6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 50.9(b)

[FRL-]

Stay of Authority Under 40 CFR 50.9(b)
Related to Applicability of 1-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: The EPA is proposing to stay its authority under the second sentence of 40 CFR section 50.9(b) to determine that an area has attained the 1-hour standard ("Proposed Stay") and that the 1-hour standard no longer applies. The EPA proposes that the stay shall be effective until such time as EPA takes final action in a subsequent rulemaking addressing whether the second sentence of 40 CFR section 50.9(b) should be modified in light of the Supreme Court's decision in Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001), remanding EPA's strategy for the implementation of the 8-hour ozone NAAQS to EPA for further consideration. In the subsequent rulemaking reconsidering the second sentence of 40 CFR section 50.9(b), EPA will consider and address any comments concerning (a) which, if any,

implementation activities for an 8-hour ozone standard, including designations and classifications, would need to occur before EPA would determine that the 1-hour ozone standard no longer applies to an area, and (b) the effect of revising the ozone NAAQS on the existing 1-hour ozone designations.

DATES: To be considered, comments must be received on or before **[insert date 30 days from date of publication].**

ADDRESSES: Comments should be submitted (in duplicate, if possible) to the EPA Docket Center (6102T), Attention: Docket Number OAR-2002-0067, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, N.W., Room: B108, Washington, DC 20460, telephone (202) 566-1742, fax (202) 566-1741, between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays. To mail comments through Federal Express, UPS or other courier services, the mailing address is: EPA Docket Center (Air Docket, U.S. Environmental Protection Agency, 1301 Constitution Avenue, N.W., Room: B108, Mail Code: 6102T, Washington, DC 20004. A reasonable fee may be charged for copying. Comments and data may also be submitted electronically by following the instructions under SUPPLEMENTARY

INFORMATION of this document. No confidential business information should be submitted through e-mail.

FOR FURTHER INFORMATION CONTACT: Questions concerning this NPRM should be addressed to Annie Nikbakht, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, Ozone Policy and Strategies Group, MD-C539-02, Research Triangle Park, NC 27711, telephone (919) 541-5246.

SUPPLEMENTARY INFORMATION: *Electronic Availability* - The official record for this proposed rule, as well as the public version, has been established under Docket Number OAR-2002-0067. Submit comments by e-mail to address: www.epa.gov/rpas.

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I. BACKGROUND

A. The Revised 8-Hour Ozone NAAQS

On July 18, 1997, the EPA promulgated a revised 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. The rule was challenged by a number of industry groups and States in the Court of Appeals for the

District of Columbia Circuit (D.C. Circuit). The Court granted many aspects of those challenges and remanded the 8-hour ozone NAAQS to EPA. American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) ("ATA"). With respect to EPA's authority to implement the revised 8-hour ozone standard, the Court held that the statute was clear on its face that the provisions of "subpart 2" applied and then held that under the terms of the statute, the 8-hour standard "cannot be enforced."[1] Id. at 1048-1050, 1057. The Court also remanded the standard to EPA on the ground that, under EPA's interpretation of its authority to promulgate the NAAQS, the CAA provided an unconstitutional delegation of authority to EPA. Id. at 1034-1040. Finally, the Court held that EPA had failed to consider whether ground-level ozone had some beneficial effects, in particular, whether ground-level

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[1] Part D of title I of the Clean Air Act (CAA) contains a number of subparts concerning implementation of the NAAQS. Subpart 1 applies for purposes of implementing all new or revised NAAQS. Subparts 2-5, each apply to one or more specific NAAQS. At the time EPA promulgated the 8-hour ozone NAAQS, EPA indicated that it believed subpart 1 was the only subpart that would apply for purposes of implementing the revised 8-hour NAAQS and stated that subpart 2, which specifically addresses ozone, applied only for purposes of implementing the 1-hour ozone standard.

ozone acted as a shield from the harmful effects of ultraviolet radiation. Id. at 1051-1053. The D.C. Circuit largely denied EPA's request for rehearing, but did modify its decision to say that the 8-hour NAAQS could be enforced, but only in conformity with certain ozone-specific provisions (subpart 2) enacted in 1990. ATA II, 195 F.3d 4 (D.C. Cir. 1999).

