

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[EPA-HQ-OAR-2003-0079, FRL8324-3]

RIN 2060-AO00

**Phase 2 of the Final Rule to Implement the 8-Hour Ozone National Ambient Air
Quality Standard –Notice of Reconsideration**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final notice of reconsideration.

SUMMARY: On December 19, 2006, EPA published, as a proposed rule, a notice of reconsideration for several aspects of the November 29, 2005, Phase 2 of the final rule to implement the 8-hour ozone national ambient air quality standard (NAAQS). These issues relate to nitrogen oxide (NO_x) reasonably available control technology (RACT) for electric generating units (EGUs) in Clean Air Interstate Rule (CAIR) states and to certain new source review (NSR) provisions. The notice of reconsideration was published as a result of a petition for reconsideration which had been submitted by the Natural Resources Defense Council. In this action, EPA summarizes and responds to comments received in response to the notice of reconsideration, and EPA announces its final actions taken in response to these comments.

As a result of this reconsideration process, EPA is changing the deadline for states in the CAIR region to submit EGU NO_x RACT SIPs subpart 2 ozone nonattainment areas classified as moderate and above. EPA is also modifying its guidance on the issue of NO_x RACT for EGUs in CAIR states.

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2003-0079. All documents in the docket are listed in www.regulations.gov. Although listed in the index, some information is not publicly available, i.e., 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 www.regulations.gov or in hard copy at the EPA Docket Center (Air Docket), EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., N.W., Washington, D.C. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT: For further information on the issue relating to NO_x RACT for EGU sources in CAIR States, contact Mr. William L. Johnson, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539-01) Research Triangle Park, NC 27711, phone number 919-541-5245, fax number (919) 541-0824 or by e-mail at johnson.williamL@epa.gov or Mr. John Silvasi, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539-01), Research Triangle Park, NC 27711, phone number (919) 541-5666, fax number (919) 541-0824 or by e-mail at silvasi.john@epa.gov. For further information on the NSR issues discussed in this notice, contact Mr. David Painter, Office of Air Quality Planning and Standards, (C504-03), U.S. EPA, Research Triangle Park, North Carolina 27711,

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

1. Issue on Determination of CAIR/RACT Equivalency for NO_x EGUs

Entities potentially affected by the subject rule for this action include States (typically State air pollution control agencies), and, in some cases, local governments that develop air pollution control rules, in the region affected by the CAIR.¹ The EGUs are also potentially affected by virtue of State action in SIPs that implement provisions resulting from final rulemaking on this action; these sources are in the following groups:

Industry group	SIC ^a	NAICS ^b
Electric Services	492	221111, 221112, 221113, 221119, 221121, 221122

^a Standard Industrial Classification.

^b North American Industry Classification System.

2. NSR Issues

Entities potentially affected by the subject rule for this action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups:

Industry group	SIC ^a	NAICS ^b
Electric Services	492	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	324110

¹ Federal Register of May 12, 2005 (70 FR 25,162).

Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210
Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414

^a Standard Industrial Classification.

^b North American Industry Classification System.

Entities potentially affected by the subject rule for this action also include State, local, and Tribal governments that are delegated authority to implement these regulations.

B. How Is This Notice Organized?

The information presented in this notice is organized as follows:

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 - 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
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II. Background

A. NO_x RACT for EGUs in CAIR states

1. Phase 2 Ozone Implementation Rule

In the Phase 2 Rulemaking to implement the 8-hour ozone NAAQS (Phase 2 Rule), EPA determined that EGU sources complying with rules implementing the CAIR requirements meet ozone NO_x RACT requirements in states where all required CAIR

emissions reductions are achieved from EGUs only.² We noted that the CAIR establishes a region-wide NO_x emissions cap, effective in 2009, at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by that date. In addition, the CAIR's 2015 NO_x cap will eliminate all NO_x emissions from EGUs that are highly cost effective to control. The 2009 cap represents an interim step toward that end. In the Phase 2 Rule, EPA also explained that requiring source-specific RACT controls on EGUs in nonattainment areas would not reduce total NO_x emissions below the levels that would be achieved under CAIR alone and that it could result in more costly emission reductions. For these and other reasons detailed in the Phase 2 Rule, EPA concluded that EGUs subject to the CAIR NO_x controls meet the definition of RACT for NO_x (in all states that obtain all required CAIR NO_x emission reductions from EGU emission reductions). EPA said it was making this finding for all areas in the CAIR region, such that states need not submit RACT analyses for sources subject to CAIR that are in compliance with a FIP or SIP approved as meeting CAIR. EPA noted that a state has discretion to define RACT to require greater emission reductions than specified in EPA guidance and also to require beyond-RACT NO_x reductions from any source it deems reasonable to provide for timely attainment of the ozone standards.

2. Petition for Reconsideration.

² However, EPA also determined that a state that elects to bring its NO_x SIP Call non-EGU sources into the CAIR ozone season trading program could continue to rely on EPA's determination that RACT is met for EGU sources covered by the CAIR trading program. EPA further noted that a state could rely on this determination if and only if the state retained a summer season EGU budget under the CAIR that was at least as restrictive as the EGU budget that was set in the state's NO_x SIP Call SIP.

The EPA received a petition for reconsideration of the final Phase 2 Rule from the NRDC. This petition raised several objections to EPA's determination that, in certain circumstances, EGUs in CAIR states may satisfy the NO_x RACT requirement for ozone if they comply with rules implementing the CAIR. Specifically, NRDC argued that:

- The EPA unlawfully and arbitrarily failed to seek public comment on the final rule's determination that the CAIR satisfies NO_x RACT requirements.
- The EPA's CAIR-RACT determinations are unlawful and arbitrary because EPA's action illegally abrogates the Act's RACT requirements.

The EPA granted NRDC's petition by letter of June 21, 2006.

In a notice of proposed reconsideration dated December 19, 2006, EPA announced the initiation of the reconsideration process and requested additional public comment on the issues raised by the petition. In this notice, EPA also explained and requested comment on the additional technical analyses it conducted to assess the determination that compliance with rules implementing CAIR may satisfy the NO_x RACT requirement for certain EGUs. EPA included in the docket a background document explaining that technical analysis.

B. Submission Date For EGU RACT SIPs for States in CAIR Region

1. Phase 2 Ozone Implementation Rule

The Phase 2 Rule established September 15, 2006 as the deadline for the submission of RACT SIPs for moderate and above subpart 2 areas. EPA explained that, since some states might rely on the submittal of SIP revisions meeting the CAIR (i.e., the CAIR SIP) to also satisfy RACT for some sources, it was extending the submittal date to 27 months after designations to be consistent with the date for submittal of the CAIR

SIPs. For subpart 1 areas requesting an attainment date more than five years after designation, the rule provides that the State shall submit the RACT SIP for each area with its attainment demonstration that requests to extend the attainment date.

2. Petition for Reconsideration

In the notice of proposed reconsideration dated December 19, 2006, EPA proposed to postpone the submission date for the portion of the 8-hour ozone SIP that addresses NO_x RACT for EGUs in the CAIR region pending reconsideration. EPA proposed a new submission date of June 15, 2007 and requested comments on that date.

C. NSR Issues

1. Our previous proposed and final rules

The major NSR provisions in the November 29, 2005 Phase 2 rulemaking were proposed as part of two different regulatory packages. On July 23, 1996 (61 FR 38250), we proposed changes to the major NSR program, including codification of the requirements of part D of title I of the 1990 CAA Amendments for major stationary sources of volatile organic compounds (VOC), NO_x, particulate matter having a nominal aerodynamic diameter less than or equal to 10 microns (PM₁₀), and CO. On June 2, 2003 (68 FR 32802), we proposed a rule to implement the 8-hour ozone NAAQS. In the 2003 action, we proposed a rule to identify the statutory requirements that apply for purposes of developing SIPs under the CAA to implement the 8-hour ozone NAAQS (68 FR 32802). We did not propose specific regulatory language for implementation of NSR under the 8-hour NAAQS. However, we indicated that we intended to revise the nonattainment NSR regulations to be consistent with the rule for implementing the 8-hour ozone NAAQS (68 FR 32844). On April 30, 2004 (69 FR 23951), we published a final

rule that addressed classifications for the 8-hour NAAQS. The April 2004 rule also included the NSR permitting requirements for the 8-hour ozone standard, which necessarily follow from the classification scheme chosen under the terms of subpart 1 and subpart 2.

In 1996, we proposed to revise the regulations limiting offsets from emissions reductions due to shutting down an existing source or curtailing production or operating hours below baseline levels (“shutdowns/curtailments”). We proposed substantive revisions in two alternatives that would ease, under certain circumstances, the existing restrictions on the use of emission reduction credits from source shutdowns and curtailments as offsets.

In 1996, we proposed to revise 40 CFR 52.24 to incorporate changes made by the 1990 CAA Amendments related to the applicability of construction bans (61 FR 38305). To clarify our intent, our proposed 8-hour ozone NAAQS implementation rule in June 2003 explained that section 52.24(k) remained in effect and would be retained. In that action, we also proposed that we would revise section 52.24(k) to reflect the changes in the 1990 CAA Amendments (68 FR 32846). On June 2, 2003 (68 FR 32802), we explained implementation of the major NSR program under the 8-hour ozone NAAQS during the SIP development period, and proposed flexible NSR requirements for areas that expected to attain the 8-hour NAAQS within 3 years after designation.

In the final regulations, we included several revisions to the regulations governing the nonattainment NSR programs mandated by section 110(a)(2)(C) and part D of title I of the CAA. First, we codified requirements added to part D of title I of the CAA in the 1990 Amendments related to permitting of major stationary sources in areas that are

nonattainment for the 8-hour ozone, particulate matter (PM), and carbon monoxide (CO) NAAQS. Second, we revised the criteria for crediting emissions reductions credits from shutdowns and curtailments as offsets. Third, we revised the regulations for permitting of major stationary sources in nonattainment areas in interim periods between designation of new nonattainment areas and EPA's approval of a revised SIP. Also, we changed the regulations that impose a moratorium (ban) prohibiting construction of new or modified major stationary sources in nonattainment areas where the State fails to have an implementation plan meeting all of the requirements of part D.

2. Petition for reconsideration

The NRDC petition for reconsideration raised two objections to the major NSR aspects of the Phase 2 rulemaking:

- Allowing sources to use pre-permit application emission reductions as offsets if they occur “after the last day of the base year for the SIP planning process”; and
- Changes to Section VI of Appendix S, which is the section allowing for waiver of nonattainment major NSR requirements in certain circumstances.

The EPA granted the petition by letter of June 21, 2006 and, on December 19, 2006, EPA published, as a proposed rule, a notice of reconsideration. This action presents the comments we received upon the proposal, our responses to the comments and our decisions on whether to amend the current regulation in response to the public comments.

III. This Action

A. NO_x RACT for EGUs in CAIR states

1. Final Action

In response to comments received during the reconsideration process, EPA in this action modifies its guidance regarding when compliance with the CAIR may satisfy NO_x RACT requirements for EGUs in CAIR states.³ EPA believes it is appropriate for the CAIR states, under the conditions outlined in this action, to presume, in general, that EGU NO_x RACT requirements are satisfied through implementation of the CAIR program. Further, in this action EPA makes a determination that in certain areas compliance with the CAIR is sufficient to satisfy the NO_x RACT requirement for EGUs covered by the CAIR program. The areas covered by this determination are those where EPA's December 2006 emissions analysis⁴ shows that the CAIR is projected to achieve greater emissions reductions than application of source-by-source RACT within the nonattainment area or state. For areas where EPA's emissions analysis does not clearly demonstrate that the CAIR program is projected to achieve greater emissions reductions than source-by source RACT, this action establishes a separate presumption that compliance with CAIR, in certain circumstances, satisfies NO_x RACT requirements for EGUs in any area subject to CAIR. As explained below, states may rely initially on this presumption whether or not the aforementioned CAIR-RACT determination applies.

More specifically, in this action, EPA determines that compliance by EGUs with an EPA-approved CAIR SIP or a CAIR FIP satisfies the nonattainment area NO_x RACT requirements in CAA sections 172(c)(1) and 182(f) if: (1) the EGU is located in a state

³ In this rule, the phrase "compliance with the CAIR" is used to mean compliance with a FIP or an EPA-approved SIP meeting the requirements of the CAIR.

⁴ Technical Support Document For Phase 2 Of The Final Rule To Implement The 8-Hour Ozone National Ambient Air Quality Standard –Notice Of Reconsideration; NO_x RACT For EGUs In CAIR states--Supplemental Technical Analysis. (Docket ID No. EPA-HQ-OAQ-2003-0079, item number EPA-HQ-OAR-2003-0079-1044.2).

where all required CAIR emission reductions are achieved from EGUs only⁵; and (2) the emissions analysis presented by EPA in the December 16, 2006 notice of proposed reconsideration shows that the CAIR will achieve greater or equal annual and ozone-season emissions reductions than source-by-source RACT in the relevant nonattainment area.⁶ EPA also determines that compliance by EGUs with an EPA-approved CAIR SIP or a CAIR FIP satisfies the NO_x RACT requirements for OTR states in sections 184(b) and 182(f) if: (1) the EGU is located in a state where all required CAIR emission reductions are achieved from EGUs only; and (2) the emissions analysis presented by EPA in the December 16, 2006 notice of reconsideration shows that the CAIR will achieve greater or equal annual and ozone-season emissions reductions than source-by-

⁵ However, a state that elects to bring its NO_x SIP Call non-EGU sources into the CAIR ozone season trading program need not show that all the CAIR reductions are achieved solely from EGUs if, and only if, the state retained a summer season EGU budget under the CAIR that was at least as restrictive as the EGU budget that was set in the state's NO_x SIP Call SIP.

⁶ The EPA emissions analysis shows that for the following nonattainment areas the CAIR is projected to achieve equal or greater annual emissions reductions than source-by-source RACT: Baltimore, MD, Buffalo-Niagara Falls, NY (Subpart 1); Charlotte-Gastonia-Rock Hill, NC-SC; Chicago-Gary-Lake County, IL-IN; Cleveland-Akron-Lorain, OH; Dallas-Fort Worth, TX; Greater Connecticut, CT; Houston-Galveston-Brazoria, TX; Jefferson Co, NY; Milwaukee-Racine, WI; New York-New Jersey-Long Island, NY-NJ-CT; Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE; Sheboygan, WI; St Louis, MO-IL; Washington, DC-MD-VA. The emissions analysis shows that for the following nonattainment areas the CAIR is projected to achieve equal or greater summer emission reductions than source-by-source RACT: Charlotte-Gastonia-Rock Hill, NC-SC; Cleveland-Akron-Lorain; Dallas-Fort worth, TX; Greater Connecticut, CT; Houston –Galveston- Brazoria, TX; Jefferson Co., NY; Milwaukee-Racine, WI; New York-N. New Jersey-Long Island, NY-NJ-CT; Philadelphia –Wilmington-Atlantic City, PA-NJ-MD-DE; Sheboygan, WI; Springfield (Western MA), MA; St. Louis, MO-IL; Washington, DC-MD-VA

source RACT in the relevant OTR state⁷. The determination for OTR states is separate from the determination for nonattainment areas within the OTR states. This means that the conditions of the determination may be met for an OTR state, in its entirety, but a particular nonattainment within the State may not meet the conditions of the determination based on the results of the EPA's emissions analysis.

