

**RESPONSE TO PUBLIC COMMENTS**

**EARLY ACTION COMPACTS FOR IMPLEMENTING  
THE 8-HOUR OZONE NATIONAL AMBIENT AIR  
QUALITY STANDARD**

**Received in response to**

**Proposed Rule--Deferral of Effective Date of Nonattainment Designations  
for 8-Hour Ozone National Ambient Air Quality Standards  
for Early Action Compact Areas  
Docket Number OAR-2003-0090**

**and**

**Proposed Rule to Implement the  
8-Hour Ozone National Ambient Air Quality Standard  
Docket Number OAR-2003-0079**

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## **Introduction**

The purpose of this document is to provide EPA's responses to public comments received on the proposed rule, "Deferral of Effective Date of Nonattainment Designations for 8-Hour Ozone National Ambient Air Quality Standard for Early Action Compact Areas" (Docket Number OAR-2003-0090). A summary of these public comments and EPA's responses are located in Section I of this document.

In addition, this document provides EPA's responses to Early Action Compact-related public comments received in response to the "Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard" (Docket Number OAR-2003-0079). These public comments and EPA's responses are located in Section II of this document.

A related document titled "Responses to Comments on EPA's Designation and Classification of Areas for the 8-Hour Ozone National Ambient Air Quality Standard" (Docket Number OAR-2003-0083-1658), April 15, 2004, contains EPA's responses to Early Action Compact-related public comments regarding the designations process.

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**Section I**

**Response to Comments Received on EPA's December 16, 2003  
Proposal to Defer the Effective Date of Nonattainment Designations  
for 8-hour Ozone NAAQS for Early Action Compact (EAC) Areas**

**I.1 IMPACT OF EAC PROGRAM AND DEFERRED NONATTAINMENT  
DESIGNATION EFFECTIVE DATE ON MANDATORY PROGRAMS**

**Commenters:** American Lung Association (ALA), OAR 2003-0090-0106; Southern Environmental Law Center (SELC), OAR 2003-0090-0085 and OAR 2003-0090-0104

**Comment:** A number of commenters expressed concern that the EAC process will result in delays in mandatory programs such as new source review, transportation conformity, and maintenance requirements. One commenter stated that the 5-year time frame for the maintenance for growth plan specified in the protocol is insufficient especially in light of VMT growth projections, and that the CAA required areas redesignated from nonattainment to attainment have an EPA-approved maintenance plan. This plan should be sufficient to correct any violation of the standard, demonstrating that the standard can be maintained into the future for up to 20 years. The same commenter states that with local governments taking experimental steps that have not been proven successful – unlike those contained within the Act itself – monitoring for the long run becomes even more important.

**Response:** Comments regarding mandatory programs are addressed in Section IX-F of the preamble to the final rule, which was signed April 15, 2004.

Concerns About Maintenance of the 8-hour Ozone NAAQS

Maintenance in EAC Areas. Unlike some subpart 1 and subpart 2 marginal nonattainment areas, which will not be required to submit an attainment demonstration (see Proposed Rule to Implement the 8-Hour Ozone NAAQS, 68 FR 32802), *all* EAC areas are required to submit an attainment demonstration showing that the area will attain the ozone 8-hour standard by December 31, 2007. As is the case with all modeled attainment demonstrations, growth parameters, including VMT, will be a part of the demonstration.

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The EPA will evaluate those demonstrations to determine whether Compact areas can indeed, attain the 8-hour standard by December 31, 2007. The nonattainment deferral will be lifted for any Compact area that cannot demonstrate attainment by this date. All measures included in the attainment demonstration must be contained in the SIP and as such, will be federally enforceable. Subsequent revisions to remove any measure from a SIP are subject to the protective intent of section 110(l). Under this section, an area, including a Compact area, cannot relax a SIP until it has demonstrated that doing so will not interfere with attainment or maintenance of any NAAQS.

Given that Compact areas must: 1) complete a modeled attainment demonstration, 2) the Compact measures that are part of the attainment demonstration must be contained in the federally-enforceable SIP; and those measures, like all SIP measures, are 3) subject to the stringency of section 110(l), we believe that requiring Compact areas to address emissions growth for at least 5 years beyond December 31, 2007, will ensure that these areas do not fall back into nonattainment.

EAC Areas That Are 1-Hour Maintenance Areas. EAC areas that are maintenance for the 1-hour standard will still be subject to their 1-hour maintenance plan, including--wherever applicable—the requirement to submit a second 10-year maintenance plan until the time that the 1-hour ozone standard is revoked for that area (one year after the effective date of designation for the 8-hour standard).

In addition, the EPA has proposed in the 8-hour implementation rule (June 2, 2004, 68 FR 32802) that all areas, including EAC areas, that were redesignated to attainment for the 1-hour standard and that had maintenance plans under §175A of the CAA, be required to submit a maintenance plan under §110(a)(1) of the CAA for the 8-hour standard within 3 years after the effective date of initial designation to attainment for the 8-hour standard. This maintenance plan would have to demonstrate continued maintenance of the 8-hour standard for 10 years following the effective date of the 8-hour designation to attainment.

To illustrate, for an EAC area that meets all of its milestones and whose deferral is lifted in 2008, the 8-hour attainment designation would become effective in 2008, and the 1-hour standard would be revoked one year later or, 2009. Until that time, the area would be subject to the maintenance plan under §175A and transportation conformity under the 1-hour standard. A §110(a)(1) maintenance plan would be due no later than 2011 or, 3 years after the effective date of initial designation to attainment for the 8-hour standard.

**Comment:** One commenter raised concerns specifically about the EAC areas in EPA Region IV states (NC, SC, MS, TN, GA). They believe that these EACs do not provide sufficient measures to address growth in transportation emissions, particularly in urban areas where transportation

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emissions comprise a significant portion of total emissions that contribute to ozone violations. Further, they state that deferral of the 8-hour designation to nonattainment hinders adoption of additional strategies since these areas will not be eligible for CMAQ funding. This commenter was also concerned that EAC areas will fail to ensure maintenance of the 8-hour standard. (Southern Environmental Law Center (SELC), OAR 2003-0090-0085 and OAR 2003-0090-0104)

**Response:** The EPA addresses comments regarding CMAQ eligibility in Section IX-F of the preamble for the proposed rule, which was signed April 15, 2004. The EPA's response to comments above (American Lung Association (ALA), OAR 2003-0090-0106; Southern Environmental Law Center (SELC), OAR 2003-0090-0085, and OAR 2003-0090-0104) addresses maintenance in EAC areas.

The EAC incentive-based program encourages local communities to develop their own program of air pollution control that leads to early reductions of VOC and NO<sub>x</sub> emissions sooner than would otherwise be required in exchange for a deferral of the effective date of nonattainment designation and the statutory obligations associated with that designation. Many of the measures contained in the June 16, 2003 milestone submittal from Region IV EAC areas targeted mobile source emissions. For example, several of the Region IV EAC areas are proposing to implement truck stop electrification along I-85. Truck stop electrification uses state-of-the-art technology to not only reduce NO<sub>x</sub> emissions at truck stops, but to also increase energy efficiency. The local plan for the Triad EAC area (Greensboro-Winston-Salem-High Point) specifies converting all on and off road city vehicles to biodiesel, and diesel retrofits on Guilford County school buses, as well as a no idling policy for school buses in the county.