The EPA requested review by the Supreme Court of two aspects of the D.C. Circuit's decision – the delegation and implementation issues. The Court agreed to consider the case and on February 27, 2000, rejected the D.C. Circuit's holding that EPA's interpretation of the CAA resulted in an unconstitutional delegation of authority. Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472-476 (2001) (Whitman). While disagreeing with the Court of Appeals that the CAA was clear on its face that subpart 2 applied for purposes of implementing the revised ozone standard, the Court found unreasonable EPA's assertion that subpart 2 was inapplicable for implementation of the 8-hour ozone NAAQS. The Court remanded the implementation strategy to EPA for further consideration. Id. at 481-486.

B. EPA's Revocation Rules

Simultaneous with its promulgation of the 8-hour ozone NAAQS on July 18, 1997, EPA promulgated a final rule governing the continued applicability of the existing 1-hour ozone NAAQS. 40 CFR section 50.9(b). The relevant language in 40 CFR section 50.9(b) provides: "The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified in 40 CFR part 81." In part, EPA based this approach on its interpretation that the provisions of subpart 2 of part D of title I of the CAA applied as a matter of law for purposes of implementing the 1-hour ozone NAAQS, but that they would not apply for purposes of implementing the revised ozone standard. Thus, EPA believed it made sense to delay revocation of the 1-hour standard until such time as the provisions of subpart 2 would no longer apply and, at that time, revoke the 1-hour standard. Thus, once an area attained the 1-hour standard and EPA determined the 1-hour standard no longer applied to that area, the provisions of subpart 2 would also no longer apply.

On June 5, 1998, EPA issued a final rule determining that over 2,000 counties had attained the 1-hour ozone

standard and that, therefore, the 1-hour standard and the associated designation for that standard no longer applied to those areas. See "Identification of Ozone Areas Attaining the 1-Hour Standard to Which the 1-Hour Standard is No Longer Applicable," (63 FR 31,014, June 5, 1998) ("Revocation Rule"). Subsequently, on August 3, 1998, Environmental Defense and the Natural Resources Defense Council (collectively "Environmental Defense") filed a petition for review challenging that rule. Environmental Defense v. EPA (No. 98-1363, D.C. Cir).

On June 9, 1999, EPA issued a final rule determining that the 1-hour ozone standard no longer applied in an additional ten areas. Appalachian Mountain Club filed a petition for review challenging that action August 9, 1999. Appalachian Mountain Club v. EPA, No. 99-1880 (1st Cir.).

Because of the doubt cast on the 8-hour standard and EPA's authority to enforce it by the D.C. Circuit in the ATA case, on July 20, 2000, EPA issued a final rule rescinding the Revocation Rules, (65 FR 45182, July 20, 2000) (Rescission Rule).[2] Thus, EPA reinstated the 1-hour

[2] In addition to the two Revocation Rules that were challenged, EPA issued a third Revocation Rule on July

ozone NAAQS for all of the counties for which EPA previously determined that the 1-hour ozone NAAQS no longer applied. As part of the Rescission Rule, EPA modified the second sentence in 40 CFR section 50.9(b) to provide: "In addition, after the 8-hour standard has become fully enforceable under part D of title I of the CAA and subject to no further legal challenge, the 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations and classifications with respect to the 1-hour standards are codified in 40 CFR part 81."

C. Revocation Rule Litigation

The parties in both the Environmental Defense and the Appalachian Mountain Club cases determined to stay the litigation based on EPA's Rescission Rule and the continued litigation regarding the 8-hour ozone NAAQS and EPA's authority to implement that standard. Following the Supreme Court's decision in the Whitman case, the parties negotiated a Settlement Agreement that provided for EPA to issue this proposal to stay its authority under 40 CFR 50.9(b) while EPA considers whether to

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22, 1998 that was not challenged, (63 FR 39432).

modify the language in 40 CFR 50.9(b) regarding the process and basis for revoking the 1-hour ozone standard. See 67 FR 48896 (July 26, 2002). Environmental Defense and Appalachian Mountain Club have agreed to dismiss their cases if EPA issues a final rule staying the revocation provision in 40 CFR 50.9(b) until such time as EPA considers in a subsequent rulemaking whether that provision should be modified and, in the final stay, commits to consider and address in the subsequent rulemaking any comments concerning (a) which, if any, implementation activities for a revised ozone standard (including but not limited to designation and classification of areas) would need to occur before EPA would determine that the 1-hour ozone standard no longer applied to an area, and (b) the effect of revising the ozone NAAQS on existing designations for the pollutant ozone.