In their RACT SIP submissions, states choosing to rely on a determination that compliance with the CAIR satisfies NO_x RACT requirements for EGUs, should document their reliance on the determination.

In areas covered by the CAIR that do not meet the conditions outlines in the preceding paragraph, EPA still believes it is appropriate for these areas to presume that compliance with the CAIR will satisfy the NO_x RACT requirements for EGUs if all required CAIR reductions in that state are achieved by EGUs only. States may rely on this presumption in the first instance regardless of whether the relevant nonattainment area or OTR state is covered by the aforementioned determination. In their RACT SIP submissions, states choosing to rely on this presumption should document their reliance on the presumption. This presumption is rebuttable and the State's documentation of reliance on this presumption must provide additional justification if necessary.

These final positions are based on a number of factors previously identified in the Phase 2 Rule, and in the December 2006 notice of proposed reconsideration. In

⁷ EPA's emissions analysis shows that for the following OTR states, the CAIR is projected to achieve equal or greater annual emissions reductions than source-by-source RACT: Delaware, Maryland, New Jersey, New York, Pennsylvania, and OTR portion of Virginia (Alexandria and Prince Counties). For the following OTR states, the CAIR is projected to achieve equal or greater summer emission reductions than source-by-source RACT: Maryland, Pennsylvania and OTR portions of Virginia (Alexandria and Prince William Counties).

evaluating RACT for EGUs, EPA believes it is appropriate to consider the special attributes of EGUs, including the unique interrelated nature of the power supply network, and the facilities' compliance with rules implementing the CAIR. EPA also asserts that the term "reasonable" in RACT may be construed to allow consideration of the air quality impact of required emissions reductions from region-wide cap-and-trade programs such as the CAIR NO_x trading programs.

Due to the nature of regional emissions transport, EPA believes that a combination of local and broader regional reductions, such as those driven by the CAIR requirements for EGUs, will achieve a more effective and economically efficient air quality improvement in nonattainment areas than application of source-by-source RACT. This is consistent with EPA's recognition in our 1986 emissions trading policy that a "bubble" approach has a number of advantages including faster compliance with RACT limits and earlier reductions. EPA does not interpret the RACT provisions of CAA section 172(c)(1) to preclude states' use of a cap-and-trade approach as a means of achieving RACT reductions from existing sources, and believes such an approach is consistent with Congresses' express authorization to auction emission rights in section 172(c)(6). Many ozone nonattainment areas are projected to achieve significant NO_x reductions under the CAIR program and EPA does not believe that requiring source-specific RACT controls on specified EGUs in nonattainment areas would reduce total NO_x emissions from sources covered by CAIR below the region-wide levels that will be achieved under CAIR alone. The region-wide CAIR NO_x EGU emissions cap for 2009 was established based on the maximum total capacity on which EPA believes it is possible to install controls by that date. So by design, the 2009 CAIR region-wide NO_x

emissions cap for EGUs represents the most reductions that are reasonable to achieve in the CAIR region by that date. Because the CAIR achieves more annual and summer season EGU NO_x emission reductions overall across the CAIR region than source-by-source application of RACT⁸, EPA believes this will result in more region-wide air quality improvements than application of RACT in the absence of the CAIR. As explained in greater detail in the preamble to the CAIR rule, the CAIR is projected to improve ozone air quality across much of the eastern half of the country, including many current and projected future nonattainment areas. 70 FR 25254-25255 (May 12, 2005). The CAIR is projected to improve air quality in all of the 40 projected 2010 nonattainment counties, and in all 22 of the projected 2015 nonattainment counties, that were identified in the CAIR rule modeling. The modeling also showed air quality improvement in numerous counties projected to be in attainment.

⁸ For 2010, annual NO_x emission reductions expected from implementation of the CAIR in the entire CAIR region are 1.3 million tons/year. This compares with annual NO_x emission reductions projected from application of source-by-source RACT from within the Ozone Transport Region (OTR) plus other nonattainment areas in the CAIR region, but outside of the OTR, of 166,780 tons/year. Ozone-season NO_x emission reductions expected from implementation of the CAIR in the entire CAIR region are 200,000 tons/season. This compares with summer time RACT-only emission reductions from within the OTR plus other nonattainment areas in the CAIR region, but outside of the OTR, of 19,210 tons/summer. These estimates show that CAIR is projected to get overwhelmingly greater NO_x reductions than source-by-source RACT in the CAIR region. The CAIR region emissions estimates are from “Regulatory Impact Analysis for the Final Clean Air Interstate Rule,” EPA-452/R-05-002, March 2005. This document can be found at <http://www.epa.gov/interstateairquality/pdfs/finaltech08.pdf> and is also in the CAIR docket no. EPA-HQ-OAR-2003-0053. The RACT emission estimates for OTR states and nonattainment areas in the CAIR region, but outside OTR states, are found in “Technical Support Document For Phase 2 Of The Final Rule To Implement The 8-Hour Ozone National Ambient Air Quality Standard –Notice Of Reconsideration; NO_x RACT For EGUs In CAIR states--Supplemental Technical Analysis.” (Docket ID No. EPA-HQ-OAQ-2003-0079, document number EPA-HQ-OAR-2003-0079-1044.2).

For most EGUs in the CAIR region, based on the conclusions explained here, states may rely on EPA's determination that RACT requirements for these sources are satisfied by compliance with the CAIR. However, this determination applies only to EGUs in states achieving all required CAIR reductions from EGUs, except as noted below. As explained in the preamble to the Phase 2 Rule, if only part of the CAIR reductions are required from EGUs, and the balance of the reductions obtained from non-EGU sources, then the stringency of the CAIR EGU control would be diminished to some extent (an amount that cannot be determined until a state submits a SIP indicating which sources are participating in the program). Therefore, in these cases, the rationale for our conclusions (either determinations or presumptions) that these sources satisfy the RACT requirement would not necessarily apply.

EPA determined in the final Phase 2 Rule that sources complying with the requirements of the NO_x SIP Call trading system meet their ozone NO_x RACT obligations. A state that elects to bring its NO_x SIP Call non-EGU sources into the CAIR ozone season trading program may under certain conditions continue to rely on the determination that RACT is met for EGU sources covered by a CAIR NO_x trading program. It may rely on this presumption if and only if the state retains a summer season EGU budget under the CAIR that is at least as restrictive as the EGU budget that was set in the state's NO_x SIP call SIP. Therefore, if the summer season EGU budget under CAIR is at least as restrictive as the budget in the NO_x SIP Call SIP, and if non-EGU sources after 2008 continue to be subject to a SIP requirement that regulates those non-EGU sources equally or more stringently than the state's current rules meeting the NO_x SIP Call, then those EGUs are meeting a level of control at least as stringent as RACT.

In addition, as we noted in the Phase 2 Rule, a state has discretion to define RACT to require greater emission reductions than specified in EPA guidance and also to require beyond-RACT NO_x reductions from any source (including sources covered by the CAIR or NO_x SIP Call programs), and has an obligation to demonstrate attainment of the 8-hour ozone standard as expeditiously as practicable. In certain areas, states may decide to require NO_x controls based on more advanced control technologies as necessary to provide for attainment of the ozone standards.

Based upon South Coast Air Quality Mgt District v. EPA (No. 04-1200) (D.C. Cir. 2006), the status of nonattainment classifications for 8-hour ozone nonattainment areas is unclear at this time. EPA has petitioned the court for rehearing of this issue. However, until this issue is resolved, there will be continuing uncertainty regarding which areas must submit RACT SIPs separate from attainment demonstrations. Currently, all areas classified under subpart 2 as moderate or higher, and areas classified under subpart 1 that are planning to request an attainment date that extends beyond April 2009 are required to submit a RACT SIP separate from attainment demonstrations. EPA is unable to determine at this time if any areas in addition to those included in the cited emissions analysis will be required to submit separate RACT SIPs. Based on the outcome of EPA's petition for rehearing, EPA may review and revise, as appropriate, the determinations made in this action.

2. Response to Comments

a. Comment: Commenters argue that the Clean Air Act (CAA) calls for State Implementation Plans (SIPs) to provide for "such reductions in emissions from existing sources in the nonattainment area as may be obtained through adoption" of RACT.

Therefore, they argue, each particular affected source in a non-attainment area is required by law to have the lowest emission limitation it is capable of meeting. One commenter says that the CAA does not give EPA the option of requiring CAIR or some other strategy in lieu of RACT, and that by deeming CAIR controls to be equivalent to RACT, EPA is seeking to insulate uncontrolled or poorly controlled EGUs in current or future nonattainment areas from cost effective controls that would qualify as RACT. Another commenter says that EPA's NO_x Supplement to the General Preamble (57 FR 55620, Nov. 25, 1992) concludes that it is "permissible under the statute for individual sources to have greater or lesser emissions reductions so long as the area wide average emission rates associated with a RACT level of NO_x emission controls [are] met." They argue that it is consistent with the Act for EPA and states to determine that compliance with an area-wide emission trading program may constitute RACT in lieu of source-by-source emission control requirements. The commenter adds that neither the CAA's language nor EPA's 1979 statement [44 FR 53762] defining RACT supports the arguments in the petition for reconsideration that emission controls must be installed on all major stationary sources in a nonattainment area, nor is there anything in these documents that indicates that the rule's CAIR = NO_x RACT provision is illegal. The commenter notes that Congress's choice of the phrase "reasonably available" bespeaks its intention that the EPA exercise discretion in determining which control measures must be implemented.

Response: As explained in the preamble to the Phase 2 Rule, EPA disagrees with the commenters' assertion that RACT necessarily requires every major source to install controls. See 70 FR 71656. To the contrary, EPA allows states to demonstrate that RACT is met by groups of sources. For example, the NO_x Supplement to the General

Preamble, November 25, 1992 (57 FR 55625) permits states to “allow individual owners/operators in the nonattainment area . . . to have emission limits which result in greater or lesser emission limits so long as the area wide average emission rates . . . are met on a Btu-weighted average.” The General Preamble also “encourage[s] states to structure their RACT requirements to inherently incorporate an emissions averaging concept (i.e., installing more stringent controls on some units in exchange for lesser control on others).” This approach was based on EPA’s conclusion that it was permissible under the CAA for individual sources to have “greater or lesser emission reductions so long as the area wide average emissions rates” associated with a RACT level of NO_x emissions control were met.

In addition, EPA does not believe that requiring source-specific RACT controls on EGUs in nonattainment areas will reduce total NO_x emissions from EGU sources covered by the CAIR below the levels that would be achieved under the CAIR alone. EPA also believes that EGU source-specific RACT would result in more costly emission reductions on a per ton basis. The combination of EGU source specific RACT and the CAIR emissions cap would not reduce the collective total emissions from EGUs covered by the CAIR, but would likely achieve the same total emissions reductions as the CAIR alone, in a more costly way.

Further, EPA’s analysis for the CAIR shows the CAIR program will result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by the 2009 date. (70 FR 22515-22225) The CAIR budgets are based on the level of emissions that can be achieved through the application of highly cost-effective controls to EGUs in the CAIR region. Due to feasibility constraints, EPA

required a phased approach for achieving highly cost effective emissions reduction. For NO_x, the first phase starts in 2009 (covering 2009-2014); the second phase of NO_x reductions begins in 2015 (covering 2015 and thereafter). (70 FR 71621). We also noted in the June 2, 2003 CAIR proposal that we considered highly-cost effective controls for NO_x for EGUs and non-EGUs that were used to establish the statewide NO_x emission caps in the NO_x SIP call to constitute a greater level of control than RACT (68 FR 32839).

EPA also disagrees with the comment arguing that EPA is seeking to insulate uncontrolled or poorly controlled EGUs in current or future nonattainment areas from cost effective controls that would qualify as RACT. The final rule does not displace the RACT requirement for any sources. Instead, EPA is exercising its authority to interpret the section 172, 182, and 184 RACT requirements for purposes of implementing the 8-hour ozone standards. For the reasons described in this section, we believe that states can rely on EPA's conclusion that compliance with a CAIR FIP or SIP, meeting certain requirements, will satisfy the EGU NO_x RACT requirement in certain areas.

Moreover, EPA has predicted that the majority of large coal-fired utilities will install advanced control technologies under the CAIR because the larger and higher emitting sources offer opportunities to obtain the most cost-effective emissions reductions. EPA expects that the largest-emitting sources will be the first to install NO_x control technology and that such control technology will gradually be installed on progressively smaller-emitting sources until the ultimate emissions cap is reached.

b. Comment: Several commenters argue that EPA's determination that CAIR may be equivalent to RACT would illegally substitute controls on sources outside of ozone

nonattainment areas for controls on sources within each nonattainment area. The commenters argue that reductions must occur within the nonattainment area. They also argue that EGUs in nonattainment areas may have significant NO_x emissions if they are not meeting a minimum level of NO_x control, and that the rule does not guarantee that any RACT level controls would actually be installed in a CAIR state. Thus, one commenter argues, the non-CAIR states and the public will bear the cost of EGUs not installing RACT controls and continuing nonattainment of the NAAQS. The commenter also argues that the public residing in nonattainment areas would continue to suffer from the emissions from those EGUs located in the CAIR state portion of the nonattainment area that purchase and use allowances for compliance instead of installing controls.

Another commenter argues that CAIR is a cap-and-trade program which cannot guarantee that a reasonable level of control will be installed where most needed. On the other hand, other commenters emphasize that CAIR achieves greater overall emissions reductions across the CAIR region than would be achieved through the implementation of source-specific RACT controls.

Response: In this action, EPA has determined that EGU sources complying with rules implementing the CAIR requirements meet ozone NO_x RACT requirements in states where all required CAIR emissions reductions are achieved from EGUs only and EPA's emissions analysis in the December 16, 2006 notice of reconsideration shows that CAIR will achieve greater or equal reductions than source-by-source RACT in the relevant nonattainment area (for CAA section 172 and 182 requirements) or the relevant OTR

state (for CAA 184 requirements).⁹ For nonattainment areas and OTR states not covered by this determination, states may still presume that compliance with CAIR will satisfy the NO_x RACT requirement for EGUs if all CAIR reductions are achieved by EGUs. These states will have the option of providing additional analysis to support this presumption. This presumption is rebuttable and the state's documentation of reliance on this presumption must address any information available that would undermine this presumption.