## **I.2 FUELS**

**Commenter:** American Petroleum Institute (API) OAR 2003-0090-0107, OAR 2003-0090-0108, OAR 2003-0090-0109, and OAR 2003-0090-0110

**Comment:** Lack of State authority to adopt fuel control measures in EAC areas.

The commenter's main points were:

- ▶ Congress intended fuel controls be used as a last resort. EPA must require EAC areas to meet section 211(c)(4)(C) of the CAA, which requires a full and robust demonstration of necessity to implement fuel control measures such as RFG and cetane programs.

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- ▶ EPA must clarify that all areas designated under Subpart 1, and compact areas, even if designated nonattainment and classified as marginal or above under Subpart 2, would not have authority to opt into the RFG program.
- ▶ Aside from the legal issues, diesel cetane programs are difficult to implement, costly, and could lead to unintended disruptions of the refining and distribution system.

The commenter expressed support of EPA's policy of encouraging compact areas to plan and act early to improve air quality. However, the commenter expressed concern that control measures allowed in compact areas must comport with other provisions in the CAA. The commenter believes that the EAC protocol should not be used as a means to circumvent the intent of Congress. Given Congress's intent that fuel controls be used as a last resort, the commenter remarked that EAC areas should look first to reasonable and practicable non-fuel measures for reducing ozone. The commenter recommended that EPA clarify that all areas designated under Subpart 1, and EAC areas, even if designated nonattainment and classified as marginal or above under Subpart 2, not have authority to opt-in to the RFG program.

The commenter attached three previously submitted comments for the rulemaking record:

Docket # OAR 2003-0090-0108 - Letter from Edward H. Murphy, API, dated July 15, 2002, to David Korotney, US EPA, Ann Arbor, Michigan, EPA Draft Technical Report, *The Effect of Cetane Number Increase Due to Additives on NO<sub>x</sub> Emissions from Heavy-Duty Highway Engines*.

Docket # OAR 2003-0090-0109, Letter from Edward H. Murphy, API, dated September 26, 2000, to Leah Weiss, Ozone Transport Commission, Washington, DC, API Comments on OTC Diesel Cetane Model Rule.

Docket # OAR 2003-0090-0110, API, Advice to States on Selecting Fuel Controls for Addressing Air Quality Concerns (no date).

Use of Fuel as a Primary Local Control Measure Is Contrary to Statutory Intent.

**Comment:** The commenter is concerned with EAC areas' plans to use fuel control measures as a first step in reducing ambient ozone concentrations. This is contradictory to Congress's intent that fuel controls be used as a last resort. The EAC protocol must comport with other requirements under the CAA. It appears that some EAC areas are considering opting into the reformulated gasoline (RFG) program or adopting a state fuel and receiving EPA approval of that fuel into a SIP under section 211(c)(4)(C) of the CAA. However, under EPA's December 16, 2003, proposal, EAC areas would not have authority to opt into RFG. In addition, it is unlikely



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that a compact area would be able to make the required demonstration for EPA approval under 211(c)(4)(C) of the Act.

**Response:** Section 211(c)(4)(A) of the Clean Air Act prohibits states (and political subdivisions of states) from prescribing or attempting to enforce, for purposes of motor vehicle emission control, “any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine,” if EPA has prescribed, “a control or prohibition applicable to such characteristic or component of the fuel or fuel additive<sup>1</sup>” under section 211(c)(1). This prohibition applies to all states except California. Section 211(c)(4)(B). For states other than California, the Act provides two mechanisms for avoiding preemption. First, if the state prohibitions or controls are identical to the prohibition or control adopted by EPA. Section 211(c)(4)(A)(ii). Second, states may seek EPA approval of SIP revisions containing fuel control measures, as described in section 211(c)(4)(C). EPA may approve such SIP revisions, and thereby “waive” preemption, only if it finds the state control or prohibition “is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements.” Additionally, Congress has directed EPA to consider if the state that is adopting a fuel control measure has other reasonable and practicable measures available to achieve the NAAQS.

Thus, where a state control or prohibition is preempted, a state may only adopt non-identical fuel control measures upon a showing of necessity under section 211(c)(4)(C).

Congress Intended Broad Federal Preemption of State Fuel Controls

**Comment:** According to the commenter, the national scope of fuel production and distribution suggests that federal rules should preempt state action to avoid an inefficient patchwork of potentially conflicting regulations, which would impede timely, reliable and efficient distribution and delivery of needed fuels to the consuming public. Congress intended that state fuel controls be allowed only as a last resort. This is apparent by the requirements provided in Section 211(c)(4)(C) of the Act. For RFG, Congress explicitly stated which nonattainment areas could opt into RFG.

**Response:** Congress has provided that federal fuels regulations preempt certain non-identical state controls subject to certain express exclusions or circumstances, under Section 211(c)(4).

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<sup>1</sup> See, for example, *Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline*, 59 FR 7714, 7809 (February 16, 1994); *Control of Emissions of Hazardous Air Pollutants From Mobile Source*, 66 FR 17230, 17248 (March 29, 2001); *Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements*, 65 FR 6698, 6765 (February 10, 2000).

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Pertinent legislative history on the 1970 Clean Air Act indicates that “states and localities are preempted from presenting or enforcing controls or prohibitions not identical to those of the Federal government, unless an approved State implementation plan under section 110 provides for fuel or additive control in order to attain the national ambient air quality standards. California, however, is free to have any regulation of fuels or additive it finds necessary.” [1970 LH at 135; Summary of Conference Agreement Provisions on 1970 CAA Amendments].

In the 1990 CAA Amendments, Congress changed the language of section 211(c)(4)(A) from “any control or prohibition respecting use of a fuel or fuel additive” to “any control or prohibition respecting any characteristic or component of a fuel or fuel additive.” The Chafee-Baucus Statement of the Senate Managers explained that this change “clarifies that section 211(c)(4) of the Clean Air Act applies only to non-identical State regulations governing the same characteristic or component of the fuel or fuel additive already regulated by EPA. EPA is also allowed to approve non-identical State regulations that are necessary to achieve an ambient standard.” [1990 LH at 892; Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990].

Thus, under section 211(c)(4)(c), states are allowed to adopt and EPA can approve otherwise preempted fuel controls that are necessary to achieve the applicable NAAQS. Additionally, EPA believes that questions regarding preemption of specific state fuel controls and determination should be addressed in the context of a specific SIP rulemaking.

With regard to the concerns expressed on the proliferation of fuels and likelihood of fuel supply disruptions, EPA has and continues to recognize these concerns. “The national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations.” *Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline*, 59 FR 7714, 7809 (February 16, 1994).

