS. States with approved general conformity SIPs should not need to revise their SIPs unless they need to do so to ensure they are consistent with the April 5, 2010, revisions to the general conformity regulations or to ensure the existing regulations apply in the appropriate newly designated areas.

*H. What are the requirements for contingency measures in the event of failure to meet a milestone or to attain?*

1. Summary of Proposal

The EPA proposed that the contingency measures required for Moderate and above areas under CAA sections 172(c)(9) and 182(c)(9) must provide for the implementation of specific measures if the area fails to attain or to meet any applicable milestone. These measures must be submitted for approval into the SIP as adopted measures that would take effect without further rulemaking action by the state or the Administrator upon a determination that an area failed to attain or to meet the applicable milestone. Per the EPA guidance, contingency measures should represent 1-year's worth of progress, amounting to reductions of 3 percent of the baseline emissions inventory for the nonattainment area, which would be achieved while the state is revising its plans for the area.[49]

Regarding the content of the contingency measures, the EPA's prior guidance specifies that some portion of the contingency measures must include VOC reductions. As explained in the proposal, this previous limitation is no longer necessary in all cases. In particular, Moderate and above areas that have completed the initial 15 percent VOC reduction required by CAA section 182(b)(1)(A)(i), can meet the contingency measures requirement based entirely on $NO_X$ controls if that is what the state's analyses have demonstrated would be most effective in bringing the area into attainment. There would be no minimum VOC requirement. Also, the EPA proposed continuing its long-standing policy that allows promulgated federal measures to be used as contingency measures as long as they provide emission reductions in the relevant years in excess of those needed for attainment or RFP.[50]

The EPA also proposed an implementation approach for Extreme nonattainment areas whereby plan provisions meeting the requirements of CAA section 182(e)(5) (referred to as the "black box"), including the requirements concerning contingency measures, therein, may satisfy the CAA section 172(c)(9) and 182(c)(9) contingency measure requirements for the area provided the state has already adopted all reasonable candidate measures in the applicable SIP to satisfy RACM, RFP, and all other requirements necessary for attainment in the area.

2. Final Action and Rationale

The EPA is finalizing the proposed requirements that contingency measures must be submitted for approval into the SIP as required by the CAA and must provide for the implementation of specific measures without any further rulemaking action if the area fails to attain or meet any applicable milestone, with limited exceptions for Extreme nonattainment areas relying on plan provisions approved under CAA section 182(e)(5), as discussed below. Regarding content of the 1-year's worth of emissions covered by the contingency measures, the EPA is finalizing its proposal to allow the 3 percent emissions reductions of the contingency measures, to be based entirely on $NO_X$ controls if the area has completed the initial 15 percent ROP VOC reduction required by CAA section 182(b)(1)(A)(i) and the state's analyses have demonstrated that $NO_X$ substitution would be most effective in bringing the area into attainment.

The EPA will continue to allow the use of federal measures providing ongoing reductions into the future to be used meet contingency measure requirements for the 2008 ozone NAAQS, consistent with the EPA's longstanding policy. The EPA has previously approved the use of federal measures to meet contingency measure requirements in actions approving 1-hour and 8-hour ozone SIPs.

With respect to Extreme ozone nonattainment areas, CAA section 182(e)(5) allows the agency to exercise discretion in approving Extreme area attainment plans that rely, in part, on the future development of new control technologies or improvements of existing control technologies, where certain conditions are met. This discretion can be applied as long as the state has demonstrated that: All reasonably available control measures, including RACT, have been included in the plan; the area's RFP demonstration during the first 10 years after designation does not rely on anticipated future technologies; and the state has submitted enforceable commitments to timely develop and adopt contingency measures to be implemented if the anticipated future technologies do not achieve planned reductions. The EPA is finalizing its proposal to allow states to submit, for Extreme nonattainment areas, enforceable commitments to develop and adopt contingency measures meeting the requirements of

[47] USDA Forest Service and Natural Resources Conservation Service, Basic Smoke Management Practices Tech Note, October 2011, *http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1046311.pdf.*

[48] For areas designated in 2012, the effective date was July 20, 2013.

[49] *See* the April 16, 1992 General Preamble section III.A.3.c (57 FR 13498 at 13511).

[50] *See Louisiana Environmental Action Network (LEAN)* v. *EPA*, 382 F.3d 575 (D.C. 2004).

182(e)(5) to satisfy the requirements for both attainment contingency measures in CAA sections 172(c)(9) and 182(c)(9). These enforceable commitments must obligate the state to submit the required contingency measures to the EPA no later than three years before any applicable implementation date, in accordance with CAA section 182(e)(5).[51] We note that this does not, however, relieve states from obligations to submit contingency plans as required by CAA sections 172(c)(9) and 182(c)(9) for periods in the first 10 years after designation.

3. Comments and Responses

*Comment:* Commenters urged the EPA to provide flexibility to states when adopting, subject to the EPA approval, contingency measures into the SIP that are ready for implementation should the area fail to either meet milestones or attain. Commenters requested that the EPA allow air quality improvement measurements to be taken into consideration for purposes of evaluating the level of emission reductions necessary to meet the contingency measure requirements when providing "approximately" 1 year's worth of progress for contingency measures. Commenters indicated that a similar air quality improvements approach has been used in approving $PM_{2.5}$ contingency measures.

*Response:* The EPA's long-standing interpretation is that a 3 percent emissions reduction from the RFP baseline, rather than a specific ozone concentration improvement, is the minimum contingency measure adoption requirement under subpart 2. The EPA did not propose to alter this guidance. However, we note that if the contingency measures are ever triggered for an area, states may take air quality considerations into account in determining whether a subset of measures amounting to less than 3 percent emissions reduction are all that is necessary to be implemented to cure the identified failure.[52] The implementation of $PM_{2.5}$ NAAQS is governed by statutory and regulatory requirements that are separate from, and not identical to, ozone implementation and provide flexibility for states to consider the degree of air quality improvement that may be needed in developing RFP plans and contingency measures.

*Comment:* Several commenters supported, and no commenters objected to using CAA section 182(e)(5) authority to approve contingency measure plans for Extreme nonattainment areas where the attainment plan is based on development of new or improved control measures.

*Response:* We appreciate the supportive comments. We recognize that all areas must meet the contingency plan requirements of CAA sections 172(c)(9) and 182(c)(9). We agree that CAA section 182(e)(5) provides the agency with discretion to approve an Extreme area attainment plan that relies, in part, on the future development of new control technologies or improvements of existing control technologies. This authority can be exercised as long as the state has demonstrated that: All reasonably available control measures, including RACT, have been included in the plan; the area's RFP demonstration during the first 10 years after designation does not rely on anticipated future technologies; and the state has submitted enforceable commitments to timely develop and adopt contingency measures in the event that anticipated future technologies do not achieve planned reductions.

*Comment:* One commenter argued that an Extreme nonattainment area seeking to rely on the CAA section 182(e)(5) "black box" should be required to demonstrate that it has adopted all feasible controls, even if they do not advance attainment by a year and regardless of whether they constitute "reasonably available control measures," and that the EPA should "change its interpretation of RACT and RACM, which currently allows areas to avoid adopting and implementing feasible measures."

*Response:* The EPA believes that both its long-standing interpretation of RACM and its focus on whether control measures are "reasonably available" provide an appropriate framework for determining when to exercise the discretion provided by CAA section 182(e)(5). As noted in the proposal, the determination of whether a SIP contains all RACM requires an area-specific analysis establishing that there are no additional economically and technically feasible control measures (alone or cumulatively) that will advance the attainment date by 1 year. This requires close review of any measure that a commenter identifies as reasonably available for implementation in the area in light of local circumstances, and of measures being implemented in other states. 78 FR 34187, at 34194 (June 6, 2013). This interpretation of RACM has been upheld in court (*e.g., Sierra Club* v. *EPA,* 294 F.3d 155, 162–163 (D.C. Cir. 2002)). Thus, the EPA believes that it is appropriate to require that an area seeking to rely on the anticipated development of new technology demonstrate that its plan includes all control measures that come within this definition of "reasonably available." The EPA does not believe it is necessary for an area to demonstrate the use of measures that go beyond that definition in order to meet contingency measure requirements.

*I. How do the NSR requirements apply for the 2008 ozone NAAQS?*

1. Major NSR Requirements for the 2008 Ozone NAAQS

The NSR programs established in parts C and D of title I of the CAA contain specific requirements for the preconstruction review and permitting of new or modified major stationary sources of air pollutants. In attainment and unclassifiable areas, the requirements under part C apply for the prevention of significant deterioration (PSD) program. In nonattainment areas, the requirements under part D apply for the nonattainment NSR program. We commonly refer to the PSD and nonattainment NSR programs together as the "major NSR programs."

The regulations for the major NSR programs are contained in 40 CFR 51.166 and 52.21 for PSD, and 51.165, 52.24 and part 51, Appendix S for nonattainment NSR.[53] Among other things, in unclassifiable and attainment areas, the PSD program requires a new major source, or a major modification to an existing major source, to obtain a permit that satisfies PSD requirements, including the application of best available control technology (BACT) for "each pollutant subject to regulation under [the CAA]," conducting an air quality impact analysis, and complying with requirements related to the protection of Class I areas.

As part of the required air quality impact analyses, section 165(a)(3) of the CAA provides that the owner or operator of a proposed facility must, among other things, demonstrate that "emissions from construction or operation of such facility will not cause,

[51] For example, where a state intends to rely on CAA section 182(e)(5) commitments to satisfy the CAA section 182(c)(9) contingency measure requirement for an RFP milestone in year 2022, the commitments must obligate the state to submit adopted contingency measures to the EPA no later than 2019. (*i.e.,* 3 years before RFP contingency measures for 2022 would be implemented.

[52] *See* "Guidance for Growth Factors, Projections, and Control Strategies for the 15 Percent Rate-of-Progress Plans," U.S. EPA, March 1993, page 83 (EPA–452/R–93/002).

[53] As appropriate, certain nonattainment NSR requirements under 40 CFR 51.165 or Appendix S can also apply to sources and modifications located in areas that are designated attainment or unclassifiable in the Ozone Transport Region. *See, e.g.,* CAA 184(b)(2), 40 CFR 52.24(k).

or contribute to, air pollution in excess of any . . . national ambient air quality standard in any air control region." The EPA has generally interpreted this statutory requirement, and the corresponding regulations implementing EPA's federal PSD permitting program at 40 CFR 52.21(k) and establishing minimum requirements for PSD programs approved into SIPs at 40 CFR 51.166(k), to include a demonstration for any NAAQS that is in effect at the time a final permit decision is issued.[54] *See, e.g.,* 73 FR 28321, 28324, 28340 (May 16, 2008); 78 FR 3253 (Jan. 15, 2013); Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards, entitled "Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards," to the EPA Regional Air Division Directors and Deputies (April 1, 2010).

In the proposal, the EPA indicated that, since the May 27, 2008, effective date of the 2008 ozone NAAQS, permit applications for new major stationary sources and major modifications have been subject to the PSD program requirements for ozone under two sets of circumstances: (1) Prior to the designation of areas for the 2008 ozone NAAQS, sources locating in areas designated attainment or unclassifiable for the 1997 ozone NAAQS; and (2) on and after the July 20, 2012, effective date of area designations for the 2008 ozone NAAQS, sources locating in areas designated as attainment or unclassifiable for both the 1997 and 2008 ozone NAAQS. If, however, an area was designated attainment or unclassifiable for the 2008 ozone NAAQS on and after July 20, 2012, but was designated nonattainment for the 1997 ozone NAAQS, consistent with the PSD regulations at 40 CFR 51.166(i)(2) and 52.21(i)(2), the nonattainment designation would require application of nonattainment NSR for permits issued to new and modified sources locating in that area that trigger major NSR requirements for ozone until the revocation of the 1997 ozone NAAQS is effective. In this rulemaking, the EPA is revoking the 1997 ozone NAAQS for all purposes. Accordingly, as explained in section IV.A of this preamble, as of 30 days after the publication of this rule in the **Federal Register**, the area designations for the 1997 ozone NAAQS will no longer be considered current designations; thus, all areas designated attainment for the 2008 ozone NAAQS will be subject to PSD requirements. In the proposal, the EPA explained that this result was based on its interpretation of the PSD regulations at 40 CFR 51.166(i)(2) and 52.21(i)(2), but recognized that those provisions did not expressly say that a nonattainment designation for a revoked standard does not trigger the exemption from PSD requirements contained in those provisions. 78 FR 34216–17. Accordingly, the EPA requested comment on whether amendment of 40 CFR 51.166(i)(2) and 52.21(i)(2) is necessary to achieve that outcome and on how such an amendment, if any, should be worded. After additional consideration, we believe there is a need for us to amend these provisions to further clarify the application of the exemption they contain. Therefore, the EPA is amending its PSD regulations at 40 CFR 51.166(i)(2) and 52.21(i)(2) as a logical outgrowth of the proposal and the submitted comments to clarify that historical designations for a revoked NAAQS should not be considered in determining whether PSD requirements apply for that pollutant once the revocation becomes effective in an area.

For any area that is designated nonattainment for the 2008 ozone NAAQS, the historical designations and classifications resulting from the revoked 1997 ozone NAAQS will continue to serve to identify nonattainment NSR anti-backsliding requirements (*i.e.,* major source thresholds and emissions offset ratios) that need to be taken into account in issuing nonattainment NSR permits to major stationary sources and major modifications.[55] As indicated previously, the designations and classifications for the revoked standard should not be regarded as current designations and classifications once the revocation takes effect. For example, in implementing the emissions offset requirements for nonattainment NSR, offset ratios based on the classification for the revoked standard, to the extent more stringent than the ratios for the 2008 ozone NAAQS classification, must be used for anti-backsliding purposes. However, for purposes of determining whether a prospective offset can be obtained from a nonattainment area other than the one in which a new or modified source would be located, the requirements under section 173(c)(1) of the CAA must be satisfied. CAA section 173(c)(1) requires, in part, that the nonattainment area from which the offset is obtained must have "an equal or higher nonattainment classification than the area in which the [new or modified] source is located. . . ." After the revocation takes effect, the historical classification for the revoked NAAQS, to the extent that it is lower than the classification in the nonattainment area where a new or modified source would be located, would not preclude obtaining the offset from that area, so long as (1) the current classification for the ozone NAAQS for that area is equal to or higher than the current classification of the nonattainment area where the new or modified source is locating and (2) the other requirements under section 173(c)(1) of the CAA are satisfied.

Some states may have already in their SIP a nonattainment NSR program consistent with part D of the CAA that can be applied to new nonattainment areas. In such situations, permitting authorities should have begun applying the nonattainment NSR requirements in permitting actions for new and modified major sources that trigger major source permitting requirements for ozone in new nonattainment areas starting from the effective date of the 2008 ozone designations (July 20, 2012).

For a newly designated (or redesignated) nonattainment area for the 2008 ozone NAAQS in a state with a SIP that specifically lists the areas in which nonattainment NSR requirements under part D apply, or in a state that currently has no approved nonattainment NSR program, there will be an interim period between the July 20, 2012, designation date and the date when the EPA approves the state's amended SIP, which must be revised to adequately address the nonattainment NSR requirements for the 2008 ozone NAAQS contained in this final rule. In the proposal, we explained that during this interim period, nonattainment NSR requirements for the 2008 NAAQS are governed by the EPA's Emission Offset Interpretative Ruling codified in Appendix S to 40 CFR part 51. Among other things, in general, Appendix S requires new or modified major sources in nonattainment areas to meet the lowest achievable emission rate (LAER) and obtain sufficient offsetting

[54] The EPA received comments relating to statements in the proposal about its discretion to grandfather permit applications in appropriate circumstances. Since this NAAQS has been in effect since 2008, the EPA is not adding a grandfathering provision in this final rule and those comments are discussed further in the Response to Comments document.

[55] In this final rule, the anti-backsliding requirements for nonattainment NSR are codified in 40 CFR 51.1105, and are described in Section IV.B of this preamble. The nonattainment NSR regulations at 40 CFR 51.165 have been amended in this final rule to add new paragraph (a)(12), which references those anti-backsliding requirements. Also, as proposed, a new section VII has been added to Appendix S to set forth the anti-backsliding requirements that must be followed when states issue nonattainment NSR permits under that Ruling.

emissions reductions to assure that the new or modified major sources will not interfere with the area's progress toward attainment. In addition, a new section VII of Appendix S has been added as part of this final rule to set forth the anti-backsliding requirements that must be addressed in order to issue a nonattainment NSR permit under Appendix S. That language for section VII is being finalized with only minor modifications to what was proposed. Readers should refer to 40 CFR part 51, Appendix S for a better understanding of the Appendix S permitting requirements.

In the proposal, the EPA explained that the time period for the NSR waiver provision contained in section VI of Appendix S, enabling permitting authorities in specified circumstances to issue nonattainment NSR permits that do not require LAER or emissions offsets as are otherwise required under section IV of appendix S, was limited by the court's ruling in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009). The court's ruling was the result of a petition filed in response to the EPA's Phase 2 Rule for the 1997 ozone NAAQS in which the EPA revised 40 CFR 52.24(k). The revision to paragraph (k) eliminated language stating that if a nonattainment area did not have an approved nonattainment NSR program within 18 months after designation, Appendix S would no longer apply and a construction ban would apply instead. 70 FR 71612 (November 29, 2005). The effect of the revision was to extend the applicability of Appendix S, including the section VI waiver provision, to cover the full period from the date of designation to the date on which the EPA approved the nonattainment NSR SIP for a new NAAQS.

In *NRDC* v. *EPA* (571 F.3d 1245 (D.C. Cir. 2009)), the court vacated "the elimination of the 18-month time limit for NSR waivers under Appendix S" on the grounds that it violated section 172(e) of the CAA (571 F.3d at 1276). As a result of the court's vacatur of the extension of the 18-month time limit for section VI of Appendix S, no section VI waivers may be granted beyond 18 months from the date of designation for any NAAQS.

Several commenters requested that the EPA clarify how the court's decision affects the implementation of Appendix S as an interim nonattainment NSR program. While most commenters understood that the vacatur applied only to the removal of the 18-month deadline for the section VI waiver, one commenter seemed to interpret the vacatur to apply to appendix S in its entirety.

To clarify, there is now a distinction between the length of time during which waivers may be granted under section VI of Appendix S and the length of time the remainder of Appendix S applies as an interim nonattainment NSR program. No section VI waivers may be granted beyond 18 months from the date of designation. The remainder of Appendix S, however, is not subject to an 18-month time limitation. It will remain as the basis for air agencies to issue nonattainment NSR permits in new ozone nonattainment areas until the EPA approves a state's nonattainment NSR program for the 2008 ozone NAAQS under the SIP for the area. Specifically, section IV of Appendix S contains preconstruction requirements for proposed sources and modifications, which reflect the requirements contained in part D of the CAA for ozone nonattainment areas. The requirements in section IV should be met consistent with the anti-backsliding requirements contained in new section VII of Appendix S.

2. Offset Requirements and Policy

To satisfy requirements under section 173 of the Act, new and modified major sources in nonattainment areas must secure emissions reductions (*i.e.*, "offsets") to compensate for a proposed emissions increase. Offsets are generated by emissions reductions that meet specific creditability criteria set forth by the SIP consistent with EPA regulations. *See*, 40 CFR 51.165(a)(3)(ii)(A)–(J) and part 51 Appendix S section IV.C.[56] One commenter suggested that nonattainment NSR major source construction and major modification offsets should be available outside the nonattainment area (from attainment areas) due to the possibility that new sources would develop in attainment areas in close proximity to the boundary of the ozone nonattainment area with subsequent impact on the nonattainment area. Further, the commenter seemed to suggest that emissions reductions from these close proximity sources should also be allowed to be used as offsets within the adjacent nonattainment area. The commenter's suggestion fails to address the statutory requirements for offsets and, more specifically, does not confront the statutory provisions restricting where offsets can be obtained from. In accordance with the requirements under section 173(c)(1) of the CAA, emissions offsets must be obtained from the same nonattainment area, except that the state may allow a source to obtain offsets from another nonattainment area if (1) that area has an equal or higher nonattainment classification than the nonattainment area in which the source requiring the offsets is located, and (2) emissions from that other area contribute to a violation of the NAAQS in the nonattainment area in which the source requiring the offsets is located. Accordingly, the EPA does not intend to revise the existing requirements as to where emissions offsets may be obtained to allow use of offsets from attainment areas.

3. Facilitating New Source Growth in Nonattainment Areas

a. Offset Banks

States can help facilitate continued economic development in a nonattainment area by establishing offset banks or registries. Such banks or registries can help new or modified major stationary source owners meet offset requirements by streamlining identification and access to available emissions reductions. Some states have established offset banks to help ensure a consistent method for generating and transferring $NO_X$ and VOC offsets.[57] Offsets in these areas are generated by emissions reductions that meet specific creditability criteria set forth by the SIP consistent with EPA regulations. *See* existing 40 CFR 51.165(a)(3)(ii)(A)–(J) and part 51 Appendix S section IV.C.

b. Interprecursor Offset Substitution

In the proposal, the EPA recognized that states could establish interprecursor[58] offset substitution provisions, which would create additional flexibility in meeting offset requirements by allowing $NO_X$ emissions reductions to satisfy VOC offset requirements and vice versa. *See* 78 FR at 34201. The EPA received no adverse comments on whether to allow such interprecursor trading for ozone and no comment suggested that such trading is not or should not be allowed for ozone. In fact, all comments addressing the EPA's statements in the proposal concerning interprecursor trades for ozone for nonattainment NSR permitting were in support of allowing $NO_X$ emissions reductions to satisfy VOC offset requirements and vice versa.

[56] *See also*, the EPA's "Improving Air Quality with Economic Incentive Programs" document at *http://www.epa.gov/region07/air/nsr/nsrmemos/eipfin.pdf*. For additional memoranda and guidance documents, *see http://www.epa.gov/region7/air/nsr/nsrindex.htm*.

[57] *See*, for example, emission reduction credit banking programs in Ohio (OAC Chapter 3745–1111) and California (H&SC Section 40709).

[58] For purposes of this rulemaking, we are using the terms interprecursor and interpollutant interchangeably.

Although there were no adverse comments relating to the EPA's ability to allow interprecursor trading for ozone, the EPA recognizes that the current language of 40 CFR 51.165(a)(11) and part 51 Appendix S IV.G.5 could be read to limit interprecursor trading to $PM_{2.5}$, and thus to preclude this kind of interprecursor trading for ozone precursors ($NO_X$ and VOC). However, the EPA has issued previous guidance that clearly allows for such interprecursor trading for ozone precursors.[59] While the EPA did not specifically propose to amend the nonattainment NSR regulations to address interprecursor trading for ozone, the proposal indicated the EPA's intent to continue to allow states to establish provisions that allow for such interprecursor trading for ozone precursors.

As noted previously, the EPA received no adverse comments on the interprecursor aspect of the proposal. Commenters did, however, indicate support for ensuring in the final rulemaking that interpollutant trading would continue to be allowed, and one commenter indicated support for measures similar to what was authorized in the final 2008 $PM_{2.5}$ NAAQS implementation rule, *see* 73 FR 28321, which revised the regulations and Appendix S to allow for interprecursor trading for $PM_{2.5}$ precursors.

Accordingly, the EPA is taking action in this final rulemaking to amend the regulatory text in both 40 CFR 51.165 and Appendix S as a logical outgrowth of the proposal and the submitted comments to ensure that the offset provisions of both rules are consistent with our proposal and our ongoing position to allow such trades for the ozone precursors (VOC and $NO_X$). *See* revised 40 CFR 51.165(a)(11) and part 51 Appendix S IV.G.5. These changes in the regulatory text are intended to clarify that interprecursor trading continues to be an option for the ozone precursors VOC and $NO_X$, as long as such trades are consistent with existing policy and legal requirements; these revisions are not intended to change the underlying requirements for such trades. Please refer to the Response to Comments document in the docket for this rulemaking for more detailed information and responses to comments with respect to interprecursor trading concerns.

c. Economic Development Zones (EDZs)

Section 173(a)(1)(B) of the CAA authorizes the Administrator, in consultation with the Secretary of Housing and Urban Development (HUD), to identify areas within nonattainment areas as "zone[s] to which economic development should be targeted." Under this section, new or modified major stationary sources that locate in such a zone are relieved of the NSR requirement to obtain emission offsets if (1) the relevant SIP includes an NSR nonattainment program that has established emission levels for new and modified major sources in the zone ("growth allowance"), and (2) the emissions from new or modified stationary sources in the zone will not cause or contribute to emission levels that exceed such growth allowance. CAA section 172(c)(4) of the CAA requires that the growth allowance be consistent with the achievement of reasonable further progress, and that it will not interfere with attainment of the applicable NAAQS by the applicable attainment date for the nonattainment area. The EPA is willing to work with HUD and states to identify potential areas that could be identified as EDZs.

4. Deadline for Submitting Nonattainment NSR Program SIPs for 2008 Ozone NAAQS

As explained in section III.A of this preamble, several commenters noted that the EPA's proposed rulemaking did not address the SIP submittal deadline for the nonattainment NSR program for the 2008 ozone NAAQS. As explained in section III.A, the final rule includes a deadline of 3 years from the effective date of designation for states to submit their nonattainment NSR program SIPs for the 2008 ozone NAAQS. The rationale for this deadline appears in section III.A of this preamble.

*J. What are the emission inventory and emission statement requirements?*

1. Emission Inventory Requirements

a. Summary of the Proposal

We proposed that states should rely on their 3-year cycle inventory as described by the Air Emissions Reporting Requirements (AERR) to meet 182(a)(3)(A) periodic inventory obligations and that the emissions reporting requirements of the AERR be applied to determine all of the data elements required for such inventories (*see, e.g.,* Tables 2A, 2B, 2C and 2D of 40 CFR part 51, subpart A, Appendix A). We also proposed to follow our existing guidance, titled "Public Hearing Requirements for 1990 Base-Year Emissions Inventories for Ozone and Carbon Monoxide Nonattainment Areas" in implementing certain SIP adoption and submission procedures for the emissions inventory requirements under CAA sections 182(a)(1) and 182(a)(3)(A) for purposes of the 2008 ozone NAAQS.

b. Final Action and Rationale

We are generally finalizing as proposed, although in light of comments received we made small changes to address reporting of ozone season day and partial county emissions not currently addressed in the AERR, as explained below. CAA section 182(a)(3)(A) requires that states submit periodic emission inventories no later than the end of each 3-year period after submission of the base year inventory for the nonattainment area. This requirement applies to Marginal and above ozone nonattainment areas. Thus, states must submit this periodic inventory no later than the end of each 3-year period after submission of the base year inventory for the nonattainment area. The periodic inventory required by this final rule must include ozone season day emissions of VOC and $NO_X$ for point, nonpoint and mobile sources (on-road and non-road) and fire-related event emissions. On December 4, 2008, the EPA promulgated the AERR rule (40 CFR 51, subpart A). The AERR requires states to submit comprehensive statewide 3-year cycle annual emission inventories (2008, 2011, 2014, *etc.*) for a number of pollutants (*see* list provided at 40 CFR 51.15(a)) regardless of an area's attainment status. During the submission of the 3-year cycle inventories in accordance with the AERR, states may also submit ozone season day emissions to meet the periodic inventory requirement of this rule. If the periodic inventory required by this rule is not included in the AERR submission, then it must be submitted to the EPA through other mechanisms in coordination with the Regional Office. Emission inventory elements submitted per the AERR that are relied on in the SIP also need to be adopted through the SIP submittal requirements per 40 CFR 51.100 *et seq.*

We are finalizing the requirement that states use the reporting requirements of the AERR to determine the data elements required for such inventories, while including an additional requirement to report ozone season day emissions, as defined in this final rule, rather than the AERR requirement for

[59] "Improving Air Quality with Economic Incentive Programs" document at *http://www.epa.gov/region07/air/nsr/nsrmemos/eipfin.pdf.* In this document, the EPA stated: "[o]zone interprecursor trading can be used to meet NSR offset requirements, regardless of whether the NSR offset emission reductions are generated through an EIP." *Id.* at 244. For additional memoranda and guidance documents, *see http://www.epa.gov/region7/air/nsr/nsrindex.htm.*

annual emissions for both the base year inventory for the nonattainment area and the periodic inventory. Additionally, the EPA has included within 40 CFR 51.1100(bb) and (cc) of this final rule definitions pertaining to base year inventory and the ozone season day emissions, in response to several significant comments as explained in section III.J.1.c of this rule. Accordingly, a base year inventory for the nonattainment area is due no later than 2 years after the effective date of designations, and the emissions included in this inventory must be ozone season day emissions as defined in CAA section 51.1100(cc) of this rule. A periodic inventory must be submitted on intervals no later than the end of each 3-year period after submission of the base year inventory for the nonattainment area.

The EPA has concluded that ozone season day emissions are the most appropriate temporal basis for developing the emissions to be included in this inventory, rather than summer day emissions as required by past implementation rules or the AERR. The EPA believes that summer day emissions required previously are an insufficient nomenclature, since in some areas nonattainment may be due to ozone exceedances in months other than summer months (*e.g.*, wintertime), and necessitate focusing planning efforts on emissions occurring during the most relevant time period. Other than changing the name to be more inclusive, the definition of the emissions to be included is essentially the same as the previous definition. Ozone season day emissions means an average day's emissions for a typical ozone season work weekday as defined in CAA section 51.1100(cc). The state will select, subject to EPA approval, the particular month(s) in the ozone season and the day(s) in the work week to be represented. The selection of days should be coordinated with the conditions assumed in the development of RFP plans and/or emissions budgets for transportation conformity to allow comparability of daily emissions estimates. The days should represent the conditions that contribute to high ozone that led to a nonattainment designation.

For all inventories submitted to the EPA for this rule, states must use the reporting requirements of the AERR to determine which sources are reported as point sources as well as the detail (*i.e.*, data elements) required for such inventories, with the exception of the emissions values. The emissions values must be ozone season day emissions rather than the AERR requirement for annual emissions for both the base year inventory for the nonattainment area and the periodic inventory.

Inventories of partial-county nonattainment areas must match the spatial extent of the nonattainment area to include only emissions within the nonattainment area. The EPA acknowledges the challenges associated with partial county inventories and has prepared an updated draft of the emissions inventory guidance (*see* below) to provide additional information for air agencies to use in preparing partial county emissions. The base year inventory for the nonattainment area is used as the baseline for RFP plans to achieve emissions reductions within the nonattainment area. As explained more fully in section III.C of this preamble, the EPA has determined that emissions reductions in areas outside the nonattainment area cannot be included in the area's RFP demonstration. Thus, the EPA has concluded that for nonattainment areas with partial county boundaries, all inventories must be developed to reflect the partial county boundaries. This requirement partly supersedes the requirement to use the AERR data elements, such that for nonpoint and mobile sources, the county field required by the AERR should be replaced by a separate identifier to indicate the partial county nonattainment area. Because of this partial difference in requirements, periodic inventories for partial county nonattainment areas cannot be reported to the EPA as part of a state's AERR/NEI triennial inventory submission. Instead, states must make available the inventory data to the EPA as electronic files in some other electronic media, such as FTP, zip drives, or DVDs.

For all inventories that are used in developing RFP plans or attainment demonstrations, mobile source emissions should be estimated using the latest emissions models, data and planning assumptions available at the time the SIP is developed. The latest approved models should be used to estimate emissions from on-road and non-road sources, in combination with the latest available estimates of vehicle miles traveled (VMT), vehicle population, and/or equipment activity. States are advised to check the EPA Web pages for the currently approved mobile source models and to consult with the EPA Office of Transportation and Air Quality and their Regional Office to determine the versions of models to use for their SIPs for the 2008 ozone NAAQS. For on-road mobile emissions in states other than California, the current approved version of MOVES, as well as links to the **Federal Register** Notice approving that version, and links to guidance documents with much more detail on when and how MOVES should be used can be found at: *http://www.epa.gov/otaq/models/moves/index.htm.* For California, consult with the EPA Region 9 Office for the information on the latest approved version of the EMFAC (EMissions FACtors) model. Emissions from non-road equipment should be estimated with the latest official version of the EPA's NONROAD model, and other appropriate methods for estimating emissions from sources not covered by these models. Links to **Federal Register** notices and policy guidance memos on the latest approved versions of MOVES and NONROAD can be found at *http://www.epa.gov/otaq/models.htm.*

Additional information is available to states for all emissions sources and quality assurance in the form of guidance. States should consult the latest version of the guidance document "Emission Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations," EPA–454/R–05–001 (latest final November 2005; revised draft April 2014) and any subsequent updates to that guidance that the EPA makes available (which can be found at *http://www.epa.gov/ttn/chief/eidocs/eiguid/index.html*). States should submit inventories that are appropriate for each nonattainment area and consistent with the EPA's guidance.

As indicated previously, some inventories submitted to meet the requirements of CAA sections 182(a)(1) and 182(a)(3)(A) may be used in the development of RFP plans and/or attainment demonstrations. The EPA expects that the base year inventory for the nonattainment area will serve as the RFP plan baseline. As such, the EPA requires the methodologies used to develop these inventories to be clearly documented and the inventories themselves to be subject to public participation requirements and formal approval/disapproval by the EPA.[60]

[60] In comparison, the AERR emissions data are submitted by the states to the EPA, electronically via the Emission Inventory System to the National Emissions Inventory (NEI), and public review is not required for NEI purposes. The states submit data to the NEI inventory 12 months after the NEI inventory year (*i.e.*, calendar year 2011 NEI inventory data were to be submitted by December 31, 2012). The NEI process provides for the states to review the data as collected by the EPA before the EPA officially publishes the data. Under the current process, the EPA intends to publish the data 6 months after the AERR data are required to be submitted to the EPA.

The EPA is not finalizing the proposed approach, where we advised that states could follow our existing September 29, 1992, guidance, titled, "Public Hearing Requirements for 1990 Base-Year Emissions Inventories for Ozone and Carbon Monoxide Nonattainment Areas" in implementing certain SIP adoption and submission procedures for the emissions inventory requirements under CAA sections 182(a)(1) and 182(a)(3)(A) for purposes of the 2008 ozone NAAQS. In that guidance, the EPA indicated it could provide states with a time-limited "*de minimis*" deferral of the CAA's state public hearing requirement for the emissions inventory SIP revision required to be submitted for each nonattainment area within 2 years of the date of designation. The EPA continues to believe that there are valid policy reasons to provide such a deferral since the inventories alone do not have significant regulatory context without the accompanying area-specific RFP plans or attainment plans, which are not required to be submitted until the 3rd year after designations at the earliest. However, as a general matter the CAA clearly requires that SIP submittals, including emissions inventories (*see* CAA sections 182(a)(1) and 182(a)(3)(A)), must meet the requirements of CAA section 110(a)(2), which includes the requirement that the state provide reasonable notice and public hearing for SIP submittals. As there is nothing in these CAA provisions that provides for waiver or delay of the public notification and hearing requirements specified in CAA section 110(a) *de minimis* or otherwise, we no longer believe it is appropriate to advise states to follow the 1992 guidance. We instead remind states that the EPA's implementing regulations at 40 CFR part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans) provide flexibility for states to streamline SIP-related public notification and hearing procedures (for example, only holding a public hearing if one is requested, per 40 CFR 51.102), and we encourage states to take advantage of those provisions in meeting the emissions inventory requirements under CAA sections 182(a)(1) and 182(a)(3)(A).

c. Comments and Responses

Commenters provided a variety of comments on issues relating to emissions inventories. A full accounting of those comments and the EPA's detailed responses are further explained in the Response to Comments document contained in the docket. Significant comments were made that resulted in small changes from the proposed rule. In particular, commenters noted that the proposed rule failed to clearly indicate the need for seasonal or summer day emissions values in the required inventories and for use in the RFP plan. Different commenters suggested different terms, time periods, and emissions bases to use in the inventories and plans, including summer day, typical summer day, high ozone season day, and maximum daily. These comments and others noted the discrepancy with this rule and proposed changes to the AERR, in that seasonal emissions were not expressly required by either the proposed ozone requirements rule or the proposed AERR changes. As a result of these comments, the EPA has included the requirement in this rule as a logical outgrowth for ozone season day emissions, as defined in this final rule, to be used in emission inventories submitted for ozone SIPs. One commenter noted that partial county areas are not expressly addressed in the emissions inventory requirements and pointed out that it will be burdensome for states to create partial county inventories. The EPA addresses partial county emissions in this final rule by specifically defining the emissions to be included as "within the boundaries of the nonattainment area" and clarifies in this preamble that such partial county estimates are still needed to comply with the CAA requirements for inventories and RFP plans.