As explained in greater detail above, EPA believes that it is appropriate for states that achieve all CAIR NO_x reductions from EGUs to consider, when evaluating RACT for EGUs, the special attributes of EGUs including the unique interrelated nature of the power supply network, and the facilities' compliance with rules implementing the CAIR. EPA also believes that the term, "reasonable" in RACT may be construed to allow consideration of the air quality impact of required emissions reductions from region-wide cap-and-trade programs such as the CAIR NO_x trading programs. The region-wide CAIR NO_x emissions cap for 2009 was established based on the maximum total capacity on which it was possible to install controls by that date. So by design, the 2009 CAIR region-wide NO_x emissions cap for EGUs represents the most reductions that are reasonable to achieve in that timeframe.

EPA acknowledges that the RACT mandate applies in specific geographic areas and determines that, in certain circumstances, the specific RACT requirements in CAA

⁹ However, a state that elects to bring its NO_x SIP Call non-EGU sources into the CAIR ozone season trading program may continue to rely on EPA's determination that RACT is met for EGU sources covered by the CAIR trading program. It may rely on this determination if and only if the state retains a summer season EGU budget under the CAIR that is at least as restrictive as the EGU budget that was set in the state's NO_x SIP call SIP.

sections 172, 182 and 184 are satisfied by compliance with CAIR rules. As a practical matter, in most nonattainment areas, the actual emissions reductions projected to occur under CAIR are greater than the projected reductions from application of source-by-source RACT. Further, in this action, EPA provides that the determination that compliance with CAIR rules satisfies NO_x RACT requirements can only apply if the technical analysis presented by EPA in the December 16, 2006 notice of reconsideration shows that CAIR will achieve greater or equal annual and ozone-season emissions reductions than source-by-source RACT in the relevant nonattainment area or OTR state. Also, note that the determination for an OTR state and a nonattainment area within that State must be made separately, i.e., the determination may apply for an OTR state but not for a particular nonattainment area in that State, based on results of the technical analysis.

In addition, the comments suggesting that EGUs may not meet a “minimum level of NO_x control” and that the rule does not guarantee that any “RACT level controls” would actually be installed in a CAIR state, appear to assume that to satisfy RACT, each individual source must achieve a specific level of control. As explained below, EPA disagrees with this assumption. Further, in states that achieve all CAIR reductions from EGUs, requiring source-specific RACT on EGUs and compliance with rules implementing CAIR would not achieve greater collective total emissions reductions from EGUs covered by the CAIR and the collective reductions would likely be achieved at a higher overall cost.

c. Comment: Several commenters challenged EPA’s suggestion that the CAIR will achieve greater reductions than RACT. These commenters argued that the suggestion that the CAIR will achieve greater reductions without RACT is unsupportable. EPA,

they argue, can and must require RACT reductions on top of CAIR reductions. Not doing so ignores the possibility that requiring both RACT and the CAIR will produce faster RFP and earlier attainment than the CAIR alone.

Response: EPA's emissions analyses prepared for the December 2006 notice of proposed reconsideration generally show that the CAIR will achieve greater EGU NO_x emission reductions across the CAIR region and also in most of the designated nonattainment areas and OTR states, than would be achieved by requiring EGUs in these areas to meet a specific level of NO_x control deemed to be RACT. The analyses show that the CAIR obtains equal or greater summer season emission reductions than source-by-source RACT in 13 out of 18 specific nonattainment areas in the CAIR region, and in 3 out of 9 OTR states. It also shows that CAIR obtains equal to or greater annual emission reductions than source-by-source RACT in 15 out of 18 specific nonattainment areas in the CAIR region and in 6 out of 9 OTR states. The docket contains a Technical Support Document¹⁰ describing the analysis.

EPA also disagrees with the commenter's assertion that EPA can and must require RACT reductions on top of the CAIR reductions. While EPA agrees that the RACT requirement, and the requirement to address ozone transport under CAA section 110(a)(2)(d) are separate requirements, EPA asserts that the Act does not specify that these are additive or mutually exclusive requirements. As such EPA has determined that the CAIR may satisfy, under certain conditions, both requirements.

¹⁰ "Technical Support Document For Phase 2 Of The Final Rule To Implement The 8-Hour Ozone National Ambient Air Quality Standard –Notice Of Reconsideration; NO_x RACT For EGUs In CAIR states--Supplemental Technical Analysis" (Docket ID No. EPA-HQ-OAR-2003-0079, item 1044.2)

As previously explained, requiring source-by-source RACT as an additional constraint on EGU control strategy in the CAIR, in certain areas would mean that controls would not necessarily be placed on the sources for which it is most cost-effective to control. The result would be the same emission reductions area wide, but at higher cost. Further, by design, the 2009 CAIR region-wide NO_x emissions cap for EGUs represents the most reductions that are reasonable to achieve. Consequently, EPA does not believe that further controls could be considered reasonably available.

Finally, as we have also previously noted, states have an overarching obligation to provide such controls as are necessary to attain the 8 hour ozone standard as expeditiously as practical. At a minimum, this must include application of RACT to major sources, but may also require beyond-RACT NO_x reductions from any source (including sources covered by the CAIR or NO_x SIP Call programs). In certain areas, states may determine that NO_x controls based on more advanced control technologies are necessary to provide for timely attainment of the ozone standards.

d. Comment: Several commenters argue that the EPA's analyses to support its determination that the CAIR may satisfy certain RACT requirements are flawed because they rely on improper assumptions. The commenter notes that EPA's technical analysis relies on a number of assumptions regarding source conduct, allowance pricing, and the like. One Commenter argues that the 1992 and 1994 agency guidance referred to by EPA is outdated and not consistent with RACT controls being imposed by states today. Another commenter stated that new controls have been developed in the 14 years since the early RACT guidance was issued. These controls such as selective catalytic reduction (SCR) and selective non-catalytic reduction (SNCR) will give a level of control beyond

what EPA assumed 14 years ago. One commenter claimed that there are many new controls being studied that can reduce NO_x emissions at a fraction of the cost assumed in the CAIR rulemaking. These new controls, which the commenter asserts would fall under RACT, are a refinement of existing combustion control technologies, along with injection of an inexpensive reagent in the boiler.

Response: EPA believes the technical analyses are based on reasonable assumptions.

EPA's views on NO_x RACT were set forth in the "NO_x Supplement to the General Preamble," November 25, 1992 (57 FR 55620). In that document, EPA determined that in the majority of cases, RACT will result in an overall level of control equivalent to specified maximum allowable emission rates (in pounds of NO_x per million Btu) for certain specified electric utility boilers. Section 4.6 of the NO_x Supplement to the General Preamble (57 FR 55625) noted in part, "In general, EPA considers RACT for utilities to be the most effective level of combustion modification reasonably available to an individual unit. This implies low NO_x burners, in some cases with overfire air and in other instances without overfire air; flue gas recirculation; and conceivably some situations with no control at all." The assumptions in EPA's technical analysis are consistent with this guidance.

EPA assumed that RACT is represented by combustion controls for EGUs defined as: 1) low NO_x burners with overfire air for wall-fired units; and 2) low NO_x coal-and-air nozzles with close-coupled and separated overfire air for tangentially-fired units. For oil and gas steam EGUs, the RACT-level of control was assumed to be 0.20 pounds of NO_x per million BTU for tangentially-fired gas or oil burning and 0.30 for wall-fired gas or oil burning. As EPA's CAIR technical analysis has shown, and as

previously noted the CAIR requires, the installation of NO_x controls on the maximum capacity on which it is feasible to install such controls by 2009. Therefore, additional controls are not “reasonably available.”

EPA does not restrict individual states from requiring EGU NO_x control levels more stringent than what EPA has determined is RACT in order to achieve compliance with the ozone NAAQS. EPA believes more stringent levels of NO_x control (represented by SCR and SNCR) are beyond RACT. The fact that some states may chose to require controls that go beyond RACT to attain the ozone standards does not necessarily mean that this level of control should be considered RACT.

e. Comment: EPA received several comments regarding the cost of RACT. These commenters argue that states have adopted RACT requirements for ozone precursors with costs per ton in excess of the \$900/ton control cost estimated for the CAIR. The commenter argues that the EGU sector can make reasonably effective emission reductions up to a \$4500/ton threshold. Further, commenters state that in connection with the adoption of the 1997 ozone and PM NAAQS, the President issued a memorandum indicating EPA’s agreement with control costs of up to \$10,000 per ton as being within the reasonable range. One commenter also points out that the Washington DC-MD-VA region has required RACT with costs of approximately \$4,000-\$10,000 per ton.

Response: EPA believes the assumptions in its technical analysis regarding the controls that would be considered RACT (if RACT were to be applied on a source-by-source basis) are reasonable. This level of control is consistent with EPA’s past NO_x RACT guidance [see “NO_x Supplement to the General Preamble,” November 25, 1992 (57 FR

55620)]. EPA considers the combustion modification guidance from the early 1990's to express what is RACT for NO_x control of EGUs considering technical feasibility and cost.

In making a general determination of what controls are representative of RACT, EPA does not necessarily recommend the highest level of stringency that is imposed by any state. However, EPA does not restrict states from imposing controls with relatively high costs if the states determine they are necessary to attain the ozone NAAQS. EPA cautions that if all states choose to impose beyond RACT controls on all EGUs by 2009 it could create shortages of labor and materials that would substantially increase the cost of compliance or make it infeasible to meet the 2009 deadline. EPA's analysis shows that the CAIR achieves the maximum level of control that is feasible by 2009 on a region-wide basis.

f. Comment: Several commenters argue that EPA's technical analysis shows that at least some nonattainment areas would achieve greater emission reduction with implementation of source by source RACT than with CAIR. They argue that, in these areas, CAIR would not be "equivalent" to RACT for EGUs.

Response: In this action we are determining that compliance with CAIR satisfies NO_x RACT requirements for EGUs in areas where EPA's emissions analysis shows that CAIR is projected to achieve greater emissions reductions than application of source-by-source RACT. As explained above, other areas may still rely on the presumption that compliance with the CAIR satisfies NO_x RACT requirements in certain circumstances. This presumption is rebuttable and the State may choose to provide supporting analyses

and will have to respond to any comments received during the comment period that address the presumption.

g. Comment: One commenter suggested that EPA adopt the Ozone Transport Commission's (OTC) approach to cap-and-trade programs where RACT was applied first. Thus, the cap-and-trade program operates in an environment that assumes RACT is in force, not in lieu of RACT. Another commenter argued that an effective attainment strategy requires both area wide programs like CAIR and nonattainment area specific program such as source-by-source RACT on EGUs. Thus, the commenter argues that in its technical analysis, EPA should have looked at CAIR + RACT versus RACT, rather than CAIR alone versus RACT.

Response: The supplemental technical analysis prepared by EPA for the reconsideration proposal was designed to analyze whether compliance with a SIP or FIP meeting the requirements of CAIR may also satisfy the NO_x RACT requirement for certain EGUs. Thus, it was appropriate for EPA to compare the reductions under CAIR alone with the reductions that would be achieved by another possible method of satisfying RACT requirements (i.e. the application of source-by-source RACT controls). The comparison that the commenter suggests should have been prepared would not have shed light on the question the analysis sought to answer, namely whether compliance with CAIR satisfies the nonattainment program requirement in question.

In addition, as noted above, by design, the 2009 CAIR region-wide NO_x emissions cap for EGUs represents the most reductions that are reasonable to achieve. Further, as explained in the reconsideration notice, source-specific control requirements layered on top of the overall allowance-based emissions cap might affect the temporal

distribution of emissions or the spatial distribution of emissions but would not affect total allowed emission in the CAIR region. EPA expects that, under the CAIR trading programs the largest-emitting EGU sources (and those with the most cost effective reductions available) will be the first to install NO_x control technology. If states were to require smaller-emitting EGU sources in nonattainment areas to meet source-specific RACT requirements, they would likely use labor and other resources that would otherwise be used for emission controls on larger sources and the cost of achieving the regional reductions would be greater on a per ton basis.

h. Comment: One commenter argues that EPA's determination that compliance with the CAIR, in some circumstances, satisfies NO_x RACT requirements for EGUs will create inequality between CAIR states and bordering non-CAIR states. They argue that EPA's determination creates an inequity where the geographic boundary of a nonattainment area crosses state lines from a CAIR state into a non-CAIR state. In the CAIR state portion of the non-attainment area, EPA would allow compliance with CAIR rules to satisfy NO_x RACT for EGUs while in the non-CAIR state portion of the nonattainment area NO_x RACT for EGUs would still be a source-specific requirement.

Response: Since sources in non-CAIR states are not subject to rules implementing the CAIR emission reduction requirements, those states naturally could not rely on compliance with those rules to show that the NO_x EGU RACT requirements has been satisfied. The fact that the non-CAIR states may use a different method to show that the same RACT requirement has been met does not create an inequity between states. Further, none of the nonattainment areas covered by the EPA's determination that compliance with CAIR rules satisfies certain NO_x RACT requirements (i.e. those for

which our technical analysis shows that CAIR provides equal or greater annual and ozone-season emissions reductions than source-by-source RACT) lie across the boundary of two states, one of which is a CAIR state and the other of which is a non-CAIR state.

j. Comment: EPA received several comments arguing that EPA's determination that CAIR may satisfy the EGU NO_x RACT requirements for some areas is improper because the purpose of RACT is not the same as the purpose served by the CAIR. The commenters argue that the purpose of the CAIR is to address interstate transport of NO_x from EGUs that contributes to nonattainment in downwind states, while the RACT requirement is intended to reduce emissions within a nonattainment area. They argue that RACT is intended to reduce emissions in nonattainment areas by requiring emission control technologies to be installed at particular sources, where CAIR does not require such emission controls. The commenter asserts that the CAIR is not intended as an attainment strategy.

Response: We find the attempt by commenters to characterize CAIR as a strategy to address only regional pollution transport as overly simplistic. The EPA analyses for the CAIR show that there are significant emissions reductions and air quality benefits projected for individual nonattainment areas as a result of NO_x reductions across the multistate CAIR region. The Clean Air Act does not prevent states from properly crediting measures that achieve multiple objectives (e.g. regional transport and local nonattainment). Moreover, CAA section 110(a)(2)(D) requires SIPs to contain adequate provisions to assure that sources in the state do not contribute significantly to nonattainment in any other state. The CAIR rule is an integral element in meeting the states' section 110 attainment obligations. Accordingly, it is reasonable to incorporate

this consideration in determining what measures qualify as RACT. Even though the CAIR may have been initially designed to get regional reductions, if it produces the most reductions that are feasible it can also represent RACT for subject areas.

j. Comment: One commenter says the EPA ignores the impact on non-EGU sources of its determination that compliance with the CAIR may satisfy the RACT requirement for certain EGUs. The commenter argues that states may be required to impose more costly controls on non-EGUs to make up for lost reductions due to the failure to impose RACT on EGUs.