Further, in *the Mobile Sources Air Toxics Rule*, EPA recognized the concerns expressed by the petroleum industry that a patchwork of different state fuel standards, sometimes referred to as “boutique” fuels, may increase the likelihood of disruptions in the fuel supply. In most situations, EPA believes that a uniform national program is the best way to protect public health and minimize disruption to the efficiency of the country’s fuel distribution network. EPA’s general expectation is that States will consider these issues in evaluating whether adoption of a state fuel program would be warranted. *Control of Emissions of Hazardous Air Pollutants From Mobile Source*, 66 FR 17230, 17248 (March 29, 2001 ).

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*See also Approval of Low Emission Diesel Fuel for Texas, 66 FR 57196, 57205 (November 14, 2001).*

Opt-in to the Reformulated Gasoline Program

**Comment:** Citing Section 211(k)(6) of the Act, API stated that all areas designated nonattainment under Subpart 1, including both compact areas and non-compact areas, would not have authority to opt in to the RFG program. API asserts that only areas designated under subpart 2 have such authority.

**Response:** In today's rule all areas designated nonattainment for the 8-hour standard and with a 1-hour design value lower than 0.121 ppm (the lowest value specified in Table 1 in subpart 2) will be subject to the planning provisions of subpart 1. Their nonattainment classification will be "areas affected by overwhelming transport." Because none of the areas designated under subpart 1 will be classified as a marginal, moderate, serious, or severe ozone nonattainment area, EPA's current rules will not allow these areas to opt in to the RFG program. *See* 40 C.F.R. 80.70. For the same reason, areas classified under subpart 2 as other than marginal, moderate, serious or severe also may not opt into the RFG program based on their 8-hour designation. Regardless of 8-hour classifications, however, until the 1-hour classifications are withdrawn all areas classified under subpart 2 for the 1-hour standard as marginal, moderate, serious or severe may opt into the RFG program based on their 1-hour classifications.

**Comment:** API states that for areas designated nonattainment under subpart 2, the deferral of the effective date of such designation for EACs means that such areas would not be eligible to opt in to the RFG program.

**Response:** Under Section 211(k)(6), certain areas that are designated as nonattainment for the ozone NAAQS may opt in to the RFG program. During the time period that the effective date of an EAC's designation as nonattainment based on the 8-hour standard is deferred, it may not opt in to the RFG program based on that deferred 8-hour designation. However, since the 1-hour nonattainment designations remain in effect during the 8-hour designation deferral period, the EAC areas may opt in to the RFG program during the 8-hour designation deferral period based on their 1-hour designations, providing they otherwise meet the requirements of Section 211(k)(6).

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Fuel Controls under Section 211(c)(4)(C)

**Comment:** Congress intended that there be broad federal preemption of state fuel controls and that state fuel controls be allowed only as a last resort. The commenter believes that EPA should clarify to compact areas that they will be required to make a full and robust demonstration under section 211(c)(4)(C) in order to implement a fuel control measure.

Section 211(c)(4)(C) provides the requirements and process for state adoption of fuel control measures. In order to obtain EPA approval for a fuel control for inclusion in a state implementation plan (SIP), states must demonstrate to EPA that the control is necessary to achieve a NAAQS and that there are no reasonable and practicable non-fuel measures available that, if implemented, would bring the area into timely attainment. The commenter cautions EPA to be aware that the absence of reasonable and practicable, non-fuel measures does not mean that a fuel control measure necessarily is reasonable, practicable or if implemented, would bring the area into attainment. The commenter notes that this remains the responsibility of the state to demonstrate.

The commenter recommends that EPA should require compact areas to meet section 211 (c)(4)(C) requirements, with no allowances provided. Compact areas should be aware of these requirements as they make their plans. The December 16, 2003, proposal says that states must provide “SIP-quality” modeling. Therefore, states must first consider the air quality need that is to be addressed. In order to do this properly, the commenter believes that air quality modeling should be conducted to identify the most effective precursors to reduce ambient ozone concentrations, and then determine what emissions sources should be controlled to most cost-effectively address those precursors.

The commenter recommends that States should identify a complete list of available stationary, area, and mobile source controls that would reduce the emissions of concern. A state must show that, even if it implemented all other reasonable and practicable non-fuel measures, the additional benefit provided by the proposed fuel control is necessary to achieve a NAAQS. A showing that the fuel control measure is reasonable and practicable and will provide the necessary emission reductions for attainment demonstrations is still the responsibility of the state. The commenter believes that compact areas are not likely to have implemented any control measures, so there should be numerous reasonable and practicable measures available, including elements required of existing 1-hour serious, severe, and extreme nonattainment areas as well as those CAA-required measures being deferred for compact areas. The commenter expressed the concern that it would be unacceptable to allow this deferral to be used as a rationale that a measure is not reasonable or practicable. Thus, given that compact areas will have a number of reasonable and practicable non-fuel measures available to them, the commenter believes it is unlikely that a

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compact area will be able to make the required demonstration. The commenter remarked that Congress did not intend that fuel control measures be the first measures used by an area to attain the NAAQS.

If, however, a compact area could make the required necessity demonstration under Section 211(c)(4)(C), the commenter adds that it would need to consider a number of things in selecting an appropriate fuel control measure. The commenter discusses two factors particularly applicable in compact area situations. The commenter provided additional discussion of criteria to consider when selecting fuel controls in a document it recently prepared. See “Advice to States On Selecting Fuel Controls For Addressing Air Quality Concerns” (Docket #OAR-2003-0090-0110).

**Response:** As earlier stated, section 211(c)(4)(A) prohibits states from prescribing or attempting to enforce nonidentical fuel measures if EPA has prescribed, “a control or prohibition applicable to such characteristic or component of the fuel or fuel additive” under section 211(c)(1). As also earlier explained, section 211(c)(4)(C) allows EPA to approve non identical state fuel controls in a SIP if EPA determines that the fuel controls are necessary to achieve the NAAQS the SIP implements. EPA may approve the measure as necessary if it finds that no other measures that would bring about timely attainment exist or that such measures exist but are unreasonable and impracticable.

Additionally, EPA has provided guidance on the necessity showing that a state must make in order to meet these requirements. See, *EPA’s “Guidance on Use of Opt-in to RFG and Low RVP Requirements in Ozone SIPs,”* (August 1997). For example, under the Guidance, EPA requires states to provide reasons as to why other measures are unreasonable or impracticable for a particular area. Such reasons include the length of time needed to implement the measure; the length of time to achieve ozone reduction benefits and the degree of disruption entailed by implementation. In sum, “the Agency believes that the Act does not call for a comparison between state fuels measures to determine which measures are unreasonable or impracticable, but rather section 211(c)(4) is intended to ensure that a state resorts to a fuel measure only if there are no available practicable and reasonable non-fuels measures.” 63 FR 6657 (February 10, 1998).

Thus, a state seeking to implement a preempted fuel requirement in an EAC area, must submit a SIP revision and must include the specific information that demonstrates the measure is necessary to achieve needed emissions reductions, as provided under section 211(c)(4)(C).

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Supply and Distribution

**Comment:** The commenter suggested that States and EPA should consider the regional supply and distribution system for an area when considering and before approving any fuel control. The commenter stressed the importance of neighboring states and local areas communicating and coordinating SIPs with one another regarding potential fuel controls in order to avoid adopting fuel provisions that create a small island of demand for a specialty product produced by few suppliers.