2. Source Emission Statements

States must develop emission reporting programs, called emission statement programs, for VOC and $NO_X$ sources in accordance with CAA section 182(a)(3)(B). The required state program and associated regulation defines how states obtain emissions data directly from facilities and report it to the EPA. States should coordinate their emission statement regulations with the requirements laid out in this rule, which includes coordination with requirements of the AERR.

The EPA published guidance on source emission statements in a July 1992 memorandum titled, "Guidance on the Implementation of an Emission Statement Program." A memorandum titled, "Emission Statement Requirements Under 8-hour Ozone NAAQS Implementation," dated March 14, 2006, clarified that the source emission statement requirement under the CAA was applicable to all areas designated nonattainment for the 1997 ozone NAAQS and classified as Marginal or higher under subpart 2, part D, title I of the CAA. This requirement similarly applies to all areas designated nonattainment for the 2008 ozone NAAQS. Most areas that need an emission statement program already have one in place due to a nonattainment designation for an earlier ozone NAAQS. If an area has a previously approved emission statement rule in force for the 1997 ozone NAAQS or the 1-hour ozone NAAQS that covers all portions of the nonattainment area for the 2008 ozone NAAQS, such rule should be sufficient for purposes of the emissions statement requirement for the 2008 ozone NAAQS. The state should review the existing rule to ensure it is adequate and, if it is, may rely on it to meet the emission statement requirement for the 2008 ozone NAAQS. In cases when an existing emission statement requirement is still adequate to meet the requirements of this rule, states can provide the rationale for that determination to the EPA in a written statement in the SIP to meet this requirement. States should identify the various requirements and how each is met by the existing emission statement program. In cases when an emission statement requirement is modified for any reason, states must provide the revisions to the emission statement as part of their SIP.

*K. What are the ambient monitoring requirements?*

The EPA's ambient monitoring requirements are contained in 40 CFR part 58. Monitoring rule amendments published on October 17, 2006, (71 FR 61236) established minimum ozone monitoring requirements based on population and levels of ozone in an area to better prioritize monitoring resources. The minimum monitoring requirements are contained in Table D–2 of Appendix D to part 58. The Photochemical Assessment Monitoring Station (PAMS) program, required by CAA section 182(c)(1), collects enhanced ambient air measurements in ozone nonattainment areas classified as Serious, Severe, or Extreme. The monitoring rule amendments published on October 17, 2006, reduced the minimum PAMS requirements. The revisions were intended to require the retention of the minimum common PAMS network elements necessary to meet the objectives of every PAMS program, while freeing up resources for states to tailor other features of their own PAMS networks to suit their specific data needs. This final rule makes no changes to these existing requirements.

*L. How can an area qualify for a 1-year attainment deadline extension?*

1. Summary of the Proposal

Section 181(a)(5) of the CAA addresses the conditions under which an area may be eligible for a 1-year extension of its attainment date. Because that statutory provision was written for an exceedance-based standard, such as the 1-hour ozone NAAQS, the EPA established through the Phase 1 Rule (40 CFR 51.907) an interpretation that would apply to a concentration-based standard, such as the 1997 ozone NAAQS.[61] We proposed the same approach as set forth in 40 CFR 51.907 for purposes of the 2008 ozone NAAQS, which like the 1997 ozone NAAQS is a concentration-based standard.

2. Final Action

The EPA is finalizing the proposed approach. An area that fails to attain the 2008 ozone NAAQS by its attainment date would be eligible for the first 1-year extension if, for the attainment year, the area's 4th highest daily maximum 8-hour average is at or below the level of the standard. The area would be eligible for the second 1-year extension if the area's 4th highest daily maximum 8-hour value, averaged over both the original attainment year and the first extension year, is at or below the level of the standard. Thus, to be eligible for the first 1-year extension, the 4th highest daily maximum 8-hour value for an area would need to be at or below 0.075 ppm. The area would be eligible for the second extension if the area's 4th highest daily maximum 8-hour value, averaged over both the original attainment year and the first extension year, is less than or equal to 0.075 ppm.

3. Rationale

This approach is the same approach used for implementing the 1997 ozone NAAQS. The EPA believes this approach makes sense for the 2008 ozone NAAQS as well.

4. Comments and Responses

The EPA received no adverse comments on the proposed action.

[61] The exceedance based standard basically allowed the NAAQS level to be exceeded an average of only once a year over a 3-year period. (This is a generalization of how attainment is determined; the actual method considers other factors such as completeness of the data.) *See* 40 CFR, appendix H. In contrast, the concentration based standard allows the level of the 8-hour ozone NAAQS to be "exceeded" more than once a year on average because the form (concentration-based) of that NAAQS is determined by averaging the 4th highest reading for each year over a 3-year period.

*M. How will the EPA identify whether a potential rural transport nonattainment area is adjacent to an urban area?*

1. Summary of Proposal

The CAA Amendments of 1990 contained section 182(h) that provides a "rural transport" determination for ozone nonattainment areas that are rural in nature and can demonstrate that sources in the area do not make a significant contribution to ozone concentrations measured in the area or in other areas. These areas are subject to Marginal nonattainment area requirements, regardless of the area's classification under CAA section 181(a). This distinction was created for rural nonattainment areas whose ozone problem is the result of ozone and/or precursors transport into the area that is so overwhelming that the contribution of local emissions to ozone concentrations above the level of the NAAQS is relatively minor and that emissions within the area do not significantly contribute to ozone measured in other areas.

One qualifying consideration for a rural transport area determination is the lack of adjacency of the candidate nonattainment area's boundary to potentially nearby urban areas. In general, we would expect a rural nonattainment area that has few or insignificant sources of ozone precursors, yet has a monitor indicating a violation of the NAAQS, to encompass a relatively small geographic area due to the relative lack of emissions sources.[62] The rural transport area criteria in CAA section 182(h) restrict rural transport areas to those nonattainment areas that do not include and are not adjacent to any part of a "Metropolitan Statistical Area" (MSA) or "Consolidated Metropolitan Statistical Area" (CMSA) as defined by the U.S. Bureau of the Census. In 2000, OMB issued new standards[63] for defining statistical areas to replace the pre-existing MSA and CMSA definitions (65 FR 82228; December 27, 2000). Under the 2000 standards, MSAs are defined as having a central county or counties with an urbanized area of at least 50,000 people, plus adjacent outlying counties having a high degree of economic integration with the central county, as measured through worker commuting ties. Multiple counties are included in a MSA if at least 25 percent of employed residents in the central county commute to work in one or more adjacent counties. The term CMSA was retired in 2003 with the introduction of Core Based Statistical Area concepts. We proposed to interpret the references to both MSA and CMSA in CAA section 182(h) to refer to the new Census Bureau definition for the term MSA.

[62] Nonattainment area boundaries are determined by the Administrator during the area designations process governed by CAA section 107(d), and must encompass the area that does not meet the NAAQS as well as any nearby area that contributes to poor air quality in the area that does not meet the NAAQS. While the lack of emissions sources in a rural transport nonattainment area foreshadows a relatively small area boundary, it may also signal special challenges in complying with certain nonattainment area requirements, including conformity for federal projects and new source emissions offsets. States may wish to consider these challenges in making nonattainment boundary recommendations to the EPA for rural areas during the designations process.

[63] *See http://www.census.gov/population/www/metroareas/metrodef.html.*

2. Final Action and Rationale

We are finalizing, as proposed, the interpretation of the references to both MSA and CMSA in CAA section 182(h) to refer to OMB's current definition of MSA. Accordingly, to qualify as a rural transport nonattainment area, the nonattainment area's boundary could not include or be adjacent to a current OMB-defined MSA. Under this approach, any nonattainment area associated with a Census-defined micropolitan area (areas with central county or counties containing an urban cluster of 10,000–49,999 people plus adjacent counties having a high degree of economic and social integration as measured through worker commuting) or an area too sparsely populated to be included in a census-defined statistical area, may be able to qualify as a rural transport nonattainment area.[64] An area seeking to be classified as a rural transport nonattainment area would also need to meet the other criteria specified in CAA section 182(h).

The EPA believes this interpretation of CAA section 182(h) is consistent with the original scope of CAA section 182(h) as promulgated in 1990 and provides maximum flexibility for areas to qualify for this determination where appropriate. We did not receive any adverse comments on our proposed interpretation.

*N. What are the special requirements for multi-state nonattainment areas?*

Each state within a multi-state ozone nonattainment area is responsible for meeting all the requirements relevant to that area. CAA section 182(j)(1)(A) requires that states should "take all reasonable steps to coordinate substantively and procedurally" on SIP development. States should coordinate

[64] During the designations process for the 2008 ozone NAAQS, the EPA did not identify any nonattainment areas as rural transport areas.

on topics such as determining the appropriate modeling domain, baseline year, projection years and meteorological episodes. In addition, they should coordinate modeling efforts and, as required by CAA section 182(j)(1)(B), the attainment demonstration must be based on photochemical grid modeling or another method determined by the EPA to be at least as effective.

CAA section 182(j)(2) recognizes that in certain instances, one or more states within a multi-state nonattainment area may not submit an attainment plan by the required date, thus interfering with the ability of the area as a whole to demonstrate attainment. In such case, CAA section 182(j) provides that even though the area as a whole would not be able to demonstrate attainment, the sanction provisions of CAA section 179 shall not apply in the portion of the nonattainment area located in a state that submitted all other provisions of an attainment plan and demonstrated that it could have demonstrated attainment but for the failure of the other state to cooperate. The EPA did not propose any changes to its prior interpretations of these sections of the CAA (*See* 70 FR 71612), and no comments were received on these provisions. Therefore, these interpretations will continue to apply for purposes of the 2008 ozone NAAQS.

*O. How will the EPA address interstate and international ozone transport?*

1. Interstate Transport

The EPA recognizes that many states are affected by transported ozone and ozone precursors from upwind states, and that transported pollution may contribute significantly to air pollution that exceeds the NAAQS in those states. The CAA establishes states' responsibilities to address interstate transport through two provisions. First, CAA section 110(a)(2)(D)(i) obligates states to include provisions in their infrastructure SIPs to prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance, of the NAAQS in another state, from interfering with required provisions preventing significant deterioration of air quality or from interfering with measures to protect visibility in another state. Second, CAA section 126 directs states to include provisions to establish a notification process in their infrastructure SIPs through which downwind jurisdictions can be alerted to specific sources of transported pollution. The EPA issued its "Guidance on Infrastructure State Implementation Plan Elements Under the Clean Air Act Sections 110(a)(1) and 110(a)(2)," on September 13, 2013,[65] on the required elements of the CAA section 110 infrastructure SIP submittal for the 2008 ozone NAAQS. This guidance does not, however, address the requirements of CAA section 110(a)(2)(D)(i). The proposal for this rulemaking, and this final rule, also do not address these requirements relating to transport. The EPA will address the transport requirements in a separate action.

Where interstate transported emissions contribute to an exceedance or violation and come from prescribed fire, wildfires or other natural sources, air agencies may be able to use the provisions in the EPA's Exceptional Events Rule (40 CFR 50.14) to request exclusion of affected data. Once EPA concurs with an air agency's request, the event-influenced data are officially noted and removed from the data set used to calculate official design values.

Because of previously expressed stakeholder feedback regarding implementation of the Exceptional Events Rule and specific stakeholder concerns regarding the analyses that can be used to support ozone-related exceptional event demonstrations, the EPA intends to propose revisions to the Exceptional Events Rule in a future notice and comment rulemaking effort and will solicit public comment at that time. Additionally, the EPA intends to develop guidance to address implementing the Exceptional Events Rule criteria for wildfires that could affect ambient ozone concentrations. Depending on the nature and scope of interstate emission events affecting downward air quality, the EPA may be able to assist states in developing approvable exceptional events demonstrations.

2. International Transport

Most ozone air quality problems in the United States are due primarily to emission sources within the United States. However, domestic ozone air quality can also be affected by sources of emissions located across United States borders in Canada and Mexico, and from other continents. These contributions to U.S. ozone concentrations from sources outside of the United States can affect to varying degrees the ability of some areas to attain and maintain the 2008 ozone NAAQS. The EPA will continue to work with our domestic and international partners to better understand the extent and implications of transboundary flows of air pollutants and, where possible, to mitigate their impact on U.S. domestic air quality.

a. Summary of the Proposal

Section 179B of the CAA allows the EPA to approve an attainment demonstration for a nonattainment area if: (1) The attainment demonstration meets all other applicable requirements of the CAA; and (2) the submitting state can satisfactorily demonstrate that "but for emissions emanating from outside of the United States," the area would attain and maintain the ozone standard. The EPA proposed that this could include consideration of any emissions from North American or intercontinental sources.

b. Final Action and Rationale

The EPA is finalizing this action as proposed. The EPA believes that the best approach for addressing the potential impacts of international transport on nonattainment is for states to work with the relevant EPA Regional Office on a case-by-case basis to determine the most appropriate information and analytical methods for each area's unique situation. We will work with states that are developing plans pursuant to CAA section 179B, and ensure the states have the benefit of the EPA's developing understanding of international transport of ozone and its precursors.

Although monitored data cannot be excluded for a determination of whether an area has attained a NAAQS based solely on the fact the data are affected by emissions from outside the U.S., such data may be excluded from consideration if they were significantly influenced by exceptional events as described in CAA section 319(b). Where international transport meets the criteria and procedural requirements contained in the EPA's Exceptional Events Rule (40 CFR 50.14), it may be addressed by that rule.[66] Depending on the nature and scope of international emission events affecting air quality in the U.S., the EPA may be able to assist states in developing approvable exceptional events demonstrations.

c. Comments and Responses

*Comment:* One commenter supported the EPA's interpretation of CAA section 179B to include consideration of any emissions from any non-United States source and requested confirmation that the EPA's interpretation may be applied to areas other than those adjoining

[65] *See http://www.epa.gov/oar/urbanair/sipstatus/infrastructure.html.*

[66] "Treatment of Data Influenced by Exceptional Events; Final Rule" (72 FR 13560, March 22, 2007).

international borders. The commenter believed that CAA section 179B does not limit this option to areas, regardless of classification and believed that the EPA did not provide an explanation for why it proposed limiting the availability of a determination under CAA section 179B for Marginal classified areas.

*Response:* The EPA appreciates the commenter's support. The EPA has interpreted the Act such that CAA section 179B allows the EPA to approve an attainment demonstration if the state can satisfactorily demonstrate that "but for emissions emanating from outside of the United States," the area would attain and maintain the ozone standard. The EPA has historically evaluated these demonstrations on a case-by-case basis, based on the individual circumstances. The EPA does not believe this provision is restricted to areas adjoining international borders. Also, in the proposal the EPA indicated that for areas classified as Moderate and above, the modeling and other elements of the attainment demonstration must show timely attainment of the NAAQS but for the emissions from outside of the U.S. However, if a Marginal area (which is not otherwise required to submit an attainment demonstration) were to submit to the EPA a demonstration that they could attain the standard but for international emissions, the EPA would be able to evaluate that demonstration similarly to demonstrations submitted by higher classified areas.

*P. How will the CAA section 182(f) $NO_X$ provisions be handled?*

1. Summary of the Proposal

We proposed, consistent with the approach taken in the Phase 2 Rule for the 1997 ozone NAAQS and the 2005 updated guidance, that a previously granted $NO_X$ exemption (or waiver) under the 1-hour or 1997 ozone NAAQS would not automatically apply for purposes of implementing the 2008 ozone NAAQS.

2. Final Action and Rationale

We are finalizing this approach as proposed. A state with a previously approved $NO_X$ waiver for the 1-hour or 1997 ozone NAAQS would need to submit a new request for an exemption that is supported by analyses specific to the 2008 ozone NAAQS. The new request should consider any relevant information developed after the 1-hour or 1997 8-hour ozone NAAQS waivers were granted.

The EPA believes that while it may be appropriate in certain circumstances to grant $NO_X$ waivers, these waivers should be based upon applications and analyses specifically focused on the circumstances relevant for attainment of the 2008 ozone NAAQS, rather than a previous ozone NAAQS, since the standards for granting a waiver relate to attainment of the relevant NAAQS.

As states evaluate whether to seek a $NO_X$ waiver, the EPA encourages them to include consideration of air quality effects that may extend beyond the designated nonattainment area. A petition requesting a $NO_X$ exemption for the 2008 ozone NAAQS must contain adequate documentation that the provisions of CAA section 182(f), some of which relate to attainment impacts in other areas, are met. The January 14, 2005 memo [67] provides guidance on appropriate documentation for a waiver request for application to the 8-hour ozone program. The EPA believes this guidance is sufficient to cover the 2008 ozone NAAQS.

3. Comments and Responses

*Comment:* One commenter stated that the EPA should avoid granting $NO_X$ exemptions for nonattainment areas that use $NO_X$ controls from other programs to demonstrate attainment and/or to address other provisions of the CAA.

*Response:* In order to request a $NO_X$ exemption, a state must submit a petition specific to the 2008 ozone NAAQS. This petition must specifically address the provisions of CAA section 182(f). The EPA will grant $NO_X$ exemptions only through notice-and-comment rulemaking where the public will have an opportunity to address whether the petition complies with the provisions of CAA section 182(f). In granting waivers, the EPA will take into consideration existing $NO_X$ controls in an area.

*Q. Emissions Reduction Benefits of Energy Efficiency/Renewable Energy Policies and Programs, Land Use Planning and Travel Efficiency*

1. Energy Efficiency/Renewable Energy Policies and Programs

Energy efficiency and renewable energy (EE/RE) policies and programs are adopted by federal, state and local governments to lower energy demand through the use of more energy efficient equipment, technologies and practices and to transition to cleaner energy. These policies help reduce electricity generation from fossil-fueled sources, which, in turn, can result in lower emissions of $NO_X$ (as well as other criteria pollutants, hazardous air pollutants and greenhouse gases). Energy efficiency policies offer cost savings benefits, and can be a cost-effective strategy to help achieve air quality goals. The EPA encourages state adoption of these policies and programs to benefit nonattainment areas and to reduce the impact of ozone transport on downwind areas.

In July 2012, the EPA released the "*Roadmap for Incorporating Energy Efficiency/Renewable Energy Policies and Programs into State and Tribal Implementation Plans (SIPs/TIPs)*" [68] to clarify guidance on the incorporation of EE/RE measures in SIPs/TIPs. The Roadmap is a "living" document that will be updated periodically as new information becomes available. The Roadmap describes four pathways that states can use for considering air pollution reductions from EE/RE policies and programs in SIPs and TIPs. Valid EE/RE policies and programs that meet the applicable requirements of CAA section 182(c)(9) can also be used as contingency measures.

In addition to the Roadmap, the EPA is providing training and technical assistance to state, tribal and local agencies, as well as tools for quantifying the emissions impacts of EE/RE policies and programs (*i.e.*, the AVoided Emissions genERation Tool, AVERT),[69] and energy savings information for state-level EE policies and programs.[70] The EPA is also working with states to develop examples that illustrate how reductions from specific EE/RE policies and programs could be quantified and considered in SIPs.

2. Land Use Planning

States may also wish to consider strategies that foster more efficient urban and regional development patterns as a long-term air pollution control measure. Resources include the HUD DOT EPA Sustainable Communities Partnership, as well as the policy and technical guidance documents on land use available on the EPA's Office of Transportation and Air Quality Web site.[71] These documents provide communities with the information they need to better understand the link between air quality, transportation and land use activities, and how certain land use activities have the potential to help local areas achieve and maintain healthy air quality. The

[67] Memorandum dated January 14, 2005, "Guidance on Limiting Nitrogen Oxides ($NO_X$) Requirements Related to 8-Hour Ozone Implementation" from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Directors, Regions I–X.

[68] *See http://www.epa.gov/airquality/eere.html.*

[69] *See http://epa.gov/avert/.*

[70] *See http://www.epa.gov/statelocalclimate/state/topics/energy-efficiency.html.*

[71] *See http://www.epa.gov/otaq/stateresources/policy/pag_transp.htm.*

documents also include methods to help communities account for the air quality benefits of their local land use activities in their air quality plans. If wildfire impacts are significant in a particular area, air agencies and communities may be able to lessen the impacts of wildfires by working collaboratively with land managers and land owners to employ various mitigation measures including taking steps to minimize fuel loading in areas vulnerable to fire. The EPA will provide additional guidance as needed, and will continue to work with states on incorporating these types of programs into their SIPs.

3. Travel Efficiency

Areas may also consider incorporating travel efficiency strategies, such as new or expanded mass transit options, commuter strategies, system operations (*e.g.*, eco-driving, ramp metering), pricing (*e.g.*, parking taxes, congestion pricing, intercity tolls), speed limit restrictions and multimodal freight strategies in their SIPs. In March of 2011, the EPA released two documents that we believe will prove to be useful to states that want to evaluate emissions reductions that may be available from travel efficiency strategies. The first document is titled, "Potential Changes in Emissions Due To Improvements in Travel Efficiency." This report provides information on the effectiveness of travel efficiency measures for reducing emissions of $NO_X$, VOC and $PM_{2.5}$ at the national scale. The second document is titled, "Transportation Control Measures: An Information Document for Developing and Implementing Emission Reduction Programs." This document provides information on transportation control measures that have been implemented across the country for a variety of purposes, including reducing emissions related to criteria pollutants. These documents are available on the EPA's Office of Transportation and Air Quality Web site.[72]

*R. Efforts To Encourage a Multi-Pollutant Approach When Developing 2008 Ozone SIPs*

1. Summary of the Proposal

The EPA stated in the proposal that from a planning and resource perspective, we believe it can be efficient for states to develop integrated control strategies that address multiple pollutants rather than separate strategies for each pollutant or NAAQS individually. The EPA also provided states with recommendations and considerations to take into account when developing a comprehensive approach. The EPA requested comment on what incentives or assistance we might be able to provide to encourage states to integrate their planning activities.

2. Final Action and Rationale

From a planning and resource perspective, the EPA continues to believe that multi-pollutant control strategy planning can be efficient for states. An integrated air quality control strategy that reduces multiple pollutants can help ensure that reductions are efficiently achieved and produce the greatest overall air quality benefits. However, multi-pollutant approaches are not required as part of this rule.

States may also find it desirable to assess the impact of ozone, $PM_{2.5}$ and/or regional haze control strategies on toxic air pollutants regulated under the CAA or under state air toxics initiatives. Given the relationships that exist between toxic air pollutants and the formation of ozone and $PM_{2.5}$, states and sources may find that controls can be selected to meet goals for ozone and/or $PM_{2.5}$ attainment as well as those of specific toxic air pollutant programs.

We recommend that states and tribes wishing to take a comprehensive approach consider the following activities:

- Choose or develop models for use in the attainment demonstration that can assess the air quality and ecosystem impacts of measures to reduce ozone precursors, secondary fine particles, pollutants that contribute to regional haze and, where appropriate, toxic air pollutants and other related pollutants that can impact ecosystems.
- Conduct an integrated assessment of the impact controls have on ambient levels of ozone, $PM_{2.5}$, regional haze and, where applicable, toxic air pollutants, greenhouse gases, ecosystem protection and environmental justice considerations.
- Use common data bases and analytical tools, where possible.

3. Comments and Responses

*Comment:* Several commenters supported the use of a multi-pollutant approach. One commenter encouraged the EPA to allow states to take credit for programs that may not yet have been fully implemented. Another commenter noted the constraints in the CAA, which focuses on a pollutant-by-pollutant approach, and another commenter stated that they prefer a single pollutant approach.

*Response:* The EPA supports multi-pollutant planning, where possible. Regarding the comment encouraging the EPA to allow states to take credit for programs that may not yet have been fully implemented, please *see* Section III.B in the preamble for details regarding the EPA's final policy on this subject.

The EPA also supports considering the co-benefits of emissions reductions on multiple pollutants. We acknowledge that there are CAA constraints that may limit the incentive for multi-pollutant planning, and clarify that single-pollutant planning is acceptable under the Act.

*S. What are the requirements for the OTR?*

The EPA proposed to adopt for the 2008 ozone NAAQS the same requirements applicable to the OTR that were codified in 40 CFR 51.916 for the 1997 ozone NAAQS, except that the submission date for OTR RACT SIPs required under CAA section 182(b)(2) would be the same as provided under the RACT section of this regulation for nonattainment areas. (*See* Section III.A of this preamble for additional information on SIP submittal timeframes.) We are finalizing adoption of the requirements as proposed along with the OTR RACT SIP submittal due date.

*T. Are there any additional requirements related to enforcement and compliance?*

The EPA did not propose any specific regulatory provisions related to compliance and enforcement. CAA section 172(c)(6) requires nonattainment SIPs to "include enforceable emission limitations, and such other control measures, means or techniques . . . as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment . . ." The EPA's current guidance, "Guidance on Preparing Enforceable Regulations and Compliance Programs for the 15 Percent Rate-of-Progress Plans (EPA–452/R–93–005, June 1993)" is still relevant to rules adopted for SIPs under the 2008 ozone NAAQS and should be consulted for purposes of developing appropriate enforceable nonattainment plan provisions under CAA section 172(c)(6). The EPA did not solicit comment on this section and thus, none were received.

*U. What are the requirements for addressing emergency episodes?*

1. Summary of the Proposal

The EPA proposed that the existing requirements for emergency episodes (40 CFR part 51, subpart H) would also apply to the 2008 ozone NAAQS.

[72] *See http://www.epa.gov/otaq/stateresources/policy/pag_transp.htm.*

2. Final Action and Rationale

The EPA did not receive any adverse comments on the proposal. The EPA is finalizing the requirements for emergency episodes as proposed. The EPA believes the existing requirements for emergency episodes (40 CFR part 51, subpart H) remain appropriate for the 2008 ozone NAAQS and/or any current ozone NAAQS. If wildfire is a potential contributor to these episodes, the EPA urges implementing state and local agencies to coordinate with the land management agencies, as appropriate, in developing plans and appropriate public communications regarding public safety and reducing exposure.

*V. How does the "Clean Data Policy" apply to the 2008 ozone NAAQS?*

1. Summary of the Proposal

The EPA proposed to apply the same approach with respect to the Clean Data Policy for the 2008 ozone NAAQS as it applied in the Phase 1 Rule for the 1997 ozone NAAQS. That is, a determination of attainment would suspend the obligation to submit attainment planning SIP elements for the 2008 ozone NAAQS. Such a determination would suspend the obligation to submit any attainment-related SIP elements not yet approved in the SIP, for so long as the area continues to attain the 2008 ozone NAAQS.

2. Final Action

The EPA is finalizing this action as proposed. The EPA is replacing 40 CFR 51.918 with 40 CFR 51.1118 to consolidate in one regulation a comprehensive provision applicable to determinations of attainment for the current and former ozone NAAQS. Thus, 40 CFR 51.1118 will apply to a determination of attainment that is made with respect to any revoked or current ozone NAAQS—the 1-hour, the 1997 or the 2008 ozone NAAQS.

3. Rationale

The EPA continues to believe that it is appropriate for an area that has met an ozone NAAQS to suspend further attainment planning efforts for that ozone NAAQS. The new 40 CFR 51.1118 sets forth the regulatory consequences of an EPA determination, made after notice-and-comment rulemaking, that an area designated nonattainment for an ozone standard has air quality attaining that standard. Upon such a determination by the EPA, the requirements for the area to submit an attainment demonstration, associated reasonably available control measures, RFP plans, contingency measures and other attainment-related planning requirements for that NAAQS, shall be suspended until such time as the area is redesignated to attainment, at which time the requirements no longer apply, or until the EPA determines that the area has again violated that ozone NAAQS, in which case the requirements are again applicable.

4. Comments and Responses

*Comment:* Several commenters supported the continued use of the Clean Data Policy. One of these commenters requested that the EPA expeditiously redesignate areas using its CAA section 107(d)(3) authority for states that have submitted "clean data" certification and redesignation/maintenance SIPs.

*Response:* As stated in the policy, the requirements for an attainment demonstration, RFP and contingency measures are designed to bring an area into attainment. Once this goal has been achieved, we believe the statute no longer requires submission of plans designed to bring the area into attainment and thus it is appropriate to suspend the obligation that states submit plans to meet that goal, so long as the area continues to attain the relevant standard. The EPA Regional Offices will act on redesignating areas based on any CAA section 175A submittals that were received in as expeditious a manner as possible.

*W. How does this final rule apply to tribes?*

As we mentioned in the proposal, tribes are generally not required to submit tribal implementation plans (TIPs).[73] However, should a tribe choose to develop a TIP, this final rule is intended to serve as a guide for addressing key implementation issues for their area of Indian country. This rule will likely be especially useful to those tribes whose areas of Indian country were designated as separate nonattainment areas from surrounding state areas.

*X. What collaborative program has the EPA implemented for the 2008 ozone NAAQS?*

The EPA stands ready to assist states in implementing the 2008 ozone NAAQS. The Ozone Advance program, which began in April 2012, is an opportunity for 2008 ozone NAAQS attainment areas to work collaboratively with EPA to improve local air quality. Information on the Ozone Advance program for the 2008 ozone NAAQS is provided in a separate guidance document that is available at *http://www.epa.gov/ozonepmadvance.*

## IV. What are the anti-backsliding requirements for the revoked 1997 ozone NAAQS?

*A. What is the effective date of the revocation of the 1997 ozone NAAQS?*

1. Summary of the Proposal

The EPA proposed to exercise its authority to revoke the 1997 ozone NAAQS for all purposes upon the publication of the final SIP Requirements Rule in the **Federal Register**.[74] The EPA also proposed that anti-backsliding provisions would apply to an area in accordance with its designation and, as applicable, its classification, for the 1997 (and, if applicable, 1-hour) ozone NAAQS at the time of revocation of the 1997 ozone NAAQS. The following sections discuss in detail the applicable anti-backsliding requirements and how they apply to areas with various designations and classifications for the 2008 and the soon to be revoked 1997 and the already revoked 1-hour ozone NAAQS.[75]

2. Final Action

The EPA is revoking the 1997 ozone NAAQS for all purposes upon the effective date of this final rule, which will be 30 days after publication of this rule in the **Federal Register**. When the 1997 ozone NAAQS is revoked, the anti-backsliding requirements for that NAAQS, as detailed in this final rulemaking, become applicable. The

[73] On January 17, 2014, the United States Court of Appeals for the District of Columbia Circuit issued a decision vacating the EPA's 2011 rule titled "Review of New Sources and Modifications in Indian Country" (76 FR 38748) with respect to non-reservation areas of Indian country (*See, Oklahoma Department of Environmental Quality* v. *EPA*, 740 F.3d 185 (D.C. Cir. 2014)). Under the court's reasoning, with respect to CAA SIPs, a state has primary regulatory jurisdiction in non-reservation areas of Indian country (*i.e.*, Indian allotments located outside of reservations and dependent Indian communities) within its geographic boundaries unless the EPA or a tribe has demonstrated that a tribe has jurisdiction over a particular area of non-reservation Indian country within the state.

[74] The EPA's Classifications Rule for the 2008 ozone NAAQS also provided that the 1997 ozone NAAQS would be revoked 1 year after the effective date of initial area designations for the 2008 ozone NAAQS for purposes of transportation conformity. The D.C. Circuit held that the EPA lacked authority for such a partial revocation, but did not question its authority to revoke a standard in total. *NRDC* v. *EPA* (D.C. Cir. No. 12–1321, Dec 23, 2014). Today's revocation of the standard is for all purposes, including transportation conformity.

[75] The 1-hour ozone NAAQS was revoked in the Phase 1 Rule. *See* 69 FR 23951, April 30, 2004. The D.C. Circuit upheld EPA's authority to revoke that standard so long as it introduces adequate anti-backsliding measures. *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882, 899 (D.C. Cir. 2007).

extent of continued implementation efforts for a revoked standard derives from administration of anti-backsliding requirements for the revoked standard. After the revocation of the 1997 ozone NAAQS, the EPA will no longer be able to take action to reclassify or to redesignate areas for that standard.

After revocation of the 1997 standard, the designations (and the classifications associated with those designations) for that standard are no longer in effect, and the sole designations that remain in effect are those for the 2008 ozone NAAQS. However, the EPA is retaining the listing of the designated areas for the revoked 1997 ozone NAAQS in 40 CFR part 81, for the sole purpose of identifying the anti-backsliding requirements that may apply to the areas at the time of revocation. Accordingly, such references to historical designations for the revoked standard should not be viewed as current designations under CAA section 107(d).

3. Rationale

This approach of establishing anti-backsliding requirements is consistent with the EPA's practice in the transition from the 1-hour to the 1997 ozone NAAQS. It is not logical to attach to an area any anti-backsliding requirements for the revoked 1997 NAAQS until that NAAQS is revoked because up until revocation, implementation of the 1997 NAAQS is still adequately governed by the relevant CAA and regulatory provisions, and the EPA can still take actions to redesignate or reclassify areas for that standard.[76] [77] In fact, the status of many areas with respect to designation and classification for the 1997 ozone NAAQS has already changed since promulgation of the 2008 ozone NAAQS. Thus, the EPA concludes that it is reasonable to establish the date of revocation of the 1997 ozone NAAQS as the time for anti-backsliding requirements for that NAAQS to take effect, which is consistent with past practice under the Phase 1 Rule.

The EPA believes it is appropriate to revoke rather than retain the 1997 ozone NAAQS for all purposes.[78] This final action ensures that only one ozone NAAQS—the more protective 2008 ozone NAAQS—directly applies, rather than having two standards apply concurrently. In revoking any standard, the EPA provides adequate anti-backsliding requirements.

We believe that revoking the 1997 ozone NAAQS is appropriate for all purposes. The EPA believes that the permanent retention of two standards, differing only in the ozone concentrations they allow, creates unnecessary complexity and is not necessary to provide for attainment of the more stringent NAAQS. The EPA's reason for establishing the new standards of 0.075 ppm as requisite to protect public health and welfare was its conclusion that the old standard of 0.08 ppm was not adequate. Revoking (with appropriate anti-backsliding measures) rather than retaining that 1997 ozone NAAQS will facilitate a more seamless transition to demonstrating compliance with the more health and welfare protective 2008 ozone NAAQS, and will ensure the most efficient use of state and local resources in working toward attainment of that standard. Moreover, we believe that by requiring adequate anti-backsliding measures we will ensure continued momentum in states' efforts toward achieving cleaner air.

4. Comments and Responses

*Comment:* One commenter recognized the EPA's authority to revoke the 1997 ozone NAAQS, but opposed the revocation because attainment of the 1997 NAAQS would advance progress toward the 2008 standard and ensures that such progress would be made sooner rather than later. The commenter indicated that the EPA's proposal to revoke the 1997 ozone NAAQS would waive key requirements for Extreme nonattainment areas under the 1997 standard before the deadline comes due. The commenter also stated that the EPA must explain the specific problems caused by retaining the 1997 (and 1-hour) ozone NAAQS and tailor the solutions to address those specific problems, citing several rulings that the commenter believed that the EPA must provide a rational basis for their action.

*Response:* The anti-backsliding approach that the EPA proposed retains all applicable control requirements for the 1997 ozone NAAQS, while enabling areas, where possible, to focus planning efforts on meeting the more protective 2008 ozone NAAQS. We believe the strong anti-backsliding provisions in 40 CFR 51.1105 will ensure that controls already adopted to attain the previous NAAQS continue to be implemented until an area attains the 2008 ozone NAAQS, and will also ensure that there will be no delay in attaining the 1997 ozone NAAQS. Since it is impossible to attain the 2008 ozone NAAQS without also attaining the 1997 ozone NAAQS, retaining the 1997 ozone NAAQS would be largely superfluous from a health protection standpoint.

The EPA agrees with the commenter that the adopted revocation approach means that the 1997 NAAQS would be revoked before the statutory maximum attainment date for areas classified as Severe and Extreme for the 1997 ozone NAAQS. We believe that Congress understood this possibility when it amended the CAA in 1990 to require the EPA to review each NAAQS every 5 years. Similarly, Congress also recognized that areas with more significant ozone problems would need more time to attain the standard, and gave these areas more time to attain the standard, with timeframes for attainment largely beyond the 5-year timeframe required for review of the NAAQS. The EPA does not agree with the commenter's characterization of revoking the NAAQS, while retaining a retinue of anti-backsliding requirements, as creating perpetual extensions for attaining old standards. The commenter's argument ignores the fact that the old standard has been supplanted by a more protective standard, and that the EPA's anti-backsliding requirements, combined with the CAA's new obligations to achieve the more stringent 2008 ozone NAAQS as expeditiously as practicable, effectively fulfill the function of the prior attainment date. In addition the EPA notes that the attainment demonstration for the prior standard is retained as an anti-backsliding measure.

The EPA believes that integrating prior requirements with new goals facilitates coherent, effective and timely planning and controls, and minimizes the separate potentially duplicative submittal of requirements left over from obsolete standards. In this time of diminished resources, the states and the EPA need to move forward efficiently without being overburdened by unnecessary paperwork requirements arising from former standards that can detract from efficient movement towards more stringent standards.