Response: As explained above, EPA disagrees with the commenters' assertion that EPA's determination that compliance with the CAIR may satisfy NO_x RACT requirements for EGUs constitutes "failure to impose RACT on EGUs." Nothing in the final rule displaces the RACT requirement for EGUs. Further, CAIR will achieve widespread SO₂ and NO_x emission reductions from EGUs and will provide significant air quality benefits for ozone and PM_{2.5} nonattainment areas. In developing attainment SIPs and identifying control measures, states may need to consider more stringent controls on all sources, including EGUs, in order to reach attainment as expeditiously as practicable. States must also consider the economic feasibility of implementing a given control measure, and EPA has determined that the CAIR will result in EGUs installing controls on the maximum total capacity on which it's feasible to do so by 2009 in the CAIR region. Further, EPA acknowledges that to achieve attainment as expeditiously as practicable, some states may need to adopt control measures for some sources which cost more per ton than the controls on EGUs, but which are still considered to be reasonable and cost-effective. Because of facility-specific factors (e.g. input costs in the geographic area and the

facility's ability to sustain the cost), EPA does not believe it would be appropriate to establish a threshold of control effectiveness (e.g. dollars per ton) based on control of EGUs and apply this threshold to all source categories.

k. Comment: Another commenter argues that states such as Illinois may be forced to require additional emission reductions, including application of RACT within their nonattainment areas, that must be achieved earlier than CAIR reductions. They argue that these additional controls on non-EGU sources will be very costly and that EGUs are usually the largest and most easily controlled NO_x sources in a nonattainment area. More specifically, they note that there are 15 coal-fired boilers in two ozone nonattainment areas in Illinois, none of which have installed SCRs. EPA projects that only two of those units will install SCRs in response to CAIR. However, based on that projection, the Chicago area will not meet the 8-hour standard by 2010.

Response: Just because the RACT requirement results in relatively less control on one source category compared to another is no reason why the RACT determination for a source category is invalid, since the two categories may be sufficiently dissimilar so as to render a comparison irrelevant. RACT represents only such technology as is reasonably available, not all controls that may be necessary to attain as expeditiously as practicable. The State is still required to demonstrate attainment as expeditiously as practicable and has the discretion to choose in its public process how to apportion responsibility for emission reductions to meet that requirement.

l. Comment: Several commenters, all associated with electric power companies, agreed that CAIR will likely achieve the same emissions controls as RACT, but in a more cost effective manner. One commenter points out that CAIR will achieve substantially more

area wide emission reductions that source-by-source RACT controls, and says this is true in most nonattainment areas also. The commenter points out that in the few areas where source-by-source RACT is projected to produce greater emission reductions than CAIR under EPA's conservative analysis, the differences are relatively small.

Response: EPA agrees that CAIR will achieve the same or lower NO_x emissions over the CAIR area than source-by-source RACT and that it will achieve these NO_x reductions in the most cost effective manner.

m. Comment: Several commenters addressed the contention in EPA's analysis that CAIR will result in EGUs installing controls on the maximum total capacity on which it is feasible to do so by 2009. One commenter agreed with this contention and noted that further controls will be installed by 2015. Another commenter says that this contention is contradicted by a 2004 analysis conducted by the Institute of Clean Air Companies (ICAC) which concluded that labor is available to install 2015 CAIR levels of reduction by 2010. If CAIR 2015 controls are closer to RACT, they argue, "EPA's implication that RACT requirements on EGUs in the CAIR regions would not achieve more reductions than those achieved by CAIR by 2010 is incorrect. However, another commenter says that CAIR requires controls as quickly as they can be practically installed given the constraints of specialized labor needed for this type of construction.

Response: EPA considered a number of analyses related to boilermaker labor availability provided by various commenters, including the 2004 Institute of Clean Air Companies analysis, when it prepared the Clean Air Interstate Rule (CAIR) which was published May 12, 2005 (70 FR 25162). EPA prepared its own technical analysis as part of the CAIR development, and decided as a result of its analysis that the dates in the final CAIR

rule of January 1, 2009 for phase I for NO_x controls, January 1, 2010 for phase II SO₂ controls and 2015 for phase 2 controls for both NO_x and SO₂ were appropriate based on projected labor availability. The EPA's analysis shows that the amount of additional NO_x emissions control that will be obtained under the CAIR in 2015 is infeasible to obtain in 2009, when RACT emission reductions under the 8-hour ozone NAAQS must be implemented. EPA believes it has set the 2009 CAIR NO_x cap at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by that date. Thus, in that timeframe controls beyond CAIR cannot be considered "reasonably available". The EPA analysis, titled "Boilermaker Labor Analysis and Installation Timing", March 2005, has been placed in the docket for the CAIR rule, docket number EPA-HQ-OAR-2003-0053, document number EPA-HQ-OAR-2003-0053-2092. This issue is also discussed in the preamble to the CAIR rule under the heading "Schedule for Implementing SO₂ and NO_x Emissions Reductions Requirements for PM_{2.5} and Ozone" starting at 70 FR 25215. EPA concluded that its analysis rather than the ICAC analysis of feasibility is correct and EPA believes it is still the most credible analysis addressing the issue.

n. Comment: Several commenters argue that the economic test for CAIR is different from that for RACT. CAIR requires only "highly cost effective controls," whereas RACT requires economically feasible controls. Thus, the commenters conclude, more controls "pass the economic test" under RACT than under CAIR

Response: EPA believes that the emission reductions achieved by CAIR, while still highly cost effective, also represent the level of control that is economically and

technologically feasible as RACT for EGUs in states that achieve all their emission reductions from EGUs. The CAIR final rulemaking established a region-wide NO_x emissions cap, effective in 2009, at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by that date. Further, EPA does not believe that requiring source-specific RACT controls on EGUs in nonattainment areas would reduce total NO_x emissions from EGU sources covered by the CAIR below the levels that would be achieved under the CAIR alone. The most expensive controls available, which might be chosen for BACT or LAER, are not always justified as RACT. States have the flexibility to require such controls as part of their attainment strategy if they find such controls are reasonable and necessary to achieve attainment of the ozone NAAQS as expeditiously as practicable.

o. Comment: One commenter argued that the time frames for the CAIR and the RACT requirement are different. This commenter says RACT is required within 30 months of when the RACT SIP is due which would require controls to be installed by the 2009 ozone season, but that CAIR sources have until 2010 or 2015.

Response: As explained in the final CAIR rule (70 FR. 25,226), the first phase of CAIR NO_x emissions cap starts in 2009, not in 2010 as the commenter states. For states affected by the CAIR annual NO_x emission reduction requirements, the first phase cap begins on January 1, 2009. For states affected only by the CAIR ozone season NO_x emission reduction requirements, the first phase starts May 1, 2009. EPA believes it has set the 2009 CAIR NO_x cap at a level that, assuming the reductions are achieved from

EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by that date.

p. Comment: EPA received comments arguing that states are not free to require more control on EGUs, as EPA suggests, since the law in many states prohibits state air agencies from being more stringent than federal law. One survey found the 26 state agencies (of 50 respondents) and 9 local agencies (of 42 respondents) reported being precluded from adopting more stringent requirements than the federal government. A commenter said that the “CAIR equals RACT” determination removes state authority and obligation to impose NO_x RACT requirements for some of the largest NO_x sources in their nonattainment areas.

One commenter said that the petition for reconsideration ignores the point that, entirely apart from what emission controls are deemed RACT, states must require emission controls as necessary to attain the NAAQS as expeditiously as practicable. Thus a state has discretion to require beyond-RACT NO_x reductions.

Response: There are no provisions in the CAA or federal law that prohibit state governments from imposing requirements more stringent than federal law. EPA recognizes, nonetheless, that some states have voluntarily chosen to adopt such limits. All states, regardless of whether such limits have been adopted, are required by section 172 of the CAA to attain the ozone NAAQS as expeditiously as practicable. Thus, requirements that are determined by the state to be necessary to attain as expeditiously as practicable with reasonably available control measures, are in fact required by federal law and cannot be considered more stringent than federal requirements. In this action, EPA has decided that it will accept a determination that NO_x RACT for EGUs is satisfied by

compliance with rules implementing CAIR in a state that achieves all CAIR emission reductions from EGUs and where EPA's technical analysis presented in the December 16, 2006 notice of reconsideration shows that CAIR will achieve greater or equal annual and ozone-season emissions reductions than source-by-source RACT in the relevant nonattainment area (or for section 184 requirements, the relevant OTR state). If a state chooses to rely on this determination, it will not be required to perform NO_x RACT analyses for sources in the relevant nonattainment area or OTR state that are subject to a CAIR NO_x trading program¹¹. Nonattainment areas and OTR states that cannot rely on this determination, may still initially presume that CAIR will satisfy the NO_x RACT requirements if all CAIR reductions are achieved by EGUs. Under this presumption, states are free to conduct case-by-case RACT determinations at their discretion. Further, the requirement to attain the NAAQS as expeditiously as practicable is distinct from the analysis of what specific emission controls are deemed RACT for a particular source. Thus, all states have discretion to require beyond-RACT NO_x reductions if necessary to comply with the requirements of CAA section 172.

q. Comment: One commenter argues that EPA attempts to stretch §172 (c)'s definition of "reasonable," when EPA states that it believes that the term "reasonable" in RACT may be construed to allow consideration of the air quality impact of required emissions reduction from a region-wide cap-and-trade program such as CAIR. Another commenter

¹¹ The determination for OTR states is separate from the determination for nonattainment within the OTR states, i.e., this determination applies to areas in these OTR states other than (a) moderate and above subpart 2 areas and (b) subpart 1 areas that request an attainment date more than 5 years after designation for the 8-hour NAAQS. This means that an OTR state can get a determination that CAIR equals RACT within the State, but a particular nonattainment within the State may not get this determination based on the results of the technical analysis.

argues that EPA's theory that the term "reasonable" is ambiguous and ignores the statutory language which only speaks to RACT, with the term reasonably modifying the word available. The commenter said that it is not reasonable for EPA to interpret reasonable to apply in one manner for EGUs and a wholly different manner for other sources.

Response: EPA disagrees with commenter's assertion that EPA interprets the term "reasonable" to apply in one manner for EGUs and in a different manner for other sources. Section 172(c)(1) of the CAA requires that nonattainment plans shall provide for the implementation of all reasonably available control measures as expeditiously as practicable. EPA has previously stated that reasonable control measures can include area wide averaging programs. (See NO_x Supplement to the General Preamble, November 25, 1992 (57 FR 55620)). EPA's determination that the term "reasonable" in RACT may be construed to allow consideration of the air quality impact of required emissions reduction from a region-wide cap-and-trade program such as CAIR is consistent with past practice and appropriate for the reasons explained in this notice.

Further, in determining a level of control which EPA recommends as RACT, EPA studies a variety of sources and controls and determines what level of control is applicable in the industry across a wide variety of sources at a reasonable cost. States are free to tailor this RACT guidance to the particular situation confronting individual sources in that state. Each permitting agency determines for each source or source-category in the state, the specific controls that constitute RACT. Thus, the precise requirements applied to ensure that RACT is met may differ from source to source and source-category to source-category.

EPA's determination that, in certain circumstances, compliance with CAIR will satisfy the RACT requirement for EGUs in most CAIR states, does not, as petitioner suggests, reinterpret the term RACT as it applies to EGUs. Instead, EPA has determined that the existing RACT requirement is satisfied by compliance with a rule implementing the CAIR requirements, if and only if a state achieves all its reductions from EGUs and the EPA's technical analysis presented in the notice of reconsideration shows that CAIR will achieve greater or equal reductions for annual and ozone-season emission reductions than source-by-source RACT in the relevant nonattainment area or OTR state¹². If a state achieves all of its CAIR emission reductions from EGUs then the emissions of other source categories in the state are not controlled by the CAIR. Thus, it would be impossible for EPA to make a similar determination that they have met their RACT requirements through compliance with CAIR.

r. Comment: EPA received several comments on whether the U.S. Court of Appeals for the D.C. Circuit decision in South Coast Air Quality Management District v. EPA, (No. 04-1200) (D.C. Cir. 2006), will affect the issues in the Ozone Phase 2 Rule that are currently under reconsideration. Specifically, commenters suggested that the South Coast decision may affect EPA's analysis and conclusions regarding whether compliance with rules implementing CAIR may satisfy NO_x RACT for EGUs in certain circumstances. One commenter argued that the decision would affect the validity of the supplemental

¹² The determination for OTR states is separate from the determination for nonattainment within the OTR states, i.e., this determination applies to areas in these OTR states other than (a) moderate and above subpart 2 areas and (b) subpart 1 areas that request an attainment date more than 5 years after designation for the 8-hour NAAQS. This means that an OTR state can get a determination that CAIR equals RACT within the State, but a particular nonattainment within the State may not get this determination based on the results of the technical analysis.

technical analysis discussed in the December 2006 notice of reconsideration. This commenter argued that the analysis would be affected since, as a result of the South Coast decision, certain areas may be moved from subpart 1 to subpart 2 nonattainment classifications. Another commenter urged that there be no further delay as a result of that ruling and argued that the issues being considered in the reconsideration of phase 2 are not affected by the South Coast decision. Another commenter argued that based on that decision, EPA cannot use its discretionary powers to replace source-specific provisions of the CAA such as RACT that were designed to achieve specific air quality goals with trading programs such as CAIR that were designed for other specific air quality goals.

Response: EPA disagrees with the comment to the extent it suggests EPA is seeking to replace the RACT requirement with CAIR. The final rule does not displace the RACT requirement for any sources. EPA also disagrees with the comment to the extent it suggests that EPA's interpretation of the RACT requirements in sections 172(c)(1), 182(f) and 184(b) is inconsistent with the South Coast decision. Further, on March 22, 2007, EPA filed a petition for panel rehearing of the South Coast decision and thus the full impact of that decision cannot yet be assessed. At this time, EPA is unable to determine which areas, if any, in addition to those included in the analysis will be required to submit separate RACT SIPs. However, as indicated above in footnote 8, region-wide emissions reductions from the CAIR are projected to be significantly greater than reductions that would be projected to occur from application of source-by-source RACT, such that the possible movement of areas designated in the phase 1 rule as subpart 1 to subpart 2 area designations is not expected to alter the conclusion that the CAIR achieves greater emission reductions in the region than source-by-source RACT. In

addition, as previously discussed, EPA is limiting the scope of its determination that compliance with the CAIR satisfies NO_x RACT requirements. This determination applies in areas where EPA's emissions analysis in the December 16, 2006 notice of reconsideration shows that the CAIR will achieve greater or equal annual and ozone-season emissions reductions than source-by-source RACT.