**Response:** The Clean Air Act allows states to adopt fuel controls under certain conditions. It is the EPA's responsibility to ensure that those conditions are met, and that any credits being claimed in a SIP are appropriate. Impacts of a state-run fuel control program on the regional supply and distribution system are generally not directly related to the conditions for Agency approval that must be met per the Clean Air Act, but they are relevant considerations for the feasibility and cost of a state-run fuel control program. States are encouraged to explore these issues in the context of their decision-making process for which emission control strategies to implement.

**Comment:** The commenter states that potential additional capital costs could be involved in providing the terminal storage and blending equipment required to add cetane improver at the terminal level. According to the commenter, the practicality of a terminal cetane improver addition is an open question. The commenter asserts that cetane improver must be carefully managed and controlled, and adequate safety systems must be in place to prevent/mitigate releases or accidents. The cost of such safety systems, the commenter states, could well outweigh the cost of conventional storage and additive blending equipment at the terminal level. The commenter estimates the cost for storage, blending and safety systems at \$150,000 - \$200,000 per terminal. As a result of these terminal costs, the commenter concludes that refinery additization may be preferred. However, the commenter adds that refiners who supply the compact areas by pipeline must then find ways to ship a segregated diesel product to a specific EAC. Given the volumes involved and the limitations on pipeline and terminal tankage, such a segregation may be infeasible, according to the commenter.

**Response:** SIP guidance documents generally do not promote specific emission reduction strategies, nor do they provide all of the types of information a state may need to decide which strategies are appropriate. Instead, such guidance documents lay out acceptable, though not exclusive, approaches for claiming credit in a SIP for certain emission control strategies. While issues such as cost, feasibility, and fuel distribution logistics may be relevant in the context of a state's decision-making process for which strategies to implement, these issues are not typically addressed in detail for a SIP guidance document.

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Timing

**Comment:** The commenter noted that the December 16, 2003 proposed rule requires that compact areas implement control measures no later than December 31, 2005. This rigid deadline, the commenter remarked, could create problems with fuel control measures. The commenter recommended that States and local areas incorporating needed fuel control measures beyond federal requirements should set implementation dates for fuel controls based on realistic estimates of producibility. For refineries supplying particular regions of the country to make volumes of a new formulation, the commenter added significant refinery infrastructure capital improvements may be necessary, and noted that it generally takes about four years for refiners to plan for and construct major refinery upgrades. The commenter stated that EPA recognizes the need for four years of lead time by providing four years in its fuel regulations. For example, the Tier 2/Low Sulfur Gasoline regulation was finalized in February 2000 with compliance beginning January 2004. The Highway Diesel Rule (ultra-low sulfur diesel) was finalized in January 2001 with compliance to begin June 2006. According to the commenter, time lines for state fuel controls that fail to leave adequate lead time for upgrades will likely result in inadequate supplies upon implementation and the need to make enforcement discretion and other distasteful decisions to keep a local market supplied. The lead time needed for a particular fuel is a critical factor when evaluating fuel controls, stated the commenter.

**Response:** We agree that lead time is an important consideration when a state considers implementing a fuel control measure. States are encouraged to investigate lead time issues before proposing to adopt a fuel control measure.

General Fuel-Related Comments

**Commenter:** U.S. Department of Energy (DOE)

**Comment:** Interrelationship of the 8-Hour Ozone Implementation Program with Other EPA Rules – Alignment of Deadlines and Requirements. DOE commented that EPA should review the timetables and requirements of other air quality and fuels’ rulemakings already promulgated, noticed, or in preparation, especially the Interstate Air Quality Transport rule (subsequently changed to the Interstate Air Quality Rule (IAQR)), to ensure that there are no conflicts between this rulemaking and the other rules. The commenter is especially concerned about the timing for the introduction of the fuel quality rules and the recently noticed IAQR. It seems likely that one widely used local measure will be some form of reformulated gasoline. The commenter is uncertain what impact this increased demand for these highly refined fuels will be and asks that EPA initiate a study of the impact of this rulemaking on the availability and cost of these expanded-use fuels.

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**Response:** The EPA is aware that, as a result of designations under the 8-hour ozone standard, more areas may consider fuels-related control measures, placing a higher demand on fuel suppliers. While today's action and the proposed IAQR rule may give states an incentive to consider local fuel control measures, certain local control measures are preempted by the Federal fuels programs except under certain circumstances in which we may grant a waiver. State opt-in to the RFG program is not preempted because EPA establishes and enforces the RFG requirements at the federal level and the Clean Air Act provides explicit authority for states to opt-in to the federal requirements under section 211(k). We will discuss the Federal RFG program separately below.

The proposed IAQR of December 17, 2003 would indirectly give states an incentive to consider local fuel control measures. The IAQR would reduce and permanently cap emissions of sulfur dioxide (SO<sub>2</sub>), and nitrogen oxides (NO<sub>x</sub>) from electric utilities in 29 states and the District of Columbia, whose power plant emissions are significantly contributing to fine particle and ozone pollution in other downwind states in the Eastern U.S. Under that proposal, states could meet the proposed emissions reductions using one of two options for compliance: 1) requiring utilities to participate in an interstate cap and trade system that caps emissions, or 2) meeting an individual state emissions budget through measures of the state's choosing. We recognize that this second option could give states an incentive to consider a local fuel control measure - either federal RFG or a state fuels program under section 211(c) of the Clean Air Act - as an alternative to reducing SO<sub>2</sub> and NO<sub>x</sub> emissions from electric utilities.

However, section 211(c)(4)(A) of the Clean Air Act prohibits states (and political subdivisions of states) from prescribing or attempting to enforce, for purposes of motor vehicle emission control, "any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine," if EPA has prescribed, "a control or prohibition applicable to such characteristic or component of the fuel or fuel additive"<sup>2</sup> under section 211(c)(1). This prohibition applies to all states except California. Section 211(c)(4)(B). For states other than California, the Clean Air Act provides two mechanisms for avoiding preemption. First, if the state prohibitions or controls are identical to the prohibition or control adopted by EPA. Section 211(c)(4)(A)(ii). Second, states may seek EPA approval of SIP revisions containing fuel control measures, as described in section 211(c)(4)(C). EPA may approve such SIP revisions, and thereby "waive" preemption, only if it finds the state control or prohibition "is necessary to achieve the national primary or secondary ambient air quality

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<sup>2</sup> See, for example, *Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline*, 59 FR 7714, 7809 (February 16, 1994); *Control of Emissions of Hazardous Air Pollutants From Mobile Source*, 66 FR 17230, 17248 (March 29, 2001); *Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements*, 65 FR 6698, 6765 (February 10, 2000).



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standard which the plan implements.” Additionally, Congress has directed EPA to consider if the state that is adopting a fuel control measure has other reasonable and practicable measures available to achieve the NAAQS. Where a state control or prohibition is preempted, a state may adopt nonidentical fuel control measures only upon a showing of necessity under section 211(c)(4)(C).