For these reasons, and consistent with the anti-backsliding regime previously endorsed by the D.C. Circuit, *South Coast Air Quality Management Dist.* v.

[76] Although 40 CFR 51.905(a) specified that the anti-backsliding requirements "attached" at the time of designation for the 1997 ozone NAAQS, areas were still able to redesignate to attainment for the 1-hour ozone NAAQS up to the date of revocation of that standard.

[77] *See,* for example, the redesignations to 1-hour attainment for Phoenix (June 14, 2005, 70 FR 34362) and Atlanta (June 15, 2005, 70 FR 34660) which occurred right up until the June 15, 2005 effective date of revocation of the 1-hour ozone NAAQS.

[78] When the EPA revises a NAAQS, the prior NAAQS is not automatically revoked. Accordingly, both the 1997 ozone NAAQS and the more stringent 2008 ozone NAAQS are active standards unless and until the EPA takes action to revoke the previous 1997 ozone NAAQS, subject to appropriate anti-backsliding requirements.

*EPA,* 472 F.3d 882 for the transition from the 1-hour to the 1997 ozone NAAQS, the EPA believes that the revocation and associated anti-backsliding measures for the 2008 ozone NAAQS provide the appropriate way to move toward attaining the more protective standards in a timely and effective manner, while ensuring that progress made under previous ozone NAAQS is not lost. For additional details, please refer to the Response to Comments document.

*Comment:* A number of commenters in favor of revocation of the 1997 ozone NAAQS suggested alternate dates for revocation. Several commenters wanted an earlier date for revocation, such as the promulgation date of the 2008 ozone NAAQS or the effective date of designations for the 2008 ozone NAAQS. One of these commenters questioned whether the revocation would occur on the date of publication of the rule in the **Federal Register** or on the effective date of the rule.

*Response:* We disagree with commenters that recommended that the EPA revoke the 1997 ozone NAAQS at an earlier date. We believe that revoking the 1997 ozone NAAQS prior to the establishment of clear anti-backsliding requirements would create a gap in air quality protection and that *South Coast* v. *EPA,* 472 F.3d 882 indicates that backstops to prevent relaxation of measures implemented for a previous NAAQS must be in place before the EPA can revoke that NAAQS. The EPA, upon considering the comment on the effective date of revocation, clarifies here that the 1997 ozone NAAQS will be revoked on the rule's effective date as set forth in the **Federal Register**. That is, the 1997 ozone NAAQS will be revoked 30 days after publication of the final rule in the **Federal Register**.

*B. What are the applicable requirements for anti-backsliding purposes following the revocation of the 1997 ozone NAAQS?*

1. Summary of the Proposal

The EPA proposal stated that subpart AA, 40 CFR 51.1100 *et seq.,* would provide comprehensive anti-backsliding requirements for transition to the 2008 ozone NAAQS. The EPA proposed that, upon revocation of the 1997 ozone NAAQS, subpart X, 40 CFR 51.900 *et seq.,* would be effectively replaced by the proposed subpart AA.

In proposed subpart AA, 40 CFR 51.1100(o) specified the list of "applicable requirements" that would apply as anti-backsliding requirements for the transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS. The EPA proposed as "applicable requirements" the requirements that were previously listed in 40 CFR 51.900(f) (except for Stage II vapor recovery),[79] as well as the addition of three anti-backsliding requirements that were included as a result of the *South Coast* v. *EPA*[80] decision: Nonattainment NSR thresholds and offset ratios, nonattainment contingency measures for failure to attain by the applicable deadline or to meet RFP milestones, and CAA section 185 fee program requirements. Since the *South Coast* v. *EPA* decision, the EPA has been including these three requirements as anti-backsliding requirements for the 1-hour ozone NAAQS for the purpose of discharging its obligations to effectuate anti-backsliding for that standard. The proposed action would formally list them with the other applicable requirements.

The applicable requirements discussed previously apply to areas that are designated nonattainment for the 2008 ozone NAAQS and remain nonattainment for a previous ozone NAAQS on the date the 1997 ozone NAAQS is revoked. For areas designated attainment for the 2008 ozone NAAQS but nonattainment for the 1997 ozone NAAQS, the EPA proposed that after the 1997 ozone NAAQS is revoked, these areas would not be required to retain in their SIPs nonattainment NSR programs for ozone. Instead, such areas would be required to implement PSD requirements for ozone. The EPA's determination that after revocation of the 1997 ozone NAAQS nonattainment NSR requirements do not apply to areas designated attainment for the 2008 ozone NAAQS is consistent with the *Greenbaum* v. *EPA* decision.[81]

Based on requirements in the Phase 1 rule for the 1997 ozone NAAQS, as modified in light of *South Coast* v. *EPA,* the definition of applicable requirements proposed in 40 CFR 51.1100(o) included the following: (1) RACT; (2) Vehicle I/M programs; (3) Major source applicability cut-offs for purposes of RACT; (4) ROP and/or RFP reductions; (5) the Clean fuels fleet program under section 183(c)(4) of the CAA; (6) Clean fuels for boilers under section 182(e)(3) of the CAA; (7) Transportation control measures during heavy traffic hours as provided under section 182(e)(4) of the CAA; (8) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA; (9) Transportation controls under section 182(c)(5) of the CAA; (10) Vehicle miles traveled provisions under section 182(d)(1)(A) of the CAA; (11) $NO_X$ requirements under section 182(f) of the CAA; (12) Attainment demonstrations; (13) Nonattainment contingency measures; (14) Nonattainment NSR requirements; and (15) CAA section 185 enforcement requirements for Severe and Extreme nonattainment areas for failure to attain.

As part of the proposal, the EPA indicated that upon revocation of the 1997 ozone NAAQS, the designations for that NAAQS would have no further effect except as references for anti-backsliding purposes. References to the designations for the revoked standard in 40 CFR part 81 would be retained solely for anti-backsliding purposes for areas designated nonattainment for the 2008 ozone NAAQS, and should not be viewed as current nonattainment designations under CAA § 107 within the meaning of 40 CFR 51.166(i)(2) and 52.21(i)(2) and, therefore, would not trigger the exemption from PSD requirements otherwise resulting from those provisions. The proposal also requested comment as to whether or not an amendment to 40 CFR 51.166(i)(2) and 52.21(i)(2) would be appropriate to make it clear that a nonattainment designation for a revoked NAAQS, once the revocation becomes effective in an area, would not trigger the PSD exemption in those provisions and would not prevent application of PSD requirements for that pollutant and how to word such an amendment. Alternatively, the EPA sought comment as to whether it would be sufficient for the EPA to articulate the interpretation of these provisions as described earlier in this paragraph.

2. Final Action

The EPA is finalizing the anti-backsliding requirements as proposed, including amendments to 51.166(i)(2) and 52.21(i)(2) which address classifications for revoked NAAQS. The amended subpart AA addresses anti-backsliding requirements for both the previously revoked 1-hour ozone NAAQS and the 1997 ozone NAAQS in a consolidated and streamlined fashion. Areas designated nonattainment for the

[79] Under CAA section 202(a)(6), the EPA found that onboard refueling vapor recovery (ORVR) systems are in widespread use in the motor vehicle fleet and waived the CAA section 182(b)(3) Stage II vapor recovery requirement for Serious and higher ozone nonattainment areas on May 16, 2012 (77 FR 28772). Thus, in the proposal, the section 182(b)(3) Stage II requirement is omitted from the list of applicable requirements in 40 CFR 51.1100(o).

[80] *South Coast Air Quality Management District* v. *EPA,* 472 F.3d at 899.

[81] *Greenbaum* v. *EPA,* 370 F.3d 527, 536 (6th Cir. 2004). "It would make little sense for [nonattainment NSR] to be included in the post-attainment SIP, as the Clean Air Act . . . explicitly states that attainment area SIPs must include a PSD program."

2008 ozone NAAQS and also designated nonattainment for the 1997 ozone NAAQS [82] at the time of revocation of the 1997 ozone NAAQS will be subject to 40 CFR 51.1100(o). As proposed, areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS when the 1997 ozone NAAQS is revoked will become subject to PSD requirements rather than nonattainment NSR requirements once the revocation is effective.

Also as proposed, three items are being added to the list of applicable requirements: Nonattainment contingency measures, nonattainment NSR requirements (clarified to refer to major source thresholds and offset ratios), and CAA section 185 requirements for Severe and Extreme areas. As proposed, Stage II vapor recovery is not being included in the list of applicable requirements for the reasons described above.

Based on feedback received during the comment period, the EPA is specifically including two additional items in the list of applicable requirements: RACM and CAA section 182(e)(5) contingency measures. These provisions were implicitly included in the attainment demonstration but are listed separately for clarification. As such, the complete list of applicable requirements in 40 CFR 51.1100(o) is: (1) RACT; (2) Vehicle I/M programs; (3) Major source applicability cut-offs for purposes of RACT; (4) ROP and/or RFP reductions; (5) the Clean fuels fleet program under section 183(c)(4) of the CAA; (6) Clean fuels for boilers under section 182(e)(3) of the CAA; (7) Transportation control measures during heavy traffic hours as provided under section 182(e)(4) of the CAA; (8) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA; (9) Transportation controls under section 182(c)(5) of the CAA; (10) Vehicle miles traveled provisions under section 182(d)(1)(A) of the CAA; (11) $NO_X$ requirements under section 182(f) of the CAA; (12) Attainment demonstrations; (13) Nonattainment contingency measures; (14) Nonattainment NSR major source thresholds and offset ratios; [83] (15) CAA section 185 requirements for Severe and Extreme areas for failure to attain; (16) RACM; and (17) Contingency measures for SIPs invoking section 182(e)(5) of the CAA.

3. Rationale

As detailed in the proposal,[84] the EPA already treats nonattainment contingency measures, nonattainment NSR major source thresholds and offset ratios, and CAA section 185 requirements for Severe and Extreme areas as being included in the list of applicable requirements that apply to areas for anti-backsliding purposes under the revoked 1-hour NAAQS, consistent with the *South Coast* v. *EPA* decision. Their explicit inclusion in this list is to formalize their place in the list of applicable requirements. Similarly, Stage II vapor recovery is not included in this list due to the May 16, 2012 determination [85] that the requirement is waived, and that an area currently implementing a Stage II control program can, under certain circumstances, remove it from the SIP. These changes to the list of applicable requirements reflect policies already being implemented by the EPA.

Similarly, areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS when the 1997 ozone NAAQS is revoked will become subject to PSD rather than nonattainment NSR once the revocation takes effect. An area that is attainment for the 2008 ozone NAAQS is attaining the most current and health protective ozone standard. The EPA believes that Congress did not intend to hold such an area to the requirements for an old standard when the area has met a newer, more stringent standard of the same form. Such areas will implement PSD for the 2008 ozone NAAQS once the revocation of the 1997 ozone NAAQS takes effect, notwithstanding any remaining references to nonattainment designations for the 1997 ozone NAAQS in 40 CFR part 81. The references to the designations for the revoked standard in 40 CFR part 81 are retained solely for anti-backsliding purposes for areas designated nonattainment for the 2008 ozone NAAQS. Accordingly, such references to historical nonattainment designations for the revoked standard should not be viewed as current nonattainment designations under CAA § 107 within the meaning of 40 CFR 51.166(i)(2) and 52.21(i)(2) and, therefore, do not trigger the exemption from PSD requirements otherwise resulting from those provisions.

Upon reviewing comments, the EPA decided that sufficient arguments were provided to append two additional items to the list of applicable requirements in 51.1100(o). Those two items are RACM and 182(e)(5) contingency measures. The EPA views this as a clarification, rather than as an addition of control elements. Attainment demonstration SIPs are already listed as an applicable requirement. RACM is an integral part of an approvable attainment demonstration. Similarly, contingency measures will become a required element of 51.1100(o) consistent with the *South Coast* v. *EPA* decision. Adding contingency measures associated with CAA section 182(e)(5) to the list is a clarification, rather than an imposition of an additional requirement.

4. Comments and Responses

*Comment:* A commenter pointed out that, with regard to applicable requirements, federal measures and locally implemented measures are held to two separate standards. The commenter used the example of Stage II vapor recovery. The EPA removed Stage II vapor recovery from the list of applicable requirements. However, locally implemented control measures included in a SIP for a previous NAAQS must be retained in perpetuity.

*Response:* The EPA disagrees with the commenter. SIP-approved control measures, whether federal programs or locally implemented measures, may not be modified unless the modification meets the requirements of CAA section 110(l) and, if applicable, CAA section 193. For purposes of anti-backsliding, Stage II control programs are no longer mandatory because the EPA has determined under the statutory provisions of CAA section 202(a)(6) that another federal program, onboard refueling vapor recovery (ORVR) technology, is in widespread use, rendering Stage II controls largely redundant. However, in an area where a Stage II control program is already adopted into the SIP, it cannot be removed from the SIP unless the conditions of CAA sections 110(l) and 193 are met. Therefore, it is subject to the same treatment as any locally implemented SIP-adopted control measure.

*Comment:* A commenter stated that no planning requirements from the 1997 ozone NAAQS should apply once that NAAQS is revoked. The commenter based this on two arguments. First, CAA section 172(e) applies to control requirements and not state planning requirements. Second, the commenter argued that the decision in *South Coast* v. *EPA* has limited applicability because

[82] Note that some areas designated as nonattainment for the 1997 NAAQS might also retain anti-backsliding requirements for the already revoked 1-hour ozone NAAQS.

[83] It should be noted that replacement of nonattainment NSR SIP provisions with PSD upon successful redesignation to attainment does not relieve sources of their obligations under previously established permit conditions.

[84] *See* 78 FR 34178, June 6, 2013.

[85] *See* 77 FR 28772.

the court was faced with two ozone standards that differed in form and level, and in this situation the two standards are of the same form.

*Response:* The EPA agrees that the transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS calls for a re-evaluation of the provisions necessary to protect against backsliding and ensure continued progress toward achieving healthy air quality. However, we do not agree that *South Coast* v. *EPA* has limited application to informing appropriate anti-backsliding requirements for a revoked 1997 NAAQS simply because the 2008 NAAQS has the same form as the 1997 NAAQS. With only one exception, the seventeen "applicable requirements" that will be listed in new 40 CFR 51.1100(o) are all control requirements, consistent with *South Coast* v. *EPA*. To the extent that any of these control requirements have not been implemented in a 1997 nonattainment area by the time the 1997 NAAQS is revoked, consistent with *South Coast* v. *EPA* the state must ensure these controls are adopted into the SIP and implemented, if applicable. The one applicable requirement that involves both planning and control elements is the attainment demonstration requirement.[86] Since the attainment demonstration is part of the basis for establishing that the RACM requirement (a control requirement consistent with *South Coast*) is satisfied, the EPA believes it is appropriate to retain this as an applicable anti-backsliding requirement to ensure timely progress toward attainment of the 1997 NAAQS, especially for areas classified in the highest classifications where the statutory attainment dates for the 1997 NAAQS extend well into the future (*e.g.*, 2019 for Severe and 2024 for Extreme areas). The EPA encourages states to synchronize their planning and emissions control efforts for attainment of the 2008 ozone NAAQS with any unfulfilled anti-backsliding requirements associated with the revoked 1997 ozone NAAQS. As a reminder, a Clean Data Determination for the 1997 ozone NAAQS can suspend the associated attainment demonstration requirement for as long as the area continues to attain the 1997 NAAQS.

*Comment:* A commenter pointed out that there are several control measures that continue to apply to areas after a standard is revoked. The commenter argued that, for consistency, the EPA should include these items in the list of applicable requirements. For example, RACT is listed as an applicable requirement, but not RACM. The commenter argued that RACM should be listed as an applicable requirement. Similarly, transportation conformity, "other control measures" as necessary for attainment under CAA section 172(c)(6), and contingency measures for CAA section 182(e)(5) measures should be retained as applicable requirements, according to the commenter.

*Response:* The EPA agrees in part with the commenter, that it is appropriate to list both RACM and CAA section 182(e)(5) contingency measures as "applicable requirements" in the final rule in 40 CFR 51.1100(o). RACM is a component of the attainment demonstration and is a requirement of the CAA. The EPA reviews each SIP submission from a state to ensure that sufficient information is provided for the EPA to determine whether the state has adopted all RACM necessary for attainment as expeditiously as practicable and provided for implementation of those measures as expeditiously as practicable. For areas remaining in nonattainment for the 1997 ozone NAAQS and designated nonattainment for the 2008 ozone NAAQS, the EPA does not believe that revocation of the NAAQS should halt or delay the planned implementation of control measures. These measures, while adopted pursuant to the 1997 ozone NAAQS, will also assist the areas in attaining the 2008 ozone NAAQS.

Similarly, for Extreme areas relying on CAA section 182(e)(5), the EPA agrees that the contingency measures required for that program should be held to the same requirements as contingency measures for sections 172(c) and 182(c) of the CAA. Thus the EPA is adding 182(e)(5) contingency measures to the list of applicable requirements in 51.1100(o).

However, the EPA does not agree with the commenter that conformity needs to be retained as an applicable requirement. Transportation and general conformity are retained as requirements for all areas designated nonattainment for the 2008 ozone NAAQS. For areas designated attainment for the 2008 ozone NAAQS, these areas are meeting the most stringent, health-protective NAAQS and thus have no remaining conformity requirements because they are designated attainment for the 2008 ozone NAAQS and the designations for the 1997 ozone NAAQS which trigger conformity requirements are revoked. Transportation and general conformity apply only in areas designated as nonattainment or redesignated to attainment with an approved CAA section 175A maintenance plan. (CAA section 176(c)(5)). Upon the effective date of the revocation of the 1997 ozone NAAQS the only relevant designation for ozone for conformity purposes will be an area's designation for the 2008 ozone NAAQS.[87] Areas that are designated attainment for the 2008 ozone NAAQS are not subject to transportation or general conformity requirements regardless of their designation for the 1997 ozone NAAQS at the time of revocation of that NAAQS. (CAA section 176(c)(5)). Similarly, "other control measures" necessary for attainment are already covered by the attainment demonstration, and cannot be removed without satisfying CAA section 110(l).

*Comment:* A commenter disagreed with what it described as the EPA's proposal to allow areas that were designated nonattainment for the 1997 ozone NAAQS or the 1-hour NAAQS before those standards were revoked to terminate any nonattainment NSR or 185 fee requirements once the 1997 ozone NAAQS is revoked and the area has been designated or redesignated attainment for the 2008 ozone NAAQS or a redesignation substitute has been approved for the revoked standard. The commenter argues that allowing such an area to remove nonattainment NSR or 185 fee requirements from the SIP is contrary to the *NRDC* v. *EPA* (2011) ruling.

*Response:* The court ruled in *NRDC* v. *EPA* that it would be improper for the EPA to relieve an area that has not attained a standard from requirements imposed for failure to attain that standard. The EPA's "redesignation substitute" proposal does not do that. It relieves areas that demonstrate that they are in fact attaining a standard from obligations arising from failure to attain that standard as well as all anti-backsliding requirements applicable for any prior revoked standard without the need for a formal redesignation. Nothing in the 2011 *NRDC* v. *EPA* decision forecloses that approach. The EPA also rejects any suggestion that an area would remain subject to NSR or 185 fees after it is designated as an attainment area and any prior standards for which it was designated nonattainment have been revoked. Areas cannot be redesignated to attainment for ozone

[86] An attainment demonstration includes technical analyses of base year emissions and future year emissions, including the impact of RACM and RACT; a list of adopted control measures with schedules for implementation; and a RACM analysis.

[87] The EPA revoked the 1997 ozone NAAQS for transportation conformity on May 21, 2012. (77 FR 30160) The revocation of the 1997 ozone NAAQS for transportation conformity purposes was effective on July 20, 2013. In this final rule, the EPA is revoking the 1997 ozone NAAQS for all remaining purposes.

unless they have attained all current standards and met all anti-backsliding requirements applicable for prior revoked standards. Moreover, nonattainment NSR is not a requirement in attainment areas and 185 by its own terms does not apply to an area that has been designated "an attainment area for ozone."

*C. Application of Transition Requirements to Nonattainment and Attainment Areas*

This section discusses how the transition requirements apply to various types of areas. The general principle is to apply transition requirements depending on how the area is designated—attainment or nonattainment—for the 2008 ozone NAAQS, while taking into account the area's status with respect to prior standards.[88] In the subsequent sections, for purposes of determining an area's transition requirements, we first look to the area's designation and classification for the 2008 ozone NAAQS. We then determine the area's designation and classification status for the 1997 ozone NAAQS as of the effective date the 1997 ozone NAAQS is revoked. Finally, where appropriate, we determine whether anti-backsliding requirements for the 1-hour ozone NAAQS apply in the area and, if so, we determine the area's designation and classification status for the 1-hour ozone NAAQS as of the date the 1-hour NAAQS was revoked.[89] Appendix B of this rule contains a list of areas subject to anti-backsliding requirements.

1. Requirements for Areas Designated Attainment for the 2008 Ozone NAAQS and Maintenance for the 1997 Ozone NAAQS

a. Summary of the Proposal

For this category, the EPA proposed that an area's approved CAA section 175A maintenance plan for the revoked 1997 ozone NAAQS satisfies both its obligations for maintenance under section 110(a)(1) for the 2008 ozone NAAQS and its obligation to submit a second approvable maintenance plan under CAA section 175A for the revoked 1997 ozone NAAQS.

b. Final Action

The EPA is finalizing this as proposed. For areas designated attainment for the 2008 ozone NAAQS and maintenance for the 1997 ozone NAAQS (as of the date of revocation of the 1997 ozone NAAQS), the area's approved CAA section 175A maintenance plan for the revoked 1997 ozone NAAQS satisfies both its obligations for maintenance under CAA section 110(a)(1) for the 2008 ozone NAAQS and its obligation to submit a second approvable maintenance plan under CAA section 175A for the revoked 1997 ozone NAAQS.

c. Rationale

All areas in this category were already subject to a CAA section 175A maintenance plan for the revoked 1997 ozone NAAQS, and have been both redesignated to attainment for the 1997 ozone NAAQS (as well as any other revoked ozone NAAQS) and designated attainment for the more stringent 2008 ozone NAAQS. The approved CAA section 175A maintenance plan for the 1997 ozone NAAQS satisfied the anti-backsliding requirements of these areas for the prior 1-hour NAAQS. Any further 110(a)(1) maintenance plan requirement under the 2008 ozone NAAQS would be unnecessarily burdensome. No revision to the CAA section 175A maintenance plans for these areas can be approved unless it complies with the anti-backsliding checks in CAA sections 110(l) and 193. The EPA believes that there is no justification for additional maintenance plan demonstration burdens to be imposed on these areas solely because at one time they were designated nonattainment under the revoked 1997 ozone NAAQS. This approach recognizes and reflects that these areas were redesignated to attainment for the 1997 ozone NAAQS prior to its revocation, and have been designated attainment for the 2008 ozone NAAQS.

d. Comments and Responses

*Comment:* One commenter opposed this action for several reasons. First, the commenter stated that the EPA cannot dispense with the statutory responsibility of areas by excusing compliance with CAA section 110(a)(1). Second, the commenter believes that demonstrating long-term compliance via an approved 175A maintenance plan for the 1997 ozone NAAQS is not sufficient to demonstrate continued compliance with the 2008 ozone NAAQS. The commenter maintained that even with an approved 175A plan for the 1997 ozone NAAQS, emissions can continue to increase. There is nothing in the approved 175A plan that will be activated should the area start to violate the 2008 ozone NAAQS.

*Response:* The EPA disagrees with the commenter. The EPA is not ignoring the maintenance provision of CAA section 110(a)(1), but rather evaluating what is sufficient to address that provision under the circumstances of transition to a new more stringent NAAQS for an area designated attainment for that more stringent NAAQS. With the control measures included in their SIPs and in approved CAA section 175A maintenance plans, those areas have already achieved sufficient emissions reductions to bring them into attainment for both the 1997 ozone NAAQS and the more stringent 2008 ozone NAAQS. These SIP control measures cannot be weakened without satisfying CAA section 110(l) and in some cases also CAA section 193, which effectively serve as anti-backsliding provisions. The EPA is not relieving areas designated attainment of the requirement under CAA section 110(a)(1) to maintain the more stringent 2008 ozone NAAQS, but rather, the EPA is allowing the approved PSD plan for the 2008 ozone NAAQS to suffice as a maintenance showing for these areas. These are areas that already have many controls in place, including approved CAA section 175A maintenance plans ensuring that the areas can maintain the level of the prior standard.

While these approved CAA section 175A maintenance plans were established for maintenance of the 1997 ozone NAAQS, and accordingly help prevent backsliding for that revoked NAAQS, they also provide a foundation for maintenance of the 2008 ozone NAAQS, which, in combination with other active requirements for the 2008 ozone NAAQS, contribute to maintenance of the new standard. The emissions reductions for one NAAQS build upon the emissions reductions from previous NAAQS. The EPA concludes that no additional measures beyond the prior CAA section 175A maintenance plans and the PSD plans for the 2008 standard should be necessary to provide for maintenance in these areas. The EPA will work with states as necessary to address any future air quality concerns and maintenance needs for these areas.

2. Areas Designated Attainment for the 2008 Ozone NAAQS and Nonattainment for the 1997 Ozone NAAQS

a. Summary of the Proposal

The EPA proposed two approaches for this category. The EPA proposed as its

[88] One area, the Uintah Basin, UT, was designated as "unclassifiable," and for purposes here would be treated like an area designated "attainment."

[89] If the nonattainment area was initially designated attainment for the 1997 ozone NAAQS or was redesignated to attainment ("Maintenance") for the 1997 ozone NAAQS prior to the date of revocation of the 1997 NAAQS, then the area has already fulfilled any applicable 1-hour anti-backsliding requirements. For ease of reference, we refer to these areas as "Maintenance" areas.

preferred approach for areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS (as of revocation of the 1997 ozone NAAQS) that the state not be required to adopt any outstanding applicable requirements for the area for the revoked 1997 standard. This approach was similar to the approach followed in the Phase 1 Rule. The EPA also proposed, in a departure from the Phase 1 Rule, that the approved PSD SIPs for these areas satisfy the obligation to submit an approvable maintenance plan for the 2008 ozone NAAQS under CAA section 110(a)(1).

The second, and less preferred, alternative proposed by the EPA for these areas was that the state be required to demonstrate maintenance for the 2008 ozone NAAQS via a "maintenance showing." This maintenance showing would be due 3 years after the effective date of designations for the 2008 ozone NAAQS and would be in a form other than a formal SIP revision. The maintenance showing would contain a demonstration of continued maintenance of the 2008 ozone NAAQS in the area for 10 years from the effective date of the area's designation as attainment for the 2008 ozone NAAQS. The EPA committed to providing guidance regarding the specific elements of the maintenance showing if this route were chosen.

b. Final Action

The EPA is finalizing the preferred option: For areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS (as of revocation of the 1997 ozone NAAQS) states are not required to adopt any outstanding applicable requirements for the revoked 1997 standard. Approved PSD SIPs for these areas satisfy the obligation to submit an approvable maintenance plan for the 2008 ozone NAAQS under CAA section 110(a)(1).

c. Rationale

Areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS (as of revocation of the 1997 ozone NAAQS) have already attained the most stringent existing standard, notwithstanding any existing nonattainment designation. These areas thus have developed nonattainment SIPs that in combination with federal measures and emissions controls in upwind areas have produced sufficient emissions reductions to achieve air quality that attained both the 1997 ozone NAAQS and resulted in an attainment designation for the more protective 2008 ozone NAAQS. They remain subject to the 1997 nonattainment area requirements already approved into the SIP, which can be revised only upon a showing that such revision complies with the anti-backsliding checks in CAA sections 110(l) and 193. Given the succession of NAAQS of increasing stringency that has occurred, the EPA believes that the burden of developing an approvable 110(a)(1) maintenance plan for the 2008 ozone NAAQS would outweigh any compensating benefit for an area that is already attaining that NAAQS and that is subject to prior nonattainment requirements which are already incorporated into the SIP and have been sufficient to bring the area into attainment of both the 1997 and 2008 standards.

d. Comments and Responses

*Comment:* A commenter believed that the EPA should adopt the alternative approach. The commenter stated that an inequity arises from the fact that areas designated maintenance for the 1997 ozone NAAQS prior to revocation of the NAAQS have contingency measures that are activated should the area begin to re-violate the 1997 ozone NAAQS. These areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS would not be subject to any maintenance plans or contingency measures. Implementing the alternative approach would address this inequity.

*Response:* The EPA disagrees with the commenter. The control measures implemented by these areas and included in their SIPs have already produced sufficient emissions reductions to achieve air quality that not only attained the 1997 ozone NAAQS, but also resulted in an attainment designation for the more stringent 2008 ozone NAAQS. These control measures cannot be modified or removed without a demonstration satisfying CAA section 110(l) and in some cases both CAA sections 110(l) and 193. These demonstrations must address not only the 1997 ozone NAAQS but also the 2008 ozone NAAQS as well as any future NAAQS.

*Comment:* One commenter believed both proposed approaches violate the plain language of the CAA by not requiring the area to submit a CAA section 175A maintenance plan, and thus opposed both options. A second commenter believed that the EPA should continue to require formal 10-year maintenance plan submittals for the 1997 ozone NAAQS from these areas in an attempt to guarantee that controls are not relaxed, thus impacting downwind areas.

*Response:* We believe that an approved PSD SIP, in conjunction with the other already-existing statutory and regulatory provisions that govern implementation of ozone standards, and the historical safeguards in place for the area adopted for prior NAAQS, are generally sufficient to prevent backsliding, and to satisfy the requirement for maintenance under CAA section 110(a)(1). The control measures implemented by these areas and included in their SIPs have already produced sufficient emissions reductions to achieve air quality that attained the 1997 ozone NAAQS, and resulted in an attainment designation for the more stringent 2008 ozone NAAQS . These control measures cannot be modified or removed without a CAA section 110(l) showing and in some cases both a CAA section 110(l) and a CAA section 193 showing. Areas designated attainment for the 2008 standard remain subject to the attainment and maintenance requirements of that standard. These include continued implementation of the control measures that brought the area into attainment. For these areas, and for any area designated attainment for the 2008 NAAQS, the CAA's general NAAQS air quality management framework and associated regulatory provisions continue to apply, and serve as the foundation for handling any potential future issues with maintaining the 2008 NAAQS.

3. Areas Designated Nonattainment for the 2008 Ozone NAAQS and Maintenance for the 1997 Ozone NAAQS

a. Summary of the Proposal

The EPA proposed that for these areas, the area's approved CAA section 175A maintenance plan for the revoked 1997 ozone NAAQS would satisfy the obligation to submit a second approvable maintenance plan under CAA section 175A for the revoked 1997 ozone NAAQS.

b. Final Action

The EPA is finalizing this as proposed.

c. Rationale

All areas in this group are already subject to an approved CAA section 175A maintenance plan for the revoked 1997 ozone NAAQS and have been redesignated to attainment for the 1997 ozone NAAQS. As explained elsewhere, the approval of the redesignation request and of the CAA section 175A maintenance plan for the 1997 ozone NAAQS required the EPA to determine that any anti-backsliding requirements

of these areas for the 1997 standard, as well as any requirements that might be applicable for the 1-hour standard, have been met. Thus the EPA's approvals of the redesignation request and the maintenance plan for the 1997 standard signify not only that all applicable requirements for the 1997 ozone NAAQS have been met, but also that all applicable anti-backsliding measures for the 1-hour standard have been adopted and approved into the SIP. No revision to the CAA section 175A maintenance plans for these areas can be approved unless it complies with the anti-backsliding checks in CAA sections 110(l) and 193.

These areas are also designated nonattainment for the more stringent 2008 ozone NAAQS and therefore are subject to nonattainment NSR and other nonattainment requirements for their classification under the more stringent 2008 ozone NAAQS. Thus, the EPA believes that there is no justification for a second CAA section 175A maintenance plan to be imposed on these areas solely because at one time they were designated nonattainment under a revoked ozone NAAQS.

d. Comments and Responses

*Comment:* A commenter that supported the EPA's approach indicated that the proposed regulatory text for areas designated nonattainment for the 2008 ozone NAAQS and maintenance for the 1997 ozone NAAQS, located in 40 CFR 51.1105(a)(2), should be modified in line with text in 40 CFR 51.1105(a)(4) to allow maintenance plans to be modified consistent with CAA sections 110(l) and 193.

*Response:* The EPA agrees that the text regarding areas designated maintenance for the 1997 ozone NAAQS should be modified. The regulatory text has been adjusted to reflect that maintenance plans can be modified pursuant to CAA sections 110(l) and 193.

*Comment:* One commenter indicated that a second 10-year 175A maintenance plan was needed by these areas. The commenter maintained that the EPA's proposed approach does not demonstrate continued maintenance. The commenter stated that an area designated nonattainment for the 2008 ozone NAAQS should prepare a second maintenance plan to assure maintenance and set conformity budgets. Another commenter opposed the proposal because the CAA clearly requires two 10-year maintenance plans. The fact that the area is designated nonattainment under the 2008 ozone NAAQS is no guarantee that there will be no increase in ozone violations. The commenter suggested that the EPA review the record for areas violating a NAAQS for which it had been redesignated to attainment with an approved maintenance plan. Waiving the requirements of a second 10-year maintenance plan as described in CAA section 175A(b) without support is arbitrary and undermines the protections of the Act.

*Response:* The EPA recognizes that the approved 175A maintenance plan for the 1997 ozone NAAQS can only be modified via a CAA section 110(l) and, where appropriate, a CAA section 193 showing. These analyses would have to demonstrate that any revisions to the maintenance plan would not interfere with the ability to demonstrate timely attainment for the new standard. The removal of the requirement for the second 10-year plan for maintenance of a revoked, less stringent standard that the areas previously attained allows states to focus planning and control efforts on attaining and maintaining the more stringent and currently applicable 2008 ozone NAAQS in these areas, for the already attained 1997 ozone NAAQS. The areas will remain subject to the MVEBs established in the approved 175A maintenance plan until such time that MVEBs for the more stringent 2008 ozone NAAQS are submitted and are found adequate or are approved, which must be used for transportation conformity determinations under the 2008 ozone NAAQS pursuant to the conformity regulations.

4. 2008 Nonattainment Areas Also Designated Nonattainment for a Prior Revoked Ozone NAAQS

a. Summary of the Proposal

The EPA proposed that areas designated nonattainment for the 2008 ozone NAAQS and also designated nonattainment for the 1997 ozone NAAQS as of the revocation of the 1997 NAAQS [90] will be subject to applicable anti-backsliding requirements for the applicable prior NAAQS as set forth in 51.1100(o), as well as the pertinent requirements for the current 2008 ozone NAAQS. In addition, if a state seeks to revise any measure already approved into its SIP for any prior standard, the revision must comply with the anti-backsliding checks in CAA sections 110(l) and 193.

b. Final Action

The EPA is finalizing this as proposed. In an area designated nonattainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS at the time of revocation of the 1997 ozone NAAQS the state will be obligated to implement the applicable requirements set forth in 51.1100(o) for the 1997 ozone NAAQS. This could include, as applicable, anti-backsliding requirements associated with the revoked 1-hour NAAQS if the area was also designated nonattainment for the 1-hour ozone NAAQS when that NAAQS was revoked. Nonattainment NSR applies in these areas in accordance with their highest nonattainment classification under any ozone standard for which they are (or were at the time of revocation) designated nonattainment. Also, if these areas are classified Severe or Extreme at the time of revocation for a prior standard, the requirements of CAA section 185 in relation to that prior standard continue to apply.

c. Rationale

The EPA believes that the application of anti-backsliding principles is very clear cut for this category of areas. These areas remain subject to the applicable requirements for the 2008 ozone NAAQS, as well as for any of the revoked ozone NAAQS for which the areas remained nonattainment, until the requirements are satisfied or suspended as detailed in sections IV.D and IV.E. The EPA received no adverse comments on this approach.