B. Submission Date for EGU NO_x RACT SIPs for states in the CAIR Region

1. Final Action

In this action, EPA also extends the deadline for the submission, by states in the CAIR region, of EGU NO_x RACT SIPs for moderate and above subpart 2 areas. Specifically, EPA has determined that states subject to the requirements of CAIR shall submit NO_x RACT SIPs for EGUs no later than the due date for the area's attainment demonstration (prior to any reclassification under section 181(b)(3)) for the 8-hour ozone NAAQS or **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]** whichever comes later¹³. EPA is therefore changing the deadline in 40 CFR 51.912(a)(2) as it applies to that portion of the RACT SIPs addressing EGU NO_x emissions in the CAIR region. EPA is not changing the deadline in 40 CFR 51.912(c)(2) that applies to RACT SIP submittals for subpart 1 areas that request an attainment date that extends beyond April 2009, since those RACT SIPs are already due with the area's attainment demonstration by June 15, 2007.

EPA decided to extend the deadline for the submission of these EGU NO_x RACT SIPs because of the continuing uncertainty regarding the required content of such SIPs and to avoid promulgating a retroactive deadline. The Administrative Procedures Act

¹³ The current deadline for submitting attainment demonstrations in these areas is June 15, 2007.

generally prohibits retroactive rulemaking. In this case, EPA also determined that it would not be reasonable to enact a retroactive deadline because it would only serve to potentially expose states to fines and suits for failure to make SIP revisions even though they previously faced substantial ambiguity regarding the required content of the SIP submissions. See Sierra Club v. Whitman, 285 F.3d 63, 68 (D.C. Cir. 2002).

EPA recognizes that significant uncertainty regarding the EGU NO_x RACT SIPs for states in the CAIR region was created by its decision to grant NRDC's petition for reconsideration. It was for this reason that, in the December 2006 notice of reconsideration, EPA proposed to extend the September 15, 2006 deadline to June 15, 2007 for this source category. This new deadline affects only moderate 8-hour ozone nonattainment areas in the CAIR region and only the portion of the RACT SIPs that covers EGUs. EPA is aware that uncertainty regarding area classifications, and hence the requirement for RACT SIPs was created by South Coast v. EPA, in which the court decided to vacate EPA's nonattainment classifications. These classifications determine, among other things, which nonattainment areas must submit RACT SIPs separate from their attainment demonstrations under the Phase 2 Rule. EPA does not believe it would be reasonable to retain the September 15, 2006 deadline for submission of the EGU NO_x RACT SIPs for states in the CAIR region since this date has now passed and the uncertainty regarding the required content of these SIPs has not been resolved. This final action removes the uncertainty created by the decision to grant reconsideration. The uncertainty regarding the classifications will be eliminated either by the reclassification of certain areas by EPA, or by a decision of the Court on rehearing not to vacate some or

all of the original classifications.¹⁴ The due date for attainment demonstrations is tied to the date of the classification, and for any classifications that are upheld on rehearing, the attainment demonstrations for moderate areas will continue to be due on June 15, 2007. Because the classifications also determine what areas must submit RACT SIPs, and in light of the passage of time during this reconsideration process, EPA believes that the EGU RACT SIP submittal deadlines for states in the CAIR region should now also be linked to the deadline for submitting attainment demonstrations. EPA recognizes that for many areas this deadline may be June 15, 2007 – a date prior to the effective date of this rule. EPA also recognizes that CAA section 172(b) requires states to make all nonattainment SIP submissions within 3 years of designation (i.e. by June 15, 2007). Nonetheless, to avoid creating a retroactive deadline and because of the continuing uncertainty regarding the classifications, EPA has decided to require the submission of EGU NO_x RACT SIPs on the due date for the area's attainment demonstration under its original classification for the 8-hour standard, or the effective date of this rule, whichever is later.

2. Response to Comments

a. Comment: Several commenters opposed the extension of the EGU NO_x RACT SIP submittal deadline. One commenter argued that EPA has no authority to extend the due date for RACT SIPs for EGUs to June 15, 2007 because section 182 of the CAA requires

¹⁴ The decision of the Court in *South Coast v EPA* vacated the Phase 1 ozone implementation rule, including the classifications contained within that Rule. On March 22, 2007, EPA filed a petition for panel rehearing of this decision. Among other things, EPA requested further briefing and panel rehearing on whether the Court erred in vacating the entire Rule even though many provisions of the Rule were not challenged or were upheld by the Court.

submittal of RACT SIPs within 2 years of designation. Other commenters urged EPA to finalize a rule that would expedite SIP submittals.

Response: Section 182 does not explicitly provide that RACT SIPs must be submitted a certain number of months after an area is designated nonattainment for the 8-hour ozone NAAQS. EPA interprets the comment to suggest that the final rule contains requirements similar to the VOC RACT requirements in section 182(b)(2)(C), which must be submitted to the Administrator by two years after November 15, 1990 (the date of enactment of the CAA Amendments of 1990). Therefore, the argument goes, the RACT SIPs must similarly be submitted within two years of the nonattainment designation, or June 15, 2006. In the final Phase 2 Rule, we determined that because some states might rely on the submittal of SIP revisions meeting the CAIR to also satisfy RACT for some sources, it was reasonable to extend the RACT submittal date to September 15, 2006 to correspond to the required date for submitting CAIR SIPs. This date has now passed, and for the reasons explained in section III.B.1 of this notice, EPA does not believe it would be appropriate to finalize this rule with a retroactive deadline.

b. Comment: Other commenters supported the extension at least until June 15, 2007 and some argued a longer extension may be necessary given the uncertainties regarding classifications created by the decision in South Coast v. EPA.

Response: As discussed in section III.B.1 of this notice, the RACT SIP submittal date in the final rule reflects EPA's recognition that the South Coast v. EPA decision has created some uncertainty about which areas, by virtue of their classification, would be required to address RACT requirements and in what timeframe.

C. Provisions of Final Rule Addressing the Criteria For Emission Reduction Credits From Shutdowns And Curtailments

1. Major Source NSR Criteria For Emission Reduction Credits (ERC) From Shutdowns And Curtailments

The November 29, 2005 Phase 2 rule removed the requirement that a State must have an approved attainment plan before a source may use pre-application credits from shutdowns or curtailments as offsets. It also revised the availability of creditable offsets, consistent with the requirements of section 173 of the CAA. We revised the provisions at 40 CFR 51.165(a)(3)(ii)(C) and appendix S concerning emission reduction credits generated from shutdowns and curtailments as proposed in Alternative 2 of the 1996 proposal, with one exception. Alternative 2 of the 1996 proposal provided that, in order to be creditable, the shutdown of an existing emission unit or curtailing of production or operating hours must have occurred after the “most recent emissions inventory.” As described in prior notices referenced herein, a public comment raised concerns about usage of this terminology. Upon consideration of various aspects of the terminology, we amended the rules at 40 CFR 51.165(a)(3)(C)(1) and Appendix S paragraph IV.C.3. to specify the cutoff date after which the shutdown or curtailment of emissions must occur as “the last day of the base year for the SIP planning process.” In our responses to comments below, we further detail our rationale supporting this change. As explained previously, this regulatory language is consistent with our previous guidance on how emission reduction credits from shutdowns and curtailments are used in attainment

planning.¹⁵ The base year inventory includes actual emissions from existing sources and would not normally reflect emissions from units that were shutdown or curtailed before the base year, as these emissions are not "in the air." To the extent that these emission reduction credits are to be considered available for use as offsets and are thus "in the air" for purposes of demonstrating attainment, they must be specifically included in the projected emissions inventory used in the attainment demonstration along with other growth in emissions over the base year inventory. This step assures that emissions from shutdown and curtailed units are accounted for in attainment planning.¹⁶ As with the prior rules, reviewing authorities thus retain the ability to consider a prior shutdown or curtailment to have occurred after the last day of the base year if emissions that are eliminated by the shutdown or curtailment are emissions that were accounted for in the attainment demonstration. However, in no event may credit be given for shutdowns that occurred before August 7, 1977, a provision carried over from the previous regulation. See 40 CFR 51.165(a)(3)(C)(1)(ii) and 40 CFR Part 51 Appendix S Paragraph IV.C.3.

¹⁵ See 57 FR 13553. After the 1990 CAA Amendments were enacted, 1990 was the base year for 1-hour ozone NAAQS attainment planning purposes. See 57 FR 13502. The EPA encouraged States to allow sources to use pre-enactment banked emissions reductions credits for offsetting purposes. States have been allowed to do so if the restored credits meet all other offset creditability criteria, and States consider such credits as part of the attainment emissions inventory when developing their post-enactment attainment demonstration.

¹⁶ For a discussion of emission inventories for the 8-hour ozone standard, see our emission inventory guidance, "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations - Final," at <http://www.epa.gov/ttn/chief/eidocs/eiguid/index.html> . For a discussion of emission projections used in attainment demonstrations, see Emission Inventory Improvement Program, Volume X, Emission Projections, December 1999, available at <http://www.epa.gov/ttn/chief/eijp/techreport/> .

2. Legal Basis For Changes To Criteria For Emission Reduction Credits From Shutdowns And Curtailments

The revisions made to the rules governing use of emissions reductions from shutdowns/curtailments as offsets were warranted by the more detailed attainment planning and sanction provisions of the 1990 CAA Amendments. These provisions specifically address air quality concerns in nonattainment areas lacking EPA-approved attainment demonstrations. As a threshold matter, we noted (See 70 FR 71677, November 29, 2005) that CAA section 173 does not mandate the prior restrictions on shutdown credits, specifically, the requirement to have an approved attainment demonstration before shutdown credits may be allowed. (See 48 FR 38742, 38751; August 25, 1983). Rather, in promulgating these restrictions in 1989, EPA recognized that it had a large degree of discretion under the CAA to shape implementing regulations, as well as the need to exercise that discretion such that offsets are consistent with reasonable further progress (RFP) as required in CAA section 173. (See 54 FR 27286, 27292; June 28, 1989). Originally, EPA believed that areas without approved attainment demonstrations lacked adequate safeguards to ensure that shutdown/curtailment credits would be consistent with RFP. We thus subjected those areas to more restrictive requirements to ensure a link between the new source and the source being shutdown/curtailed (that is, shutdown/curtailment must occur after the application for a new or modified major source is filed).

The 1990 CAA Amendments changed the considerations involved. For areas subject to subpart 2 of CAA Part D, Congress emphasized the emission inventory requirement in section 172(c)(3) as a fundamental tool in air quality planning (See

Section 182(a)(1). Congress also added new provisions keyed to the inventory requirement, including specific reduction strategies (e.g., section 182(b)(3) and (4) (regarding gasoline vapor recovery and motor vehicle inspection and maintenance programs)) and “milestones” that measure progress toward attainment from the base year emissions inventory or subsequent revised inventories (See section 182(b)(1)). Subpart 4 sets forth specific reduction strategies and milestones for attainment of the PM₁₀ standards. Additionally, there are now several adverse consequences where States fail to meet the planning or emissions reductions requirements of the CAA. For example, the CAA contains mandatory increased new source offset sanctions at a 2:1 ratio where the Administrator finds that a State failed to submit a required attainment demonstration (See section 179). In areas that are subject to subpart 2 and subpart 4, failure to attain the air quality standard by the attainment deadline results in the area being bumped up to a higher classification (see sections 181(b)(2) and 188(b)(2)). Additional regulatory requirements are imposed as a result of the higher classification (see, e.g., section 182(c), (d), and (e), and section 189(b)). These statutory changes justify shifting the focus of the prior regulations from individual offset transactions between a specific new source and shutdown source and towards a systemic approach. Considering the changes to the 1990 CAA Amendments, we now believe that continuing the prohibition on the use of shutdown/curtailment credits generated in a nonattainment area that is without an approved attainment demonstration is not warranted. We believe that use of emission reduction credits from shutdowns/curtailments will be consistent with RFP towards attainment under CAA section 173, even in the absence of an approved attainment demonstration, if the shutdown or curtailment occurs after the last day of the base year

for the SIP planning process or is included in the projected emissions inventory used to develop the attainment demonstration. From an air quality planning perspective, emissions from the shutdown source actually impacted the measurements of air quality used in determining the nonattainment status of an area. Therefore, emissions reductions from such source shutdowns/curtailments are actual emissions reductions, and their use as emission offsets at a ratio of 1:1 or greater is consistent with RFP towards improved air quality as set forth in CAA section 173(a)(1)(A) provided they are included in the baseline emissions inventory.

3. Reconsideration of Emission Reduction Credits Final Rule Language and Request for Public Comments

In its January 30, 2006, petition for reconsideration, NRDC requested that EPA reconsider provisions in the final Phase 2 Rule that pertain to ERC. NRDC argued that EPA failed to present portions of the rule's "shutdown-curtailment offset provisions" and accompanying rationales to the public for comment. In our December 19, 2006 proposal for reconsideration we presented our opinion that the basis for the ERC provisions of the final rule was adequately provided in the November 29, 2005 rule and in earlier actions leading to that rule. Petitioners asserted in their request for reconsideration that certain aspects of our clarifying amendments to the ERC provisions of the final rule were not a logical outgrowth of the ERC provisions we proposed. While disagreeing, we nonetheless presented certain changes made in the November 29, 2005 final rule for additional public comment as requested by the petitioners. Concerning emission reduction credits, our proposal for reconsideration drew twelve public comments. Of those comments, eight supported the rules as now written. Among those opposed were

the petitioners, who continued presentation of the concerns leading to today's notice. Detailed discussion and analysis of arguments raised by all of the commenters is given below.

4. Comments and Responses for Emission Reduction Credits Issues

Two commenters objected to the inclusion of NSR program elements into the same action as the requirements for the implementation of the eight-hour ozone standard. Our response to that concern is that we considered it more efficient to combine the two actions. We observed in 70 FR 71672 that we did not propose specific regulatory language for implementation of NSR under the 8-hour NAAQS. However, we indicated that we had intended to revise the nonattainment NSR regulations to be consistent with the rule for implementing the 8-hour ozone NAAQS. We found it expeditious to address these and other NSR matters in the same regulatory package as the phase 2 ozone rule. In the future, any combination of actions affecting multiple aspects of an overall program would be considered in light of the pros and cons of doing so at that time. In this instance, coordination of distinct program elements was a primary concern.

a. Comments on Emission Reduction Credits and Emissions Inventories.

In the January 30, 2006, NRDC petition for reconsideration, Earthjustice argued on behalf of NRDC that EPA failed to present portions of the rule's "shutdown-curtailment offset provisions" and accompanying rationales to the public for comment. The petitioners asserted in their request for reconsideration that certain aspects of our clarifying amendments to the ERC provisions of the final rule were not a logical outgrowth of the ERC provisions we proposed on July 23, 1996 proposal. First, they identified the change in language regarding when shutdowns and curtailments must have

occurred in order to be creditable. The proposed language (alternative 2) said that shutdowns and curtailments could be credited “if such reductions occurred after the last day of the baseline year of the most recent base year emissions inventory used (or to be used) in the plan.” In the final rule, after considering comments, we changed the language to say that such reductions could be credited if they occurred “after the last day of the base year for the SIP planning process.” Earthjustice objected to this change because, in their view, the final rule “allows offsets from pre-application shutdowns and curtailments even in the absence of an emission inventory for the attainment plan.” While we believe the ERC provisions in the final rule were a logical outgrowth of the proposal, we nevertheless granted their request for reconsideration with respect to this particular language change, as indicated in the December 19, 2006, notice. The NRDC/Earthjustice petition also contained a second argument, which was that the final rule “could allow pre-baseline reductions from shutdowns or curtailments to be used as post-baseline offsets.” This argument hinged on the second sentence of §51.165(a)(3)(C)(1)(ii), which now provides that “a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units.” While we did not specifically open this issue for reconsideration, we nevertheless address related comments below. For the purpose of providing potential commenters context and clarity, we included the full language of §51.165(a)(3)(C)(1) and Appendix S paragraph IV.C.3 in our December 19, 2006 notice of reconsideration.