With regard to the concerns about the proliferation of fuels and possibility of fuel supply disruptions, EPA has and continues to recognize these concerns. “The national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations.” Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 FR 7714, 7809 (February 16, 1994). Further, in the Mobile Sources Air Toxics Rule,

EPA recognize[d] the concerns expressed by the petroleum industry that a patchwork of different state fuel standards, sometimes referred to as “boutique” fuels, may increase the likelihood of disruptions in the fuel supply. In most situations, EPA believes that a uniform national program is the best way to protect public health and minimize disruption to the efficiency of the country’s fuel distribution network. EPA’s general expectation is that States will consider these issues in evaluating whether adoption of a state fuel program would be warranted. Control of Emissions of Hazardous Air Pollutants From Mobile Source, 66 FR 17230, 17248 (March 29, 2001 ). See also Approval of Low Emission Diesel Fuel for Texas, 66 FR 57196, 57205 (November 14, 2001).

In determining the need of the local area for the fuel measure, including the availability of other reasonable and practicable measures in that area to achieve the NAAQS, we attempt to balance a number of factors, some of which are localized. We have issued guidance explaining what states need to consider in determining whether other ozone control measures are unreasonable or impracticable<sup>3</sup>. For example, the guidance explains that reasons why a measure might be unreasonable or impracticable for a particular area include "length of time to implement the measure; length of time to achieve ozone reduction benefits; degree of disruption entailed by implementation; other implementation concerns, such as supply issues; costs to industry, consumers and/or the state; cost-effectiveness; or reliance on commercially unavailable technology." Guidance at p. 6. Thus, EPA will consider cost impacts for non-fuel measures in making a “necessity” finding under section 211(c)(4)(C). However, section 110(a)(3)(A) places an additional obligation on EPA to approve SIP revisions that meet the requirements of section

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<sup>3</sup> *Guidance on Use of Opt-Into RFG and Low RVP Requirements in Ozone SIPs*, August 1997, located on EPA internet site at <http://www.epa.gov/otaq/regs/fuels/rvpguide.pdf>

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110(a)(2). See, *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 98 (1975). Therefore, EPA may not consider the economic impact of a necessary SIP revision under section 110(a)(2), rather under that provision, it is for the state to determine what economic costs are appropriate to achieve the NAAQS. See, *Union Electric Co., v. EPA*, 427 U.S. 246, 256-258 (1976). Thus, once EPA makes the finding that state fuel controls are necessary to achieve the standard, EPA may not reject a state's SIP proposal simply for economic reasons. For more on EPA's economic considerations in SIP approvals see, 54 FR 25572, 25576 (Approval of the state of New Jersey Ozone SIP revision).

Because of these very important considerations, EPA considers state requests on a case-by-case basis, rather than in the context of a national rule, such as today's action. EPA actions on state requests for local fuel control measures are proposed in the Federal Register for public notice and comment. Thus, the public and stakeholders in the local areas and nationwide have opportunities to comment on the "necessity" finding for the proposed local fuel control measure prior to a final decision by EPA. We also note that industry and the public are provided with notice and opportunity to comment when individual states engage in rulemaking actions and thus, are not precluded from raising fuel costs and supply concerns.

In summary, Congress specifically provided an exception to preemption for state fuel measures that are necessary for achievement of a NAAQS. Where a state control or prohibition is preempted, a state may adopt nonidentical fuel control measures only upon a showing of necessity under section 211(c)(4)(C). Therefore, any expansion of local fuel requirements under today's action or the proposed IAQR will be limited to those areas that need the local fuel control measure to meet a NAAQS and can make the prerequisite showing of necessity. The Agency will make decisions in any particular case by applying the law and applicable regulations and guidelines to the specific facts at issue.

Unlike local fuel control measures that must be incorporated into SIPs under section 211(c)(4)(c), reformulated gasoline (RFG) is mandated under 211(k)(10)(D) for the nine worst ozone areas with population over 250,000 (at the time of the 1990 Clean Air Act amendments). In addition, areas subsequently reclassified as severe ozone nonattainment are, by operation of law, RFG covered areas one year after the effective date of the reclassification. Under today's action for the 8-hour ozone standard, no area will fall under the severe ozone nonattainment classification that is not already an RFG covered area under the 1-hour standard. Thus, today's action will not create any additional mandatory RFG covered areas.

There may be an incentive for other areas to consider opting into the RFG program to achieve additional emission reductions. States requesting RFG opt-in under section 211(k)(6) do not have to make a showing of necessity under 211(c)(4)(C), but EPA's rules limit opt-in to only

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those areas classified as marginal, moderate, serious or severe. Under today's rule, areas designated nonattainment for the 8-hour standard and with a 1-hour design value lower than 0.121 ppm (the lowest value specified in Table 1 in subpart 2) will be subject to the planning provisions of subpart 1. Their nonattainment classification will be "areas affected by overwhelming transport." Because none of the areas designated under subpart 1 will be classified as a marginal, moderate, serious, or severe ozone nonattainment area, these areas may not opt into the RFG program based on their 8-hour designation. For the same reason, areas classified under subpart 2 as other than marginal, moderate, serious or severe also may not opt into the RFG program based on their 8-hour designation. Further, during the time period that the effective date of an EAC's designation as nonattainment based on the 8-hour standard is deferred, it may not opt into the RFG program based on that deferred 8-hour designation. However, until the 1-hour classifications are withdrawn and regardless of the 8-hour classifications, all areas classified under subpart 2 for the 1-hour standard as marginal, moderate, serious or severe may opt into the RFG program based on their 1-hour classifications.

For the areas that qualify for RFG opt-in under today's action based on their 1-hour or 8-hour designations, section 211(k)(6) does not grant EPA authority to deny a State's request for RFG opt-in, as long as it meets the criteria of section 211(k)(6). Consequently, an EPA study of the impact of today's rule on the availability and cost of the additional use of RFG under the 8-hour standard, as DOE has suggested, would have no bearing on today's action. RFG covered area opt-in is determined by section 211(k)(6) - not EPA regulations.

### **I.3 REDESIGNATION TO NONATTAINMENT**

**Commenters:** Texas Commission on Environmental Quality (TCEQ), OAR-2003-0090-0099; New York State Dept of Environmental Conservation (DEC), OAR-2003-0090-0092; Northeast States for Coordinated Air Use Management (NESCAUM), OAR-2003-0090-0097; American Lung Association (ALA), Clean Air Task Force, Environmental Defense, Natural Resources Defense Council, Sierra Club, and U.S. Public Interest Research Group, OAR-2003-0090-0106.

**EPA Response:** This comment is addressed in Section IX-F of the preamble to the final rule, which was signed April 15, 2004.