*D. Satisfaction of Anti-Backsliding Requirements for an Area*

1. Summary of the Proposal

The EPA proposed two acceptable procedures through which a state may demonstrate that it is no longer required to adopt any additional applicable requirements for an area which have not already been approved into the SIP for a revoked ozone NAAQS. Both procedures allow a state to remove or revise the nonattainment NSR provisions in the SIP and, upon a showing of consistency with the anti-backsliding checks in CAA sections 110(l) and 193 (if applicable), shift requirements which are contained in the active portion of the SIP to the

[90] We do not include in these groups any areas that were redesignated to attainment for the 1997 ozone NAAQS prior to revocation of that NAAQS. In order to be redesignated for the 1997 ozone NAAQS, the area had to satisfy all applicable anti-backsliding requirements for the 1-hour ozone NAAQS. Any 1997 ozone NAAQS nonattainment area that was designated nonattainment for the 1-hour ozone NAAQS at time of revocation of the 1-hour NAAQS had to meet applicable 1-hour ozone NAAQS anti-backsliding requirements in order to be redesignated to attainment for the 1997 ozone NAAQS.

contingency measures portion of the SIP.[91]

The first of the proposed procedures is formal redesignation of the area to attainment for the 2008 ozone NAAQS. For areas subject to anti-backsliding requirements for revoked standards, approval of a request for redesignation to attainment for the 2008 ozone NAAQS signifies that the state has satisfied its obligations to adopt anti-backsliding requirements for the revoked standards. This is an extension of the approach that the EPA adopted in the Phase 1 Rule. The EPA proposed that once the area is redesignated and the requirement(s) for nonattainment NSR for the 2008 ozone NAAQS and for any prior ozone NAAQS cease to apply, the state may request that the corresponding nonattainment NSR requirements be removed from the SIP rather than be retained as a maintenance plan contingency measure.[92] The state would instead implement the PSD program.

The second of the proposed procedures for satisfying anti-backsliding requirements was a new separate route referred to as a "redesignation substitute" for a revoked standard. This redesignation substitute showing would serve as a successor to redesignation to attainment, for which the area would have been eligible were it not for revocation. The showing is based on the CAA's criteria for redesignation to attainment [CAA section 107(d)(3)(E)]. States would have to demonstrate that the area has attained the relevant standard and met all of the requirements for redesignation. After notice-and-comment rulemaking on this showing, the EPA approval of the showing would have the same effect on the area's nonattainment anti-backsliding obligations as would a redesignation to attainment for the revoked standard. The EPA did not propose to require states to go through formal SIP submission procedures to submit a request for approval of a redesignation substitute because it is not a redesignation. The EPA proposed that such an area would no longer be subject to any remaining applicable anti-backsliding requirements and the nonattainment NSR requirements associated with the revoked NAAQS for which the area completed a redesignation substitute would be lifted, leaving the remaining NSR requirements to be determined by the highest remaining classification the area is subject to, whether for the 2008 ozone NAAQS or another revoked NAAQS for which the EPA had not approved a redesignation showing.

2. Final Action

The EPA is finalizing both routes as acceptable ways to address anti-backsliding requirements. That is, states can choose either to submit a request to redesignate to attainment for the most current NAAQS with an approved 175A maintenance plan that addresses the current and revoked NAAQS, or to submit a redesignation substitute request for a revoked NAAQS. Under both of the these procedures, a state seeking to revise its SIP to remove anti-backsliding measures from the active portion of its SIP must demonstrate, pursuant to CAA section 110(l), that such revision would not interfere with attainment or maintenance of any applicable NAAQS, or any other requirement of the CAA.[93]

3. Rationale

The first of the procedures, formal redesignation of the area to attainment for the 2008 ozone NAAQS, is an extension of the approach that the EPA adopted in the Phase 1 Rule. Redesignation to attainment for the 2008 ozone NAAQS would allow a state to terminate and remove from the active portion of its SIP any applicable anti-backsliding requirements, including nonattainment NSR requirements associated with its classifications under the 2008 ozone NAAQS, or under the 1997 or 1-hour ozone NAAQS, except for areas in the OTR. The area would instead need, at a minimum, to implement the PSD program. This approach is consistent with the EPA's longstanding interpretation of nonattainment NSR requirements for areas that are redesignated to attainment.[94] Redesignation to attainment would also terminate any obligations to implement CAA section 185 fee programs in a Severe or Extreme area for the 2008 or prior revoked 1997 or 1-hour ozone NAAQS pursuant to the express terms of CAA section 185.

Approval of a redesignation to attainment for the 2008 ozone NAAQS signifies that the state has satisfied its obligations to adopt anti-backsliding requirements for the current and revoked standards for that area. This same approach was used in the Phase 1 Rule in requiring redesignations for the 1997 ozone NAAQS to address anti-backsliding requirements for the revoked 1-hour standard. Approval of the CAA section 175A maintenance plan for the 2008 ozone NAAQS assures that the area's SIP includes the provisions necessary for maintenance of the 2008 ozone NAAQS, which is the most stringent of the NAAQS. Therefore, upon redesignation to attainment and approval of its plan for maintenance of the 2008 ozone NAAQS, an area will have satisfied its obligations to adopt anti-backsliding requirements. All of the anti-backsliding measures that have been approved into the SIP must continue to be implemented unless or until the state can show that such implementation is not necessary for maintenance, consistent with CAA sections 110(l) and 193 if applicable.[95]

Experience has shown the EPA that a second mechanism for areas to address the requirements imposed by anti-backsliding requirements is also appropriate. After revocation of the 1997 ozone NAAQS, areas that attain and meet requirements for the revoked 1997 or 1-hour ozone NAAQS would be disadvantaged relative to areas that were redesignated to attainment for those standards prior to their revocation. Absent this second mechanism, areas that would otherwise have qualified for redesignation to attainment for the 1997 or 1-hour ozone NAAQS, were it not for revocation of those NAAQS, would need to continue implementing potentially outdated and onerous requirements for a NAAQS they have attained until they also qualify for redesignation to attainment for the more stringent 2008 ozone NAAQS. The EPA believes that, under any view of anti-backsliding for a revoked standard, it should not mean imposing requirements greater than those that would apply if the standard had not been revoked.

The EPA has no mechanism for formally redesignating areas for a

[91] Nonattainment NSR is not required to be retained in the SIP as a contingency measure. In areas designated attainment, the PSD permitting program applies rather than nonattainment NSR. Replacement or removal of an area's NSR SIP provisions does not relieve sources in the area of their obligations under previously established permit conditions.

[92] States in the OTR may not use this flexibility because the CAA requires all areas of the OTR including attainment areas to implement, at a minimum, the nonattainment NSR requirements prescribed for Moderate areas.

[93] Likewise, to the extent that a SIP revision seeking to remove anti-backsliding measures modifies control requirements subject to CAA section 193, the revision would also have to satisfy the requirements of that provision.

[94] *See* 40 CFR 51.905(a)(3), the comparable provision for transition from the 1-hour NAAQS to the 1997 ozone NAAQS, which allows states with such areas to request that the 1-hour nonattainment NSR provisions be removed from the SIP.

[95] This showing may be submitted to the EPA at the same time as the maintenance plan, and may be approved by the EPA in a single action. Subject to this process, anti-backsliding requirements contained in the SIP could be shifted to the contingency measures portion of a CAA section 175A maintenance plan, or, in limited circumstances (such as nonattainment NSR) removed from the SIP.

revoked standard. However, by establishing the redesignation substitute, the EPA is providing a pathway for states to demonstrate and for the EPA to acknowledge that they have satisfied the applicable requirements for the revoked 1-hour or 1997 ozone NAAQS by submitting a showing that functions as a substitute for redesignation to attainment for that revoked standard, and ensures that the substance of the redesignation requirements are met. For a revoked standard, this second mechanism will serve as a successor to redesignation to attainment, for which the area would have been eligible were it not for revocation.

The EPA believes this is an acceptable approach because it is based on the CAA's criteria for redesignation to attainment [CAA section 107(d)(3)(E)]. A showing would include: Attainment of the relevant revoked 1-hour or 1997 ozone NAAQS; a showing that attainment was due to permanent and enforceable emissions reductions; and a demonstration that the area can continue to maintain the standard over the next 10 years. Redesignation criteria in CAA section 107(d)(3)(E)(ii) and (v) would be met by the existing approved SIP, under which the area has attained the revoked standard, in the context of (and reinforced by) the requirements for the new 2008 ozone NAAQS. The EPA will conduct notice-and-comment rulemaking on the state's showings. We believe a notice-and-comment process fulfills the function of redesignation to attainment for the purpose of satisfying anti-backsliding requirements for a revoked standard.

The EPA believes that requiring more elaborate administrative procedures for purposes of approving a state's request for a redesignation substitute for a revoked NAAQS (for example, requiring states to use the formal SIP adoption process) would needlessly impose burdens because the area will remain subject to all the formal requirements for redesignation to attainment for the 2008 ozone NAAQS. Development of SIP revisions takes time and imposes administrative costs on states, industry and the public. As in the case of a redesignation to attainment for the 2008 ozone NAAQS, at the time of submitting a redesignation substitute request or at any time thereafter, a state may request to revise its SIP so as to cease implementing a specific nonattainment SIP requirement. However, this request could not be granted, and the SIP revised, until the EPA approves the redesignation substitute and a demonstration that the SIP revision meets the requirements of CAA section 110(l). The EPA is not providing this mechanism for the purpose of allowing states to relax or avoid air quality management measures that are needed for attainment and maintenance of the 2008 ozone NAAQS. The showings required, the provisions of CAA section 110(l), and the fact that the area remains subject to CAA requirements for the more stringent 2008 ozone NAAQS, assure that is not the case. It is, however, important to relieve states of requirements that are no longer necessary, or that can be replaced by other forms of protection that might better meet the local needs and circumstances of an area.

The EPA is providing in the redesignation substitute option a mechanism that demands more than a determination of attainment of the prior NAAQS, and calls for a showing that addresses redesignation criteria for that NAAQS. Moreover, the process under this option occurs while the state remains subject to ongoing requirements to meet the new more stringent standard in that area. In this context, this final action is clearly sufficient for its limited anti-backsliding purpose—it recognizes and supports the state's progress in having attained the prior standard in that area due to permanent and enforceable emissions reductions, and reinforces continued attainment by calling for a demonstration that the area can maintain the revoked standard.

4. Comments and Responses

*Comment:* Several commenters requested that the EPA preserve the statutory mechanism as described in 42 U.S.C 7407(d)(3) that would allow the EPA to redesignate areas for a revoked NAAQS.

*Response:* After the revocation of a standard, the EPA believes that it can no longer take action to reclassify or to redesignate areas for that standard. Revocation of the standard removes both classifications and designations for the revoked standard. The EPA believes the two mechanisms provided in the final rule accomplish the goals of 42 U.S.C 7407(d)(3) [CAA section 107(d)(3)] in a manner consistent with anti-backsliding principles and appropriate for the circumstance where a more stringent NAAQS with the same form and averaging time exists and is being actively implemented.

*Comment:* A commenter argued that redesignation to attainment for the 2008 ozone NAAQS is not sufficient to turn off anti-backsliding obligations triggered under the revoked 1-hour or the 1997 ozone NAAQS.

*Response:* The EPA disagrees with the commenter. When the EPA approves a redesignation request for the current 2008 ozone NAAQS, we assess whether the area is in attainment for the current and previous NAAQS. The maintenance plan submitted by the state demonstrates that the area being considered for redesignation will continue for the next 10 years to attain the standard that is requisite to protect public health, and that attainment is due to permanent and enforceable emissions reductions. A redesignation to attainment signifies that the area has met the requirements of the 2008, as well as any revoked, NAAQS. CAA section 185 specifically indicates redesignation "as an attainment area for ozone" as a basis for terminating fee requirements. Also, redesignation to attainment historically has terminated nonattainment NSR requirements, which are not required to be kept in the SIP as contingency measures. *See Greenbaum* v. *EPA* (370 F.3d at 536). Moreover, redesignation for the current standard was the unchallenged basis for demonstrating satisfaction of anti-backsliding requirements in the EPA's previous Phase 1 anti-backsliding regime (69 FR 23951). We believe the application of the same principle when transitioning from the 1997 to the 2008 ozone NAAQS is an even better fit: It is impossible to attain the 2008 ozone NAAQS without first achieving air quality that would attain the 1997 ozone NAAQS due to the identical form of the two standards.

*Comment:* A number of commenters supported the concept of the redesignation substitute, but requested that a more streamlined process be developed. Several commenters suggested that a clean data determination would be sufficient to terminate anti-backsliding requirements for a revoked NAAQS.

*Response:* The EPA recognizes that a clean data determination alone is less burdensome for states than a CAA section 107(d)(3) redesignation or a redesignation substitute. A clean data determination only suspends planning requirements associated with the NAAQS for which the determination was granted. However, we believe that the redesignation and redesignation substitute mechanisms represent the minimum set of requirements sufficient to demonstrate satisfaction of anti-backsliding requirements under the EPA's application of the principles of CAA section 172(e). These mechanisms provide a way for states to demonstrate that they have attained these standards, they have met all the requirements for redesignations, and no longer need any anti-backsliding requirements beyond those already approved in their SIPs.

*Comment:* Two commenters asked the EPA to reconsider the use of CAA section 172(e). One of these commenters asked that the use of 172(e) be applied to all applicable requirements required of areas subject to anti-backsliding allowing them to substitute measures at least as stringent as the controls listed. The other commenter believed no application of 172(e) is justified, even to CAA section 185 fees where the EPA has historically applied this principle.

*Response:* CAA section 172(e), which addresses relaxations of a NAAQS, requires protections for areas that have not attained a NAAQS prior to a relaxation, by requiring controls that are "not less stringent" than the controls applicable in nonattainment areas prior to any such relaxation. The EPA applied these principles in developing previous guidance on satisfying the anti-backsliding approach for CAA section 185 requirements. As stated in previous EPA guidance, we interpret the principles of 172(e) as authorizing, but not requiring, the Administrator to approve on a case-by-case basis "not less stringent" alternatives to the applicable CAA section 185 fee program requirements associated with a revoked ozone NAAQS.[96] The NRDC challenged this guidance in 2010. Although the court vacated the 2010 guidance memorandum on procedural grounds, it did not prohibit alternative programs, stating that "neither the statute nor our case law obviously precludes that alternative." *See NRDC* v. *EPA,* 643 F.3d 332 (D.C. Cir. July 2011). We believe the application of CAA section 172(e) principles to applicable CAA section 185 anti-backsliding requirements is an appropriate and reasonable use of the Administrator's discretion to approve "not less stringent" controls. However, we did not propose and do not intend at this time to promulgate regulatory language to apply principles of CAA section 172(e) to other anti-backsliding requirements.

*E. How will the EPA's determination of attainment ("Clean Data") regulation apply for purposes of the anti-backsliding requirements?*

1. Summary of the Proposal

The EPA proposed to apply the same approach with respect to determinations of attainment for the 2008 ozone NAAQS as applied under the 1997 ozone NAAQS under 40 CFR 51.918. Under 40 CFR 51.918, an EPA determination that an area attained the 1997 ozone NAAQS suspended the obligation to submit any attainment-related SIP planning elements for the 1997 ozone NAAQS not yet approved in the SIP, for so long as the area continued to be in attainment of that NAAQS.[97] In order to reflect the ongoing status of the Clean Data Policy and to consolidate in one regulation a comprehensive provision applicable to determinations of attainment for all current and former ozone NAAQS, the EPA proposed to replace 40 CFR 51.918 with proposed 40 CFR 51.1118 after revocation of the 1997 ozone NAAQS.

2. Final Action

The EPA is finalizing its proposed approach to implementing the Clean Data Policy with respect to the 2008 ozone NAAQS and all prior ozone NAAQS. Under the EPA's Clean Data Regulation, a determination of attainment suspends the obligation to submit certain attainment-related planning requirements for the associated NAAQS for an area as long as the area continues to attain that standard.[98] For those areas that have already incorporated measures into their approved SIPs that satisfy the nonattainment requirements for that standard, CAA section 110(l) functions as an anti-backsliding check to require continued implementation of such measures unless revised in accordance with its provisions.

The planning elements that may be suspended under 40 CFR 51.1118 are the same as those suspended under existing 40 CFR 51.918: RFP requirements, attainment demonstrations, RACM, contingency measures and other state planning requirements related to attainment of the relevant standard. For a Severe or Extreme area, a CAA section 185 fee program is expressly linked by the statute itself to an attainment plan; therefore suspension of the obligation to submit the attainment plan also necessarily suspends the obligation to submit the fee program which is part of the attainment plan (provided that the EPA has not already determined that the area failed to attain by its attainment deadline and thus triggered the obligation to implement a fee program). The EPA notes that a determination of attainment would not, however, suspend obligations to submit non-planning requirements such as nonattainment NSR, subpart 2 RACT or emission inventories under CAA section 182(a)(1).

3. Rationale

40 CFR 51.1118 applies essentially the same language as 40 CFR 51.918. Upon revocation of the 1997 ozone NAAQS, this section would be applicable to determinations of attainment for all ozone NAAQS: The 2008, 1997 and the already revoked 1-hour ozone NAAQS. With the finalization of 51.1118, the EPA's long-standing Clean Data Policy, which has been upheld by the D.C. Circuit and all other courts that have considered it, is embodied in a regulation applicable for the purpose of all existing and prior ozone NAAQS. The EPA believes that continuation of this approach makes the most sense for implementing the 2008 ozone NAAQS.

4. Comments and Responses

*Comment:* Two commenters indicated that a determination that an area has "clean data" for the more-stringent 2008 ozone NAAQS should be sufficient to lift anti-backsliding requirements for the 1997 and the 1-hour ozone NAAQS.

*Response:* A clean data determination only suspends specific planning requirements, not mandatory control requirements, which could include, as applicable, anti-backsliding requirements associated with revoked NAAQS. As explained previously, the EPA believes that an approved redesignation to attainment or a redesignation substitute is necessary to lift anti-backsliding requirements. 40 CFR 51.1118 clarifies that a clean data determination for a specific standard only affects attainment-related planning requirements for that standard.

*Comment:* A commenter requested that the EPA clarify language in the proposed 40 CFR 51.1118 to indicate more specifically which NAAQS must be attained to suspend planning requirements.

*Response:* The EPA will revise the language in 40 CFR 51.1118 to make it clear that a clean data determination for the 2008 NAAQS acts to suspend planning requirements associated with the 2008 and less stringent 1997 ozone NAAQS, which have an identical form.

[96] Memo from Stephen D. Page to Regional Air Division Directors, Jan. 5, 2010, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-Hour Ozone NAAQS."

[97] The EPA initially issued the Clean Data Policy in 1995, "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard." Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995. For purposes of the 1997 ozone NAAQS, we codified that policy at 40 CFR 51.918. This codified policy was upheld by the D.C. Circuit in *NRDC* v. *EPA,* 571 F.3d 1245 (D.C. 2009).

[98] Depending on the area's classification for the 1997 ozone NAAQS and the SIP elements already approved, the area may still have outstanding non-planning 1997 anti-backsliding submission requirements that are not suspended by 51.918 (*e.g.,* emissions inventories, nonattainment NSR, Subpart 2 RACT requirements).

*F. What is the relationship between implementation of the 2008 ozone NAAQS and the CAA title V permits program?*

1. Summary of the Proposal

We proposed, and solicited comment on, two alternative approaches for implementing the title V permit program for sources in areas designated nonattainment for the 2008 ozone NAAQS and subject to anti-backsliding requirements for a prior ozone NAAQS. The EPA co-proposed two approaches to interpreting title V applicability requirements following revocation of the 1997 ozone NAAQS: (1) Major source thresholds for title V should be the same as the major source thresholds applicable for purposes of other requirements such as RACT and NSR; and (2) major source thresholds for title V depend solely on the area's classification for the 2008 ozone NAAQS. The EPA specifically solicited comments on whether title V should (or should not) be considered a "control" within the meaning of CAA section 172(e) in light of the fact that title V generally does not impose new substantive air quality control requirements but is intended to assure compliance with all such existing requirements.

2. Final Action

We are finalizing the first option and the associated proposed revisions to parts 70 and 71. Following revocation of the 1997 ozone NAAQS, major source thresholds for title V will be the same as the major source [99] thresholds applicable for purposes of other requirements, such as RACT and NSR (*i.e.*, the major source threshold associated with the more stringent of the area's classification for the 2008, 1997 and/or 1-hour ozone NAAQS will be the applicable threshold for title V purposes, to the extent that anti-backsliding requirements for the 1997 and/or 1-hour ozone NAAQS apply in the area).[100]

3. Rationale

The EPA received a wide range of comments on the question of whether the major source thresholds for title V permitting should be considered a "control" for purposes of the anti-backsliding requirements of CAA section 172(e). The EPA recognizes that many of these comments raise valid perspectives. It is true that title V generally does not impose new substantive pollution control requirements on sources, and thus ordinarily the EPA would not describe title V permitting itself as a "control." At the same time, the EPA does believe that one of the underlying purposes of title V is to assure compliance with the pollution control requirements applicable to a source. Thus, it may well be true that title V provides air quality benefits, and should be considered a "control" under the broad, functional analysis used by the court in the *South Coast* v. *EPA* decision. The EPA believes it is unnecessary to resolve this precise question at this time, because the EPA believes that regardless of whether title V should be considered a "control" for purposes of CAA section 172(e), it fulfils the purposes and requirements of the Act for title V permitting thresholds to be the same as the permitting thresholds for underlying applicable requirements, particularly NSR which was considered a control by the *South Coast* court.

Title V and NSR have long shared a common approach to the definition of major source.[101] [102] The EPA concurs with the commenters, such as Texas and New York, who believe that we should maintain clarity and uniformity in major source threshold determinations for both NSR and title V.

In addition, the EPA notes that, under CAA section 502, sources are required to operate in accordance with the terms of a title V permit if, *inter alia*, the source is a major source *or* the source is required to have a permit under part D of Title I. Thus, even if a source is not a major source for purposes of title V, it is still required to get a title V permit if it is required to have a permit under part D of title I. This provides additional support to the EPA's conclusion that the major source permitting threshold for NSR and RACT should be the same as for title V because otherwise, a source that is not a "major source" for purposes of title V might not understand it is still covered by the applicability provisions of parts 70 and 71, if it is required to have a permit under part D of title I.

Maintaining consistency between the NSR and title V thresholds in this regard will promote compliance with CAA requirements by providing a simpler permitting regime, ensuring that sources subject to major source NSR understand they are also subject to title V, and enabling permitting authorities to identify sources that are potentially subject to major source NSR. The EPA believes a contrary approach would introduce not only complexity, but anomalies, into the permitting program that would be contrary to the purposes and requirements of the Act. To promote effective program implementation and ensure consistency with the CAA, this final rule will amend the relevant provisions of parts 70 and 71 related to application of title V thresholds.

4. Comments and Responses

*Comment:* Several commenters supported the first option, which sets major source title V thresholds equal to those applied for RACT and NSR. One of these commenters supported the first option with the minor conforming amendments to the definition of major source in 40 CFR 70.2 and 71.2 as detailed on page 34225 of the proposal. Commenters stated that this approach would provide applicants with clarity and uniformity regarding applicable major source thresholds, and that this approach maintains the consistency which will ultimately simplify permitting and enforcement. A commenter indicated that option 1 is supported by the fact that these thresholds emanate from the same provisions of the CAA (part D of title I), therefore, the intent of the CAA was to keep the thresholds the same. Several commenters noted that the first approach is consistent with past

[99] One of the ways a source can become subject to title V is as a "major source." *See* CAA section 502(a); 40 CFR 70.3; 71.3. Furthermore, the definition of "major source" for purposes of title V includes, but is not limited to, a "major stationary source as defined . . . in part D" of title I. *See* CAA section 501(2)(B) and 502(a); 40 CFR 70.2; 71.2. Thus, changes in an area's classification (*e.g.*, from "Serious" to "Severe") by changing the emissions threshold for being deemed a major source (*e.g.*, from 100 tpy to 50 tpy of a relevant pollutant) can result in changes in title V applicability for a source. (The EPA notes that sources can become subject to title V permitting for other reasons, and nothing in this discussion is intended to suggest that changes in an area's classification would affect those other provisions of title V. Accordingly, sources subject to title V under other provisions would remain subject to title V for those independent reasons.)

[100] It should be noted that, pursuant to CAA section 503(a), a source is subject to a permit program on the later of the date that it becomes a major source and the effective date of a permit program applicable to the source. Thus, if a permitting authority with an approved title V program lacks any authority to permit certain sources that are major sources subject to title V as a result of ozone precursor emissions and an area classification for ozone that has a major source threshold lower than 100 tpy (*e.g.*, "Serious") then there is no title V permit program "applicable to the source" and those sources have no obligation to apply for a title V permit until after such time as a permit program becomes applicable to them. The EPA will work with states to ensure that all approved title V programs are adequate under the CAA.

[101] The EPA recognizes that there are statutory and regulatory differences between title V and NSR, but for purposes of the discussion we are focusing on the commonalities.

[102] *See, e.g.*, Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (April 26, 1993).

precedent and compelled by the Act's anti-backsliding requirements as well as court precedent.

*Response:* As discussed previously, the EPA agrees with these commenters that the major source threshold for title V should be the same as the major source threshold for NSR and RACT, and the EPA is finalizing the proposed revisions to parts 70 and 71 to make that clear.

*Comment:* Several commenters supported the second approach, in which the major source thresholds for title V permitting are based solely on an area's classification for the 2008 ozone NAAQS. Commenters cited a number of reasons for this, including: This approach would provide relief to small operators, and that this approach makes good sense in a time of resource constraints. Several commenters questioned the utility of setting title V levels based on a revoked NAAQS. Several commenters also commented that EPA's understanding of the impacts of the *South Coast* v. *EPA* decision is not correct. These commenters agreed that the classifications of revoked NAAQS can impact the NSR level, but disagreed with the EPA that the title V levels are controlled by anything other than the current 2008 ozone NAAQS.

*Response:* The EPA recognizes that the approach being adopted does not solely rely on the area's current classification for purposes of determining major source thresholds for title V. The EPA believes there is ambiguity in the intersection between title V and part D as to whether title V should apply the major source threshold of the area's current classification, or the area's classification for purposes of NSR and other underlying applicable requirements, when that threshold would be lower. As discussed previously, the EPA believes that it is appropriate under the CAA, and consistent with the EPA's longstanding approach to these programs, for a source which is considered to be "major" for purposes of NSR to also be considered "major" for purposes of title V. For the reasons stated previously, the EPA believes maintaining consistency in the major source applicability of the two programs in the context of today's rulemaking is the best approach to promote consistency and compliance with the purposes and requirements of the CAA. Additional information can be found in the Response to Comments document.

*Comment:* The EPA received a wide range of comments on the question of whether the major source thresholds for title V permitting should be considered a "control" for purposes of the anti-backsliding requirements of CAA section 172(e). Several commenters believed that title V should be considered as a control within the meaning of CAA section 172(e). One commenter stated that title V permits represent "controls" for purposes of the Act's anti-backsliding requirements and, as such, the EPA should abide by *South Coast* v. *EPA* and use the same major source thresholds for administering the title V permit program as the agency proposes to for the NSR and RACT programs. The commenter stated that title V permits serve as independently enforceable compliance assurance mechanisms that constrain emissions by sources and accordingly should be seen as control measures. Since title V permits collect multiple control requirements in one document, there is no reason for the agency to depart from *South Coast* v. *EPA* and treat title V permitting classifications differently than, for example, NSR permitting.

A number of commenters stated that the title V program is not a control in and of itself. One commenter stated that the EPA has consistently stated that title V is a separate program when compared to the requirements of title I. Several commenters stated that the history of title V rulemaking is clear on this point, indicating that the EPA has stated repeatedly that no substantive controls are imposed simply by having a title V permit. Title V should not be considered a "control" in light of the fact that title V is not intended to impose new substantive air quality control requirements but is instead intended to assure compliance with all existing applicable requirements.

*Response:* The EPA believes it is unnecessary to resolve this precise question at this time, because the EPA believes that regardless of whether title V should be considered a "control" for purposes of CAA section 172(e), it fulfills the purposes and requirements of the CAA for title V permitting thresholds to be the same as the permitting thresholds for underlying applicable requirements, particularly NSR. Thus, the EPA is taking final action adopting the interpretation that major source definitions should be the same for both programs.

## V. Environmental Justice Considerations

The CAA requires that states with areas designated as nonattainment submit to the Administrator the appropriate SIP revisions and implement specified control measures by certain dates applicable to the area's classification. By addressing the planning and implementation requirements for all areas designated nonattainment under the 2008 ozone NAAQS, this action protects all those residing, working, attending school, or otherwise present in those areas regardless of minority or economic status.

## VI. Statutory and Executive Order Reviews

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. This action raises novel policy issues. Any changes made in response to OMB recommendations have been documented in the docket.

### *B. Paperwork Reduction Act (PRA)*

The information collection activities in this final rule have been submitted for approval to the Office of Management and Budget under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned the EPA ICR number 2347.02 and OMB Reference number 2060–0695. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The EPA is finalizing this 2008 ozone NAAQS SIP Requirements Rule so that states will know what CAA requirements apply to their nonattainment areas when the states develop their SIPs for attaining and maintaining the NAAQS. The intended effect of the SIP Requirements Rule is to provide certainty to states regarding their planning obligations such that states may begin SIP development. For purposes of analysis of the estimated paperwork burden, the EPA assumed 46 nonattainment areas,[103] some of which must prepare an attainment demonstration as well as submit an RFP and RACT SIP. The attainment demonstration requirement would appear in 40 CFR 51.1108 which implements CAA subsections 172(c)(1), 182(b)(1)(A) and 182(c)(2)(B). The RFP SIP submission requirement would appear in 40 CFR 51.1110, and the RACT SIP submission requirement would appear in 40 CFR 51.1112, which implements CAA subsections 172(c)(1) 182(b)(2), (c), (d) and (e).

States should already have information from many emission

[103] May 21, 2012, 77 FR 30088.

sources, as facilities should have provided this information to meet 1-hour and 1997 ozone NAAQS SIP requirements, operating permits and/or emissions reporting requirements. Such information does not generally reveal the details of production processes. But, to the extent it may, confidential business information for the affected facilities is protected. Specifically, submissions of emissions and control efficiency information that is confidential, proprietary and trade secret is protected from disclosure under the requirements of subsections 503(e) and 114(c) of the CAA.

The annual burden for this information collection averaged over the first 3 years of this ICR is estimated to be a total of 120,000 labor hours per year at an annual labor cost of $2.4 million (present value) over the 3-year period or approximately $91,000 per state for the 26 state air agency respondents, including the District of Columbia. The Information Collection Request Supporting Statement for the 2008 8-hour Ozone National Ambient Air Quality Standard Implementation Rule EPA ICR #2347.02 in the docket provides the details for the 26 state air agencies that are required to provide the 58 SIP revisions for the 46 areas designated nonattainment for the 2008 ozone standard. The average annual reporting burden is 690 hours per response, with approximately 2 responses per state for 58 state responses from the state air agencies. There are no capital or operating and maintenance costs associated with the proposed rule requirements. Burden is defined at 5 CFR 1320.3(b).

*Respondents/affected entities:* States with 46 nonattainment areas.

*Respondent's obligation to respond:* Mandatory (CAA, sections 172 and 182).

*Estimated number of respondents:* 26 state respondents.

*Frequency of response:* Once.

*Total estimated burden:* 40,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* $2.4 million (per year), includes $0 annualized capital or operation & maintenance costs.

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 the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Entities potentially affected directly by this rule include state, local and tribal governments and none of these governments are small governments. Other types of small entities are not directly subject to the requirements of this rule because this action only addresses how a SIP will provide for adequate attainment and maintenance of the NAAQS and meet the obligations of the CAA. Although some states may ultimately decide to impose economic impacts on small entities, that is not required by this rule and would only occur at the discretion of the state.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action implements mandates specifically and explicitly set forth in the CAA without the exercise of any policy discretion by the EPA.

*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.

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

This action does not have tribal implications as specified in Executive Order 13175. It would not have a substantial direct effect on one or more Indian tribes, since no tribe has to develop a TIP under these regulatory revisions. 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. Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this action, the EPA met with tribal officials in developing the proposal. Meeting summaries are contained in the docket for this rulemaking.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This final rule addresses the substantive requirements for states with nonattainment areas to develop planning SIPs and attain the NAAQS.

*I. National Technology Transfer and Advancement Act (NTTA)*

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment.

The final revisions to the regulations address the substantive requirements for SIPs to attain the NAAQS, which are designed to protect all segments of the general populations. As such, they do not adversely affect the health or safety of minority or low-income populations and are designed to protect and enhance the health and safety of these and other populations. The EPA encourages states to consider any potential impacts on these populations in developing SIPs to attain the NAAQS.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

*L. Determination Under Section 307(d)*

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of CAA section 307(d). Section 307(d) establishes procedural requirements specific to rulemaking under the CAA. CAA section 307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine."

*M. Judicial Review*

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator" or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule implementing the 2008 ozone NAAQS is "nationally applicable" within the meaning of CAA section 307(b)(1). First, the rulemaking addresses a NAAQS that applies to all states and territories in the U.S. Second, the rulemaking addresses issues relevant to specific existing SIP provisions in states across the U.S. that are located in each of the 10 EPA Regions, numerous federal circuits and multiple time zones. Third, the rulemaking addresses a common core of knowledge and analysis involved in formulating the decision and a common interpretation of the requirements of the CAA being applied to SIPs in states across the country. Fourth, the rulemaking, by addressing issues relevant to appropriate SIP provisions in one state, may have precedential impacts upon the SIPs of other states nationwide. Courts have found similar rulemaking actions to be of nationwide scope and effect.[104]

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by May 4, 2015. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. 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. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

## Appendix A to Preamble Glossary of Terms and Acronyms

ACT Alternative Control Techniques (document)
AERR Air Emissions Reporting Requirements Rule
BACT Best Available Control Technology
CAA Clean Air Act
CAAAC Clean Air Act Advisory Committee
CAIR Clean Air Interstate Rule
CERR Consolidated Emissions Reporting Rule
CFR Code of Federal Regulations
CO Carbon Monoxide
CSAPR Cross-State Air Pollution Rule
CTG Control Technique Guideline
DOT Department of Transportation
DV Design Value
EMFAC EMissions FACtors (a mobile emissions model)
EO Executive Order
ESRP Emissions Statement Reporting Program
EGU Electricity Generating Unit
EPA Environmental Protection Agency
FIP Federal Implementation Plan
GDF Gasoline dispensing facilities
HEDD High Electric Demand Day
ICR Information Collection Requirement
I/M Inspection and Maintenance (*i.e.*, smog check)
km Kilometers
LAER Lowest Achievable Emission Rate
MACT Maximum Achievable Control Technology
MCR Mid-course Review
MPO Metropolitan Planning Organization
NAAQS National Ambient Air Quality Standards
$NO_X$ Nitrogen Oxides
NPRM Notice of Proposed Rulemaking
NSR New Source Review
NTTAA National Technology Transfer and Advancement Act of 1995
OMB Office of Management and Budget
ORVR Onboard refueling vapor recovery
OTR Ozone Transport Region
PM Particulate Matter
$PM_{2.5}$ Fine Particulate Matter
ppb Parts per Billion
ppm Parts per Million
PSD Prevention of Significant Deterioration
RACM Reasonably Available Control Measures
RACT Reasonably Available Control Technology
RFA Regulatory Flexibility Act
RFG Reformulated Gasoline
RFP Reasonable Further Progress
ROP Rate-of-Progress
RPO Regional Planning Organization
SBA Small Business Administration
SIP State Implementation Plan
TAR Tribal Authority Rule
TAS Treatment in the Same Manner as a State ("Treatment as State")
TIP Tribal Implementation Plan; also Transportation Improvement Program (depending on context)
tpd Tons Per Day
tpy Tons Per Year
TSP Total Suspended Particulate
UMRA Unfunded Mandates Reform Act of 1995
VCS Voluntary Consensus Standards
VOC Volatile Organic Compound

## Appendix B—List of Areas Nonattainment for the 2008 Ozone NAAQS in Addition to a Prior Ozone NAAQS as of April 6, 2015

This table lists the areas that were designated nonattainment for the 2008 ozone NAAQS effective July 20, 2012 that were also nonattainment for a prior ozone NAAQS (1997 NAAQS and/or 1-hour NAAQS) as of the date the prior NAAQS was revoked. The table also indicates the attainment-related status of each area with respect to each of the ozone standards, which is relevant to understanding which obligations associated with the standards applies to each area, as detailed in this final rule. Clean Data Determination means the area received a determination from the EPA that suspends the obligation to submit to the EPA certain planning requirements associated with a standard. Attainment Deadline Determination means the EPA determined that the area attained a standard by the applicable attainment date. No Action means the EPA did not determine that the area qualified for either a Clean Data Determination or a determination of attainment by the applicable attainment date. The term "n/a" means not applicable for this area because the area was not nonattainment for the 1-hour ozone NAAQS at the time the 1-hour NAAQS was revoked (June 15, 2005).