In its comments upon our proposal for reconsideration, Earthjustice essentially repeated the points made in the NRDC/Earthjustice petition, stating that the final ERC provisions “would allow use of such pre-application offsets before the state even knows the degree of emission reductions needed to assure RFP, and before the state has even developed a baseline emission inventory.” Earthjustice also pursued the second issue, stating that “the proposed rule further violates the Act to the extent that it allows the source to claim offsets from reductions that occurred prior to the baseline year for the attainment demonstration.” In addition, Earthjustice offered broad comments that relate to aspects of the ERC provisions that pre-dated the Phase II rule. We will examine those comments after first addressing the discrete issues that were the subject of the reconsideration proposal.

As summarized above, the first concern raised by NRDC/Earthjustice in the petition for reconsideration was with the replacement of the terminology “most recent emissions inventory” as used in the July 23, 1996 proposal (61 FR 38250) with the terminology “the last day of the base year for the SIP planning process.” Alternative 2 of the 1996 proposal provided that, in order to be creditable, the shutdown of an existing emission unit or curtailing of production or operating hours must have occurred after the “most recent emissions inventory.” We agreed with a commenter on the 1996 proposal who found the phrase “most recent emissions inventory” confusing. In particular, that prior commenter believed this language could be read as meaning that the base year for the purpose of determining emissions that may be used as creditable offsets would continue to shift. The prior commenter noted that it would be more accurate to state that the base year emissions inventory is the starting point and all creditable emissions

reductions must result from the shutdown or curtailment of emissions that have been reported in the base year inventory or a subsequent emissions inventory. (For the 8-hour ozone NAAQS, the base year is 2002.¹⁷) We agreed with the prior commenter that the terminology “most recent emissions inventory” was not desirable and revised §51.165(a)(3)(C)(1) and Appendix S paragraph IV.C.3. Accordingly, specifying the cutoff date after which the shutdown or curtailment of emissions must occur as “the last day of the base year for the SIP planning process.”

Eight commenters voiced support for the ERC language as promulgated on November 29, 2005, and offered further comment on our December 19, 2006 proposal. In general, the commenters noted the important role assigned by Congress to the usage of emissions inventories for air quality planning. The commenters were supportive of the availability of ERC as a tool for factoring managed growth into the planning process. As a whole, these commenters supported the change from the language “most recent emissions inventory” as proposed July 23, 1996 to the final “the last day of the base year for the SIP planning process.” Speaking directly to the language that was the subject of the December 19, 2006 proposal, several commenters remarked that ERC should not be lost every time an inventory is updated. One observed that losing ERC due to a moving target cannot be directly tied to attainment planning. Another commenter found EPA’s rationale to be reasonable and saw no merit to the petition. This opinion was echoed by yet another commenter who found no new information in the petition for reconsideration to support changing the promulgated ERC rule. Several of the commenters supporting the cutoff date for ERC as being the last day of the base year for the SIP planning process

¹⁷ 68 FR 32833, See also “2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, PM2.5 and Regional Haze Programs,” U.S. EPA, pg. 1 (November 18, 2002).

went on to express opinions about implementation of the provision. A State air pollution control agency said that emissions included in the base year inventory will also be included in a modeled attainment demonstration. Their experience has been that emissions go down while ERC are employed. We agree with the commenters regarding the important role of emissions inventories in air quality planning and the retention of ERCs. There is no good rationale to support the removal of ERC as a consequence to updating of inventory. We provided a detailed rationale for our own conclusion at 70 FR 71676-71677.

One commenter expressed appreciation of the specific clarifications we provided with regard to the ability to credit pre-emissions inventory shutdowns and curtailments if those emissions were included in the baseline SIP emission inventory. The commenter noted that this shutdown and curtailment policy provides incentive to remove old equipment without modern controls or to control emissions from such units with new technology or practically enforceable permit limits. The ban on the use of shutdowns and curtailments was counter-productive to improving air quality as it provided an incentive to keep older and higher emitting sources operating. The commenter opined that given the paucity of NO_x emissions reduction opportunities in certain nonattainment areas, the new rule represents sound public policy by providing an incentive for sources that want to build or install new emissions equipment to purchase and or control NO_x-emitting equipment at other sources that might have little incentive to reduce their emissions otherwise. Also, since an offset generates net emissions reductions because greater than one-to-one offset ratios are required for NSR permitting in these areas, such offsets do not interfere with attainment. We strongly agree with this commenter. The chosen

approach to ERC should not encourage owner/operators to continue operating old inefficient equipment solely for the purpose of having those emissions available for credits at the time of a permit application. Establishing programmatic incentives to delay emission reductions that make good business sense (but are not otherwise required) is detrimental to the goal of achieving attainment as expeditiously as possible.

Some comments were received upon the mechanics of implementing ERC provisions. A State air pollution control agency said that since curtailments, by definition, are temporary, the EPA also needs to review the procedures it employs for allowing sources to use emissions reductions from curtailments as offset credits to ensure that the emissions reductions from the curtailments are real, federally enforceable, quantifiable and surplus. The commenter thought emissions might resume at a later point in time after the curtailment ends and expressed concern about adequate tracking of both the generation and use of these emission reductions to ensure that the use of such credits would be discontinued as soon as the curtailment ends. According to the commenter, EPA also needs to ensure that prior to the end of the curtailment, other emission reductions are available to offset the increase in emissions that occur when the source recommences operation. The commenter recommends that in order to ensure consistency on a regional and national basis, EPA should perform a detailed evaluation of the current procedures used by its regional offices for reviewing and approving the use of emissions reductions from curtailments as emissions offsets. Another State air pollution control agency thought the term “explicit” should be clarified. The second agency opined that it may be appropriate to explicitly include a line item in the projected emissions inventory on expected use of pre base year shutdown and curtailment emission reduction credits.

They thought it should not be necessary to list separately each company that shutdown or curtailed operations in the projected emissions inventory. The second commenter went on to note that not all ERC in its inventory were actually used and that they have a schedule for retiring unused credits. This commenter expressed the opinion that we should avoid basing requirements of the permitting program on an inventory, which is designed for planning purposes.

Our interpretation of the two sets of comments referenced in the preceding paragraph is that they generally argue for opposite outcomes. We believe that emission inventories should be sufficiently detailed that the contributions of individual sources, particularly major sources, might be ascertained. The depth of detail yielded by periodic inventory updates is beyond the scope of this action. We do think the second commenter's concerns as to the status of particular credits should be addressed in the course of permitting. Applicants should be able to guarantee the continued existence of any credits upon which their permits might be based. Concerning the final point made by the second commenter regarding use of inventories, we disagree. The requirements of the NSR program provide growth management tools and are an integral part of the overall air quality attainment program. The ERC provisions which are the subject of this discussion are a tool to be used by States when tailoring programs to meet their individual needs. In the case just cited, the State has chosen to retire ERC according to a schedule. Used in this manner, ERC are available to encourage owner/operators to close aging facilities more quickly than they might should they see a need to internally "bank" their emissions for anticipated future permit applications. At the same time, the State has flexibly implemented the availability of ERC to suit its planning needs.

As noted above, the Earthjustice/NRDC petition for reconsideration and comments on the December 19, 2006 notice raised a discrete issue with respect to the phrase “the last day of the base year for the SIP planning process.” Earthjustice objected to the change from the proposed language because, in their view, the final language “would allow use of such pre-application offsets before the state even knows the degree of emission reductions needed to assure RFP, and before the state has even developed a baseline emission inventory.” We disagree with the commenter’s suggestion that ERC may be employed with no consideration of consequences to air quality planning. In particular, the regulatory language in question from §51.165(a)(3)(C)(1)(ii) specifically conditions usage of ERC for shutdowns and curtailments that occur prior to the cutoff date on identification of the underlying emissions in the inventory being used to develop a particular attainment demonstration. Shutdowns or curtailments based on emissions that were “in the air” during the baseline year are based on emissions that would automatically form part of the inventory. All emissions whose reduction would be creditable as offsets must be at some point incorporated into inventories employed for demonstrations of attainment. Any ERC, whether eventually used for offsetting or not, must be accounted for within either the baseline inventory or within periodic inventory updates. Any ERC employed as offsets may be readily taken into account during attainment planning.

The Earthjustice comments also contain the argument that the second sentence of §51.165(a)(3)(C)(1)(ii) “violates the Act to the extent that it allows the source to claim offsets from reductions that occurred prior to the baseline year for the attainment demonstration.” The complete second sentence provides that “a reviewing authority may

choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units.” In this argument the commenter cites to CAA § 173(c)(1) as containing language precluding the offsets in question. As discussed below, this exception to the baseline provision predated the Phase 2 rule. The only change we made in the Phase 2 rule was to allow its use in a greater range of circumstances. This change was consistent with our overarching action in expanding the circumstances in which pre-application shutdowns and curtailments could be used to generate ERCs. We did not intend to revisit the exception as promulgated prior to the Phase 2 rule. We note that this exception is consistent with the policy on allowing pre-enactment banked emissions to be credited as set forth in the 1992 General Preamble (57 FR 13553). In that notice, we stated: “For purposes of equity, EPA encourages States to allow sources to use pre-enactment banked emissions reductions credits for offsetting purposes. States may do so as long as the restored credits meet all other offset creditability criteria and such credits are considered by States as part of the attainment emissions inventory when developing their post-enactment attainment demonstration.” We discuss CAA § 173(c)(1) further below in conjunction with our discussion of CAA § 173(a)(1)(A) and RFP.

As previously noted, portions of Earthjustice’s comments relate to aspects of the ERC provisions that pre-dated the Phase II rule. While we view these issues as outside the scope of the reconsideration, we provide background on these broader issues in order to put the Phase 2 changes into context. We note, however, that Earthjustice had an

opportunity to comment on these longstanding provisions at the time they were promulgated.

The concept of generating credits for later use has been a fundamental part of the NSR program for decades. See, for example, the “General Preamble for Proposed Rulemaking on Approval of State Implementation Plan Revisions for Nonattainment Areas,” 44 FR 20372 (April 4, 1979), indicating that “the state may allow emission reductions to be banked for later use under the [Emission Offset Interpretive] Ruling and under the state’s preconstruction review program under Part D.”

In 1989, EPA promulgated changes to the provisions that existed at that time regarding the extent to which source shutdowns and curtailments were creditable as emission offsets in nonattainment areas (54 FR 27286, June 28, 1989). In that notice, EPA pointed out that “the Act does not expressly mandate any particular treatment of shutdowns for offset crediting purposes. Rather, this question is a matter within the administrative discretion delegated to EPA under the Act. . . . Thus, although it is true, as noted in the proposed regulations, that section 173 requires EPA to allow the construction of new sources in nonattainment areas where such construction will be consistent with RFP toward attainment, EPA retains broad discretion to establish criteria for determining when RFP has been assured” (54 FR 27292). The version of 5.165(a)(3)(ii)(C)(1) & (2) promulgated in that 1989 rule was the version that remained current up until the Phase 2 revisions. In other words, as far back as 1989, EPA approved the concept of pre-application shutdown credits in certain circumstances (primarily where areas had EPA-approved attainment plans).

In the 1989 final rule, EPA also adopted, for purposes of areas with approved attainment plans, a provision allowing permitting authorities “to consider a prior shutdown or curtailment to have occurred after the date of its most recent emission inventory, if the inventory explicitly includes as current “existing” emissions the emissions from such previously shutdown or curtailed sources” (54 FR 27295). We explained that absent such explicit treatment, “emissions from a new source whose construction is premised upon such shutdowns cannot reliably be said to be consistent with RFP.” Our stated concern was that if the emissions were not included in the inventory, “[i]t would constitute ‘double counting’ of these emissions reductions to allow their unrestricted use as shutdown offset credits by potential new sources.” With the inclusion of the emissions in the inventory, however, the concern about possible double counting was eliminated.

Thus, our November 29, 2005 amendment to the ERC provisions introduced neither the concept of credits for pre-application shutdowns and curtailments nor the exception to the cutoff date for emissions explicitly included in the emissions inventory. What our November 29, 2005 amendment accomplished was to broaden the scope of these provisions to acknowledge 1990 CAA changes that enhanced the role of inventories in attainment planning. In its comments Earthjustice called our attention to CAA § 173(a)(1)(A), which they noted as requiring offsets to ensure that total allowable emissions will be sufficiently less than total emissions “prior to the [NSR permit] application” to ensure RFP. They also invoked CAA §173(c)(1) as requiring that increased emissions from a new or modified major source “shall be offset” by an equal or greater reduction in actual emissions. Earthjustice, however, failed to note the final

language of 173(a)(1)(A), which states that the difference between the pre-application emissions and the post-application emissions is to be considered together with the plan provisions required under section 172 in determining whether the difference represents reasonable further progress. In particular, we note that §172(c)(3) presents the framework for non-attainment planning and includes use of inventories in the development of non-attainment plan provisions, into which NSR factors as a management tool. The inventories under §172(c)(3) are to account for actual emissions from all sources. We consider the inclusion of emissions associated with pre-application shutdowns and curtailments in the inventory as “actual emissions” to be reasonable in that they represent emissions that would be “in the air” absent incentives to close or curtail sources. Reductions in these emissions thus fulfill the requirement for reductions in actual emissions as set forth in §173(c)(1).

In light of the overall goal of RFP towards attainment, we have used our discretion to provide an incentive for sources to retire or curtail emissions sources early rather than continue operation of higher emission sources until such time as permit applications might be filed for replacement facilities. This construction is reinforced by §172(c)(6) which says that plans shall include necessary and appropriate “measures, means, or techniques,” including economic incentives such as marketable permits. ERCs are one such economic incentive. Should ERC be lost every three years when inventories are updated, their marketability would be greatly diminished.