### **I.4 COMPACT PROCESS**

#### Support For Early Action Compacts

**Commenters:** Richland County Government, OAR-2003-0090-0081; Virginia Dept. of Transportation (VA DOT), OAR-2003-0090-0083; International Paper, OAR-2003-0090-0084;

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Greater Winston-Salem Chamber of Commerce, OAR-2003-0090-0086 and OAR-2003-0090-0100; RJ Reynolds Tobacco Co., OAR-2003-0090-0087; Triad Early Action Compact, OAR-2003-0090-0095; South Carolina Chamber of Commerce, OAR-2003-0090-0088 and OAR-2003-0090-0103; Virginia Dept. of Environmental Quality, OAR-2003-0090-0089; Georgia Dept. of Natural Resources, OAR-2003-0090-0091; Northern Shenandoah Valley EAC, OAR-2003-0090-0093; Upstate Air Quality Steering Committee, OAR-2003-0090-0094; Mitsubishi Polyester Film, OAR-2003-0090-0096; BMW Manufacturing Co., OAR-2003-0090; Michelin North America, OAR-2003-0083-1389; Chemical Lime, OAR-2003-0090-0098; TXI Hunter Cement, OAR-2003-0090-0115; Roanoke Valley Area MPO, OAR-2003-0090-0101; State of Missouri Dept. of Natural Resources, OAR-2003-0090-0102; South Carolina Dept. of Health and Environmental Control, OAR-2003-0090-0105; American Petroleum Institute (API), OAR-2003-0090-0107; North Carolina Dept. of Environmental and Natural Resources, OAR-2003-0090-0112.

**Comment:** Many commenters expressed support for the compact process, the goal of clean air sooner, the incentives and flexibility the program provides for encouraging early reductions of ozone-forming pollution, and the deferred effective date of nonattainment designation.

**Response:** We continue to believe that the compact program gives local areas the flexibility to develop their own approach to meeting the 8-hour ozone standard, provided the participating communities control emissions from local sources earlier than the CAA would otherwise require. By involving diverse stakeholders, including representatives from industry, local and State governments, and local environmental and citizens groups, a number of communities are discussing the need for regional cooperation in solving environmental problems that affect the health and welfare of its citizens. People living in these areas that realize reductions in pollution levels sooner will enjoy the health benefits of cleaner air sooner than might otherwise occur.

Opposition to Compacts

These comments are addressed in the preamble to the April 15, 2004 final rule.

Timing of Original Compact Agreements

**Commenters:** New York State Department of Environmental Conservation (DEC), OAR-2003-0090-0092; State of Missouri Department of Natural Resources, OAR-2003-0090-0102; Kentucky Transportation Cabinet, OAR-2003-0079-0331; State of New York Department of Transportation, OAR-2003-0079-0227; Georgia Department of Transportation, OAR-2003-0079-0298; City of Kansas City, OAR-2003-0079-0359

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**Comment:** A number of commenters expressed concern that EPA did not provide sufficient time for States and local areas to prepare their initial submission due December 31, 2002, for participating in the compact program (New York State Department of Environmental Conservation (DEC), OAR-2003-0090-0092; State of Missouri Department of Natural Resources, OAR-2003-0090-0102; Kentucky Transportation Cabinet, OAR-2003-0079-0331; State of New York Department of Transportation, OAR-2003-0079-0227; Georgia Department of Transportation, OAR-2003-0079-0298; City of Kansas City, OAR-2003-0079-0359). The commenters recommended that the deadline for compact submittal should have been extended beyond this deadline; other commenters believe that EPA should provide an additional opportunity for other areas of the country to establish compacts. One of the commenters remarked that "...While some states were able to meet this time frame, it should be noted that most EAC (compact) participants were involved in an ad hoc EPA/STAPPA-ALAPCO 'Group of Eight' which met to discuss EPA SIP implementation issues related to the ozone and PM NAAQS." (New York State Department of Environmental Conservation (DEC), OAR-2003-0090-0092) According to the commenter, these compact participants were "...well along in the process to secure Early Action Compacts prior to the issuance of the guidance memorandum."

Another commenter recommended that, if EPA does not extend the compact program to other areas who did not have sufficient time to submit a request, EPA may allow that certain provisions be removed from Subpart 1 requirements instead of completely deferring designations. As an example, the commenter noted that offsets for new source review or other components of the program (e.g., major source cutoffs) could be deferred for areas with compacts (State of Missouri Department of Natural Resources, OAR-2003-0090-0102).

**Response:** The deadline for submitting a compact request was based on the tight time frame for completing the planning process necessary for attainment of the 8-hour ozone NAAQS by 2007. This compliance time frame is similar to the original attainment dates for traditional 8-hour nonattainment areas (subpart 1 or subpart 2-marginal classification) . Therefore, EPA believes it was necessary to establish a cutoff for original compact submittal that would enable local areas to identify local measures and to implement those measures in a time frame that would result in emissions reductions and air quality improvement needed for attainment in 2007. This time frame also provides a narrow window of time for States to submit a revised SIP (due December 2004) that demonstrates attainment by December 2007, and that ensures federal enforceability of control strategies for these compact areas.

Even though EPA has not allowed other areas to participate in EACs after the December 31, 2002 deadline for compact signature by EPA, State and local representatives, we did allow two counties in the Denver area to join that existing compact. The original Denver EAC comprised a seven-county metropolitan area (one county less than the full CMSA). After reviewing

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monitoring data, emission inventories, population and commuting patterns, and EAC dispersion modeling information, it was apparent to EPA Region 8 and the State that the ozone planning process for Denver should include a much larger area than seven counties. In its “120-day” Governor’s letter, Region 8 recommended to Colorado that for the 8-hour ozone standard, the seven EAC counties be designated nonattainment along with four other counties that are adjacent to the EAC area. The recommendation by the Colorado agency and the EPA Regional Office to add counties to the existing Denver compact was based on their potential to “cause or contribute” to the Denver ozone nonattainment problem.

The EPA recommended to the State that the 8-hour ozone nonattainment boundary encompass all eleven counties (the full Denver CMSA, plus three other counties). With this in mind, EPA Region 8 offered to the State that four new adjacent counties be allowed to join the Denver EAC and to also receive a nonattainment designation deferred effective date. We believe that this a reasonable approach which would result in greater reductions of NO<sub>x</sub> and VOC emissions over a larger area. All four counties (Elbert, Morgan, Weld and Larimer Counties) agreed to join the Denver compact. The original signatories of the EAC unanimously approved the addition of these counties. We note that significant emissions from oil and gas fields located in Weld and Larimer Counties had not been previously controlled.

While it is true that a subcommittee (“Group of Eight”) of the STAPPA-ALAPCO was engaged in discussions of early reductions prior to EPA’s release of guidance for compact areas,<sup>4 5 6 7</sup>

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<sup>4</sup> Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-hour Ozone Standard, draft submitted by Texas Commission on Environmental Quality (TCEQ), March 2002. Endorsed by EPA in a letter dated June 19, 2002, from Gregg Cooke, (then) Administrator, EPA Region 6, to Robert Huston, Chairman, TCEQ. Protocol revised December 11, 2002 based on comments from EPA.

<sup>5</sup> Memorandum from Lydia N. Wegman, Director, Air Quality Strategies and Standards Division, “Early Action Compacts: The June 16, 2003 Submission and Other Clarifications,” April 4, 2003. Docket No. OAR-2003-0090-0002.

<sup>6</sup> Memorandum from Jeffrey R. Holmstead, Assistant Administrator, to EPA Regional Administrators, “Schedule for 8-Hour Ozone Designations and Its Effect on Early Action Compacts,” November 14, 2002. Docket No. OAR-2003-0090-0003.