[104] *See, e.g., State of Texas, et al.* v. *EPA*, 2011 U.S. App. LEXIS 5654 (5th Cir. 2011) (finding SIP call to 13 states to be of nationwide scope and effect and thus transferring the case to the U.S. Court of Appeals for the D.C. Circuit in accordance with CAA section 307(b)(1)).

| 2008 Nonattainment area name | 2008 8-hour ozone classification | 1997 8-hour ozone classification | 1997 8-hour ozone attainment determination | 1-hour ozone classification | 1-hour ozone attainment determination |
|---|---|---|---|---|---|
| Baltimore Area, MD | Moderate | Serious | No Action | Severe-15 | Clean Data Determination. |
| Calaveras County, CA [1] | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | n/a | n/a. |
| Chico Area, CA | Marginal | Marginal | Clean Data Determination, Attainment Deadline Determination. | n/a | n/a. |
| Dallas-Fort Worth Area, TX [1]. | Moderate | Serious | No Action | Serious | Clean Data Determination. |
| Denver-Boulder-Greeley-Ft. Collins-Loveland Area, CO. | Marginal | Marginal | No Action | n/a | n/a. |
| Dukes County, MA [1] | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | Serious | Clean Data Determination, Attainment Deadline Determination. |
| Greater Connecticut Area, CT. | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | Serious | Clean Data Determination. |
| Houston-Galveston-Brazoria Area, TX. | Marginal | Severe-15 | No Action | Severe-17 | No Action. |
| Imperial County Area, CA | Marginal | Moderate | Clean Data Determination | n/a | n/a. |
| Jamestown Area, NY | Marginal | Moderate | Clean Data Determination [2] | n/a | n/a. |
| Kern County (Eastern Kern) Area, CA. | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | n/a | n/a. |
| Los Angeles and San Bernardino Counties (W Mojave Desert) Area, CA. | Severe-15 | Severe-15 | No Action | Severe-17 | No Action. |
| Los Angeles-South Coast Air Basin Area, CA. | Extreme | Extreme | No Action | Extreme | No Action. |
| Mariposa County, CA [1] | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | n/a | n/a. |
| Morongo Areas of Indian Country (Morongo Band of Mission Indians) [3]. | Serious | Severe-17 | No Action | Severe-17 | No Action. |
| Nevada County (Western part) Area, CA. | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | n/a | n/a. |
| New York-N. New Jersey-Long Island Area, NY-NJ-CT. | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | Severe-17 | Clean Data Determination. |
| Pechanga Areas of Indian Country (Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation) [4]. | Moderate | Severe-17 | No Action | Extreme | No Action. |
| Philadelphia-Wilmington-Atlantic City Area, PA-NJ-MD-DE [1]. | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | Severe-15 | Clean Data Determination, Attainment Deadline Determination. |
| Pittsburgh-Beaver Valley Area, PA. | Marginal | Moderate | Clean Data Determination [2] | n/a | n/a. |
| Riverside County (Coachella Valley) Area (1-hr Southeast Desert), CA. | Severe-15 | Severe-15 | No Action | Severe-17 | No Action. |
| Sacramento Metro Area, CA. | Severe-15 | Severe-15 | No Action | Severe-15 | Clean Data Determination. |
| San Francisco Bay Area, CA. | Marginal | Marginal | No Action | Other | Clean Data Determination, Attainment Deadline Determination. |
| San Joaquin Valley Area, CA. | Extreme | Extreme | No Action | Extreme | No Action. |
| Seaford, DE [5] | Marginal | Moderate | Clean Data Determination, Attainment Deadline Determination. | Marginal | Clean Data Determination, Attainment Deadline Determination. |
| Sheboygan County, WI | Marginal | Moderate | Clean Data Determination | n/a | n/a. |
| Ventura County (part) Area, CA. | Serious | Serious | Clean Data Determination | Severe-15 | Clean Data Determination, Attainment Deadline Determination. |

| 2008 Nonattainment area name | 2008 8-hour ozone classification | 1997 8-hour ozone classification | 1997 8-hour ozone attainment determination | 1-hour ozone classification | 1-hour ozone attainment determination |
|---|---|---|---|---|---|
| Washington Area, DC-MD-VA. | Marginal ..... | Moderate ..... | Clean Data Determination, Attainment Deadline Determination. | Severe-15 ..... | Clean Data Determination, Attainment Deadline Determination. |

[1] 2008 ozone NAAQS nonattainment area boundary differs from 1997 and (where applicable) 1-hr ozone NAAQS nonattainment area boundary.
[2] Former subpart 1 areas with Determinations of Attainment prior to subpart 2 classification on May 14, 2012 (77 FR 28424). An Attainment Deadline Determination for these areas for the 1997 ozone NAAQS attainment dates is pending with the EPA.
[3] Part of Los Angeles-South Coast Air Basin Area, CA (South Coast) for 1997 and 1-hr ozone nonattainment area boundaries. The EPA published a correction of the classification for the 1997 ozone and 1-hr ozone NAAQS on September 23, 2013 (78 FR 58189).
[4] Part of Los Angeles-South Coast Air Basin Area, CA (South Coast) for 1997 and 1-hr ozone nonattainment area boundaries. The EPA published a correction of the classification for the 1997 ozone NAAQS on May 5, 2010 (75 FR 24409).
[5] Part of the Philadelphia-Wilmington-Atlantic City Area, PA, NJ, MD, DE for 1997 ozone nonattainment area boundary, and part of the Sussex County, DE ozone nonattainment area boundary for the 1-hour ozone NAAQS.

**Statutory Authority**

The statutory authority for this action is provided by sections 109; 110; 172; 181 through 185B; 301(a)(1) and 501(2)(B) of the CAA, as amended (42 U.S.C. 7409; 42 U.S.C. 7410; 42 U.S.C. 7502; 42 U.S.C. 7511–7511f; 42 U.S.C. 7601(a)(1); 42 U.S.C. 7661(2)(B)).

**List of Subjects**

*40 CFR Part 50*

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

*40 CFR Part 51*

Air pollution control, Intergovernmental relations, Ozone, Particulate matter, Transportation, Volatile organic compounds.

*40 CFR Part 52*

Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter.

*40 CFR Part 70*

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Operating permits, Ozone, Particulate matter, Reporting and record keeping requirements, Volatile organic compounds.

*40 CFR Part 71*

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Nitrogen oxides, Operating permits, Ozone, Particulate matter, Reporting and record keeping requirements, Volatile organic compounds.

Dated: February 13, 2015.

**Gina McCarthy,**

*Administrator.*

For the reasons stated in the preamble, Title 40, Chapter I of the Code of Federal Regulations is amended as follows:

## PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

■ 1. The authority citation for part 50 continues to read as follows:

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

■ 2. In § 50.10, revise paragraph (c) to read as follows:

**§ 50.10 National 8-hour primary and secondary ambient air quality standards for ozone.**

* * * * *

(c) Until the effective date of the final Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements Rule (final SIP Requirements Rule) to be codified at 40 CFR 51.1100 *et seq.*, the 1997 ozone NAAQS set forth in this section will continue in effect, notwithstanding the promulgation of the 2008 ozone NAAQS under § 50.15. The 1997 ozone NAAQS set forth in this section will no longer apply upon the effective date of the final SIP Requirements Rule. For purposes of the anti-backsliding requirements of § 51.1105, § 51.165 and Appendix S to part 51, the area designations and classifications with respect to the revoked 1997 ozone NAAQS are codified in 40 CFR part 81.

## PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

■ 3. The authority citation for part 51 continues to read as follows:

**Authority:** 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

### Subpart X—Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standards

■ 4. Add § 51.919 to read as follows:

**§ 51.919 Applicability.**

As of April 6, 2015, the provisions of subpart AA shall replace the provisions of subpart X, §§ 51.900 to 51.918, which will cease to apply, with the exception of the attainment date extension provisions of § 51.907 for the anti-backsliding purposes of § 51.1105(d)(2).

### Subpart AA—Provisions for Implementation of the 2008 Ozone National Ambient Air Quality Standards

■ 5. In § 51.1100, add paragraphs (o) through (cc) to read as follows:

**§ 51.1100 Definitions.**

* * * * *

(o) *Applicable requirements* for an area for anti-backsliding purposes means the following requirements, to the extent such requirements apply to the area pursuant to its classification under CAA section 181(a)(1) for the 1-hour NAAQS or 40 CFR 51.902 for the 1997 ozone NAAQS at the time of revocation of the 1997 ozone NAAQS:

(1) Reasonably available control technology (RACT) under CAA sections 172(c)(1) and 182(b)(2).

(2) Vehicle inspection and maintenance programs (I/M) under CAA sections 182(b)(4) and 182(c)(3).

(3) Major source applicability thresholds for purposes of RACT under CAA sections 172(c)(2), 182(b), 182(c), 182(d), and 182(e).

(4) Reductions to achieve Reasonable Further Progress (RFP) under CAA sections172(c)(2), 182(b)(1)(A), and 182(c)(2)(B).

(5) Clean fuels fleet program under CAA section183(c)(4).

(6) Clean fuels for boilers under CAA section 182(e)(3).

(7) Transportation Control Measures (TCMs) during heavy traffic hours as specified under CAA section 182(e)(4).

(8) Enhanced (ambient) monitoring under CAA section 182(c)(1).

(9) Transportation controls under CAA section 182(c)(5).

(10) Vehicle miles traveled provisions of CAA section 182(d)(1).

(11) $NO_X$ requirements under CAA section 182(f).

(12) Attainment demonstration requirements under CAA sections 172(c)(4), 182(b)(1)(A), and 182(c)(2).

(13) Nonattainment contingency measures required under CAA sections 172(c)(9) and 182(c)(9) for failure to attain the 1-hour or 1997 ozone NAAQS by the applicable attainment date or to make reasonable further progress toward attainment of the 1-hour or 1997 ozone NAAQS.

(14) Nonattainment NSR major source thresholds and offset ratios under CAA sections 172(a)(5) and 182(a)(2).

(15) Penalty fee program requirements for Severe and Extreme Areas under CAA section 185.

(16) Contingency measures associated with areas utilizing CAA section 182(e)(5).

(17) Reasonably available control measures (RACM) requirements under CAA section 172(c)(1).

(p) *CSAPR* means the Cross State Air Pollution Rule codified at 40 CFR 52.38 and part 97.

(q) *CAIR* means the Clean Air Interstate Rule codified at 40 CFR 51.123, 52.35 and part 95.

(r) *$NO_X$ SIP Call* means the rules codified at 40 CFR 51.121 and 51.122.

(s) *Ozone transport region* (OTR) means the area established by CAA section 184(a) or any other area established by the Administrator pursuant to CAA section 176A for purposes of ozone.

(t) *Reasonable further progress* (RFP) means both the emissions reductions required under CAA section 172(c)(2) which EPA interprets to be an average 3 percent per year emissions reductions of either VOC or $NO_X$ and CAA sections 182(c)(2)(B) and (c)(2)(C) and the 15 percent reductions over the first six years of the plan and the following three percent per year average under § 51.1110.

(u) *Rate-of-progress* (ROP) means the 15 percent progress reductions in VOC emissions over the first 6 years required under CAA section 182(b)(1).

(v) *Revocation of the 1-hour NAAQS* means the time at which the 1-hour NAAQS no longer apply to an area pursuant to 40 CFR 50.9(b).

(w) *Revocation of the 1997 ozone NAAQS* means the time at which the 1997 8-hour NAAQS no longer apply to an area pursuant to 40 CFR 50.10(c).

(x) *Subpart 1* means subpart 1 of part D of title I of the CAA.

(y) *Subpart 2* means subpart 2 of part D of title I of the CAA.

(z) *I/M* refers to the inspection and maintenance programs for in-use vehicles required under the 1990 CAA Amendments and defined by subpart S of 40 CFR part 51.

(aa) An area *"Designated nonattainment for the 1-hour ozone NAAQS"* means, for purposes of 40 CFR 51.1105, an area that is subject to applicable 1-hour ozone NAAQS anti-backsliding requirements at the time of revocation of the 1997 ozone NAAQS.

(bb) *Base year inventory* for the nonattainment area means a comprehensive, accurate, current inventory of actual emissions from sources of VOC and $NO_X$ emitted within the boundaries of the nonattainment area as required by CAA section 182(a)(1).

(cc) *Ozone season day emissions* means an average day's emissions for a typical ozone season work weekday. The state shall select, subject to EPA approval, the particular month(s) in the ozone season and the day(s) in the work week to be represented, considering the conditions assumed in the development of RFP plans and/or emissions budgets for transportation conformity.

■ 6. In § 51.1103, revise the section heading and Table 1 in paragraph (a) to read as follows:

**§ 51.1103 Application of classification and attainment date provisions in CAA section 181 to areas subject to § 51.1102.**

(a) * * *

TABLE 1—CLASSIFICATIONS AND ATTAINMENT DATES FOR 2008 8-HOUR OZONE NAAQS (0.075 PPM) FOR AREAS SUBJECT TO CFR SECTION 51.1102

| Area class | | 8-hour design value (ppm ozone) | Primary standard attainment date (years after the effective date of designation for 2008 primary NAAQS) |
|---|---|---|---|
| Marginal | from | 0.076 | 3 |
| | up to* | 0.086 | |
| Moderate | from | 0.086 | 6 |
| | up to* | 0.100 | |
| Serious | from | 0.100 | 9 |
| | up to* | 0.113 | |
| Severe-15 | from | 0.113 | 15 |
| | up to* | 0.119 | |
| Severe-17 | from | 0.119 | 17 |
| | up to* | 0.175 | |
| Extreme | equal to or above | 0.175 | 20 |

* But not including

* * * * *

■ 7. Add §§ 51.1104 through 51.1119 to read as follows:

* * * * *

**51.1104 [Reserved]**

**51.1105 Transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS and anti-backsliding.**

**51.1106 Redesignation to nonattainment following initial designations.**

**51.1107 Determining eligibility for 1-year attainment date extensions for the 2008 ozone NAAQS under CAA section 181(a)(5).**

**51.1108 Modeling and attainment demonstration requirements.**

**51.1109 [Reserved].**

**51.1110 Requirements for reasonable further progress (RFP).**

**51.1111 [Reserved].**

**51.1112 Requirements for reasonably available control technology (RACT) and reasonably available control measures (RACM).**

**51.1113 Section 182(f) $NO_X$ exemption provisions.**

**51.1114 New source review requirements.**

**51.1115 Emissions inventory requirements.**

**51.1116 Requirements for an Ozone Transport Region.**

**51.1117 Fee programs for Severe and Extreme nonattainment areas that fail to attain.**

**51.1118 Suspension of SIP planning requirements in nonattainment areas that have air quality data that meet an ozone NAAQS.**

**51.1119 Applicability.**

* * * * *

**§ 51.1104 [Reserved]**

**§ 51.1105 Transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS and anti-backsliding.**

(a) *Requirements that continue to apply after revocation of the 1997 ozone NAAQS*—(1) *2008 ozone NAAQS nonattainment and 1997 ozone NAAQS nonattainment.* The following requirements apply to an area designated nonattainment for the 2008 ozone NAAQS and also designated nonattainment for the 1997 ozone NAAQS, or nonattainment for both the 1997 and 1-hour ozone NAAQS, at the time of revocation of the respective ozone NAAQS: The area remains subject to the obligation to adopt and implement the applicable requirements of § 51.1100(o), for any ozone NAAQS for which it was designated nonattainment at the time of revocation, in accordance with its classification for that NAAQS at the time of that revocation, except as provided in paragraph (b) of this section.

(2) *2008 ozone NAAQS nonattainment and 1997 ozone NAAQS maintenance.* For an area designated nonattainment for the 2008 ozone NAAQS that was redesignated to attainment for the 1997 ozone NAAQS prior to April 6, 2015 (hereinafter a "maintenance area") the SIP, including the maintenance plan, is considered to satisfy the applicable requirements of 40 CFR 51.1100(o) for the revoked NAAQS. The measures in the SIP and maintenance plan shall continue to be implemented in accordance with the terms in the SIP. Any measures associated with applicable requirements that were shifted to contingency measures prior to April 6, 2015 may remain in that form. After April 6, 2015, and to the extent consistent with any SIP for the 2008 ozone NAAQS and with CAA sections 110(l) and 193, the state may request that obligations under the applicable requirements of § 51.1100(o) be shifted to the SIP's list of maintenance plan contingency measures for the area.

(3) *2008 ozone NAAQS attainment and 1997 ozone NAAQS nonattainment.* For an area designated attainment for the 2008 ozone NAAQS, and designated nonattainment for the 1997 ozone NAAQS as of April 6, 2015 or for both the 1997 and the 1-hour ozone NAAQS as of the respective dates of their revocations, the area is no longer subject to nonattainment NSR and the state may at any time request that the nonattainment NSR provisions applicable to the area be removed from the SIP. The state may request, consistent with CAA sections 110(l) and 193, that SIP measures adopted to satisfy other applicable requirements of § 51.1100(o) be shifted to the SIP's list of maintenance plan contingency measures for the area. The area's approved PSD SIP shall be considered to satisfy the state's obligations with respect to the area's maintenance of the 2008 ozone NAAQS pursuant to CAA section 110(a)(1).

(4) *2008 ozone NAAQS attainment and 1997 ozone NAAQS maintenance.* An area designated attainment for the 2008 ozone NAAQS with an approved CAA section 175A maintenance plan for the 1997 ozone NAAQS is considered to satisfy the applicable requirements of 40 CFR 51.1100(o) through implementation of the SIP and maintenance plan provisions for the area. After April 6, 2015, and to the extent consistent with CAA sections 110(l) and 193, the state may request that obligations under the applicable requirements of 40 CFR 51.1100(o) be shifted to the list of maintenance plan contingency measures for the area. For an area that is initially designated attainment for the 2008 ozone NAAQS and which has been redesignated to attainment for the 1997 ozone NAAQS with an approved CAA section 175A maintenance plan and an approved PSD SIP, the area's approved maintenance plan and the state's approved PSD SIP for the area are considered to satisfy the state's obligations with respect to the area's maintenance of the 2008 ozone NAAQS pursuant to CAA section 110(a)(1).

(b) *Effect of Redesignation or Redesignation Substitute.* (1) An area remains subject to the anti-backsliding obligations for a revoked NAAQS under paragraphs (a)(1) and (2) of this section until either EPA approves a redesignation to attainment for the area for the 2008 ozone NAAQS; or EPA approves a demonstration for the area in a redesignation substitute procedure for a revoked NAAQS. Under this redesignation substitute procedure for a revoked NAAQS, and for this limited anti-backsliding purpose, the demonstration must show that the area has attained that revoked NAAQS due to permanent and enforceable emission reductions and that the area will maintain that revoked NAAQS for 10 years from the date of EPA's approval of this showing.

(2) If EPA, after notice-and-comment rulemaking, approves a redesignation to attainment, the state may request that provisions for nonattainment NSR be removed from the SIP, and that other anti-backsliding obligations be shifted to contingency measures provided that such action is consistent with CAA sections 110(l) and 193. If EPA, after notice and comment rulemaking, approves a redesignation substitute for a revoked NAAQS, the state may request that provisions for nonattainment NSR for that revoked NAAQS be removed, and that other anti-backsliding obligations for that revoked NAAQS be shifted to contingency measures provided that such action is consistent with CAA sections 110(l) and 193.

(c) *Portions of an area designated nonattainment or attainment for the 2008 ozone NAAQS that remain subject to the obligations identified in paragraph (a) of this section.* Only that portion of the designated nonattainment or attainment area for the 2008 ozone NAAQS that was required to adopt the applicable requirements in § 51.1100(o) for purposes of the 1-hour or 1997 ozone NAAQS is subject to the obligations

identified in paragraph (a) of this section. Subpart C of 40 CFR part 81 identifies the areas designated nonattainment and associated area boundaries for the 1997 ozone NAAQS at the time of revocation. Areas that are designated nonattainment for the 1997 ozone NAAQS at the time of designation for the 2008 ozone NAAQS may be redesignated to attainment prior to the effective date of revocation of that ozone NAAQS.

(d) *Obligations under the 1997 ozone NAAQS that no longer apply after revocation of the 1997 ozone NAAQS*—(1) *Second 10-year Maintenance plans.* As of April 6, 2015, an area with an approved 1997 ozone NAAQS maintenance plan under CAA section 175A is not required to submit a second 10-year maintenance plan for the 1997 ozone NAAQS 8 years after approval of the initial 1997 ozone NAAQS maintenance plan.

(2) *Determinations of failure to attain the 1997 and/or 1-hour NAAQS.* (i) As of April 6, 2015, the EPA is no longer obligated to determine pursuant to CAA section 181(b)(2) or section 179(c) whether an area attained the 1997 ozone NAAQS by that area's attainment date for the 1997 ozone NAAQS.

(ii) As of April 6, 2015, the EPA is no longer obligated to reclassify an area to a higher classification for the 1997 ozone NAAQS based upon a determination that the area failed to attain the 1997 ozone NAAQS by the area's attainment date for the 1997 ozone NAAQS.

(iii) For the revoked 1-hour and 1997 ozone NAAQS, the EPA is required to determine whether an area attained the 1-hour or 1997 ozone NAAQS by the area's attainment date solely for anti-backsliding purposes to address an applicable requirement for nonattainment contingency measures and CAA section 185 fee programs. In making such a determination, the EPA may consider and apply the provisions of CAA section 181(a)(5) and former 40 CFR 51.907 in interpreting whether a 1-year extension of the attainment date is applicable under CAA section 172(a)(2)(C).

(e) *Continued applicability of the FIP and SIP requirements pertaining to interstate transport under CAA section 110(a)(2)(D)(i) and (ii) after revocation of the 1997 ozone NAAQS.* All control requirements associated with a FIP or approved SIP in effect for an area as of April 6, 2015, such as the $NO_X$ SIP Call, the CAIR, or the CSAPR shall continue to apply after revocation of the 1997 ozone NAAQS. Control requirements approved into the SIP pursuant to obligations arising from CAA section 110(a)(2)(D)(i) and (ii), including 40 CFR 51.121, 51.122, 51.123 and 51.124, may be modified by the state only if the requirements of §§ 51.121, 51.122, 51.123 and 51.124, including statewide $NO_X$ emission budgets continue to be in effect. Any such modification must meet the requirements of CAA section 110(l).

(f) *New source review.* An area designated nonattainment for the 2008 ozone NAAQS and designated nonattainment for the 1997 ozone NAAQS on April 6, 2015 remains subject to the obligation to adopt and implement the major source threshold and offset requirements for nonattainment NSR that apply or applied to the area pursuant to CAA sections 172(c)(5), 173 and 182 based on the highest of: (i) The area's classification under CAA section 181(a)(1) for the 1-hour NAAQS as of the effective date of revocation of the 1-hour ozone NAAQS; (ii) the area's classification under 40 CFR 51.903 for the 1997 ozone NAAQS as of the date a permit is issued or as of April 6, 2015, whichever is earlier; and (iii) the area's classification under § 51.1103 for the 2008 ozone NAAQS. Upon removal of nonattainment NSR obligations for a revoked NAAQS under § 51.1105(b), the state remains subject to the obligation to adopt and implement the major source threshold and offset requirements for nonattainment NSR that apply or applied to the area for the remaining applicable NAAQS consistent with this paragraph.

**§ 51.1106 Redesignation to nonattainment following initial designations.**

For any area that is initially designated attainment for the 2008 ozone NAAQS and that is subsequently redesignated to nonattainment for the 2008 ozone NAAQS, any absolute, fixed date applicable in connection with the requirements of this part other than an attainment date is extended by a period of time equal to the length of time between the effective date of the initial designation for the 2008 ozone NAAQS and the effective date of redesignation, except as otherwise provided in this subpart. The maximum attainment date for a redesignated area would be based on the area's classification, consistent with Table 1 in § 51.1103.

**§ 51.1107 Determining eligibility for 1-year attainment date extensions for the 2008 ozone NAAQS under CAA section 181(a)(5).**

(a) A nonattainment area will meet the requirement of CAA section 181(a)(5)(B) pertaining to 1-year extensions of the attainment date if:

(1) For the first 1-year extension, the area's 4th highest daily maximum 8 hour average in the attainment year is 0.075 ppm or less.

(2) For the second 1-year extension, the area's 4th highest daily maximum 8 hour value, averaged over both the original attainment year and the first extension year, is 0.075 ppm or less.

(b) For purposes of paragraph (a) of this section, the area's 4th highest daily maximum 8 hour average for a year shall be from the monitor with the highest 4th highest daily maximum 8 hour average for that year of all the monitors that represent that area.

**§ 51.1108 Modeling and attainment demonstration requirements.**

(a) An area classified as Moderate under § 51.1103(a) shall be subject to the attainment demonstration requirement applicable for that classification under CAA section 182(b), and such demonstration is due no later than 36 months after the effective date of the area's designation for the 2008 ozone NAAQS.

(b) An area classified as Serious or higher under § 51.1103(a) shall be subject to the attainment demonstration requirement applicable for that classification under CAA section 182(c), and such demonstration is due no later than 48 months after the effective date of the area's designation for the 2008 ozone NAAQS.

(c) Attainment demonstration criteria. An attainment demonstration due pursuant to paragraph (a) or (b) of this section must meet the requirements of § 51.112; the adequacy of an attainment demonstration shall be demonstrated by means of a photochemical grid model or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.

(d) Implementation of control measures. For each nonattainment area, the state must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season.

**§ 51.1109 [Reserved]**

**§ 51.1110 Requirements for reasonable further progress (RFP).**

(a) *RFP for nonattainment areas classified pursuant to § 51.1103.* The RFP requirements specified in CAA section 182 for that area's classification shall apply.

(1) *Submission deadline.* For each area classified as Moderate or higher pursuant to § 51.1103, the state shall submit a SIP revision no later than 36 months after the effective date of designation as nonattainment for the 2008 ozone NAAQS that provides for

RFP as described in paragraphs (a)(2) through (4) of this section.

(2) *RFP requirements for areas with an approved 1-hour or 1997 ozone NAAQS 15 percent VOC ROP plan.* An area classified as Moderate or higher that has the same boundaries as an area, or is entirely composed of several areas or portions of areas, for which EPA fully approved a 15 percent plan for the 1-hour or 1997 ozone NAAQS is considered to have met the requirements of CAA section 182(b)(1) for the 2008 ozone NAAQS and instead:

(i) If classified as Moderate or higher, the area is subject to the RFP requirements under CAA section 172(c)(2) and shall submit a SIP revision that:

(A) Provides for a 15 percent emission reduction from the baseline year within 6 years after the baseline year;

(B) Provides for an additional emissions reduction of 3 percent per year from the end of the first 6 years up to the beginning of the attainment year if a baseline year earlier than 2011 is used; and

(C) Relies on either $NO_X$ or VOC emissions reductions (or a combination) to meet the requirements of paragraphs (a)(2)(i)(A) and (B) of this section. Use of $NO_X$ emissions reductions must meet the criteria in CAA section 182(c)(2)(C).

(ii) If classified as Serious or higher, the area is also subject to RFP under CAA section 182(c)(2)(B) and shall submit a SIP revision no later than 48 months after the effective date of designation providing for an average emissions reduction of 3 percent per year:

(A) For all remaining 3-year periods after the first 6-year period until the year of the area's attainment date; and

(B) That relies on either $NO_X$ or VOC emissions reductions (or a combination) to meet the requirements of paragraphs (a)(2)(ii)(A) and (B) of this section. Use of $NO_X$ emissions reductions must meet the criteria in CAA section 182(c)(2)(C).

(3) *RFP requirements for areas for which an approved 15 percent VOC ROP plan for the 1-hour or 1997 ozone NAAQS exists for only a portion of the area.* An area that contains one or more portions for which EPA fully approved a 15 percent VOC ROP plan for the 1-hour or 1997 ozone NAAQS (as well as areas for which EPA has not fully approved a 15 percent plan for either the 1-hour or 1997 ozone NAAQS) shall meet the requirements of either paragraph (a)(3)(i) or (ii) of this section.

(i) The state shall not distinguish between the portion of the area with a previously approved 15 percent ROP plan and the portion of the area without such a plan, and shall meet the requirements of (a)(4) of this section for the entire nonattainment area.

(ii) The state shall treat the area as two parts, each with a separate RFP target as follows:

(A) For the portion of the area without an approved 15 percent VOC ROP plan for the 1-hour or 1997 ozone NAAQS, the state shall submit a SIP revision as required under paragraph (a)(4) of this section.

(B) For the portion of the area with an approved 15 percent VOC ROP plan for the 1-hour or 1997 ozone NAAQS, the state shall submit a SIP as required under paragraph (a)(2) of this section.

(4) *ROP Requirements for areas without an approved 1-hour or 1997 ozone NAAQS 15 percent VOC ROP plan.* (i) For each area, the state shall submit a SIP revision consistent with CAA section 182(b)(1). The 6-year period referenced in CAA section 182(b)(1) shall begin January 1 of the year following the year used for the baseline emissions inventory.

(ii) For Moderate areas, the plan must provide for an additional 3 percent per year reduction from the end of the first 6 years up to the beginning of the attainment year if a baseline year from 2008 to 2010 is used.

(iii) For each area classified as Serious or higher, the state shall submit a SIP revision consistent with CAA section 182(c)(2)(B). The final increment of progress must be achieved no later than the attainment date for the area.

(5) *Creditability of emission control measures for RFP plans.* Except as specifically provided in CAA section 182(b)(1)(C) and (D), CAA section 182(c)(2)(B), and 40 CFR 51.1110(a)(6), all emission reductions from SIP-approved or federally promulgated measures that occur after the baseline emissions inventory year are creditable for purposes of the RFP requirements in this section, provided the reductions meet the requirements for creditability, including the need to be enforceable, permanent, quantifiable, and surplus.

(6) *Creditability of out-of-area emissions reductions.* For each area classified as Moderate or higher pursuant to § 51.1103, in addition to the restrictions on the creditability of emission control measures listed in § 51.1110(a)(5), creditable emission reductions for fixed percentage reduction RFP must be obtained from sources within the nonattainment area.

(7) *Calculation of non-creditable emissions reductions.* The following four categories of control measures listed in CAA section 182(b)(1)(D) are no longer required to be calculated for exclusion in RFP analyses because the Administrator has determined that due to the passage of time the effect of these exclusions would be *de minimis:*

(i) Measures related to motor vehicle exhaust or evaporative emissions promulgated by January 1, 1990;

(ii) Regulations concerning Reid vapor pressure promulgated by November 15, 1990;

(iii) Measures to correct previous RACT requirements; and

(iv) Measures required to correct previous I/M programs.

(b) *Baseline emissions inventory for RFP plans.* For the RFP plans required under this section, at the time of designation for the 2008 ozone NAAQS the baseline emissions inventory shall be the emissions inventory for the most recent calendar year for which a complete triennial inventory is required to be submitted to EPA under the provisions of subpart A of this part. States may use an alternative baseline emissions inventory provided the state demonstrates why it is appropriate to use the alternative baseline year, and provided that the year selected is between the years 2008 to 2012. All states associated with a multi-state nonattainment area must consult and agree on a single alternative baseline year. The emissions values included in the inventory required by this section shall be actual ozone season day emissions as defined by § 51.1100(cc).

**§ 51.1111 [Reserved]**

**§ 51.1112 Requirements for reasonably available control technology (RACT) and reasonably available control measures (RACM).**

(a) *RACT requirement for areas classified pursuant to § 51.1103.* (1) For each nonattainment area classified Moderate or higher, the state shall submit a SIP revision that meets the VOC and $NO_X$ RACT requirements in CAA sections 182(b)(2) and 182(f).

(2) The state shall submit the RACT SIP for each area no later than 24 months after the effective date of designation for the 2008 ozone NAAQS.

(3) The state shall provide for implementation of RACT as expeditiously as practicable but no later than January 1 of the 5th year after the effective date of designation for the 2008 ozone NAAQS.

(b) *Determination of major stationary sources for applicability of RACT provisions.* The amount of VOC and $NO_X$ emissions are to be considered separately for purposes of determining whether a source is a major stationary source as defined in CAA section 302.

(c) *Reasonably Available Control Measures (RACM) requirement.* For each nonattainment area required to submit an attainment demonstration under

§ 51.1108(a) and (b), the state shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all RACM necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.

**§ 51.1113 Section 182(f) $NO_X$ exemption provisions.**

(a) A person or a state may petition the Administrator for an exemption from $NO_X$ obligations under CAA section 182(f) for any area designated nonattainment for the 2008 ozone NAAQS and for any area in a CAA section 184 ozone transport region.

(b) The petition must contain adequate documentation that the criteria in CAA section 182(f) are met.

(c) A CAA section 182(f) $NO_X$ exemption granted for the 1-hour or 1997 ozone NAAQS does not relieve the area from any $NO_X$ obligations under CAA section 182(f) for the 2008 ozone NAAQS.

**§ 51.1114 New source review requirements.**

The requirements for nonattainment NSR for the ozone NAAQS are located in § 51.165. For each nonattainment area, the state shall submit a nonattainment NSR plan or plan revision for the 2008 ozone NAAQS no later than 36 months after the effective date of the area's designation for the 2008 ozone NAAQS.

**§ 51.1115 Emissions inventory requirements.**

(a) For each nonattainment area, the state shall submit a base year inventory as defined by § 51.1100(bb) to meet the emissions inventory requirement of CAA section 182(a)(1). This inventory shall be submitted no later than 24 months after the effective date of designation. The inventory year shall be selected consistent with the baseline year for the RFP plan as required by § 51.1110(b).

(b) For each nonattainment area, the state shall submit a periodic emission inventory of emissions sources in the area to meet the requirement in CAA section 182(a)(3)(A). With the exception of the inventory year and timing of submittal, this inventory shall be consistent with the requirements of paragraph (a) of this section. Each periodic inventory shall be submitted no later than the end of each 3-year period after the required submission of the base year inventory for the nonattainment area. This requirement shall apply until the area is redesignated to attainment.

(c) The emissions values included in the inventories required by paragraphs (a) and (b) of this section shall be actual ozone season day emissions as defined by § 51.1100(cc).

(d) The state shall report emissions from point sources according to the point source emissions thresholds of the Air Emissions Reporting Requirements (AERR), 40 CFR part 51, subpart A.

(e) The data elements in the emissions inventory shall be consistent with the detail required by 40 CFR part 51, subpart A. Since only emissions within the boundaries of the nonattainment area shall be included as defined by § 51.1100(cc), this requirement shall apply to the emissions inventories required in this section instead of any total county requirements contained in 40 CFR part 51, subpart A.

**§ 51.1116 Requirements for an Ozone Transport Region.**

(a) *In general.* CAA sections 176A and 184 apply for purposes of the 2008 ozone NAAQS.

(b) *RACT requirements for certain portions of an Ozone Transport Region.* (1) The state shall submit a SIP revision that meets the RACT requirements of CAA section 184(b)(2) for all portions of the state located in an ozone transport region.

(2) The state shall submit the RACT revision no later than 24 months after designation for the 2008 ozone NAAQS and shall provide for implementation of RACT as expeditiously as practicable but no later than January 1 of the 5th year after designation for the 2008 ozone NAAQS.

**§ 51.1117 Fee programs for Severe and Extreme nonattainment areas that fail to attain.**

For each area classified as Severe or Extreme for the 2008 ozone NAAQS, the state shall submit a SIP revision within 10 years of the effective date of designation that meets the requirements of CAA section 185.

**§ 51.1118 Suspension of SIP planning requirements in nonattainment areas that have air quality data that meet an ozone NAAQS.**

Upon a determination by EPA that an area designated nonattainment for the 2008 ozone NAAQS, or for any prior ozone NAAQS, has attained the relevant standard, the requirements for such area to submit attainment demonstrations and associated reasonably available control measures, reasonable further progress plans, contingency measures for failure to attain or make reasonable progress and other planning SIPs related to attainment of the 2008 ozone NAAQS, or for any prior NAAQS for which the determination has been made, shall be suspended until such time as: The area is redesignated to attainment for that NAAQS or a redesignation substitute is approved as appropriate, at which time the requirements no longer apply; or EPA determines that the area has violated that NAAQS, at which time the area is again required to submit such plans.

**§ 51.1119 Applicability.**

As of revocation of the 1997 ozone NAAQS on April 6, 2015, as set forth in § 50.10(c), the provisions of subpart AA shall replace the provisions of subpart X, §§ 51.900 to 51.918, which cease to apply except for § 51.907 for the anti-backsliding purposes of § 51.1105(c)(2). *See* subpart X § 51.919.

■ 8. In Appendix S to part 51, revise section IV.G.5 and add section VII to read as follows:

## Appendix S to Part 51—Emission Offset Interpretative Ruling

* * * * *

IV. * * *

G. * * *

5. *Interpollutant offsetting.* In meeting the emissions offset requirements of paragraph IV.A, Condition 3 of this Ruling, the emissions offsets obtained shall be for the same regulated NSR pollutant unless interpollutant offsetting is permitted for a particular pollutant as specified in this paragraph IV.G.5.

(i) The offset requirements of paragraph IV.A, Condition 3 of this Ruling for emissions of the ozone precursors $NO_X$ and VOC may be satisfied by offsetting reductions of emissions of either of those precursors, if all other requirements for such offsets are also satisfied.