In §172(c)(6) we see direction to construct a coordinated and cohesive air quality management program to accomplish the goal of RFP. The inclusion of ERC as now allowed in the NSR component of the program is a viable measure entirely consistent

with Congress' direction that implementation of § 173(a)(1)(A) be accomplished in conjunction with the overarching requirements of §172. The ERC in question herein are properly tracked through required inventories built into demonstrations of attainment. They provide incentives for sources to reduce emissions in advance of planned future permit applications and thereby enhance RFP. The credits for ERC are marketable. To the extent they are included as offsets in NSR permits, they lock down reductions of emissions that might otherwise be legitimately discharged into the atmosphere as actual emissions up to the time of the permit application. We consider this to be entirely consistent with the spirit and requirements of the CAA.

b. Comments on Impact of D.C. Circuit Court of Appeals Decision on Phase 2 Rule

One commenter believes that the recent D.C. Circuit Court of Appeals decision in *South Coast Air Quality Management District v. Environmental Protection Agency* (2006 U.S. App. LEXIS 31451(D.C. Cir. 2006)) has a direct impact on the Phase 2 Rule and the issues under review in this reconsideration notice, particularly with respect to specific control measures such as the NSR program. The commenter opined that NSR program elements included in the Phase 2 Rule are in direct conflict with this D.C. Circuit Court opinion. Another commenter drew an opposite conclusion and said there is no need for further delay as a result of that same decision. The second commenter submits that the issues that are subject to the proposed EPA action are not affected by the Court of Appeals' recent ruling in *SQAQMD v. EPA*, and that it is critical for the Agency to take final action on the issues raised in the December 19, 2006 notice. The commenter's opinion is that the Phase 2 rule addresses new source review requirements during the

transition period until SIP revisions for the 8-hour ozone rule are adopted by jurisdictions and approved by EPA. This commenter said that in view of the Court of Appeals' opinion that many features of the Phase 1 ozone rule are not consistent with the Act, it is unlikely that States and regional air pollution control agencies will be able to adopt approvable SIP revisions for some time. Thus, transitional rules affecting new source review pursuant to the federal transitional requirements are essential.

As discussed below, we do not believe that the issues under review in this reconsideration are in conflict with the South Coast decision. The first commenter gave no specifics. Earthjustice did provide a specific argument concerning the impact of the Court's decision.

According to Earthjustice, the ERC provisions in the Phase 2 rule constitute a weakening of offset requirements and are contrary to CAA protections limiting EPA's discretion to provide flexibility to states in complying with the Act's mandates. They cite South Coast. They argue that the 1990 Amendments' more explicit rate of progress targets do not somehow relax the offset requirements for new major sources. Further they argue that, to the contrary, the 1990 Act sets out even more explicit offset requirements than before, making crystal clear that such minimum offsets are required regardless of whether the Act's rate of progress requirements in the Act are being met. See, e.g., CAA §§182(a)(4), (b)(5), (c)(10), (d)(2), (e)(1). Thus, according to Earthjustice, the offset requirements are not mere subsets of the rate of progress requirements, but distinct mandates to ensure a net cut in emissions after the application for a new source permit. They maintain that EPA has attempted to weaken these mandates and that such action

violates the Act's anti-backsliding provisions, by relaxing the level of pollution control required prior to revision of the ozone NAAQS.

In response, EPA first notes that the South Coast decision relates to a different context. The anti-backsliding discussion in that decision revolved about §172(e) requirements that controls not be made less stringent in conjunction with relaxation of national ambient air quality standards. The ERC changes challenged by Earthjustice are not tied to any particular national ambient air quality standard or its revision. Rather, they are broader programmatic changes, as noted by some of the commenters. Earthjustice does not identify which anti-backsliding provisions other than section 172(e) might be implicated by this action. The changes to 40 CFR 51.165 do not in and of themselves modify any requirements applicable to nonattainment areas. Thus, even assuming section 193, for example, is potentially applicable, this is not the appropriate time to determine its application. We believe the appropriate time to determine the applicability of and compliance with Section 193 is when a control requirement in a nonattainment area is changed. For States that undertake a SIP revision, we will address the applicability of Section 193 in our future actions to approve the SIP revisions. Similarly, the applicability of section 110(l) would only become an issue upon submission of a SIP revision to EPA. We disagree with the commenter who stated that the NSR changes are limited to the transitional period. The ERC changes are broader in nature, given that they amend section 51.165 as well as Appendix S. The extent to which the changes to Appendix S would affect areas that were nonattainment for the 1-hour standard is currently unclear. In the South Coast decision, the DC Circuit vacated certain aspects of EPA's phase 1 rule implementing the 8-hour ozone NAAQS. One possible

effect of the court's vacatur of that rule is that it could require Federal, state, and local agencies to issue NSR permits in accordance with the area's 1-hour ozone nonattainment classification. Were that to occur, areas that were nonattainment for the 1-hour standard would presumably implement their 1-hour NSR SIPs rather than Appendix S, at least until EPA had established appropriate 1-hour anti-backsliding provisions and had taken further action with respect to the 1-hour standard

Similarly, Earthjustice's argument that the ERC changes weaken the offset requirements in CAA §§182(a)(4), (b)(5), (c)(10), (d)(2), (e)(1) is unconvincing. The ERC changes do not affect the applicable offset ratios as mandated by those statutory provisions. They concern the cutoff date for offsets, rather than the degree of offset required. As previously discussed, the inventory required in § 172(c)(3) is one component of the nonattainment plan provisions of § 172(c). The components of § 172(c) are not intended to stand alone. They complement one another. When we look to § 172(c)(6) we find direction that plans include a range of "other measures, means, or techniques," including economic incentives, "as may be necessary or appropriate to provide for attainment." ERCs are one such incentive. As discussed in more detail above, they are fully compatible with the provisions of sections 172 and 173. Furthermore, they do not interfere with the specific offset ratios mandated by Congress in section 182.

Having considered the comments received, we have seen no new rationale presented that would lead us to change the current regulatory language describing the availability and usage of ERC. Accordingly, we are electing not to amend relevant rule language currently codified in the Code of Federal Regulations.

D. Applicability of Appendix S, Section VI

1. Changes to Applicability of Appendix S, Section VI

Section VI allows new sources locating in an area designated as nonattainment to be exempt from the requirements of Section IV.A. of Appendix S under certain circumstances if the date for attainment has not yet passed. Section VI provides a management tool to provide a limited degree of flexibility in situations where a new source would not interfere with an area's ability to meet an attainment deadline. The final Phase 2 Rule made a procedural change to limit the applicability of appendix S, section VI to only those instances in which the Administrator has specifically approved its use. Although we did not include the regulatory language to accomplish this goal in the June 2, 2003 proposal, we did clearly state our intention of doing so. As we noted at 68 FR 32848, section VI as worded without any amendment could apply in any nonattainment area where the dates for attainment have not passed as long as the source met all applicable SIP emission limitations and would not interfere with the area's ability to meet its attainment date. As codified prior to the amendment in the Final Phase 2 Rule, section VI contained no provision conditioning its applicability on approval by the Administrator. We noted at proposal, however, that States generally would not be able to show that a nonattainment area would continue to meet its attainment date if it did not apply LAER or offsets to major new sources and major modifications in the absence of safeguards (68 FR 32848).

Further, we stated in the preamble to the Phase 2 Rule that we continued to believe, as we stated in its proposal, that States should not interpret section VI as allowing a blanket exemption from LAER and offsets for all major new sources and

major modifications in a given area before attainment dates have passed for that area. Thus, in the final rule we added a further requirement that the Administrator independently determine and provide public notice that those requirements have been met. The purpose of the requirement is to assure that States do not interpret section VI to provide a broad exemption to all major new sources and major modifications in any nonattainment area for which the attainment date has not passed.

2. Legal Basis for Changes to Applicability of Appendix S and the Transitional NSR Program

The legal basis for Appendix S, including section VI, was discussed in detail in section V.B.3.b. of the preamble to the final Phase 2 Rule. We have historically recognized that the SIP development period provided for in section 172(b) leaves a gap in part D major NSR permitting and have determined that this gap is to be filled with an interim major NSR program that is substantially similar to the requirements of part D, including the LAER and offset requirements from part D, subject to a limited exemption where the attainment deadline will be met (57 FR 18070, 18076). This interim NSR program has been implemented to date through Appendix S.

The section VI exemption, as limited by the final Phase 2 Rule, is consistent with the section 110(a)(2)(C) requirement that preconstruction permitting is implemented “as necessary to assure that the [NAAQS] are achieved.” While the Phase 2 Rule did not adopt the eligibility criteria that were proposed to ensure satisfaction of the original section VI conditions, we did add the proposed requirement that the Administrator determine that sources exempted from LAER and offsets under section VI will meet those conditions, in particular, noninterference with the attainment deadline. Section VI

also is consistent with the exercise of our gap filling authority under section 301, as informed by the legislative history. That is, Appendix S reflects Congressional intent that standards equivalent to part D govern the issuance of NSR permits, subject to a limited degree of flexibility under conditions where attainment of the NAAQS by the attainment deadline is assured.

3. Reconsideration of Appendix S, Section VI Final Rule Amendments

In its January 30, 2006, petition, NRDC requested that EPA reconsider provisions in the final Phase 2 Rule that pertain to Appendix S, section VI. NRDC argued that EPA failed to provide the public with an opportunity to comment on the language of Appendix S, Section VI that was included in the final rule. As is the case with respect to the ERC provisions, EPA believes that our rationale was fully explained in the November 29, 2005 rulemaking and in earlier actions leading to that rulemaking. The preamble to the final rule included a lengthy description of preceding actions in which our rationale was developed. Further, the preamble to the final rule detailed our response to comments pertaining to the proposal. As noted above, what we did in the final rule was add one provision to the already existing language of Appendix S, section VI to limit use of Section VI to only those instances publicly approved by the Administrator. From our perspective, we made the smallest change possible and achieved closure of a gap in section VI. As well, we continue to disagree with the petitioner's assertion that section VI, as amended by the Phase 2 rule constitutes an open-ended scheme to evade the strictures of Part D. If anything, the prior rule language could have been construed as open-ended. The sole intention of our language change was to close what we perceived to be a loophole allowing just the type of outcome to which the petitioners object.

Congress required just such closure through the provisions of the original section 129 as included in the August 7, 1977 amendments to the Act. At that time, Congress made clear its opinion that it would be the role of the Administrator to determine whether waiver of the appendix S provisions in question might be appropriate. The change made to Section VI in the final Phase 2 rule providing that the Administrator must determine whether the conditions of Section VI have been satisfied provides a positive safeguard to prevent just the kinds of unchecked application of its provisions as envisioned by the petitioners.

As was the case for ERC, we saw value in presenting for public comment the changes made to Section VI of Appendix S in the final Phase 2 Rule. Accordingly, on December 19, 2006 we requested comment on subsection C. of Section VI of Appendix S as added in the final Phase 2 rule as requested by the petitioners. Concerning the new paragraph C. of section VI, our proposal for reconsideration drew ten public comments. Of those comments, five supported the rule amendments as now written and five were opposed. Among those opposed, were the petitioners and State air pollution control agencies. The petitioners continued presentation of the concerns leading to this notice and were echoed, in part, by the States. In short, those opposing the change to section VI see it as an opening which might be subject to abuse of discretion. We continue to see our change as a closing of a loophole. Five commenters agreed with our assessment. Detailed discussion and analysis of arguments raised by all of the commenters is given below.

4. Comments and Responses for Appendix S, Section VI

We received ten comments upon the proposed section VI paragraph C language. A number of comments made it clear that the nature of our addition of paragraph C for the purposes of closing a loophole and constraining application of section VI was not completely understood. Also, we received comments questioning the legality and existence of Section VI along with requests for its removal from the Code of Federal Regulations. Such comments are outside the scope of this action. Section VI significantly predates the Phase 2 Rule. While it originally applied only to secondary NAAQS, EPA revised it to include primary standards following the 1977 Amendments (44 FR 3274, Jan. 16, 1979). EPA made an additional revision to Section VI in 1980 in the course of clarifying the applicability of Appendix S to sources located outside of nonattainment areas that cause or contribute to violations (45 FR 31307, May 13, 1980). The version of Section VI established by that 1980 rulemaking remained current up until the effective date of EPA's final Phase 2 rule. The time for challenging rules issued in 1979 and 1980 is long past. If commenters believe Section VI as a whole is no longer desirable, then the appropriate vehicle for their concerns is a petition for rulemaking. The only matter opened for comment by the proposal for reconsideration was the appropriateness of paragraph C. Before reviewing those comments which were germane to the proposal, we will first recap the reasoning for our addition of paragraph C to section VI.

Section VI allows new sources locating in an area designated as nonattainment to be exempt from the requirements of section IV.A. of appendix S under certain circumstances if the date for attainment has not yet passed. Section VI provides a management tool to provide a limited degree of flexibility in situations where a new

source would not interfere with an area's ability to meet an attainment deadline. The final Phase 2 Rule made a procedural change to limit the applicability of appendix S, section VI to only those instances in which the Administrator has specifically approved its use. Contrary to the suggestions of comments to be discussed below, we had no intention of expanding usage of Section VI through our addition of paragraph C. Our purpose in making the change was to close what we saw as a loophole and constrain the application of Section VI. Although we did not include the regulatory language to accomplish this goal in the June 2, 2003 proposal, we did clearly state our intention of doing so. As we noted at 68 FR 32848, section VI as worded prior to our amendment could have applied in any nonattainment area where the dates for attainment had not passed, even if the source met all applicable SIP emission limitations and would not have interfered with the area's ability to meet its attainment date. As codified prior to the amendment in the Final Phase 2 Rule, section VI contained no provision conditioning its applicability on approval by the Administrator. We noted at proposal, however, that States generally would not be able to show that a nonattainment area would continue to meet its attainment date if it did not apply Lowest Achievable Emission Rate (LAER) or offsets to major new sources and major modifications in the absence of safeguards (68 FR 32848).

Further, we stated in the preamble to the Phase 2 Rule that we continued to believe, as we also stated in its proposal, that States should not have interpreted section VI as allowing a blanket exemption from LAER and offsets for all major new sources and major modifications in a given area before attainment dates had passed for that area. In that proposal, we also offered for comment two broad programmatic proposals to

modify the then-existing section VI for the purpose of providing greater flexibility. Overall, commenters considered the programmatic options to be impracticable. However most commenters did express support for the flexibility provided by section VI. For that reason, we retained the original eligibility conditions for determining when section VI might apply, but added the procedural requirement that the Administrator determine that the two previously existing conditions of Section VI are satisfied, and that the Administrator provide public notice of that determination. That requirement achieved the proposal's purpose of assuring that States could not interpret section VI to provide a broad exemption to all major new sources and major modifications in any nonattainment area for which the attainment date has not passed.