<sup>7</sup> Frequently Asked Questions on—

1. Early Action Compacts for 8-hour Ozone Standard.
  - a. Volume 1, May 15, 2003, located at the following URL site:  
[http://www.epa.gov/ttn/naaqs/ozone/eac/20030515\\_eac\\_faq\\_vol-1.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/20030515_eac_faq_vol-1.pdf)
  - b. Volume 2, February 19, 2004, located at the following URL site:  
[http://www.epa.gov/ttn/naaqs/ozone/eac/20040219\\_eac\\_faq\\_vol-2.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/20040219_eac_faq_vol-2.pdf)
2. Implementing the DRAFT 8-Hour Ozone Modeling Guidance to Support Attainment Demonstrations

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these meetings were conducted with the full knowledge and consent of the member States. The subcommittee prepared issue papers that identified various options for achieving early reductions.<sup>8</sup>

In addition, EPA conducted a series of three public meetings in Tempe, Arizona; Atlanta, Georgia; and Alexandria, Virginia, prior to EPA's proposal of the 8-hour ozone implementation rulemaking, to discuss various issues regarding implementation of the standard, including incentives for early reductions. The public was given an opportunity to provide comments during these meetings, as well as an opportunity for written comments outside the public meeting. The EPA also discussed the Early Action Compact approach with the STAPPA-ALAPCO organization in June 2002, following the Texas Commission on Environmental Quality's submittal of its draft compact protocol in March 2002 to EPA for review. We believe that the member States and local agencies had sufficient notification of the compact approach prior to issuance of EPA's November 14, 2002 guidance, including the draft compact protocol, and the April 4, 2003 guidance.

Regarding the comment that EPA could remove subpart 1 requirements for areas not participating in a compact rather than deferring the designations, the commenter is incorrect in stating that EPA is deferring the designation of nonattainment for compact areas. Instead, EPA is deferring the effective date of the nonattainment designation, which essentially delays imposition of mandatory requirements for compact areas that continue to meet all milestones and requirements. EPA can not remove a statutory requirement unilaterally; a change in the statute requires an amendment to the CAA which requires legislative approval.

Other EAC Process Comments

**Commenter:** ESTEC Enterprises, Inc., OAR-2003-0090-0149, OAR-2003-0090-0151, and OAR-2003-0079-0106

**Comment:** One commenter expressed concern and his belief that Early Action Compact in the Greenville/Spartanburg/Anderson, South Carolina area has poor participation by voting members, unequal representation, no Roberts Rules of Order to address issues, inaccurate minutes, and short or no advanced notice of meetings. In another letter on the proposed EAC

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for Early Action Compact, January 15, 2004, located at the following URL site:  
[http://www.epa.gov/ttn/naaqs/ozone/eac/20040115\\_eac\\_faq\\_modeldemo.pdf](http://www.epa.gov/ttn/naaqs/ozone/eac/20040115_eac_faq_modeldemo.pdf)

<sup>8</sup> Draft Issue Paper on Incentives for Early Reductions, located at the following URL:  
[http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/documents/issue\\_papers/beforemeetings/earl\\_red\\_022702.pdf](http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/documents/issue_papers/beforemeetings/earl_red_022702.pdf)

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rule, the commenter asserts his opinion regarding the following procedural deficiencies for South Carolina's Appalachian-A EAC:

1. The process is wrought with misleading statements in reporting. The minutes of meeting are biased and do not reflect actual happenings and points of view in meetings. During meetings attempts were made to limit free speech violating civil rights to free speech,
2. Public presentation has been censored both in presentation to the public and in the record,
3. Where the few occasions that an inconsistent process was used to decide upon ozone reduction strategies for submissions to the USEPA. Subsequently, these submissions were altered, producing a potential fraudulent representation of these strategies and process to the USEPA,
4. Lack of participation by Steering Committee members,
5. Lack of representation and lack of fair representation of public interests groups for the populous of the participated Counties in the Steering Committee that a) has no rules, procedures & guidelines written or otherwise, b) acts with impunity under the USEPA EAC guidelines and local rules and c) acts with a whimsical nature in committees' procedure,
6. State officials at EAC committee meetings provided misleading statements along with other Steering Committee members about the legal process in the EAC and the process for the State Implemented Plan (SIP),
7. South Carolina's Department of Health and Environmental Control (DHEC) voted to allow more emissions from industry in areas that are in "non-attainment" for the 8-hr ozone standard than would be allow under the current provisions of the Clean Air Act,
8. State officials discouraged voluntary programs a) that would reduce emissions at low-cost and b) that follow the current trend of the USEPA promoting free market incentive to reduce emissions over command-and-control regulation, and
9. State official, local officials, elected representatives and EAC committees voted against Environmental Justice considerations for reducing local air pollution while a) a disproportionate number of low income and minority residents in Greenville, Spartanburg and Anderson Counties are subject to hazardous air pollution, b) have no representation on the Steering Committee for the Counties and c) the State of South Carolina Department of Health and Environment Control (DHEC) voted for plans to implement regulations that would potentially produce more pollution in these same low income and minority residential communities regions.

According to the commenter, censorship has occurred in the EAC process in South Carolina's Appalachian I Region. The commenter firmly believes that censorship occurred to hide information that would affect the cost/benefit analysis for South Carolina's air quality regulations.



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On August 21, 2003, the key information on a model that showed an emissions credits trading model that would produce low-cost and possibly free pollution control equipment for industries that emit ozone precursors that are volatile organic compounds in my presentation to the Staff Advisory committee meeting was removed by John Owings prior to a critical vote on competing views. Subsequently, the information re-appeared in the minutes of the meeting and was located in an appendix that contained the presentation.

After voting on strategies for the EAC for the Appalachian I Region, subsequent information was removed from Strategy 1 without any further voting, either by the steering committee or the staff advisory committee. This information also included modeling that would effect the cost/benefit analysis for South Carolina's air quality regulations. Attachment 3 of the minutes for the August 21, 2003 Staff Advisory Committee Meeting, a key measure under consideration for reducing ozone for Strategy 1 that was agreed upon by both the Staff Advisory committee and Steering Committee, was subsequently removed without the normal vote and notification to the both staff members. The key measure that was subsequently removed is located under the column entitled "Description of Measure" in Strategy 1. The key measure is: "Arrange for modeling of NOx and VOC affects on non-attainment in EAC compact areas from NOx control and BACT control"

Furthermore, according to the commenter, Steering Committee Members and a member of South Carolina's Department Health and Environment Control (DHEC) apparently made misleading statements regarding EAC Procedures, SIP and the VOC-BACT regulation development process during the August Steering Committee Meeting. A Steering Committee meeting member and a DHEC official that has a key role in South Carolina's EAC made misleading statements that said that there was no reasonable time for a voluntary emission credits to be discussed for BACT regulation or enacted. Subsequent review of this regulatory process suggests otherwise. The steering and staff committee meetings were in August 2003 while the VOC BACT regulatory development process was ongoing and did not finalize the recommendations until November 2003. Therefore, 90 days were still left to address issues which would affect the cost /benefit analysis of regulations. The USEPA and the public should note that SC's NOx SIP Call regulations have both a regulatory approach and voluntary emission credits (allowance) trading program that was developed concurrently.