(ii) The offset requirements of paragraph IV.A, Condition 3 of this Ruling for direct $PM_{2.5}$ emissions or emissions of precursors of $PM_{2.5}$ may be satisfied by offsetting reductions of direct $PM_{2.5}$ emissions or emissions of any $PM_{2.5}$ precursor identified under paragraph II.A.31 (iii) of this Ruling if such offsets comply with an interprecursor trading hierarchy and ratio approved by the Administrator.

* * * * *

VII. Anti-Backsliding Measures for Revoked Ozone NAAQS

Nonattainment area new source review obligations for prior ozone NAAQS.

A. Except as provided in paragraph VII.B of this Ruling, an area designated nonattainment for the 2008 ozone NAAQS and designated nonattainment for the 1997 ozone NAAQS on April 6, 2015 remains subject to the obligation to adopt and implement the major source threshold and offset ratio requirements for nonattainment NSR that apply or applied to the area pursuant to sections 172(c)(5), 173 and 182 of the Act based on the highest of: (i) The area's classification under section 181(a)(1) of the Act for the 1-hour ozone NAAQS as of

the effective date of revocation of that NAAQS; (ii) the area's classification under § 51.903 for the 1997 ozone NAAQS as of the date a permit is issued or as of April 6, 2015, whichever is earlier; and (iii) the area's classification under § 51.1103 for the 2008 ozone NAAQS.

B.1. An area remains subject to the obligations for a revoked NAAQS under paragraph (a) until either (i) the area is redesignated to attainment for the 2008 ozone NAAQS; or (ii) the EPA approves a demonstration for the area in a redesignation substitute procedure for a revoked NAAQS per the provisions of § 51.1105(b). Under this redesignation substitute procedure for a revoked NAAQS, and for this limited anti-backsliding purpose, the demonstration must show that the area has attained that revoked NAAQS due to permanent and enforceable emission reductions and that the area will maintain that revoked NAAQS for 10 years from the date of EPA's approval of this showing.

2. Effect of redesignation to attainment for 2008 ozone NAAQS or approval of a redesignation substitute for a revoked ozone NAAQS. After redesignation to attainment for the 2008 ozone NAAQS, the state may request that provisions for nonattainment NSR be removed from the SIP. After EPA approval of a redesignation substitute for a revoked NAAQS under the provisions of § 51.1105(b), the state may request that provisions for nonattainment NSR for that revoked NAAQS be removed from the SIP. Upon removal of nonattainment NSR provisions for a revoked NAAQS, the state remains subject to the obligation to adopt and implement the major source threshold and offset ratio requirements for nonattainment NSR that apply or applied to the area for the remaining applicable NAAQS consistent with paragraph VII.A of this Ruling.

■ 9. In § 51.165, revise paragraph (a)(11) and add paragraph (a)(12) to read as follows:

**§ 51.165 Permit requirements.**

(a) * * *

(11) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section, the emissions offsets obtained shall be for the same regulated NSR pollutant unless interprecursor offsetting is permitted for a particular pollutant as specified in this paragraph.

(i) The plan may allow the offset requirement in paragraph (a)(3) of this section for emissions of the ozone precursors $NO_X$ and VOC to be satisfied by offsetting reductions in emissions of either of those precursors, if all other requirements for such offsets are also satisfied.

(ii) The plan may allow the offset requirements in paragraph (a)(3) of this section for direct $PM_{2.5}$ emissions or emissions of precursors of $PM_{2.5}$ to be satisfied by offsetting reductions in direct $PM_{2.5}$ emissions or emissions of any $PM_{2.5}$ precursor identified under paragraph (a)(1)(xxxvii)(C) of this section if such offsets comply with the interprecursor trading hierarchy and ratio established in the approved plan for a particular nonattainment area.

(12) The plan shall require that in any area designated nonattainment for the 2008 ozone NAAQS and designated nonattainment for the 1997 ozone NAAQS on April 6, 2015 the requirements of this section applicable to major stationary sources and major modifications of ozone shall include the anti-backsliding requirements contained at § 51.1105.

* * * * *

■ 10. In § 51.166, revise paragraph (i)(2) to read as follows:

**§ 51.166 Prevention of significant deterioration of air quality.**

* * * * *

(i) * * *

(2) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act. Nonattainment designations for revoked NAAQS, as contained in part 81 of this chapter, shall not be viewed as current designations under section 107 of the Act for purposes of determining the applicability of requirements equivalent to those contained in paragraphs (j) through (r) of this section to a major stationary source or major modification after the revocation of that NAAQS is effective.

* * * * *

■ 11. In § 51.372, revise paragraph (b)(2) to read as follows:

**§ 51.372 State Implementation Plan submissions.**

* * * * *

(b) * * *

(2) A SIP revision required as a result of a change in an area's designation or classification under a NAAQS for ozone, including all necessary legal authority and the items specified in paragraphs (a)(1) through (8) of this section, shall be submitted no later than the deadline for submitting the area's attainment SIP for the NAAQS in question.

* * * * *

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 12. The authority citation for part 52 continues to read as follows:

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

■ 13. In § 52.21, revise paragraph (i)(2) to read as follows:

* * * * *

(i). * * *

(2) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act. Nonattainment designations for revoked NAAQS, as contained in 40 CFR part 81, shall not be viewed as current designations under section 107 of the Act for purposes of determining the applicability of paragraphs (j) through (r) of this section to a major stationary source or major modification after the revocation of that NAAQS is effective.

* * * * *

## PART 70—STATE OPERATING PERMIT PROGRAMS

■ 14. The authority citation for part 70 continues to read as follows:

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

■ 15. In § 70.2, under the definition of "*Major source,*" revise paragraphs (3)(i), (3)(iii)(A), and (3)(iv) to read as follows:

**§ 70.2 Definitions.**

* * * * *

*Major source* * * *

(3) * * *

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified or treated as classified as "Marginal" or "Moderate," 50 tpy or more in areas classified or treated as classified as "Serious," 25 tpy or more in areas classified or treated as classified as "Severe," and 10 tpy or more in areas classified or treated as classified as "Extreme"; except that the references in this paragraph to 100, 50, 25 and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

* * * * *

(iii) * * *

(A) That are classified or treated as classified as "Serious," and

* * * * *

(iv) For particulate matter (PM–10) nonattainment areas classified or treated as classified as "Serious," sources with the potential to emit 70 tpy or more of PM–10.

* * * * *

## PART 71—FEDERAL OPERATING PERMIT PROGRAMS

■ 16. The authority citation for part 71 continues to read as follows:

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

■ 17. In § 71.2, under the definition of "*Major source,*" revise paragraphs (3)(i), (3)(iii)(A), and (3)(iv) to read as follows:

**§ 71.2 Definitions.**

* * * * *

*Major source* * * *

(3) * * *

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified or treated as classified as "Marginal" or "Moderate," 50 tpy or more in areas classified or treated as classified as "Serious," 25 tpy or more in areas classified or treated as classified as "Severe," and 10 tpy or more in areas classified or treated as classified as "Extreme"; except that the references in this paragraph to 100, 50, 25 and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

* * * * *

(iii) * * *

(A) That are classified or treated as classified as "Serious," and

* * * * *

(iv) For particulate matter (PM–10) nonattainment areas classified or treated as classified as "Serious," sources with the potential to emit 70 tpy or more of PM–10.

* * * * *

[FR Doc. 2015–04012 Filed 3–5–15; 8:45 am]

BILLING CODE 6560–50–P

# HOUSE OF REPRESENTATIVES

## SCM 1014

urging EPA; ozone concentration standard
Sponsors: Senators Griffin, Allen, Burges, et al.

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**DP** Committee on Federalism & States' Rights

**X** Caucus and COW

House Engrossed

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**OVERVIEW**

SCM 1014 urges the Environmental Protection Agency (EPA) to refrain from reducing the ozone concentration standard.

**HISTORY**

The EPA was proposed by President Richard Nixon and began operation on December 2, 1970, after Nixon signed an executive order. The EPA is an agency of the U.S. federal government which was created for the purpose of protecting human health and the environment by writing and enforcing regulations based on laws passed by Congress. The EPA has thirteen divisions and has 10 regions with each having a regional office that works with cases in those regions.

Ozone is one of the six common air pollutants identified by the EPA as being critical to assessing environmental health of a place. Ozone occurs naturally in the stratosphere to provide a protective layer which filters the sun's harmful ultraviolet rays. However, at the ground-level, ozone is created by a chemical reaction between nitrogen oxides and volatile organic compounds. Sunlight and heat cause ground-level ozone to form in harmful concentrations. Since nitrogen oxides come from internal combustion engines and volatile organic compounds come from vehicle exhaust, industrial emissions, gasoline vapors and chemical solvents, ground-level ozone is more prevalent in urban centers as oppose to rural areas.

In 2008, the EPA lowered the national standard for ozone air pollution from 80 parts per billion (pbb) to 75 pbb. On November 25, 2014, the EPA proposed a change to the national concentration standard for ozone air pollution from 75 ppb to between 65 and 70 ppb. The comment period closes on March 17, 2015, and the EPA is expected to finalize the rule in October 2015. The only counties in Arizona expected to meet the proposed standards are Yavapai County at 69 ppb and Navajo County at 70 ppb.

**PROVISIONS**

1. Urges the EPA to refrain from reducing the ozone concentration standard from 75 ppb to between 65 and 70 ppb.
2. Specifies that the Secretary of State of Arizona transmit copies of this Memorial to the Administrator of the U.S. EPA, the President of the U.S., the President of the U.S. Senate, the Speaker of the U.S. House of Representatives and each Member of Congress from the State of Arizona.

Senate Engrossed

State of Arizona
Senate
Fifty-second Legislature
First Regular Session
2015

# SENATE CONCURRENT MEMORIAL 1014

A CONCURRENT MEMORIAL

URGING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO REFRAIN FROM REDUCING THE OZONE CONCENTRATION STANDARD.

(TEXT OF BILL BEGINS ON NEXT PAGE)

To the Administrator of the United States Environmental Protection Agency:

Your memorialist respectfully represents:

Whereas, the United States Environmental Protection Agency (EPA) is proposing to reduce the national ambient air quality standard for ozone from 75 parts per billion to 65 to 70 parts per billion, while taking comment on a level as low as 60 parts per billion; and

Whereas, the Clean Air Act requires the EPA to review the ozone concentration standard every five years, and the EPA last updated this standard in 2008, setting it at 75 parts per billion; and

Whereas, if the EPA reduced the standard to 70 parts per billion, nine out of 11 counties monitored for ozone levels in Arizona would be out of compliance; and

Whereas, if the EPA reduced the standard to 65 parts per billion, all 11 counties monitored for ozone levels in Arizona would be out of compliance, and the four rural counties that are not currently monitored might also be out of compliance; and

Whereas, a revised ozone standard of 65 to 70 parts per billion would result in widespread nonattainment designations in areas of the nation that already meet the current ozone standards; and

Whereas, based on 2011 through 2013 monitoring data, the EPA reports that 358 counties in the nation would violate a standard of 70 parts per billion and that an additional 200 counties would violate a standard of 65 parts per billion; and

Whereas, nonattainment area designations would limit economic and job growth by restricting new and expanded industrial and manufacturing facilities, imposing emission "offset" requirements on new sources of nitrogen oxides and volatile organic compounds emissions, constraining oil and gas extraction and raising electricity prices for industries and consumers; and

Whereas, low-income and fixed-income citizens would bear the brunt of higher energy costs and utility bills; and

Whereas, according to the National Association of manufacturers, the EPA's proposal could be the most expensive regulation ever issued on the American public, costing the nation $270 billion to $360 billion annually; and

Whereas, according to the National Association of Manufacturers, the proposed ozone regulations could cost Arizona $28 billion in gross state product loss from 2017 to 2040, 19,982 lost jobs or job equivalents per year, $639 million in total compliance costs and a $520 drop in average household consumption per year; and

Whereas, the National Association of Manufacturers predicts that the EPA's proposed standards could result in a 15% increase in residential electricity prices, a 32% increase in residential natural gas prices and an 8% reduction in Arizona's coal-fired generating capacity; and

Whereas, the EPA has identified only 46% of the controls needed to meet the proposed standards, and the remaining 54% would have to be met with unknown controls that the EPA has not yet identified but that would likely have to include early shutdowns and scrappage of existing facilities, equipment and vehicles; and

Whereas, early retirement and scrappage of power plants, industrial facilities, heavy-duty trucks and equipment and automobiles would be much more costly ways to remove each additional ton of emissions than the controls the EPA has identified; and

Whereas, air quality continues to improve, and nitrogen oxide emissions are already down to 60% nationwide since 1980, which, after adjusting for economic growth, implies a 90% reduction in emission rates from the relatively uncontrolled 1990 rates for nitrogen oxide-emitting sources; and

Whereas, average ozone concentrations have decreased significantly in both urban and rural areas over the past two decades in response to state and federal emission control programs; and

Whereas, states are on track to be fully in attainment with the current standards, but some have not yet reached full attainment; and

Whereas, instead of giving states enough time to meet the current standards through ongoing emission reduction programs, the EPA now wants to move the goalpost by imposing a lower standard; and

Whereas, retaining the current ozone standards would provide for continued air quality improvement throughout the nation as emission reduction programs under existing EPA regulations are implemented.

Wherefore your memorialist, the Senate of the State of Arizona, the House of Representatives concurring, prays:

1. That the EPA refrain from reducing the ozone concentration standard from 75 parts per billion to 65 to 70 parts per billion.

2. That the Secretary of State of the State of Arizona transmit copies of this Memorial to the Administrator of the United States Environmental Protection Agency, the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives and each Member of Congress from the State of Arizona.

**BILL STATUS OVERVIEW**

**SCM1014**

**SPONSORS:** GRIFFIN P ALLEN P BURGES P
FARNSWORTH D P LESKO P MCGUIRE P
WARD P PRATT P SHOOTER C
LEACH C

**TITLE:** urging EPA; ozone concentration standard

**SENATE FIRST READ:** 02/02/15

**SENATE SECOND READ:** 02/03/15

**COMMITTEES: ASSIGNED COMMITTEES ACTION**

| | | | |
|---|---|---|---|
| Vote Detail | 02/02/15 | WE | 02/09/15 (5-1-1-0) DP |
| | 02/02/15 | RULES | 02/16/15 PFC |

**CONSENT CALENDAR:** 02/16/15 1:40 PM

**MAJORITY CAUCUS:** 02/17/15 Y

**MINORITY CAUCUS:** 02/17/15 Y

| **THIRD READ:** | **DATE** | **AYES** | **NAYS** | **NV** | **EXC** | **VAC** | **EMER** | **AMEND** | **RFE** | **2/3 VOTE** | **RESULT** |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Vote Detail | 02/19/15 | 19 | 10 | 1 | 0 | | | | | | PASSED |

**TRANSMIT TO HOUSE:** 02/19/15

**HOUSE FIRST READ:** 02/25/15

**COMMITTEES: ASSIGNED COMMITTEES ACTION**

| | | | |
|---|---|---|---|
| Vote Detail | 02/25/15 | FSR | 03/11/15 (5-3-0-0-0) DP |
| Vote Detail | 02/25/15 | RULES | 03/16/15 (8-0-0-1-0) C&P |

**HOUSE SECOND READ:** 02/26/15

**MAJORITY CAUCUS** 03/17/15 Y

**MINORITY CAUCUS:** 03/17/15 Y

| **COW ACTION 1:** | **DATE** | **ACTION** | **AYES** | **NAYS** | **NV** | **EXC** | **VAC** |
|---|---|---|---|---|---|---|---|
| | 03/18/15 | DP | 0 | 0 | 0 | 0 | |

Douglas A. Ducey
Governor

# ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Henry R. Darwin
Director

March 17, 2015

**Submitted via Electronic Docket and E-mail**

Attn: Docket ID No. EPA-HQ-OAR-2008-0699
Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Proposed Rule, National Ambient Air Quality Standards for Ozone, 79 Fed. Reg. 75,234 (Dec. 17, 2014)

Dear Sir or Madam:

The Arizona Department of Environmental Quality (ADEQ) appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) 2014 proposed revisions to the primary and secondary ozone NAAQS. As a member of WESTAR, ADEQ also generally supports WESTAR's comments on EPA's proposal.

The EPA proposes to revise the primary standard to a range of 0.065 to 0.070 parts per million (ppm) (i.e. 65-70 ppb), and to revise the secondary standard to a range of 0.065 to 0.070 ppm, a level secondary standard analogous a range of 13-17 ppm-hours in terms of W126 weighted index values averaged over three years. The EPA also solicits comment on possible health standard levels between 60 ppb to the current 75 ppb and on different possible variations of the secondary standard's averaging time form, and level.

Based on ADEQ's review of the record it appears that isolated evidence from the current record may justify any level within EPA's proposed range (with both the primary and secondary standards laterally proposed within the same range).[1] Ultimately, ADEQ hopes that the revised standards and associated levels will support ADEQ's and EPA's shared mission to protect and enhance human health and the environment, and will bolster regulatory program stability across the country without undue burden to the economy necessary to support the environmental benefits.

[1] ADEQ notes, however, that the range of possible levels that may result from EPA's proposal is extremely broad. This makes the proposal very difficult to comment on with specificity because there are many variables to contemplate. Such a broad notice may neither lead to better-informed agency decision-making, nor afford interested persons a meaningful opportunity to participate in the rulemaking process.

The CAA does not require the Administrator to establish the NAAQS at a zero-risk level or at background concentration levels.[2] However, for many jurisdictions, setting a standard at 60 or 65 ppb would be similar to setting a standard at or just above zero, because background and other emissions are uncontrollable[3] by states. ADEQ urges the EPA to set the standards' ranges at the highest levels supported by the most defensible science that provide either an adequate margin of safety (primary) or protect against anticipated effects (secondary). Any standard lower than that supported by the most recent and reliable scientific evidence must be contemplated in future reviews, as future reviews may yet produce the requisite defensible evidence to support further lowering the standard.

Below, Arizona offers comments on: (1) the health standards, (2) the secondary standards, (3) proposed monitoring changes, (4) implementation challenges, (5) tensions in the Clean Air Act's effectiveness, and (5) the possible effects that a lower ozone standard may have on energy in Arizona and possibly other states.

## 1. Primary Standard – Health

Ozone is well established as a pollutant that is reasonably anticipated to endanger public health, chiefly affecting respiratory function. The primary standard for ozone should be set at a level requisite to protect human health while allowing for an adequate margin of safety[4] sufficient to protect an acceptable proportion of sensitive group population.[5] The EPA is required to periodically review the primary (and secondary) standard every five years.[6] The results of such review depend on the context of such review, including current scientific knowledge and policy judgments.[7] The EPA is in an especially difficult position when reviewing and revising a standard for a non-threshold pollutant such as ozone. According to current interpretations of the CAA, the EPA must choose a health standard without taking into account cost or technical feasibility. However, courts "have previously acknowledged the impossibility of eliminating all risk of health effects from 'non-threshold' pollutants like ozone." [8] The EPA must follow CAA dictates and protect against adverse health effects while still allowing the review and revision to be meaningful in the face of possible multi-jurisdictional inability to attain the decided standard.

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[2] *See*, Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1155 (D.C. Cir. 1980).
[3] i.e. transported or mobile source emissions
[4] Clean Air Act (CAA) § 109(b)(1), 42 U.S.C. § 7410(b)(1) (1977).
[5] National Ambient Air Quality Standards for Ozone, 79 Fed. Reg. 75234, 75237 (proposed Dec. 17, 2014) (to be codified at 40 C.F.R. Parts 50, 51, 52, et al.) (EPA's proposal notes that the legislative history of section 109 indicates that a primary standard is to be set at "the maximum permissible ambient air level . . . which will protect the health of any [sensitive] group of the population," and that, for this purpose, "reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in such a group." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970).).
[6] CAA, 42 U.S.C. § 7410(d)(1) (1977).
[7] *See*, Mississippi v. EPA, 744 F.3d 1334, 1343 (D.C. Cir. 2013).
[8] *See, id.* at 1351.

The EPA has stated that there is "no bright-line rule delineating the set of conditions or scales at which known or anticipated effects become adverse to public welfare," within the range proposed.[9] Still, the EPA must choose a safe level even in the face of uncertainty.[10] To alleviate EPA's concerns regarding uncertainty, CASAC points out that the lower standard level, the more the standard will provide an incrementally greater margin of safety.[11] ADEQ notes, however, that a greater margin of safety comes with a greater likelihood that the level exceeds the level adequate to protect health.

ADEQ agrees with the EPA that it should not set a standard below 65 ppb. In *Mississippi v. EPA*, a case that reviewed the 2008 ozone NAAQS, the Court cautioned that future studies might reveal that the 60 ppb level "produces significant adverse decrements that simply cannot be attributed to normal variation in lung function."[12] The Court also cautioned that "agencies may not merely recite the terms 'substantial uncertainty' as a justification for their actions."[13] In the current review, adverse effects have been most confidently reflected in recent lab studies. Lab studies are more directly related to the effects seen from ozone[14] than epidemiological studies, which involve many confounding variables.[15] The EPA explained in the current proposal, "respiratory symptoms have been evaluated following 6.6-hour exposures to average O3 concentrations of 60 ppb (Adams, 2006; Kim et al., 2011) and 63 ppb (Schelegle et al., 2009)...[and] [n]one of these studies reported a statistically significant increase in respiratory symptoms, compared to filtered air controls."[16] Therefore, given the now multiple lab study evidence, it seems relatively certain that lung decrements are not in fact related to ozone levels below 65 ppb. While it is still possible that that corpus of scientific knowledge will change in the future, it now appears certain that setting a standard below 65 ppb would be more than requisite and would provide a more than adequate margin of safety, exceeding statutory requirements.

The Schelegle study[17] is the one selected lab study appears to meet the American Thoracic Society's criteria for an adverse response showing a combination of *both* lung function decrements and respiratory symptoms following 6.6 hour exposures to O3

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[9] Proposed Standards for Ozone, 79 Fed. Reg. at 75330.
[10] *See*, Lead Industries v. EPA, 647 F.2d at 1155 n.51.
[11] Letter from H. Christopher Frey, CASAC Chairman, to Gina McCarthy, EPA Administrator, CASAC Review of the EPA's Second Draft Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards at iii (Jun. 26, 2014), *available* at http://yosemite.epa.gov/sab/sabproduct.nsf/264cb1227d55e02c85257402007446a4/5EFA320CCAD326E885257D030071531C/$File/EPA-CASAC-14-004+unsigned.pdf.
[12] Mississippi v. EPA, 744 F.3d at 1350.
[13] *Id.* at 1350.
[14] *See*, Proposed Standards for Ozone, 79 Fed. Reg. at 75244 (Controlled human exposure studies provide direct evidence of relationships between pollutant exposures and human health effects).
[15] *Id.* at 75245 (For [epidemiological] studies, the degree of uncertainty introduced by confounding variables (*e.g.*, other pollutants, temperature) and other factors (*e.g.*, effects modifiers such as averting behavior) affects the level of confidence that the health effects being investigated are attributable to O3 exposures, alone and in combination with co-pollutants.).
[16] *Id.* at 75304.
[17] *See generally*, E.S. Schelegle et al., 6.6-Hour inhalation of ozone concentrations from 60 to 87 parts per billion in healthy humans, 180(3) AM. J. RESPIR. CRIT. CARE MED. 265 (2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3081277/.

concentrations as low as 72 ppb.[18] For argument's sake, ADEQ relegates to the EPA's judgment that the Schelegle study is one of the most representative and scientifically reliable of all the lab studies before the Administrator, including the four other human exposure lab studies most heavily discussed.[19] Based on this assumption, it might be possible to conclude from the record that the standard should be set below 72 ppb to account for an adequate margin of safety. The EPA stated in its proposal, "[t]he Administrator has decreasing confidence that adverse effects will occur following exposures to O3 concentrations below 72 ppb."[20] Should EPA cite this study as the primary reason for reducing the ozone standard from its current level of 75 ppb, ADEQ contends that a more than generous margin of safety will surpass what is requisite to shield against any uncertainty in the science. The EPA should therefore choose the most defensible level at or near 72 ppb that encompasses no more than an adequate margin of safety.

## 2. Secondary Standard

Regarding the proposed secondary standard, Arizona understands that the EPA must set a standard that protects against known or anticipated adverse effects on public welfare. Some found adverse effects are decreased tree seedling growth, visible foliar injury and reduced yield and quality of agriculture. The under-defined and uncertain identification of foliar injury and heavy crop management complicate and confuse the consideration of adverse effects of ozone on such vegetation. According to EPA's conclusions, the science indicates that the standard should be lowered to a level between 65 and 70 ppb. This level proposed is analogized to a W126[21] index value range of 13 - 17 ppm-hrs.

CASAC has recommended and the EPA has considered using the W126 metric as the standard form. ADEQ instead urges the EPA to retain the current form and averaging time.

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[18] *See*, Proposed Standards for Ozone, 79 Fed. Reg. at 75304.

[19] *See*, U.S. ENVIRONMENTAL PROTECTION AGENCY OFFICE OF AIR QUALITY PLANNING AND STANDARDS, RESEARCH TRIANGLE PARK, NC., POLICY ASSESSMENT FOR OZONE 165 table 3-1(2014) [hereinafter POLICY ASSESSMENT], *available at* http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_index.html; *see generally*, W.C. Adams et al., Comparison of chamber and face-mask 6.6-hour exposures to ozone on pulmonary function and symptoms responses, 14 INHAL. TOXICOL. 745 (2002), *available at* http://dx.doi.org/10.1080/ 08958370290084610; *see generally*, W.C. Adams et al., Comparison of chamber 6.6 hour exposures to 0.04–0.08 ppm ozone via square-wave and triangular profiles on pulmonary responses, 18 INHAL. TOXICOL. 127 (2006), *available at* http://dx.doi.org/10.1080/08958370500306107;*see generally*, J.S. Brown et al., Effects of exposure to 0.06 ppm ozone on FEV1 in humans: A secondary analysis of existing data, 116 ENVIRON. HEALTH PERSPECT. 1023 (2008), *available at* http://dx.doi.org/10.1289/ehp.11396; *see generally*, C.S. Kim et al., Lung function and inflammatory responses in healthy young adults exposed to 0.06 ppm ozone for 6.6 hours, 183 AM. J. RESPIR. CRIT. CARE. MED. 1215 (2011), *available at* http://dx.doi.org/10.1164/rccm.201011-1813OC.

[20] Proposed Standards for Ozone, 79 Fed. Reg. at 75304.

[21] The W126 metric is a seasonal aggregate of daytime (8:00 AM to 8:00 PM) hourly ozone concentrations designed to measure the cumulative effects of ozone exposure on plant and tree species, with units in parts per million-hours (ppm-hrs). The W126 metric uses a logistic weighting function to place less emphasis on exposure to low hourly ozone concentrations and more emphasis on exposure to high hourly ozone concentrations. POLICY ASSESSMENT at 80.

The EPA has done significant research, including a technical memorandum,[22] to find that the W126 three year average index values are sufficiently similar to the 4th highest daily max design values. The EPA's technical memorandum shows that within each region, a "positive, linear relationship between the changes in the 4th max and the W126 values persists."[23] The technical memorandum and other research previously documented in EPA reviews indicates that the West and Southwest regions "tend to have higher W126 index values relative to their design values than do monitors in other regions."[24] Given the fact that the EPA finds that the W126 and the current forms are both sufficiently similar to each other overall, it is not requisite to change the form to protect against known or anticipated adverse effects. In fact, a new W126 form may improperly disadvantage the West and Southwest with less representative high index values than the 4th highest daily max. Further, changing the form of the standard would be more burdensome for all to calculate and implement, without real benefit. Therefore, EPA should retain the 4th highest daily max form.

Moreover, the W126 index may be inappropriate for some parts of the country. Ozone effects on plants have been shown to primarily occur through passage of the pollutant through open stomata.[25] The equation itself assumes that all plants' stomata always open during the day.[26] However, in arid portions of the country, the primary photosynthetic mechanism natural vegetation use is CAM photosynthesis. During CAM photosynthesis, vegetation generally opens its stomata during the nighttime periods in order to reduce extreme transpiration losses during the daytime when temperatures are highest in a water limited environment. Consequently, little ozone exposure occurs for desert plants during daylight hours. The greater stringency in the Southwest resulting from the W126 index as compared to the current form, as discussed above, may not be requisite to protect public welfare if the index equation itself is not actually reflective of the biology in the Southwest.

Therefore, the W126 index may not be an appropriate form, much less requisite, to gauge ozone levels for a large portion of the country. Comparisons indicate that a switch to the W126 standard will likely result in a generally more stringent standard than would staying with the 4th highest max form.

ADEQ recommends that the EPA keep the current secondary averaging time, indicator, and form, and moderate the level to rationally reflect current scientific knowledge concerning known and anticipated effects.

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[22] *See generally*, Memorandum from Benjamin Wells of EPA's Office of Air Quality Planning and Standards to Ozone NAAQS Review Docket (EPA-HQ-OAR-2008-0699), Comparison of Ozone Metrics Considered in the Current NAAQS (November 20, 2014), *available at* http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_td.html.

[23] *Id.* at 13.

[24] Proposed Standards for Ozone, 79 Fed. Reg. at 75345.

[25] *See generally*, Benjamin S. Felzer et al., Impacts of ozone on trees and crops, 339 C. R. Geoscience 784 (2007), *available at* http://web.mit.edu/globalchange/www/MITJPSPGC_Reprint07-21.pdf

[26] *See*, U.S. ENVIRONMENTAL PROTECTION AGENCY, REGULATORY IMPACT ANALYSIS 2-9 (2014) [hereafter REGULATORY IMPACT ANALYSIS], *available at* http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_ria.html.

## 3. Implementation of Proposed Standards

ADEQ expects implementation of new proposed standards to be extremely challenging. If the ozone standard(s) is set at 65 ppb, all monitored counties in Arizona, 10 of the 15 total,[27] will be designated nonattainment. At 70 ppb, 9 of the 15 Arizona counties will be designated nonattainment.

### *a) All Levels Within Proposed Range Present Implementation Challenges, Especially Where Background Levels Are High*

Arizona understands that the EPA may not consider the costs of implementing the standards when setting a standard[28] nor need tailor national regulations to fit each region or locale.[29] However, the EPA may consider a possible standard's proximity to background levels when setting a standard.[30]

In its proposed rule, the EPA states, "there is no question that, as the levels of alternative prospective standards are lowered [below 70], background will represent increasingly larger fractions of total O3 levels and may subsequently complicate efforts to attain these standards."[31] The EPA also states that "for a prospective standard of 70 ppb, the EPA does not believe that background $O_3$ would create significant implementation-related challenges at locations throughout the U.S. and prevent attainment of the NAAQS."[32] The EPA's latter implementation statement assumes that very little anthropogenic ozone contributes to high-background affected areas, whether transported or otherwise outside a jurisdiction's control. While background alone will not always prevent attainment of the NAAQS, background in some areas may be so high as to create significant obstacles for areas to succeed in implementing the standards, even at 70 ppb.

In Arizona, areas such as Cochise (at a 63.49 ppb background level), Coconino (at 57.78 ppb), Yavapai (at 55.57 ppb) and La Paz (at 52.68 ppb) counties,[33] are projected to have quite elevated background levels in 2018, assuming background includes boundary concentrations, biogenic emissions, and wild and prescribed fire emissions.[34] For areas such as these, a standard of 70 ppb could be very difficult to meet.

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[27] If Mohave County is deemed classifiable because of the Las Vegas-Paradise, NV MSA, 11 of the 15 counties in Arizona will likely be nonattainment.
[28] *See generally*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465–472, 475–76 (2001).
[29] *See*, American Petroleum Institute v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981).
[30] *See*, Am. Trucking Ass'ns v. EPA, 283 F.3d 355, 379 (D.C. Cir. 2002).
[31] Proposed Standards for Ozone, 79 Fed. Reg. at 75383.
[32] *Id.*
[33] *See*, U.S. ENVIRONMENTAL PROTECTION AGENCY, AIR QUALITY MODELING TECHNICAL SUPPORT DOCUMENT FOR THE 2008 OZONE NAAQS TRANSPORT ASSESSMENT 96 (2015) [hereinafter EPA'S 2008 OZONE NAAQS TRANSPORT TSD], *available at* http://www.epa.gov/airtransport/O3TransportAQModelingTSD.pdf.
[34] *See*, EPA'S 2008 OZONE NAAQS TRANSPORT TSD AT 84.

For example, if the standard is set at 70 ppb, Cochise County is projected to already have an average design value of 69.20 ppb and a background level of 63.49 ppb.[35] The difference between the projected design value and the background level will result in only 5.71 ppb of "controllable" emissions. This amount is a relatively small fraction of the total emissions and thus may be difficult to control.

In other similarly affected high background areas, the "controllable" number can be further whittled down to a lesser controllable amount when considering the addition of United States generated anthropogenic emissions that are either transported to the area or that are otherwise outside the jurisdiction's control. As another example, a Coconino County area near the Grand Canyon has a projected average design value of 68.40 ppb and a background level of 57.78 ppb, with a difference of 10.62 ppb.[36] Of this difference, 7.70 ppb is projected attributable to transport from California.[37] This leaves 2.92 ppb of state "controllable" emissions, although some of this amount may still be attributable to state transport and mobile sources. This small number likewise presents an inflexible margin to control, and thus will present significant implementation and possible program stability challenges.

ADEQ believes EPA should consider carefully the efficacy of a standard so near in proximity to background levels.

*b) CAA Relief Mechanisms Are Not Practical or Otherwise Viable Options in Areas Where They Are Most Needed*

The EPA further contends that "as the levels of prospective standards are lowered, the areas that would most likely need to use the relief mechanisms discussed....are rural locations in the western U.S....where we have estimated the largest seasonal average values of background to occur."[38] Almost every area in Arizona, not just those areas that might qualify as rural, will need relief mechanisms. However, the demonstrations of such mechanisms may be impractical, or the area may not qualify (e.g. a county may be part of an MSA, even though the area is rural for all practical purposes). In some areas, some significant sources are not within a state's jurisdiction for the most part (e.g. mobile sources or nonroad engine regulation loopholes). In many areas, the main source of ground level ozone may be vehicular emissions from a passing interstate or from interstate pollution, both of which are beyond a state's jurisdiction to regulate.

Regarding exceptional events as a relief mechanism, ADEQ believes there should be a more efficient process to demonstrate such occurrences. Too many resources are required to demonstrate a single event. These resources could be better spent on regulating controllable pollution. ADEQ understands that guidance and changes to the exceptional event process are in progress, but stresses the excessive cost of exceptional event demonstrations.

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[35] *Id.*
[36] *Id.*
[37] *Id.* at 94.
[38] Proposed Standards for Ozone, 79 Fed. Reg. at 75383.

*c) Good Neighbor and Related Relief Mechanisms Prove Ineffective in Practice*

In its Regulatory Implementation Analysis, the EPA assumes that the CAA will account for and resolve transport issues between states through CAA § 126 (Interstate Pollution Abatement) and § 110 (Good Neighbor). These provisions are not nearly as practically effective as they are in theory.

According to preliminary projection modeling for the 2008 Ozone NAAQs and EPA's current Good Neighbor interpretations, Arizona is projected to contribute 1.47 ppb to a nonattainment receptor in Imperial County, California in 2018,[39] which is above the EPA's currently recognized threshold of significant contribution to another state's nonattainment or maintenance area.[40] California is projected to contribute more than 16 ppb to the Yuma County receptor in the same year.[41] Yuma County is currently designated as and projected to be an attainment area in 2018 for the 2008 standard—this will likely reverse sharply with the proposed standard changes. Yuma will surely be nonattainment whether standards are set at 65 or 70 ppb, with an estimated 16 ppb of its ozone attributable to transport from California.

In theory, transport to Arizona from California is a temporary problem, soon to be remedied in 2037, which will likely be the required attainment date for much of the southern part of California. Meanwhile, areas in Arizona such as Yuma County and La Paz County will initially be classified as moderate areas and possibly continue to increase in classification severity because of continuing transport. Arizona has reason to suspect that transport may continue for quite a while considering that several California counties will likely be classified severe or extreme per the new standards, allowing for more time to attain and consequently continue to contribute ozone to Arizona. Many contributing counties in California are not even projected to attain the 2008 ozone NAAQS levels in 2018. Hence, it seems unlikely that technology and feasibility will keep pace with attainment goals for the new proposed standards to prevent transport.

California, a state with the 8th largest economy in the world,[42] can perhaps force the markets in the state to change by way of regulation, and in fact change human behavior to reduce ozone within its attainment deadlines. This is a hope. However, Arizona's economy is less robust than California's, and would not likely have the same success through regulation alone, as transport from other jurisdictions is a prime cause for nonattainment in some areas. Until California attains the new standards, the standards could seriously demean Arizona's economy and leave Arizona with relatively unchanged air quality.