II. SUMMARY OF TODAY'S ACTION

The EPA is proposing to stay its authority under the second sentence of 40 CFR section 50.9(b) to determine that an area has attained the 1-hour standard and that the 1-hour standard no longer applies. The EPA proposes that the stay shall be effective until such time as EPA

takes final agency action in a subsequent rulemaking addressing whether the second sentence of 40 CFR section 50.9(b) should be modified in light of the Supreme Court's decision in Whitman regarding implementation of the 8-hour NAAQS. In developing a revised 8-hour implementation strategy consistent with the Supreme Court's decision, EPA will consider and address any comments concerning (a) which, if any, implementation activities for an 8-hour ozone standard, including designations and classifications, would need to occur before EPA would determine that the 1-hour ozone standard no longer applied to an area, and (b) the effect of revising the ozone NAAQS on existing designations for the pollutant ozone.

The EPA plans to consider the timeframe and basis for revoking the 1-hour standard in the implementation rulemaking that it plans to issue in response to the Supreme Court's remand. The EPA believes that it is appropriate to reconsider this issue because, at the time EPA promulgated section 50.9(b), EPA anticipated that subpart 2 would not apply for purposes of implementing the revised ozone standard. It makes sense, in light of the many issues that are now being considered regarding

implementation of the 8-hour standard, including the applicability of subpart 2 for purposes of implementing that standard, for EPA to consider simultaneously the most effective means to transition from implementation of the 1-hour standard to implementation of the revised 8-hour ozone NAAQS.

III. STATUTORY AND EXECUTIVE ORDER REVIEWS

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether the regulatory action is "significant" and therefore subject to review by the OMB and the requirements of the Executive Order. The Executive Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise

interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this action is not a "significant regulatory action" and was not submitted to OMB for review.

B. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of

small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) a small business as defined in the Small Business Administration's (SBA) regulations at 13 CFR 12.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

This action will not impose any requirements on small entities. This action proposes to stay EPA's authority under the second sentence of 40 CFR section 50.9(b) to determine that an area has attained the 1-hour standard and that the 1-hour standard no longer applies. It does not establish requirements applicable to small

entities.

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 UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and Tribal governments, in the aggregate, or by 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 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 laws. 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 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.

This proposed action also does not impose any additional enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in UMRA. Because today's action does not create any additional mandates, no further UMRA analysis is needed.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of

regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed 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 action stays the language of 40 CFR section 50.9(b) regarding EPA's authority to take action and imposes no additional burdens on States or local entities; it does not change the existing relationship between the national government and the States or the distribution of power and responsibilities among the various branches of government. Thus, the requirements of section 6 of this Executive Order do not apply to this proposed rule.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have Tribal implications." This proposed rule does not have
Tribal implications, as specified in Executive Order 13175, because it will not have a substantial direct effect on one or more Indian Tribes, on the relationship

between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Today's action does not significantly or uniquely affect the communities of Indian Tribal governments, and does not impose substantial direct compliance costs on such communities. Thus, Executive Order 13175 does not apply to this proposed rule.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045, because this action is not "economically significant" as defined under Executive Order 12866 and there are no environmental health risks or safety risks addressed by this rule.

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

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect

Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12 of the National Technology Transfer Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing new regulations. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this proposed action. Today's proposed action does not require the public to perform activities conducive to the use of VCS.

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

Under Executive Order 12898, each Federal agency must make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

environmental effects of its programs, policies, and activities on minorities and low-income populations. Today's proposed action to stay EPA's authority under 40 CFR 50.9(b) related to applicability of the 1-hour ozone standard does not have a disproportionate adverse effect on minorities and low-income populations.

List of Subjects in 40 CFR Part 50

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

December 19, 2002
Dated:

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Christine Todd Whitman,
Administrator.

For the reasons set forth in the preamble, part 50 of chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 50 – AMENDED

1. The authority citation for part 50 continues to read as follows:

Authority: 42 U.S.C. 7410, *et seq*.

2. Section 50.9 is proposed to be amended by adding paragraph (c) to read as follows:

Section 50.9 National 1-hour primary and secondary ambient air quality standards for ozone.

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(c) *EPA's authority under paragraph (b) of this section to determine that an area has attained the 1-hour standard and that the 1-hour standard no longer applies is stayed until such time as EPA issues a final rule revising or reinstating such authority.*