Earthjustice/NRDC filed the petition for reconsideration leading to today's action and provided comment upon our proposal. This commenter referenced a prior comment on the proposed Phase 2 rule claiming EPA has no authority to waive NSR requirements in areas designated nonattainment under the Act and that the proposed rule was unlawful. Earthjustice acknowledged a need for EPA's gap-filling program as supported by §§101(b)(1), 110(a)(2)(C), and 301 of the Act. This commenter disagrees that §110(a)(2)(C) implies an authority to waive NSR requirements, but rather expressly requires each SIP to include "a permit program as required in parts C and D," and part D does not allow for waiver of NSR permitting requirements in nonattainment areas. They went on to question allowing section VI waivers after the statutory deadline for completion of the state's Part D SIP development process. They voiced their concern that the proposed rule appears to allow continued issuance of NSR waivers even if the state has failed to timely submit a part D SIP.

Two commenters questioned the legal underpinnings of section VI pursuant to sections 110(a)(2)(C), 173, and 182 of the Act. One was of the opinion that EPA's revisions do not provide any incentive for the timely completion of the SIP, and the exemption appears to allow continued issuance of NSR waivers after a state fails to timely submit a SIP. Also, the commenter said we did not propose or establish an end date for the transitional period during which a waiver would apply, thus allowing NSR requirements to be waived indefinitely without any restrictions on such waiver.

In response to these specific comments, we note that section VI pre-dated the Phase 2 rule and that our reconsideration did not open up the entirety of section VI for comment. Nevertheless, we will discuss these issues briefly. We recounted the history of appendix S in the preamble to the Phase 2 rule (70 FR 71677 – 71680). There, we noted that the SIP development period provided for in section 172(b) leaves a gap in part D major NSR permitting and that section 110(a)(2)(C) does not define specific requirements States must follow for issuing major source permits during this time. We further noted that EPA's regulations at 40 CFR section 52.24(k) require States to follow Appendix S during the period between nonattainment designation and EPA approval of a part D nonattainment NSR SIP. We also summarized the relationship of the construction ban to Appendix S, stating: "When Congress removed the construction ban . . . it left in place 40 CFR section 52.25(k), implementing the interim major NSR program under appendix S" (70 FR 71678). In adding paragraph (c) to Section VI, we did not disturb the existing requirements and incentives for timely SIP completion. Regarding the concern that waivers might be granted after a state fails to timely submit a SIP, EPA

would be highly disinclined to grant a waiver where the SIP submission deadline had passed and EPA had not received the required submission.

The State also thought the original purpose of this exemption has long passed. Thus, there would be little or no use of the exemptions in practice and, consequently, EPA's proposed revision to this section amounts to encouraging states to reconsider its use. They see the proposal as EPA's encouragement of an NSR exemption that would create a new obstacle for them to surmount as we strive to attain the 8-hour ozone standard. Another State agency saw us as proposing to waive NSR provisions for LAER and emissions offsets requirements which many states need as part of their state implementation plans in order to attain and maintain compliance with the ozone NAAQS. They were of the opinion that the proposal constituted that kind of "backsliding" precluded by the South Coast decision

We received additional comments echoing concerns that the addition of paragraph C. would encourage the use of section VI and expand its impacts. One commenter speaking on behalf of the nation's air pollution control agencies expressed concern that the new paragraph might create new difficulties for states attempting to meet attainment deadlines. Also given was a concern that new and existing modified sources would not achieve the level of emissions reductions that would be possible with installation of LAER without the usual NSR benefit of comparable or greater decreases in emissions. They continued that attainment dates are, in fact, highly likely to be affected by this exemption from LAER and offsets for new and modifying sources. In summation, they expressed concern that increased emissions resulting from the NSR exemption could jeopardize state and local attainment plans.

We respond to the commenters by first noting that, as discussed above, section VI as a whole was not placed on the table for comment. We do believe that the commenter's concerns over the addition of the Administrator as a gatekeeper to application of section VI are misplaced. Their comments upon today's action and the concerns conveyed by Earthjustice in their petition for reconsideration make clear a misunderstanding by several parties who have come to believe our addition of paragraph C. is intended to open the door for widespread use and abuse of section VI. This is not the case. We added paragraph C. expressly to limit and minimize usage of Section VI. Further, paragraph C. brings to the public's attention any usage of section VI by requiring publication of any approvals for such use in the Federal Register. So, the concerns that EPA is encouraging States to apply section VI, making it open-ended, or encouraging backsliding are unfounded. Quite the contrary, our intention with the addition of paragraph C. is to decrease the likelihood that section VI might be applied by first requiring close scrutiny by the EPA and by communicating any decisions in a public forum. Tightening pre-existing requirements does not constitute backsliding.

Several commenters perceived the intent of our addition of paragraph C. and offered comments in support of re-proposed rule language. Their comments expressed viewpoints opposite to the just-described comments of Earthjustice and the air pollution control agencies. Four commenters expressed their opinions that the revision adding EPA as the determining authority to application of section VI would not interfere with achieving attainment in a timely manner. Two offered their expectations that section VI provides a limited flexibility that would be seldom used. One commenter does not believe that the waiver of certain LAER or offset requirements would often be approved,

but may make sense and should be provided when there is a public need. The commenter opined that, in many instances, there is little difference between BACT and LAER. With the modeling demonstrations that require the use of worst-case scenarios to demonstrate that neither attainment nor progress towards attainment would be interfered with, there is little opportunity “to evade the strictures of Part D.” Another commenter believes States should be given the limited flexibility provided in the rule to allow new sources to locate in nonattainment areas without applying LAER or obtaining offsets if such action is reviewed by EPA and found not to interfere with attaining the NAAQS. They agreed that the additional safeguard of EPA determining that the conditions of the rule have been satisfied (*i.e.*, non-interference) provides a positive safeguard to ensure areas meet their attainment deadlines. Another commenter found the EPA rationale reasonable and saw no merit to the petition for reconsideration.

EPA appreciates the comments in support of the addition of paragraph C. These commenters have correctly identified our purpose of adding a requirement that EPA oversee application of Section VI in order to limit its usage while preserving its flexibility for those limited instances where its application might be justified.

Three commenters specifically endorsed the requirement for the Administrator to publish in the Federal Register all approvals of section VI actions. The commenters said EPA’s requirement for publication in the Federal Register ensures public awareness of the use of this provision as an added safeguard.

At proposal we provided two possible outcomes for today’s action. First, we said that should we receive compelling arguments that it was inappropriate for us to add the section VI.C. requirement for the Administrator approval, we would remove the language

in question so as to revert the text of section VI to that which existed prior to November 29, 2005. The second possibility was that we would leave the rule language unchanged from that currently codified in the Code of Federal Regulations. None of the comments received made a good case for removing the language change from November 29, 2005 and we have elected to make no amendments removing that provision.

IV. STATUTORY AND EXECUTIVE ORDER REVIEWS

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." This action is significant because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this reconsideration notice have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et. seq. They were addressed along with those covering the Phase 1 Rule (April 30, 2004; 69 FR 23951) and the Phase 2 Rule (November 29, 2005; 70 FR 71612) under EPA ICR # 2236.01. The information collection requirements are not enforceable until OMB approves them other than to the extent required by statute.

This action announces EPA's final decision on reconsideration of several provisions of the Phase 2 Rule, namely the RACT provisions and selected NSR

provisions. This action does not establish any new information collection burden on States beyond what was required in the Phase 2 Rule.

The EPA has projected cost and hour burden for the statutory SIP development obligation for the Phase 2 Rule, and prepared an Information Collection Request (ICR). Assessments of some of the administrative cost categories identified as a part of the SIP for an 8-hour standard are already conducted as a result of other provisions of the CAA and associated ICRs (e.g. emission inventory preparation, air quality monitoring program, conformity assessments, NSR, inspection and maintenance program).

The burden estimates in the ICR for the Phase 2 rule are incremental to what is required under other provisions of the CAA and what would be required under a 1-hour standard. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When the ICR for the Phase 2 rule is approved by OMB, the Agency will publish a

technical amendment to 40 CFR part 9 in the Federal Register to display the OMB control number for the approved information collection requirements contained in this final rule. However, the failure to have an approved ICR for this rule does not affect the statutory obligation for the States to submit SIPs as required under part D of the CAA.

The information collection requirements associated with NSR permitting for ozone are covered by EPA's request to renew the approval of the ICR for the NSR program, ICR 1230.17, which was approved by OMB on January 25, 2005. The information collection requirements associated with NSR permitting were previously covered by ICR 1230.10 and 1230.11. The OMB previously approved the information collection requirements contained in the existing NSR regulations at 40 CFR parts 51 and 52 under the provisions of the Paperwork Reduction Act, and assigned OMB control number 2060-0003. A copy of the approved ICR may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW, Washington, DC 20460 or by calling (202) 566-1672.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an Agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the Agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this reconsideration action on small entities, small entity is defined as: (1) a small business as defined by the Small Business

Administration's (SBA) regulations at 13 CFR 121.201; (2) a governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the Phase 1 and Phase 2 Rules, we concluded that those actions did not have a significant economic impact on a substantial number of small entities. For those same reasons, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action of reconsideration will not impose any requirements on small entities.

Concerning the NSR portion of this notice of reconsideration, a Regulatory Flexibility Act Screening Analysis (RFASA) was developed as part of a 1994 draft Regulatory Impact Analysis (RIA) and incorporated into the September 1995 ICR renewal. This analysis showed that the changes to the NSR program due to the 1990 CAA Amendments would not have an adverse impact on small entities. This analysis encompassed the entire universe of applicable major sources that were likely to also be small businesses (approximately 50 "small business" major sources). Because the administrative burden of the NSR program is the primary source of the NSR program's regulatory costs, the analysis estimated a negligible "cost to sales" (regulatory cost divided by the business category mean revenue) ratio for this source group. The incorporation of the major source thresholds and offset ratios from the 1990 CAA Amendments in section 51.165 and appendix S for the purpose of implementing NSR for the 8-hour standard does not change this conclusion. Under section 110(a)(2)(C), all States must implement a preconstruction permitting program "as necessary to assure that

the [NAAQS] are achieved,” regardless of the changes in the Phase 2 rule. Thus, small businesses continue to be subject to regulations for construction and modification of stationary sources, whether under State and local agency minor NSR programs, SIPs to implement section 51.165, or appendix S, to ensure that the 8-hour standard is achieved.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with AFederal mandates@ that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives, and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of

affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this reconsideration action does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. In promulgating the Phase 1 and Phase 2 Rules, we concluded that they were not subject to the requirements of sections 202 and 205 of the UMRA. For those same reasons, this notice of reconsideration and request for comment is not subject to the UMRA.

The EPA has determined that this notice of reconsideration contains no regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments.

E. Executive Order 13132: Federalism

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

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the

States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This reconsideration action pertains to three aspects of the Phase 2 Rule. For the same reasons stated in the Phase 1 and Phase 2 Rules, Executive Order 13132 does not apply to this action.

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

Executive Order 13175 (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure Ameaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.@ This reconsideration action does not have ATribal implications@ as specified in Executive Order 13175.

The purpose of this reconsideration action is to announce our decision following reconsideration of specific aspects of the Phase 2 Rule. The CAA provides for States and Tribes to develop plans to regulate emissions of air pollutants within their jurisdictions. The Tribal Authority Rule (TAR) gives Tribes the opportunity to develop and implement CAA programs such as the 8-hour ozone NAAQS, but it leaves to the discretion of the Tribes whether to develop these programs and which programs, or appropriate elements of a program, they will adopt.

For the same reasons stated in the Phase 1 and Phase 2 Rules, this action does not have Tribal implications as defined by Executive Order 13175. It does not have a substantial direct effect on one or more Indian Tribes, since no Tribe has implemented a CAA program to attain the 8-hour ozone NAAQS at this time. If a Tribe does implement such a plan, it would not impose substantial direct costs upon it. Furthermore, this action

does not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the TAR establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and this action does nothing to modify that relationship. Because this action does not have Tribal implications, Executive Order 13175 does not apply.

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

Executive Order 13045: “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be economically significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risk addressed by this action presents a disproportionate risk to children.

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

This action is not a significant energy action as defined in Executive Order 13211, “Actions That Significantly Affect Energy Supply, Distribution, or Use,” (66 FR

28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The reconsideration action announces our decision following reconsideration of several aspects of the Phase 2 Rule, for which EPA did perform an analysis of the energy impacts under Executive Order 13211.¹⁸

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

The EPA will encourage the States and Tribes to consider the use of such standards, where appropriate, in the development of the implementation plans.

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

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provisions direct federal agencies, to

¹⁸ Technical Appendix: Potential Impacts of Implementation of the 8-Hour Ozone NAAQS; Technical Support Document. July 21, 2005. Docket Document EPA-HQ-OAR-2003-0079-0860.

the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA concluded that the Phase 2 Rule does not raise any environmental justice issues (See 70 FR at 71695, col. 2; (November 29, 2005)); for the same reasons, since this action concerns several aspects of the Phase 2 rule, this reconsideration action does not raise any environmental justice issues. This action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because the 8-hour ozone national ambient air quality standard is designed to protect public health and is intended to apply equally to all portions of the population. In addition, this rule makes only minor changes to the previous Phase 2 implementation rule and these changes are intended to strengthen the rule, which should not disproportionately affect minority or low income populations. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS [62 FR 38856 (July 18, 1997)]. The level is designed to be protective with an adequate margin of safety. The Phase 2 Rule provides a framework for improving environmental quality and reducing health risks for areas that may be designated nonattainment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which

includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this reconsideration action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the reconsideration action in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This action will be effective **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

L. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if (i) the agency action consists of “nationally applicable regulations promulgated, or final action taken, by the Administrator,” or (ii) 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.”

Final actions described in this Final Action on Reconsideration are “nationally applicable” within the meaning of section 307(b)(1). This action explains the final actions EPA is taking on the petitions for reconsideration of several aspects of the Phase 2 rule. EPA has determined that all of these actions are of nationwide scope and effect for purposes of section 307(d)(1) because these actions clarify the obligations of all states

with respect to the nationwide implementation of the 8-hour ozone NAAQS and concern the basic program elements of nonattainment new source review SIPs. Thus, any

petitions for review of the final action described in this Notice must be filed in the Court of Appeals for the district of Columbia Circuit within 60 days from the date this Notice is published in the Federal Register.

List of Subjects in 40 CFR Part 51

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: May 31, 2007.

Stephen L. Johnson,
Administrator.

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

PART 51 – REQUIREMENTS FOR PREPARATION, ADOPTION, AND
SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401-7671q.

Subpart X – [Amended]

2. Section 51.912 is amended by revising paragraph (a)(2) to read as follows:

§ 51.912 What requirements apply for reasonably available control technology (RACT) and reasonably available control measures (RACM) under the 8-hour NAAQS?

(a) *****

(2) The State shall submit the RACT SIP for each area no later than 27 months after designation for the 8-hour ozone NAAQS, except that for a State subject to the requirements of the Clean Air Interstate Rule, the State shall submit NO_x RACT SIPs for electrical generating units (EGUs) no later than the date by which the area's attainment demonstration is due (prior to any reclassification under section 181(b)(3)) for the 8-hour ozone national ambient air quality standard, or **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, whichever comes later.

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