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[39] *See*, EPA's 2008 OZONE NAAQS TRANSPORT TSD at 88.

[40] *See*, Memorandum from Stephen Page, Director of EPA's Office of Air Quality Planning and Standards, to EPA Regional Air Division Directors, Regions 1-10, Comparison of Ozone Metrics Considered in the Current NAAQS 3 (Jan. 22, 2015), *available at* http://www.epa.gov/airtransport/GoodNeighborProvision2008NAAQS.pdf.

[41] *See*, EPA'S 2008 OZONE NAAQS TRANSPORT TSD at 94.

[42] *See*, Allen Young, California Regains Ranking as World's Eighth Largest Economy, SACRAMENTO BUSINESS JOURNAL, Jul. 7, 2014, *available at* http://www.bizjournals.com/sacramento/news/2014/07/07/tech-construction-drive-california-s-worldwide-gdp.html

ADEQ is not impeaching California's attainment efforts, as we are aware that California is doing all it can to control ozone emissions within its borders. Likewise, ADEQ wants to ensure that Arizona air becomes as free from unhealthy pollutants like ozone as possible, and the state will certainly do what is required to reduce ozone from sources within its jurisdiction. However, Arizona stresses that efforts to attain will very likely reach a limit where the more that effort is exerted to clean the air, benefits to health and welfare will approach and infinitely diminish toward zero. For this reason, ADEQ highlights the tangible disconnect in the CAA regarding the Act's inability to account for transport problems, outside of legal theory.

In the East, the EPA has spent significant resources on programs and research to address the effect that transport has on attainment, whereas little similar Federal effort has been made in the West. At this point, the East is likely much more prepared than the West to understand the complex cause and effects of ozone, including transport. While the West would like to take advantage of the East's existing knowledge, the source make-up, geography, and county sizes in the East are not the same as in the West. Western states generally have very large counties so that clear and reasonable boundary designation guidance will be of utmost importance. Guidance should focus on the availability of controls in, and the ability of, an area to attain. In Arizona, there is much uncertainty as to how the state can reasonably reduce ozone, especially in areas that self-contribute very little. Accordingly, Arizona hopes that the EPA will champion significant resources to help Western states to individually and collectively understand and address the complex and regional ozone problem.

## 4. Monitoring

ADEQ generally supports the proposed changes to the PAMS monitoring program. ADEQ also agrees that requiring PAMS monitoring at already existing NCore locations will benefit national and local objectives to understand ozone formation and would also provide significant cost efficiencies.[43]

ADEQ suggests the EPA develop guidance documentation for the "Enhanced Monitoring Plan."[44] Guidance for the "Enhanced Monitoring Plan" is needed well in advance of the due date. No such guidance is currently in place. While ADEQ appreciates flexibility, ADEQ needs more formulaic guidance in order to appropriately and efficiently justify monitoring changes and explain each area's specific ozone issues to the EPA's satisfaction.

ADEQ suggests EPA allow consolidation of Enhanced Monitoring Plans for adjacent nonattainment areas of similar type. For states like Arizona, most counties will likely be nonattainment for the 2015 ozone rule. It is a heavy burden on Arizona to develop a

[43] *See*, Proposed Standards for Ozone, 79 Fed. Reg. at 75361-62.
[44] *See*, *id.* at 75362-63.

separate plan for each county. If adjacent nonattainment areas are similar,[45] it should be appropriate to develop a plan for the combined area rather than address each separately.

ADEQ supports the minimum required monitoring changes for PAMS at NCore sites.[46] However, ADEQ is concerned with the aggressive proposed schedule for implementation of PAMS requirements for current nonattainment areas (implementation required by June 1, 2017) and new nonattainment areas (implementation required by June 1, 2019). Assuming most counties will be designated nonattainment in Arizona, ADEQ will need significant resources and guidance to achieve the proposed goals of developing an Enhanced Monitoring Plan for all areas and implementing PAMS requirements by the proposed dates.[47] Further, ADEQ suggests more flexibility in the implementation schedule for new nonattainment areas in cases where a single Primary Quality Assurance Organization (PQAO) will be covering many new areas.[48]

## 5. General Comments on Tensions within Clean Air Act

ADEQ is generally concerned with setting the ozone standard very near or below background levels, as background is generally understood. At the same time, Arizona understands that such a level may be required per the CAA as it is now written. However, setting standards so near or below background levels may dull the effectiveness of the Act itself by increasing program instability and negative economic impacts, driving irreparable political animosity.

It is ADEQ's current hope that the Clean Air Act remains a strong force to reduce air pollution. It is worth noting that the strength of the Clean Air Act comes from the hope that states can accomplish their missions and clean the air as efficiently and equitably as possible. If the standard is lowered to even 70 ppb, the majority of Arizona will be in nonattainment, likely for a long time given the influence of upwind neighbors. A standard that positions some counties to perpetually fail to attain, and triggers long-standing federal sanctions, undermines the intent of the Act that agencies cooperatively prevent and control air pollution.

It may be time re-examine Clean Air Act's means of achieving its goals through cooperative federalism. Cooperation is central to the CAA's goals, and requires flexibility. This country is very large and diverse, and it seems that the need has now presented itself for the Act to allow for more flexibility in remediating the air in different regions of the country because of, but not limited to, different regions' ecology, biologic composition, population density, and industry.

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[45] Similarities may include severity, meteorological conditions, ozone transportation issues, ozone formation, point and area sources, and population.
[46] *See, id.* at 75363-65.
[47] See, *id.* at 75365.
[48] *See, id.*

## 6. Energy Effects

EPA states in Section VIII.H of the proposal that the revision of the ozone standards is not a "significant energy action" per Executive Order 13211 because the revision is not likely to have a significant adverse effect on the supply, distribution, or use of energy."[49] This is not altogether true.

Part of EPA's expectation that ozone will decrease over the years is based on already existing or soon to be finalized regulations, such as the Clean Power Plan.[50] The proposed ozone revisions, however, could potentially interfere with the success of the Clean Power Plan, and vice versa, therefore affecting the expected supply and distribution of energy.

Under the Clean Power Plan, Arizona will have to reduce coal combustion, which, in the immediate future, will necessitate the increase of natural gas power production. Arizona sources may do this in three ways, by (1) increasing existing natural gas electric generating units' (natural gas EGU) operating hours that are not currently permit-limited, (2) increasing current permit limits on operating hours for existing natural gas EGUs, and (3) constructing and operating new natural gas EGUs to accommodate peak energy periods.

First, if a currently unlimited existing natural gas EGU's operating hours are increased, New Source Review would not be a concern, but increasing production may still make it difficult for the areas in which the EGUs are located to demonstrate attainment because fuel combustion will nonetheless increase NOx generation and therefore ozone concentrations.

Second, some existing natural gas EGUs have previously accepted restrictions on operating hours in their permits to demonstrate the facilities' lack of contribution to nonattainment. Some of these facilities may need to increase operating hours to meet energy demand in the future. Such facilities would be required to undergo New Source Review and to demonstrate offsets for consequent pollution increases. In an ozone nonattainment area, presently projected to be most of the state with the proposed standards, finding offsets will prove to be more than difficult.

Third, new natural gas EGU "peaker" plants will likely be necessary to satisfy energy demand and meet re-dispatch goals because Arizona does not currently have the capacity it needs to retire all coal by 2020. New plants will have to find offsets somewhere, and

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[49] *Id.* at 75386.

[50] REGULATORY IMPACT ANALYSIS at ES-2 ("The 2025 baseline reflects, among other existing regulations, the Mercury and Air Toxics Standard, the Clean Air Interstate Rule, the Tier 3 Motor Vehicle Emission and Fuel Standards, and adjustments for the Clean Power Plan, all of which will help many areas move toward attainment of the existing ozone standard...").

again, it's unclear where offsets may be found in Arizona if so much of the state is designated nonattainment.

While these effects are indirect impacts of the new ozone standards in combination with other regulations, together the regulatory agendas pose complex problems for energy production and distribution, contrary to EPA's conclusion in the proposed revision.

Thank you again for the opportunity to comment on the proposed ozone standards. ADEQ strives to continue to meaningfully partner with the EPA. We look forward to future progress in the cooperative effort to further our mutual goals.

Sincerely,

Eric C. Massey
Director of Air Quality
Arizona Department of Environmental Quality

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Arizona Chapter Associated General Contractors

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March 13, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
Attn: Docket ID No. EPA-HQ-OAR-2008-0699

Dear Administrator McCarthy:

As an association representing some of the many businesses, both large and small that employ millions of Americans, the Arizona Chapter, Associated General Contractors of America (AZAGC) is deeply concerned about the harmful impact that the Environmental Protection Agency's (EPA) recently proposed rule to make ozone standards more stringent could have on the still struggling economy. Ozone standards at the levels considered in EPA's proposal could push virtually the entire country into "non-attainment" – where local communities face burdens to commercial and industrial activity not only vital to creating jobs, but also to providing tax revenue that support important local services like public safety and education. This proposal's hardship to the American worker is real and immediate, while the benefits are unverified and uncertain. Therefore, AZAGC strongly urges you to retain the current ozone standard when finalizing this proposal.

We all value clean air. The managers and employees of the companies we represent as well as their families all breathe the same air. We are proud that ozone forming emissions have been cut in half since 1980, leading to a 33% drop in ozone concentrations. Moreover, EPA just updated ozone standards six years ago. These current standards are behind schedule due to EPA effectively suspending their implementation from 2010 – 2012 while the Agency unsuccessfully pursued reconsideration. This country can expect to see event greater reductions in ground-level ozone as states make up lost ground in putting the current standards into effect.

Indeed states are currently committing substantial resources – both in time and money towards achieving emission reductions under those current ozone standards. Yet despite over three decades of cleaner air and before states can catch up with EPA's delays in implementing existing ozone standards, EPA is now proposing a new stringent range of standards from 70 to 65 parts per billion that would bring vast swaths of the country into non-attainment. In some areas, this proposed range is at or near the level of background ozone that is naturally occurring or internationally transported, pushing even remote counties far from industrial activity into non-attainment. According to EPA's own data, even the pristine Grand Canyon and Yellowstone National Parks would fail the proposed ozone standards.

If finalized, EPA's proposed stringent ozone standards could limit business expansion in nearly every populated region of the United States and impairs the ability of U.S. companies to create new jobs. EPA's proposed range would immediately add red tape to companies seeking to grow even in areas that can attain those standards. The Clean Air Act (CAA) carries even stiffer consequences for non-attainment areas, directly impacting economic vitality of local communities and making it difficult to attract and develop new business. Increased costs associated with restrictive and expensive permit requirements would likely deter companies from building new facilities in a non-attainment area. This would make America a less attractive place to do business which risks shipping more jobs overseas.

Companies building a new facility or performing major modifications to certain existing facilities resulting in increased ozone concentrations in, or near, a non-attainment area will be required to meet the most stringent CAA standard by installing the most effective emission reduction technology regardless of cost. As well, states are mandated to offset any ozone-forming emissions from new projects or projects undergoing major modifications by reducing emissions from other existing sources in a non-attainment area.

If no party is willing to provide offsets, then the project cannot go forward. This offset can be a 2-to-1 ratio in certain situations. Non-attainment designations have also profound impact on infrastructure development vital to the business community.

Beginning one year from the date of the non-attainment area designation, federally supported highway and transit projects cannot proceed in a non-attainment area unless the state can demonstrate that the project will cause no increase in ozone emissions. *Arizona will be crippled as a state as will the heavy civil construction companies, its suppliers and other ancillary employers that build this infrastructure. The current program administered by the Arizona Department of Transportation is all federally funded dollars. This would be devastating to Arizona's economy hit hard from the recession; **Arizona's construction wages are ranked 4% higher than most private sector jobs in the state.***

These restrictions do not disappear when an area finally comes into attainment. Instead, former non-attainment areas face a legacy of EPA regulatory oversight. Before a non-attainment area can be redesignated to attainment, EPA must receive and approve an enforceable maintenance plan for the area that specifies measures providing continued maintenance of ozone standards and contingency measures to be implemented promptly if an ozone standard is violated.

Against these economic consequences, scientific uncertainties regarding the benefits of more stringent ozone standards have increased. Indeed, stringent ozone standards may have severe unintended consequences for public health. Studies show that by increasing the costs of goods and services such as energy, and decreasing disposable incomes, regulation can inadvertently harm the socio-economic status of individuals and, thereby, contribute to poor health and premature death. As a representative of businesses employing needed jobs in our community, AZAGC believes these scientific uncertainties should be better explored in order to best allocate resources in a manner that strengthens both the economy and the environment.

The air is getting cleaner, and current ozone standards need an opportunity to work. Therefore, in light of the economic hardship, reduction in funding for crucial civic services, and uncertain benefits all related to stringent ozone standards that EPA is now considering, the Arizona Chapter, Associated General Contractors of America; calls on the EPA to retain the existing ozone standards in the final rule of *75 parts per billion*.

Sincerely,

Amanda McGennis

Amanda McGennis
Sr. Vice President

ALAN L. LANDES, President
CHARLES L. GRECO, Senior Vice President
MARK KNIGHT, Vice President
ERIC L. WILSON, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
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March 16, 2015

U.S. Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

**Attention Docket ID No. EPA-HQ-OAR-2008-0699**

**RE: AGC's Comments on EPA's National Ambient Air Quality Standards for Ozone**

Dear Sir or Madam:

The Associated General Contractors of America (AGC) provides the following comments on the U.S. Environmental Protection Agency's (EPA) proposed rule that would reduce the level of the National Ambient Air Quality Standards (NAAQS) for ground-level ozone. The proposal would greatly increase the stringency of the ozone NAAQS at a time when implementation of the current 2008 NAAQS is still underway and despite key uncertainties in the underlying science. There is strong data that casts doubt on whether lowering ozone levels beyond the current standards will have any significant health benefit. AGC is interested in this rulemaking because a "nonattainment" designation under the Clean Air Act (CAA) may result in construction bans in geographic areas so designated by EPA, which would have a negative effect on employment, gross domestic product, manufacturing shipments, the completion of critical infrastructure projects, and the delivery of important public services. AGC's membership is deeply concerned about the harmful impact that EPA's proposal to make the ozone NAAQS more stringent could have on the still struggling economy.

AGC recommends that EPA retain the currently protective primary and secondary NAAQS for ozone, which are set at 75 parts per billion (ppb). There are no compelling data to warrant stricter standards. AGC appreciates that EPA heeded the call from citizens, lawmakers and the businesses community alike to accept comment on maintaining the current ozone NAAQS. Through ongoing efforts across many industry sectors, including the construction industry, air quality continues to improve across the country. Many AGC members have proactively supported voluntary measures for reducing emissions of ozone precursors (and other NAAQS pollutants) from their diesel equipment.[1] Since 1980, emissions of ozone precursors have been cut in half and the ozone concentrations are down by 33 percent.

[1] AGC has worked side-by-side with EPA in advancing every major federal, voluntary "clean diesel" initiative intended to improve air quality and simultaneously protect the construction industry from serious disruption. These initiatives have sought (1) to identify appropriate incentives for the retrofit of diesel equipment, (2) to secure federal funding for diesel retrofit, (3) to inform AGC Chapters and fleet owners that they may qualify for government grants to retrofit existing fleets of construction equipment, and (4) to enact a federal tax incentive for diesel retrofit.

AGC is the leading association for the construction industry. AGC represents more than 26,500 firms, including more than 6,500 general contractors, approximately 8,800 specialty-contracting firms and more than 10,800 suppliers of equipment, materials and services. Members belong to AGC through 94 state and local chapters that blanket the country from Alaska to Puerto Rico and Maine to San Diego. AGC's members build highways, bridges, tunnels, airport runways and terminals, buildings, factories, warehouses, shopping centers, and both water and wastewater treatment facilities.

A large portion of the U.S. will not meet EPA's proposed range, resulting in non-compliance or nonattainment. If EPA lowers the current 75 ppb NAAQS to the most restrictive end of the proposed range of 60 ppb, the number of counties being designated in nonattainment would almost triple. EPA maps[2] show that 358 counties would violate a 70 ppb standard, based on 2011-2013 monitoring data. An additional 200 counties would violate a 65 ppb standard, raising the total to 558 counties.

In the fall of 2011, the Obama Administration halted a similar EPA proposal to tighten the ozone NAAQS, stating the need to minimize regulatory costs and burdens on the economy. At that time, the Obama Administration affirmed that the current standards issued in 2008 were adequately protective of human health and the environment and that EPA's proposal was going too far with too little benefit. AGC believes that remains the case today. Unfortunately, the current standards are behind schedule due to EPA effectively suspending their implementation from 2010-2012 while the agency unsuccessfully pursued reconsideration. This country can expect to see even greater reductions in ground-level ozone as states make up lost ground in putting the current standards into effect.

AGC is concerned that EPA's continual push over recent decades to reset the ozone NAAQS at lower and lower levels is approaching a point where the gap between EPA's allowable concentrations of ozone and irreducible background levels will be dramatically narrowed. In fact, the lower ozone concentration ranges being considered in EPA's proposal would be at or below the naturally occurring ozone levels in many rural areas — particularly in the Western part of the country.

Consequences of Nonattainment Designation

AGC contractors will be impacted by the agency's proposed rule in many direct and indirect ways. New nonattainment area designations will hurt both large and small businesses and prevent expansion and growth in many urban, suburban, and rural counties.

There are significant adverse consequences in a state that has areas designated as nonattainment. Businesses and industries would incur increased costs, permitting delays and restrictions on expansion, forcing to them to either impose higher prices on their customers or relocate out of the nonattainment area, taking much-needed revenue from the state. In the case of construction, equipment owners may face restrictions on the use and/or operation of their off-road diesels. Other serious repercussions include *potential* federal sanctions, including emissions caps

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[2] *See* http://www.epa.gov/groundlevelozone/maps.html.

limiting economic development and the loss of federal highway transportation dollars, for any state that fails to develop a suitable State Implementation Plan (SIP) (or to meet EPA's CAA deadlines). In addition, federally-supported highway and transit projects may be halted in a nonattainment area if the state cannot demonstrate that the project will conform to a SIP. States are struggling to balance existing priorities with limited and ever tightening budgets and cannot afford to divert finite resources from job creation and economic development. The lack of readily accessible funding to implement a new, tighter ozone standard would divert funds from other programs.

AGC maintains that restrictions on the use and operation of diesel equipment and the loss of highway funds are, in essence, construction bans. Leaving projects incomplete has consequences far beyond the impacts to the project itself, as the owner and users are deprived of the direct benefits of that project. In addition, because construction is a major contributor to employment, Gross Domestic Product (GDP) and manufacturing, the effects reverberate through the larger economy. Construction also is vital to restoring our nation's aging infrastructure and delivering important public services.

These are just a few examples of how the implementation of more stringent ozone NAAQS could impact AGC contractors. The following comments outline some of AGC's specific concerns related to the proposed rule.

EPA Proposal

EPA has proposed setting a more stringent primary and secondary NAAQS for ozone to somewhere within the range of 65 ppb to 70 ppb.[3] EPA is also accepting comments on either retaining the current standard or setting an even lower standard of 60 ppb, which was suggested by the Clean Air Scientific Advisory Committee.

EPA, which is required to review its NAAQS once every five years, is under an Oct. 1, 2015, court-ordered deadline to decide whether to revise or retain the current ozone standards.

Currently, all or portions of more than 200 counties across the country[4] are in nonattainment with EPA's 75 ppb NAAQS, and those areas include more than one-third of the total U.S. population. EPA has evaluated[5] which counties with air monitoring equipment in place would violate this new proposal, and it projects that 358 counties would violate a 70 ppb standard, and 558 counties would violate a 65 ppb standard.

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[3] 79 *Fed. Reg.* 75234, Dec. 17, 2014. There are two ozone NAAQS addressed in the proposed rule: a primary NAAQS, meant to protect "public health," and a secondary NAAQS, meant to protect "public welfare," and the NAAQS must be set with an "adequate margin of safety." EPA's proposed standard of between 65 ppb and 70 ppb would apply to both the primary and secondary standards.

[4] *See* http://www.epa.gov/airquality/greenbook/hnsum.html.

[5] *See* http://www.epa.gov/groundlevelozone/pdfs/20141126-20112013datatable.pdf.

Implementation of 2008 Standards Still Underway

EPA should not move ahead with new ozone standards before the country has met the current ones. AGC strongly urges EPA to help counties currently in nonattainment with the existing 75 ppb NAAQS meet the primary and secondary standards before tightening them even further. Further, reducing the ozone NAAQS at this time would force states back to the drawing board to develop new SIPs to implement an even more stringent standard.

EPA last revised the ozone NAAQS in March 2008 when it lowered both the primary and secondary standards from 80 ppb to 75 ppb. Due to litigation- and administrative-based delays, states are still struggling with implementation of the 2008 standards. On Oct. 6, 2014, the U.S. Supreme Court denied an industry group's petition that sought to declare EPA's 2008 ozone rule too strict.[6] Under a different court ruling, EPA must decide by October 2015, whether to revise or retain the current 2008 NAAQS.

Although EPA revised the ozone standards seven years ago, the agency just signed a final rule on Feb. 13, 2015, to aid states in implementing the 2008 ozone NAAQS.[7] The rule includes various requirements for nonattainment area SIPs, including new attainment deadlines and requirements for how states must demonstrate attainment with the NAAQS. It also provides states with guidance on New Source Review permitting, revokes the 1997 ozone standards for all purposes and sets anti-backsliding measures for areas that still do not meet the 1997 ozone standards. EPA has been criticized over the past year by members of Congress, state regulators and industry groups for how long it has taken the agency to develop an implementation rule for the ozone standards.

Additionally, environmental groups (joined by several states) are pursuing legal action[8] because EPA has failed to meet deadlines laid out under the CAA to approve or disapprove 21 states' plans to meet the 2008 ozone NAAQS. In a proposed partial consent decree[9] filed with the U.S. District Court for the Northern District of California on Jan. 21, EPA has agreed with the Sierra Club on a set of proposed deadlines in 2015 and 2016 for acting on 24 SIPs for controlling ozone. The states are Alabama, Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah and West Virginia. The Sierra Club's lawsuit also alleges the EPA failed to find that another state, Tennessee, has not submitted a SIP for the 2008 ozone NAAQS. The court is currently considering that issue.

A newly revised standard will hamper states' ongoing efforts to comply with the existing ozone standards. The lack of an implementation rule for the 2008 ozone standards has been cited by many industry groups that are urging the EPA to give states and businesses more time to implement the current standards before revising them.

If EPA issues a final revision, states will have the primary responsibility for implementing the revisions. States will have one year to propose designation of areas as attainment, unclassifiable, or nonattainment — based on

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[6] The case is *Utility Air Regulatory Group v. U.S. Environmental Protection Agency* et al., case number 13-1235, in the U.S. Supreme Court.
[7] A pre-publication version is on EPA's website at http://www.epa.gov/air/ozonepollution/pdfs/20150213fr.pdf.
[8] *Sierra Club v. McCarthy,* N.D. Cal., No. 4:14-cv-03198, *consent decree filed* Jan. 21, 2015.
[9] 80 *Fed. Reg.* 6513, Feb. 5, 2015.

2013-2015 air data. States must then prepare SIPs that explain how they will attain the NAAQS in nonattainment areas.

Adverse Impacts of the Proposal on Construction and the Economy

AGC strongly disagrees with EPA's findings that the proposed action has no significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, that it does not contain unfunded mandates or federalism implications, and that it will have no effect on energy production.

AGC maintains that EPA has not adequately accounted for the real-world economic impacts and burdens the ozone NAAQS proposal would impose on state and local governments, businesses and American consumers. While the U.S. Supreme Court has held that EPA does not consider costs in setting the appropriate level for the NAAQS, this does not absolve EPA from all consideration of adverse impacts.[10] EPA's Regulatory Impact Analysis[11] of the proposed rule estimates the costs of a 70 ppb standard to be $3.9 billion, the costs of a 65 ppb standard to be $15 billion, and the costs of a 60 ppb standard to be $39 billion. Industry experts say the costs would be far higher than $15 billion annually. A February 2015 NERA Economic Consulting study commissioned by the National Association of Manufacturers[12] finds that a new ozone standard of 65 ppb could cost the economy $140 billion per year and place over one million jobs at risk. This would be the most expensive regulation ever imposed on the American public.

These costs are critical. Three years after the rule is promulgated, states must submit their SIPs to EPA detailing how they will comply with the new regulation. States can only succeed by adopting legally-enforceable emission control measures: Those measures will impose real costs and burdens on all entities, large and small — as explained more fully below.[13] Per EPA's proposal: "States are to develop and maintain an air quality management infrastructure that includes enforceable emission limitations, a permitting program, an ambient monitoring program, an enforcement program, air quality modeling capabilities, and adequate personnel, resources, and legal authority."[14]

AGC disagrees with EPA's finding that this action does not contain an unfunded mandate as described in the Unfunded Mandates Reform Act (UMRA)[15] and does not significantly or uniquely affect small governments.

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[10] *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001). As Justice Breyer explained, EPA may take into account contextual factors when determining the levels that are requisite to protect public health with an adequate margin of safety. *Id.* at 495 (Breyer, J. concurring) (The Clean Air Act allows EPA "to take account of context when determining the acceptability of small risks to health.").

[11] *See* http://www.epa.gov/airquality/ozonepollution/pdfs/20141125ria.pdf. EPA writes in its proposed regulation at page 75238 that its "task is to establish standards that are neither more nor less stringent than necessary for these purposes. In so doing, the EPA *may not consider* the costs of implementing the standards" (italics added). EPA all but discredits its 575-page Regulatory Impact Analysis, stating on page 543: "Accordingly, although an RIA has been prepared, the results of the RIA have not been considered in issuing this proposed rule."

[12] *See* http://www.nam.org/Special/Media-Campaign/EPA-Overregulation/Ozone-Regulations.aspx.

[13] CAA Section 110(a)(2)(C) requires SIPs to include enforcement and regulation programs "as necessary ***to assure that [NAAQS] are achieved***" (emphasis added).

[14] 79 *Fed. Reg.* 75373 (Dec. 14, 2014).

[15] *See* 2 U. S. C. 1531–1538.

The requirements are certainly mandates, and states will not be given funding to put them into place. Similarly, EPA has incorrectly determined that this action does not have federalism implications (*i.e.*, 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). AGC maintains that the proposal affects federalism because states are not free to opt out.

EPA also finds that this action is not a "significant energy action" because "it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. ... Such strategies will be developed by states on a case-by-case basis, and the EPA cannot predict whether the control options selected by states will include regulations on energy suppliers, distributors, or users." But the only way that states will succeed is by reducing production of fossil fuels, which produces most of their energy, and/or restricting energy users (*i.e.*, limiting growth).

AGC strongly maintains that EPA must consider the adverse impacts that would result from its proposal in order to assess what level in the continuum of exposures/effects is "requisite" to protect public health and welfare.[16] In proposing to revise the ozone standard level, EPA has not analyzed or accounted for the significant adverse social, economic, and energy effects that may occur if EPA's proposed revisions to the ozone NAAQS were adopted. Below are some of the likely impacts on the construction industry. These effects would ripple through the entire economy as construction creates jobs not only for construction workers but also *indirectly* from supplying construction materials and services and *induces* an even greater number of jobs when workers and owners in construction and supplier businesses spend their additional wages and profits, locally and nationwide.

*Restrictions on Equipment Use*

As EPA continues to tighten the ozone NAAQS, states are challenged to find ways to further reduce ozone, and related precursor, emissions from mobile sources. In geographic areas that do not meet EPA's ozone standards, states may attempt to directly impose requirements through their SIPs on the users of diesel engines to reduce emissions from the existing fleet of construction equipment. Although the CAA generally reserves for the federal government the authority to set emissions standards for either new or old engines in off-road construction equipment (a concept called federal preemption), some states have attempted (or currently are attempting) to include provisions in their SIPs that appear to violate this statutory prohibition—such as operating restrictions on the use of construction equipment; requirements to retire or replace older diesel equipment; or mandates (via contract specifications or bid preferences) to retrofit older off-road engines. Restrictions on the use and operation of diesel equipment are, in essence, construction bans.

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[16] As the National Association of Manufacturers and other commenters have pointed out, NAAQS are not intended to eliminate all risk. As the U.S. Supreme Court has explained, "requisite to protect" means "not lower or higher than is necessary." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 476 (2001). Thus, in setting NAAQS, EPA must determine the levels of a pollutant that are "sufficient, but not more than necessary" to protect the public health and welfare. *Id.* at 473 (internal quotation marks omitted). As noted by Justice Breyer in *Whitman*, Section 109 "does not require the EPA to eliminate every health risk, however slight, at any economic cost, however great." *Id.* at 494 (Breyer, J., concurring). The D.C. Circuit recently confirmed that setting primary NAAQS may require a contextual assessment such as described by Justice Breyer. *Mississippi v. EPA*, 744 F. 3d 1334, 1343 (D.C. Cir. 2013).

*Loss of Federal Highway Funding*

It also becomes even more difficult to build new roads or other transportation projects in areas that are designated as nonattainment. Nonattainment areas are subject to "Transportation Conformity."[17] This conformity analysis requires extensive transportation and air quality coordination and computer modeling to ensure transportation projects do not affect the area's ability to regain and/or maintain attainment. Transportation conformity requirements are time-consuming, costly and include establishing a mobile emissions "budget" from which to determine the impact transportation projects, once implemented, would have on regional air quality. In nonattainment areas, transportation projects can proceed only if it can be demonstrated that they will not result in increased emissions. Such construction bans would delay the renovation and improvement of public infrastructure, including highway and transit construction projects, and bridge construction and repairs.

What is more, states that fail to develop suitable SIPs (or to meet EPA's CAA deadlines) could be subject to numerous federal sanctions, including the statewide loss of federal highway transportation dollars and emissions caps limiting economic development.

The United States currently faces "a significant backlog of overdue maintenance across [its] infrastructure system" and "a pressing need for modernization."[18] The suspension or restriction for these projects could result in intolerable delays to the renovation and improvement of public infrastructure, including highway and transit construction projects, bridge construction and repairs, and dam repairs. The Federal Highway Administration estimates that $170 billion in capital investment per year is needed to significantly improve conditions and performance; the current level of investment is approximately half of that number. One in nine of the nation's bridges are rated as structurally deficient[19] — and 15 states have had their number of structurally deficient bridges increase since 2011. In addition, there are 14,000 high-hazard dams, and 4,000 deficient dams, in the U.S. Even a temporary freeze on new highway construction could prevent states from "obligating" their federal highway funds, which could, in turn, result in a loss of those federal dollars. The long-term impacts of losing federal funding would have substantial impacts on the states' ability to keep highways safe, prevent accidental deaths and injuries, and reduce traffic-related congestion.

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[17] Under the CAA transportation conformity provisions, federal departments and agencies may not approve, permit or provide financial support to most highway and transit projects in areas that have not attained air quality standards, unless such projects conform with the state's SIP. "Conformity" means transportation activities will not cause new air quality violations, worsen existing violations or delay timely attainment of air quality standards in polluted areas. Failure to demonstrate conformity results in a "conformity lapse," which renders the area's transportation program and plans invalid. Only certain types of projects can advance during a conformity lapse (*e.g.*, safety projects and transportation control measures).

[18] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013). The report thoroughly documents the condition of the nation's water, transportation, energy and public infrastructure. Cumulatively, ASCE's 2013 report gave the nation's infrastructure a "D+"— signaling a need to substantially increase public investment in a wide range of infrastructure.

[19] "Structurally deficient" – Bridges require significant maintenance, rehabilitation, or replacement.

Disruptions that delay highway construction projects could delay numerous safety-related projects, resulting in increased potential for injuries and fatalities to the traveling public.[20] Although fatalities have been decreasing, one-third of traffic deaths each year can be attributed to road conditions, *i.e.*, inadequate road infrastructure where reducing obstructions, adding medians, widened lanes and shoulders would improve conditions.[21]

The delay of much needed repairs and investments to our roadways and transportation infrastructure will only exasperate air quality concerns. Highway improvement projects improve traffic flows and reduce congestion, which decreases air pollution associated with idling. These efforts can be successful, although still a serious problem, traffic congestion is down slightly. Forty-two percent of America's major urban highways remain congested (down from 45 percent in 2008).[22] Congestion wasted 2.8 billion gallons of fuel in 2007—approximately three week's worth of gas for every traveler[23]—and 1.9 billion gallons in 2010.[24]

*Public Health and Welfare Impacts*

Any tightening of the ozone NAAQS could result in construction bans that would impede projects that are vital to improving municipal water supplies and wastewater treatment facilities located throughout the nation. While drinking water quality remains good, the water infrastructure is aging rapidly. Leaking pipes alone are responsible for billions of gallons of lost water every day.[25] There are an estimated 240,000 water main breaks each year, and 75 percent of drinking water capital needs are to repair pipes.[26] According to one source, "Investment needs for buried drinking water infrastructure total more than $1 trillion nationwide over the next 25 years."[27] In addition, the nation's nearly 15,000 wastewater systems face enormous needs. Wastewater and stormwater infrastructure systems require roughly $298 billion of investment over the next twenty years.[28] Some sewer systems are 100 years old and many treatment facilities are past their recommended life expectancy. In many parts of the country, wet weather events regularly lead to overflowing systems that release waste and chemicals into the environment—damaging aquatic ecosystems and causing human illness. Threats to the nation's water resources investments caused by construction bans would only work against EPA's complementary goals of improving water quality.

Approximately 14 million people live or work behind the 14,700 miles of levees in the National Levee Database; however, the reliability of the nation's massive levee system, which increasingly protects developed communities, is essentially unknown. It is also not clear how much investment is needed to maintain these important systems;

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[20] *See Traffic Safety Facts*, U.S. Department of Transportation ("DOT"), National Highway Traffic Safety Administration, 2000 and 2001.
[21] *Id. See also* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[22] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[23] Texas Transportation Institute, Texas A&M University, 2009 Urban Mobility Report, July 2009.
[24] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[25] The 2009 Report Card for America's Infrastructure estimates 7 billion gallons of water lost per day due to leaking pipes. http://www.infrastructurereportcard.org/fact-sheet/drinking-water.
[26] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).
[27] *See* American Water Works Association, Buried No Longer, February 2012; report available at http://www.awwa.org/Portals/0/files/legreg/documents/BuriedNoLonger.pdf.
[28] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013).

although one estimate comes in at approximately $100 billion. Reports attribute levees to preventing "more than $141 billion in flood damages in 2011."[29]

*Restrictions on New 'Major' Stationary Sources & Major Modifications to Existing Ones*

Once an area is designated as nonattainment, there is essentially a ban on the construction of new industrial or manufacturing facilities in this area, and it becomes very difficult even to expand existing facilities. This happens immediately because of restrictive permitting requirements under the CAA New Source Review (NSR) Program that are applied in nonattainment areas.

Companies interested in building a major manufacturing plant, for example, will likely not build in a nonattainment area due to the increased costs, delays, and uncertainties associated with the restrictive permit requirements.[30] Specifically, nonattainment areas face mandatory emissions offsetting; prior to permitting the construction of new facilities, a state must offset any emissions increases by achieving reductions at existing facilities. If no party is willing to provide offsets, then the project cannot go forward. In addition, new and upgraded facilities in, or near, nonattainment areas are required to install the most effective emissions reduction controls, without consideration of cost. (Less stringent controls may be installed in attainment areas.) Since operators of existing facilities may be required to install more restrictive control technologies than are otherwise required for similar units in areas that are in attainment, businesses may opt to build elsewhere or not at all.

These restrictions do not disappear when an area finally comes into attainment. Instead, former nonattainment areas face a legacy of EPA regulatory oversight. Before a nonattainment area can be redesignated to attainment, EPA must receive and approve an enforceable maintenance plan for the area that specifies measures providing continued maintenance of ozone standards and contingency measures to be implemented promptly if an ozone standard is violated.

New Source Review Permit Applications

As explained above, the proposed rule would increase costs and create new regulatory hurdles for businesses that require new or modified air permits to expand their facilities. EPA is accepting comments on a potential grandfathering provision for sources with pending NSR permit applications.

The issue of how EPA treats NSR review permit applications that are being considered during implementation of a final standard is critical to AGC. It has direct bearing on the construction of new industrial or manufacturing facilities in nonattainment areas and the update or expansion of existing facilities. AGC strongly urges EPA to

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[29] *Id.*

[30] If an area is in attainment for a given NAAQS, a major source that commences construction or undergoes a major modification must obtain a Prevention of Significant Deterioration (PSD) permit based on Best Available Control Technology (BACT) and must demonstrate that its emissions will not cause any area to exceed the NAAQS. In contrast, if an area is in nonattainment, a major source must obtain a nonattainment New Source Review permit based on a more stringent Lowest Achievable Emission Rate (LAER). In addition, a source in a nonattainment area must obtain emissions reductions "offsets" from other sources.

add a provision to its regulations that would grandfather certain NSR permit applications that are pending on the effective date of the revised ozone NAAQS, which would allow those applications to be evaluated under the current 75 ppb standard.

As a general rule, EPA requires sources to demonstrate that they will not contribute to nonattainment of any NAAQS in effect at the time the PSD permit is issued. EPA's proposed grandfathering provision would allow sources to make the PSD demonstration based on the ozone standard that was in effect (1) when the reviewing authority deemed the PSD permit application complete or (2) when public notice of the draft PSD permit was first published. AGC supports this approach.

AGC also supports EPA's plan to propose a new rulemaking in the spring of 2015 wherein EPA would consider whether to update existing regulations that describe how a source seeking a PSD permit must demonstrate that it will not cause or contribute to a violation of any NAAQS or PSD increment. Such a proposal could provide additional guidance to sources in the PSD permitting process that are impacted by the revised NAAQS.

The Economic Impact of Construction in the United States[31]

The construction industry plays a powerful role in sustaining economic growth and helping the current economic recovery.

Any tightening of the ozone NAAQS could result in construction bans that would have a negative impact on Gross Domestic Product (GDP), as well as a significant loss of jobs by construction workers and of workers who supply a multitude of materials, equipment and services to construction. In addition, construction bans would cut deeply into manufacturing shipments and return that sector into recession.

Construction is a major contributor to employment, GDP and manufacturing. Nonresidential construction spending in the United States totaled an estimated $606 billion in 2014. An extra $1 billion in nonresidential construction spending adds about $3.4 billion to GDP, about $1.1 billion to personal earnings and creates or sustains 28,500 jobs.[32] Two-thirds of those jobs occur outside of construction—in industries ranging from mining and manufacturing to a host of services, locally and across the country.

Overall employment in the construction industry peaked at 7.7 million in April 2006, fell to 5.4 million (down 30 percent) by January 2011 and has recovered only about one-third of the losses since then, reaching 6.3 million in June 2014. This gradual and still-fragile recovery would be severely threatened if EPA chooses to lower the ozone standard.

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[31] Economic data compiled by Ken Simonson, Chief Economist, AGC of America, from Prof. Stephen Fuller, George Mason University, and U.S. government sources.

[32] This breaks down as follows: 9,700 jobs direct construction jobs; 4,600 jobs indirect jobs from supplying construction materials and services; and 14,300 jobs induced when workers and owners in construction and supplier businesses spend their additional wages and profits. The majority of these jobs would be located within the state of investment but there would be some out-of-state jobs supported.

In spite of the recession, construction jobs remain good-paying jobs. In 2013, annual pay of all construction workers in the United States averaged $53,200, which is 7 percent more than the average for all private-sector employees.

Construction also is an important source of orders for U.S. manufacturing. In 2014 U.S. manufacturers shipped $545 billion in construction materials and supplies (9 percent of total factory shipments) and $55 billion in new construction equipment (13 percent of total machinery shipments). A precipitous drop in investment would cut deeply into these shipments and potentially end the recovery that has occurred in recent years in manufacturing employment. Similarly, a loss of federal funding for highway projects would result in significant job losses in industries that supply raw materials, design and other professional services to construction, as well as businesses that depend on purchases by the workers and owners of construction companies and their suppliers.

The United States had more than 600,000 firms in 2012.[33] In that same year, 92 percent of those firms were small businesses employing employed fewer than 20 workers.

Questionable Health Benefits

Against the aforementioned economic consequences, scientific uncertainties regarding the benefits of more stringent ozone standards have increased. EPA's methodology for estimating the economic costs versus benefits of tighter ozone NAAQS is questionable. AGC takes issue with the fact that much of EPA's claimed health benefits under the proposal are derived from "co-benefits" of reducing particulate matter emissions, not from the reduction of ozone (or ozone precursors) itself. AGC also is concerned about the reports that a stricter ozone standard could have a negative impact on public health. More study is needed in this area.

According to an EPA fact sheet,[34] lowering the ozone NAAQS to 70 ppb — down from the current 75 ppb — would deliver benefits valued at between $6.3 billion and $13 billion, but would cost $3.9 billion, creating "net benefits" of between $2.4 billion and $9.1 billion. If the NAAQS were set at 65 ppb, EPA estimates that the costs would jump to $15 billion, but the benefits would also increase to between $19 billion and $38 billion. However, as explained in EPA's Regulatory Impact Analysis (RIA),[35] this gain is not from a reduction in ozone, but from the associated decline in fine particulate matter ($PM_{2.5}$) that will occur due to the ozone regulation. The RIA states that "$PM_{2.5}$ co-benefits account for approximately two-thirds to three-quarters of the estimated benefits, depending on the standard analyzed and on the choice of ozone and PM mortality functions used."

In Table 5-1 of the RIA, EPA divides the benefits into those from ozone reduction and those from particulate matter reduction. The ozone-only benefits are $8.6 billion in 2025, compared with $15 billion in costs. The proposed regulation fails a basic cost-benefit analysis on ozone alone.

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[33] *See* http://censtats.census.gov/cbpnaic/cbpnaic.shtml.
[34] *See* http://www.epa.gov/groundlevelozone/pdfs/20141125fs-numbers.pdf.
[35] *See* ES.2 Results of Benefit-Cost Analysis and Table ES-6.

Currently, EPA thoroughly regulates PM emissions under the 1997 and 2006 fine particulate standards.[36] In December 2012, EPA finalized a rule to require a 20 percent reduction in the amount of $PM_{2.5}$ allowed in outdoor air through the entire country; implementation of that rule remains underway. If the EPA seeks to further regulate PM, it should propose additional standards, and perform a cost-benefit analysis to demonstrate that a tighter standard is necessary to protect the public. Conversely, if it seeks to further regulate ozone, it should clearly depict the associated benefits derived from reducing emissions of that criteria air pollutant. EPA cannot throw in extra benefits from reductions in other substances as a way of convincing the public that the benefits of regulating ozone trump the costs.

EPA should not be double and triple counting these benefits and instead, should recalculate the cost and benefit of the proposed ozone NAAQS based solely on the reduction in ambient ozone concentrations.

EPA claims that the health benefits of lowering the ozone NAAQS are as high as $23 billion. AGC has taken note that this amounts to *a 3,100 percent increase in net benefits EPA claimed in 2011 when it proposed the exact same standard.* In 2011, when the EPA proposed a 70 ppb standard, its median "net benefits" estimate for a 65 ppb standard was only $700 million, with a high possibility that the costs could outweigh any benefits. (Those also included "co-benefits" of reducing particulate matter, or $PM_{2.5}$, meaning the benefits of the ozone reductions alone would be less than what EPA presented.)[37] AGC questions this dramatic change and the health data behind EPA's costly new proposal.

AGC also is concerned about the reports that more stringent NAAQS for ozone could have a negative impact on public health. The EPA cites "asthma attacks" as one of its key health indicators, suggesting that imposing a stricter ozone standard would reduce asthma attacks, and thereby delivering health benefits.[38] But as noted by the Center for Regulatory Solutions,[39] EPA's own documents show that asthma-related mortality could increase in certain areas if ozone levels decrease.

To this end, Dr. Michael Honeycutt, director of the Texas Commission on Environmental Quality (TCEQ) Toxicology Division, observed last year[40] that EPA's own data sets[41] indicate the net result of a tighter ozone standard will be *increased* mortality in some areas, including Houston and Los Angeles.[42] In Houston, adjusting the ozone standard to 70 ppb or 65 ppb would result in 48 or 44 *more* premature deaths, respectively.

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[36] On Apr. 25, 2014, EPA classified as "moderate" nonattainment areas for the 1997 and 2006 fine particle pollution standards and set Dec. 31, 2014 as the deadline for states to submit remaining implementation plan requirements.
[37] The chart that accompanied EPA's 2011 proposal, as part of its final RIA, is online at http://www.epa.gov/groundlevelozone/pdfs/201107_OMBdraft-OzoneRIA.pdf.
[38] Another problem with this association is that **asthma diagnoses** are increasing in the U.S., yet nationwide, air quality is improving - http://www.epa.gov/airtrends/ozone.html.
[39] *See* http://centerforregulatorysolutions.org/fact-of-the-day-asthma-rates-have-increased-while-ozone-levels-have-fallen/.
[40] *See* http://www.tceq.state.tx.us/publications/pd/020/2014/will-epas-proposed-new-ozone-standards-provide-measurable-health-benefits.
[41] *See* http://www.epa.gov/ttn/naaqs/standards/ozone/data/20140829healthrea79app.pdf.
[42] The EPA's own modeling in its Health Risk and Exposure Assessment (HREA) online at http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_rea.html indicates that lowering ozone concentrations would actually result in more deaths in some cities (Appendix 7, page 7B-2 of the HREA).

Honeycutt's analysis also includes a chart[43] showing the relative health impacts from a variety of outside factors and lifestyle choices. Notably, the health impact from lost employment was far larger than what could potentially be associated with higher ozone levels.

A thorough evaluation of the proposed ozone NAAQS was performed by the TCEQ Toxicology Division, which consists of 10 Ph.D. and 5 master's level scientists. TCEQ has pointed out that only 1 out of 12 studies considered by the EPA showed an association between long-term exposure to ozone and early death (after considering other pollutants). This single study is used by the EPA as evidence that long-term exposure to ozone causes mortality. Interestingly, this study did not show higher mortality in Southern California, where some of the highest ozone levels in the country are measured.

Science Is Lacking

The science developed since the last revision to the ozone standard does not support another revision at this time. Although EPA includes some new studies and analyses in the record, the agency does not appear to incorporate any major new substantive information on the health effects of ozone since its prior decision in 2008 to set the standards at 75 ppb; the difference is largely in interpretation.

The National Association of Manufacturers and other commenters have pointed out that the new scientific information that has become available since the adoption of the current standards is relatively limited and does not provide any fundamental alteration in the understanding of the effects of ozone on public health and welfare. EPA must provide a reasoned explanation for a change in judgment.

New Standard Is Unachievable

If the EPA decides on a stricter standard, many counties, even those with few sources of emissions within their boundaries, will face compliance problems. Some places in the U.S. have background levels of ozone that account for up to 80 percent of total ozone. Background ozone occurs naturally, or is transported from other countries. EPA did not take this into account when drafting its proposal.[44]

Many states, including "clean" Western states, have high "background" levels of naturally-occurring ozone from vegetation, wildfires, and other sources as well as the transport of ozone and ozone precursors from other countries. These states may be unable to meet EPA's proposal even with costly controls. In fact, the proposal is so stringent that the Grand Canyon would fail the proposed 70 ppb standard, and Yellowstone National Park would fail the proposed 65 ppb standard.

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[43] *See* http://www.tceq.state.tx.us/publications/pd/020/2014/will-epas-proposed-new-ozone-standards-provide-measurable-health-benefits.

[44] During the reviews of the EPA staff documents, several commenters pointed out that EPA had still not adequately determined U.S. background (USB), was underestimating USB concentrations, and was still not properly taking into account the impact of USB on projected attainment of the ozone NAAQS.

Revising the ozone NAAQS without appropriately taking these issues into account would ignore a key factor for setting the NAAQS at the requisite level, rendering the NAAQS revision arbitrary and capricious.

Air Quality Is Getting Cleaner

Further reductions in ozone will continue to occur over the next several years as a result of national U.S. EPA requirements that are already on the books but have yet to realize their full environmental benefits. Ambient air quality is getting significantly better even as our economy grows.

According to the EPA's own data, concentrations of ozone already have declined by 33 percent (annual average) between 1980 and 2013.[45] This decline in emissions becomes more remarkable when compared to additional EPA data showing that since 1980, gross domestic product increased by 145 percent, vehicle miles travelled increased by 95 percent, population increased by 39 percent and energy consumption increased by 25 percent.[46]

This continuing improvement indicates that current regulations are having their desired and continued effect.[47]

EPA has also designed and developed national programs that, when fully implemented, will achieve significant reductions in air emissions. Specifically, EPA will continue to implement its rule to make heavy-duty trucks and buses run cleaner. Since model year 2007, pollution from heavy-duty highway vehicles has been cut by more than 90 percent, which EPA projects will reduce nitrogen oxide ($NO_x$) emissions by 2.6 million tons by 2030.[48] In addition, EPA will continue to implement its rule to reduce emissions from off-road diesel equipment, wherein engine manufacturers must reduce diesel exhaust (*e.g.*, $NO_x$) from such machines by more than 90 percent by 2014.[49] EPA estimates this rule will result in an additional reduction of 738,000 tons of $NO_x$ per year, when the fleet of older off-road engines has fully turned over.

The EPA Administrator herself recently pointed to a "long-term trend" of ozone reductions, "as additional emissions reductions are achieved through existing [federal] regulations" already in place. This statement was made in a recent letter and enclosure wherein Administrator McCarthy denied an environmental group's petition that asked EPA to redesignate 57 areas that allegedly do not meet the ozone NAAQS of 75 ppb, based on the most recent air monitoring data (designations were based on 2008-10 monitoring data, the most recent data available at the time). EPA found it "appropriate" to allow more time for the affected areas to address air quality issues. EPA states that nationwide emissions of the ozone precursors are expected to decline significantly: $NO_x$ is expected to decline by 29 percent from 2011 through 2018; and volatile organic compounds (VOCs) are expected to decline by 10 percent from 2011 through 2018.

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[45] *See* http://www.epa.gov/airtrends/pm.html#pmnat and http://www.epa.gov/airtrends/ozone.html.
[46] *See* U.S. EPA, Comparison of Growth Areas and Emissions, 1980-2013, available at: http://www.epa.gov/airtrends/aqtrends.html#comparison.
[47] *See* U.S. EPA, Our Nation's Air, Status and Trends through 2010, p. 12, available at: http://www.epa.gov/airtrends/2011/index.html.
[48] See http://www.epa.gov/otaq/highway-diesel/index.htm.
[49] *See* http://www.epa.gov/nonroad-diesel/2004fr.htm.

Conclusion

AGC is concerned that a significant increase in the number of ozone nonattainment areas as proposed by this rulemaking would put at risk important highway and transit construction projects needed to move goods and people and provide employment. Further, potential restrictions on the use and operation of diesel equipment would leave other important construction projects unbuilt, including bridge construction and repairs, as well as projects that are vital to providing safe drinking water, wastewater and stormwater management, flood control and navigation, health care, and education.

If a rule of this magnitude is to be imposed, then the EPA should have to provide a far more scientifically robust "public health" basis — one that does not rely on what appears to be a dubious inflation of health benefits and a lack of attention to the quantitative and qualitative costs.

Air quality is clean and getting significantly cleaner even as our economy continues to grow. Any tightening of the ozone NAAQS will have significant consequences for many states and localities and will impact their ability to provide for economic growth and opportunity as well as for public health and welfare. AGC urges EPA to retain the existing ozone NAAQS and allow EPA rules currently in place and future actions and voluntary initiatives to achieve ozone attainment.

AGC appreciates the opportunity to comment. Thank you for taking our concerns into account. If you have any questions, please contact me at pilconisl@agc.org or (703) 837-5332.

Sincerely,

Leah Pilconis

Leah F. Pilconis
Senior Environmental Advisor to AGC

ARIZONA
ROCK
PRODUCTS
ASSOCIATION

March 13, 2015

Via Email: A-and-R-Docket@epa.gov

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 28221T
Attention Docket ID No. OAR–2008-0699
1200 Pennsylvania Avenue, NW.
Washington, DC 20460.

Re: **Arizona Rock Products Association Comments**
**Docket ID No. EPA-HQ-OAR-2008-0699**

Dear Administrator McCarthy:

The Arizona Rock Products Association ("ARPA") appreciates the opportunity to provide these comments concerning EPA's proposed National Ambient Air Quality Standards for Ozone (the "Proposed Rule"), published at 79 Fed. Reg. 75,234, December 17, 2014.

ARPA is a trade association that represents the interests of Arizona's sand, gravel, cement, concrete, asphalt, and aggregate industries. ARPA's mission is to promote and preserve the sustainability of the rock products industry through active involvement in the community and regulatory and political processes. In 2010, the Arizona Rock Products Industry created a direct economic impact valued at nearly $1.6 billion with a direct indirect effect of $2.9 billion. The producers of aggregates, stone, cement, asphalt, and ready mix employ over 6,124 employees and supply essential materials to the construction industry that employs an additional 112,577 workers. The Rock Products industry is a significant and dynamic force in Arizona's economy.

***If adopted as proposed, the Rule will have significantly negative economic impacts.***

As explained by many commenters in the private and public sectors, if EPA adopts a new ozone NAAQS within the range set forth in the Proposed Rule, the negative effect on the economy generally and jobs in particular will be substantial. As explained by the National Association of Manufacturers, a 65 ppb standard will reduce gross state product by $7 billion.[1] This will affect job creation and lower tax revenues for education and other public services. In addition, the Environmental Protection Agency's (EPA) new ozone regulation could be the most expensive ever issued on the American public, costing the nation $140 billion annually, according to a new analysis by NERA Economic Consulting.

[1] ARPA fully supports and incorporates the comments and concerns made by the National Association of Manufacturers.

916 West Adams Street • Phoenix, AZ 85007-2732
(602) 271-0346 • Fax (888) 269-0430 • www.azrockproducts.org

This regulation will make it harder to get the necessary permits to manufacture goods and build critical infrastructure like roads and highways in Arizona, while increasing the cost of energy for every business and household in the state. The picture gets even worse in non-attainment areas, manufacturers won't be able to expand without a reduction of emissions or shutdown of operations from other plants in the area. Plans for new plants and expansion at existing plants will be shelved. Federal highway funds could freeze and economic growth could grind to a halt.

***If adopted as proposed, the new standard will overwhelm the NAAQS program.***

ARPA is also concerned about the Proposed Rule's effect on the NAAQS program. The NAAQS program is not perfect by any means, but has resulted in vastly improved air quality across the country since its inception. The Proposed Rule, however, would overwhelm the resources of local, state, and federal regulators, threatening the continued viability of the program. Further, many areas in the Mountain West will be unable to meet a more stringent NAAQS due to natural background and transport from other areas, including international sources. As explained in the comments by the National Mining Association:

> The 60 to 70 ppb range of reasonable ozone levels recommended by CASAC includes levels that are below the peak natural background levels that exist in many parts of the United States, particularly the Intermountain West. As EPA recognizes, the "largest seasonal average values of background ozone are modeled to occur at locations in the intermountain western U.S. and the highest daily USB levels are highest in the spring and early summer seasons." EPA identifies only three of the factors that contribute to elevated ozone levels in these areas: "stratospheric intrusions of ozone, wildfire ozone plumes, [and] long-range transport of ozone from sources outside the U.S." Other contributing factors include high elevation, lightning and biogenic sources. These mostly natural mechanisms are fundamentally distinct from the industrial, photochemical smog-producing mechanisms that have been the focus of previous NAAQS. The most important difference between these two types of ozone sources is that only anthropogenic emissions can be controlled through Clean Air Act mechanisms.

ARPA fully supports and incorporates these comments by the National Mining Association.

The Proposed Rule acknowledges the potential futility of meeting the proposed NAAQS in the high-elevation Mountain West and suggests potential escape valves such as rural transport areas, international transport demonstrations, and exceptional events exclusions. However, given the inherent complexity of ozone formation and the certainty that many areas will be unable to meet any standard within the range set forth in the Proposed Rule, any approach that relies on future exceptions will overwhelm the local, state and federal regulators who must attempt to make and review these demonstrations.

In addition, as explained by the National Mining Association, mining operations present a unique challenge for NAAQS implementation:

Emission sources at mining operations include activities unique to the industry. Notably, the emission inventories at mining operations tend to be dominated by emissions from heavy mobile equipment. As is the case with other mobile equipment, this equipment is regulated under Title II of the CAA. Emissions characteristics of heavy mobile equipment (HME) are, with very few exceptions, inherent to the design of the equipment, as received from the original equipment manufacturer, and are not suited for add on controls. This is a stark contrast between stationary equipment and HME. As such, mining producers are captive to the emission performance of the HME available on the market, as established by EPA and mobile equipment manufacturers pursuant to Title II of the CAA. Rock products producers therefore have extremely limited options to reduce ozone precursor emissions from HME fleets beyond what is available on the market at the time equipment is procured. Furthermore, ARPA members do have specific stationary sources that would be significantly impacted by the proposed ozone NAAQS. These sources include cement plants, hot mix asphalt plants, and generators (all of which have NOx and VOC emissions). The proposed reduction in ozone NAAQS would require significant financial expenditures for additional emissions controls, while having very limited impacts on ozone emissions from these sources.

ARPA urges EPA to acknowledge and address head on the difficulty presented as part of this rulemaking, as it has done in the past when establishing NAAQS, and take into consideration programmatic stability. As the Proposed Rule notes, programmatic stability is a lawful consideration when establishing a NAAQS. 79 Fed. Reg. at 75294, n 123. Careful consideration of programmatic stability is necessary here to save the NAAQS program from collapsing under the weight of countless, expensive and ultimately futile attempts to fit within narrow exemptions for rural transport areas, international transport, or exceptional events.

ARPA also asks the EPA to reconsider ANY changes to the current ozone standard as it would have far reaching and detrimental effects.

Thank you for the opportunity to provide these comments.

Regards,

Steve Trussell

Steve Trussell
Executive Director

# Maricopa County
**Air Quality Department**

**Philip A. McNeely, R.G.**
**Director**
1001 North Central Avenue
Suite #125
Phoenix, Arizona 85004
602-506-6443 – phone
602-372-6440 – fax

March 17, 2015

U.S. Environmental Protection Agency, Region 9
EPA Docket Center (EPA/DC)
Mailcode: 28221T
Attention Docket ID No. EPA-HQ-OAR-2008-0699
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**RE: Proposed National Ambient Air Quality Standards for Ozone**

To Whom It May Concern:

The Maricopa County Air Quality Department (MCAQD) welcomes the opportunity to provide the following comments on the U.S. Environmental Protection Agency's (EPA) proposed *National Ambient Air Quality Standards for Ozone* (NAAQS) published on December 17, 2014 (79 FR 75234). Our review has identified issues we support as well as some areas of concern.

Air Quality Index (AQI)

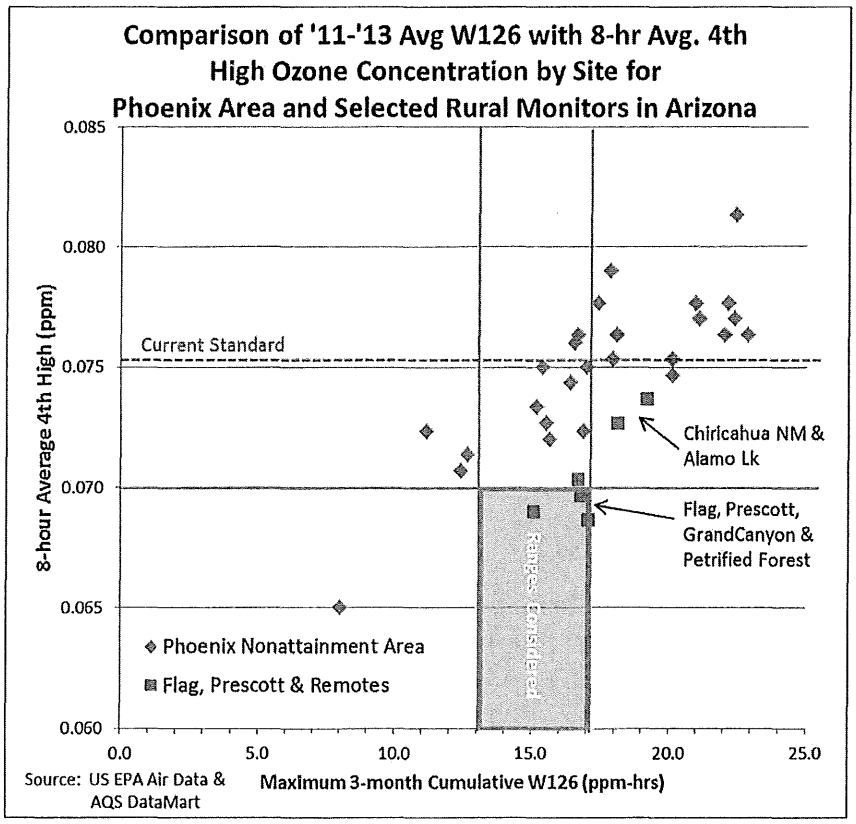
MCAQD welcomes EPA's proposal to revise the AQI at the same time it revises an ozone NAAQS. The AQI is a communication tool to keep the general public informed about local air quality and to make educated decisions about exposures to air pollutants. In the past, the effectiveness of the AQI as a public health tool has been undermined by leaving a period of time when state and local agencies had to predict how EPA would revise the AQI following a revision of the NAAQS in order to provide timely information to the general public.

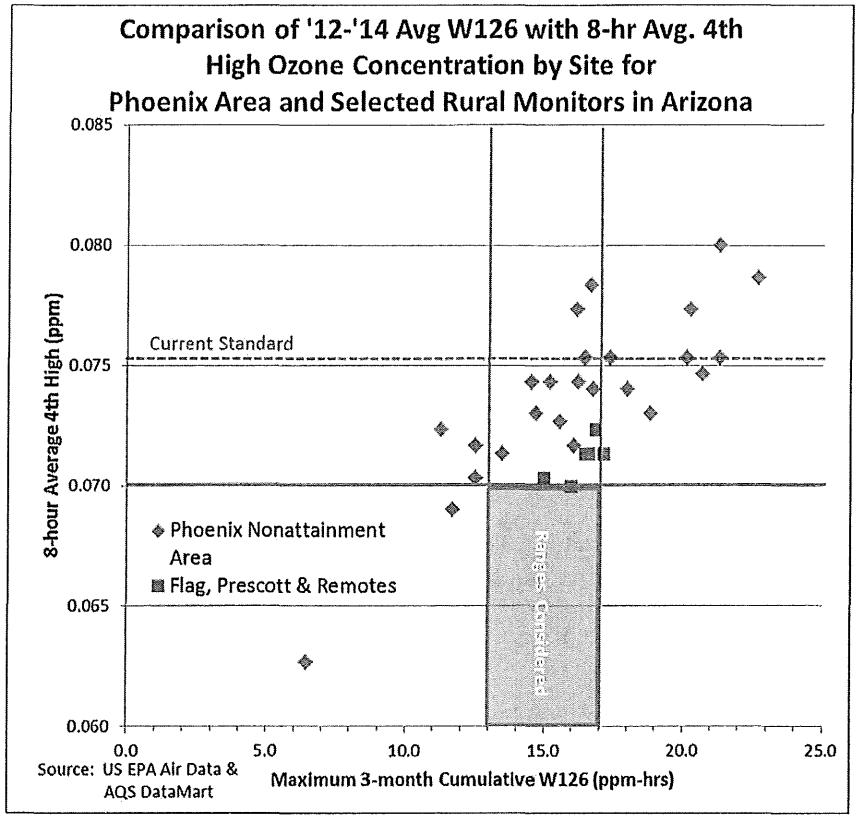
Appendix U: Interpretation of the NAAQS

EPA is proposing to prevent consecutive day, overlapping exceedances with some hours in common through a new procedure for determining daily maximum 8-hour average ozone concentrations for the proposed NAAQS. The new procedure is based on 17 consecutive 8-hour periods in each day, beginning with the 8-hour period from 7:00 a.m. to 3:00 p.m., and ending with the 8-hour period from 11:00 p.m. to 7:00 a.m. The monitoring network for MCAQD's nonattainment area does include non-urban sites located at higher elevations that do experience overlapping daily maximum 8-hour averages. MCAQD supports this proposed change to Appendix U.

Secondary Ozone NAAQS

MCAQD analyzed the data for the Maricopa-Pinal nonattainment area as well as the national parks and monuments where monitors are present and MCAQD agrees with EPA's conclusion that attainment of a more stringent 8-hour average NAAQS will probably achieve substantial and adequate protection of public welfare. While the science supports a cumulative exposure standard for protection vegetation, ultimately, the decision on the right metrics and levels of the NAAQS is a policy decision. However, little or no additional protection of public welfare will be gained by adopting a W126-based secondary standard. Further, the increased stringency of the revised NAAQS will require substantial air quality improvements in the urban areas, which are the primary sources of ozone and ozone precursors for rural areas where the W126 metric may not track as closely with an 8-hour average. The graphs below compare the 3-year averages for W126 with the 4th-high 8-hour average for the Phoenix area network and the most isolated rural monitors in Arizona to illustrate this point.






MCAQD also believes the planning and regulatory requirements for attaining a secondary standard different from a primary standard would be duplicative, more complicated, and, will add a magnitude of difficulty to what is already a very burdensome process. Finally, a high likelihood exists that much of what will be necessary to develop the state implementation plans (SIPs) to attain a new primary standard will require multistate regional analyses, and, as such, will need to address long-range transport. Thus, attainment of a more stringent 8-hour average NAAQS will probably achieve substantial and adequate protection of public welfare. MCAQD prefers EPA's proposal to set the an 8-hour secondary ozone standard to achieve a level of protection equivalent to a W126 index.

Background

Background ozone formed outside Maricopa County jurisdiction becomes a bigger contributor to high ozone concentrations as the ozone NAAQS is lowered. Further, ozone data collected at the Hillside and Alamo Lake ozone monitors operated by Arizona Department of Environmental Quality since 1996 have documented what would be violations of a 0.070 ppm standard for their entire history. Since these monitors are upwind of the Phoenix Nonattainment Area by over 35 miles, Maricopa County believes that these high concentrations are the result of interstate transport of ozone and its precursors. Like other state and local governments, Arizona and Maricopa County will face additional challenges to address a lower standard with significant background contributions that few state or local measures can influence. We recognize that working with other states on regional air quality planning will be critical and plan to continue to

participate. However, EPA has not addressed western ozone transport as comprehensively as eastern ozone transport. MCAQD strongly urges EPA to follow through on their commitment to work with state and local agencies to ensure that background ozone does not create unnecessary control obligations. Timely completion of upcoming regulations and guidance will be crucial as western state and local agencies work together to address significant background contributions from natural sources and interstate transport, as well as international transport. Further, EPA's work on understanding international transport and the work with other countries to reduce long-range transport will be critical for western states and regions.

Timely Implementation Guidance

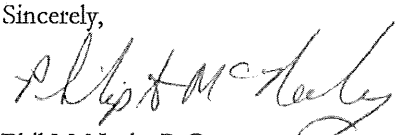
Given the profound impact on the work of state and local air agencies that results from this proposal, MCAQD strongly urges EPA to follow through on proposing the implementation rule for the revised ozone standards at the same time it issues the final revised standards and issuing the final implementation rule within one year following its proposal. For areas that will not meet the 2008 ozone NAAQS, it will be crucial that the rule address transition issues from the 2008 8-hour ozone NAAQS to the 2015 8-hour ozone NAAQS to minimize duplicative work and streamline timelines to the extent possible. We strongly encourage EPA to work in close partnership with state and local air agencies to increase efficiencies in the planning process.

Adopt or Further Strengthen Federal Measures

MCAQD urges EPA to take timely action to adopt, or further, strengthen, federal measures to control a range of emission sources. It will be extremely important that these measures be adopted and implemented in time for the associated emission reductions to contribute to attainment by the specified deadlines. Further, EPA should ensure that state and local governments are able to take credit for federal measures that achieve real emission reductions.

In closing, MCAQD appreciates the opportunity to provide these comments on EPA's proposed National Ambient Air Quality Standards for Ozone. If you have any questions, please contact me at (602) 506-6443 or Jo Crumbaker on my staff at (602) 506-6728. Thank you for your cooperation in this matter.

Sincerely,



Phil McNeely, R.G.
Director

cc: Eric Massey, ADEQ
Lindy Bauer, MAG

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114TH CONGRESS
1ST SESSION

# H. R. 1388

To improve the establishment of any lower ground-level ozone standards, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 2015

Mr. OLSON (for himself, Mr. LATTA, Mr. SHIMKUS, Mr. CUELLAR, Mr. MCKINLEY, Mr. TIPTON, Mr. JONES, Mr. POMPEO, Mr. JOHNSON of Ohio, Mr. MCCLINTOCK, Mr. YOHO, Mr. GOSAR, Mr. FLORES, Mr. BILIRAKIS, Mr. LONG, Mr. SMITH of Texas, Mr. SMITH of Missouri, Mr. HULTGREN, Mr. HENSARLING, Mr. BABIN, Mr. BRIDENSTINE, Mr. BLUM, Mr. DUNCAN of Tennessee, Mr. BARR, Mr. KELLY of Pennsylvania, and Mrs. KIRKPATRICK) introduced the following bill; which was referred to the Committee on Energy and Commerce

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# A BILL

To improve the establishment of any lower ground-level ozone standards, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Clean Air, Strong Economies Act".

**SEC. 2. GROUND-LEVEL OZONE STANDARDS.**

Notwithstanding any other provision of law (including regulations), in promulgating a national primary or secondary ambient air quality standard for ozone, the Administrator of the Environmental Protection Agency—

(1) shall not propose a national primary or secondary ambient air quality standard for ozone that is lower than the standard established under section 50.15 of title 40, Code of Federal Regulations (as in effect on July 2, 2014), until at least 85 percent of the counties that were nonattainment areas under that standard as of July 2, 2014, achieve full compliance with that standard;

(2) shall only consider all or part of a county to be a nonattainment area under the standard on the basis of direct air quality monitoring;

(3) shall take into consideration feasibility and cost; and

(4) shall include in the regulatory impact analysis for the proposed and final rule at least 1 analysis that does not include any calculation of benefits resulting from reducing emissions of any pollutant other than ozone.

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114TH CONGRESS
1ST SESSION

# S. 640

To amend the Clean Air Act to delay the review and revision of the national ambient air quality standards for ozone.

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IN THE SENATE OF THE UNITED STATES

MARCH 3, 2015

Mr. FLAKE (for himself, Mr. MCCAIN, Mr. INHOFE, Mr. WICKER, Mr. CRAPO, Mr. ENZI, Mr. COATS, Mr. LEE, Mr. CORNYN, and Mr. VITTER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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# A BILL

To amend the Clean Air Act to delay the review and revision of the national ambient air quality standards for ozone.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Ozone Regulatory Delay and Extension of Assessment Length Act of 2015" or the "ORDEAL Act of 2015".

**SEC. 2. NATIONAL AMBIENT AIR QUALITY STANDARDS.**

Section 109(d) of the Clean Air Act (42 U.S.C. 7409(d)) is amended—

(1) in paragraph (1)—

(A) in the first sentence, by striking "(d)(1) Not later than December 31, 1980, and at five-year intervals" and inserting the following:

"(d) REVIEW AND REVISION OF CRITERIA AND STANDARDS; INDEPENDENT SCIENTIFIC REVIEW COMMITTEE; APPOINTMENT; ADVISORY FUNCTIONS.—

"(1) REVIEW AND REVISION OF CRITERIA AND STANDARDS.—

"(A) IN GENERAL.—Except as provided in subparagraph (C), not later than December 31, 1980, and at 10-year intervals";

(B) in the second sentence, by striking "The Administrator" and inserting the following:

"(B) EARLY AND FREQUENT REVIEW AND REVISION.—Except with respect to any national ambient air quality standard promulgated under this section for ozone concentrations, the Administrator"; and

(C) by adding at the end the following:

"(C) NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE CONCENTRATIONS.—Not earlier than February 1, 2018, but not

later than December 31, 2018, and at 10-year intervals thereafter, the Administrator shall, with respect to national ambient air quality standards for ozone concentrations—

"(i) complete a thorough review of any standard promulgated under this section; and

"(ii) make revisions to the standards described in clause (i) and promulgate new standards as may be appropriate in accordance with section 108 and subsection (b)."; and

(2) in paragraph (2)(B)—

(A) by striking "(B) Not later than January 1, 1980, and at five-year intervals" and inserting the following:

"(B) REVIEW.—

"(i) IN GENERAL.—Except as provided in clause (ii), not later than January 1, 1980, and at 10-year intervals"; and

(B) by adding at the end the following:

"(ii) NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE CONCENTRATIONS.—Not earlier than February 1, 2018, and at 10-year intervals thereafter,

the committee referred to in subparagraph (A) shall, with respect to national ambient air quality standards for ozone concentrations—

"(I) complete a review of any standard promulgated under this section; and

"(II) recommend to the Administrator any new standard and any revision to the standards described in subclause (I) as may be appropriate under section 108 and subsection (b).".

○