The USEPA and the USEPA EAC division should make keynote of the abuse that has occurred in the Cost/Benefit analysis by South Carolina and Appalachian Region 1.

The commenter provided remarks on Environmental Justice Issues in the South Carolina EAC for Appalachian Region:

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On August 21, 2003, the Appalachian Region 1 Staff advisory committee, the Steering committee and subsequently all three County Councils rejected addressing environmental justice issues in the Communities of Greenville, Anderson and Spartanburg Counties and in the State of South Carolina. the official representative of South Carolina's Department of Health and Environmental Control also voted against environmental justice issues during the meetings.

In August of 2003, the Greenville News reported that the Greenville County had environmental justice irregularities; Minorities and low-income families are 2.5 to 3 times more likely to be exposed to hazardous air pollutants.

In January of 2004, the State of South Carolina's Department of Health and Environmental Control (SCDHEC) elected control measures for industrial smokestacks that reduce ozone precursor emissions (notably volatile organic compounds) that are less stringent than guidelines for non-attainment status. Additionally, SC DHEC voted to not require emissions controls on new industries that could be located in these same unhealthy regions. These same regions would be in non-attainment under the Clean Air Act which could provide better protection to low-income and minority areas, but under the USEPA Early Action Compact would be exempt from better protection against emissions and have stronger regulations for improving air quality.

Additionally, the Appalachian Region 1 has failed to adequately address programs that would provide school buses with clean-air technologies that could be acquired through the USEPA clean school bus program. The Staff and Steering Committees leaders refused to address the possibility of using new hybrid-electric diesel engines that are manufactured in South Carolina for school buses.

Therefore, a reasonable person must question the actual effectiveness of the entire EAC program for improving air quality and protecting the health of low-income and minority neighborhoods compared to non-attainment status under the Clean Air Act, especially in the EAC program in South Carolina and most especially the EAC programs in Appalachian Region 1; Greenville, Anderson and Spartanburg Counties. The facts against the Early Action Compact are plain and simple: The current Administration in the State of South Carolina and the Appalachian Region 1 Counties voted against addressing an unequal distribution of air quality to the detriment of low-income and minority neighborhoods, then subsequently chose not to protect these same neighborhoods from potentially having more ozone precursors and hazardous air pollutants from being emitted in or to these same low-income and minority areas.

In the EAC Appalachian Region 1, the voting record and method of vote were arbitrary, when voting occurred, if it occurred at all. Sometimes quorums were not present and voting continued,

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as the rules for voting changed with the current situation. Attendance by the Steering Committee members on the only two (2) voting-occasions did not have enough appointed members for a quorum to vote. And, the only January Staff Advisory Committee Meeting was canceled due to lack of interest.

**Response:** The EPA's expectation is that the EAC program is a broad-based stakeholder process with public involvement conducted in all stages of the planning and implementation process. The Appalachian EAC agreement was signed by all local counties and by South Carolina DHEC and EPA by December 30, 2002. We have examined the local documents for the Anderson area, and they appear to be in order with appropriate stakeholder participation, as documented by their stakeholders' signatures.

**I.5 IMPACTS OF EAC PROGRAM AND DEFERRED NONATTAINMENT  
DESIGNATION EFFECTIVE DATE ON AIR QUALITY PLANNING**

Need for Quantitative Analysis of the Impacts of EACs on Growth

**Commenters:** New York State Department of Environmental Conservation (DEC), OAR 2003-0090-0092; Northeast States for Coordinated Air Use Management (NESCAUM), OAR 2003-0090-0097

**Comment:** The commenters state that EPA has not adequately addressed the impacts of Early Action Compacts in Section VII of the NPR (see 68 FR 70116, December 16, 2003). New York State DEC believes EPA's analysis must be quantitative, with emphasis on those programs that are designed to control growth in emissions.

**Response:** The concept of an Early Action Compact was to create an incentive for areas to explore innovative measures to reduce air pollution--incentives not currently contained in the Clean Air Act--that local areas could voluntarily take in advance of a SIP requirement. Such early actions could realize emissions reductions, thus improve air quality, sooner than they would otherwise under a traditional system of designation to nonattainment that includes prescribed SIP elements.

EAC areas are required to submit an attainment demonstration by December 31, 2004. The EPA will evaluate these demonstrations at that time to determine whether Compact areas can indeed attain the 8-hour standard by December 31, 2007. As is the case with all modeled attainment demonstrations, growth parameters will be a part of the demonstration.

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Need for Subpart 2 Analysis

**Commenter:** New York State Department of Environmental Conservation (DEC), OAR 2003-0090-0092

**Comment:** The commenter states that EPA must provide analyses with respect to Subpart 2 requirements, as those are the appropriate requirements that would apply to those areas under the Clean Air Act.

**Response:** For Compact areas, the effective date of nonattainment designation will be deferred unless the area misses one of the milestones. Therefore, the nonattainment requirements of Part D apply only if and unless that happens.

Transport-Related Comments

**Commenters:** Ozone Transport Commission, OAR-2003-0090-0090; Northeast States for Coordinated Air Use Management (NESCAUM), OAR-2003-0090-0097; New York State Dept of Environmental Conservation, OAR-2003-0090-0092

**Comment:** In implementing any early reduction strategy, several commenters encourage EPA to address the impact of transported ozone or ozone precursor emissions on downwind areas. The compact process should ensure that control measures ensure an adequate margin of safety to allow for growth and continued maintenance of the standard in both upwind and downwind areas. One of the commenters added that such measures should be in addition to the requirements of any regional transport rule.

**Response:** Although a local area may be implementing measures under an Early Action Compact, these agreements do not relieve the State of its obligation to consider the impacts of transported ozone on downwind areas in developing attainment demonstrations for the 8-hour ozone NAAQS. Therefore, States should address impacts of transport as they adopt EAC controls and incorporate them as revisions to the State implementation plans due December 31, 2004.

Contingency Measures

**Commenters:** Northeast States for Coordinated Air Use Management (NESCAUM), OAR-2003-0090-0097; New York State Dept of Environmental Conservation, OAR-2003-0090-0092

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**Comment:** The commenters are concerned that appropriate and timely backstop mechanisms are not in place in the event that an Early Action Compact area either fails to meet its milestones or achieve the ozone standard by 2007.

**Response:** Voluntary measures that are included in EAC plans may need contingency measures in the event they do not achieve the expected reductions. Contingency measures under section 172 of the CAA are not required for EAC areas because the nonattainment designation will not be effective until the period of deferral ends. Consequently, EPA can not require contingency measures in these areas. Some EAC areas have specified contingency measures as part of their local plans, while others have not. We have encouraged compact areas to include contingency measures in their plans for their SIP-strengthening effect or to fill any shortfall in emissions that may be needed for attainment.

## **I.6 DESIGNATIONS**

### General

**Commenters:** American Lung Association (ALA); Clean Air Task Force; Environmental Defense; Natural Resources Defense Council; Sierra Club; and U.S. Public Interest Research Group, OAR-2003-0090-0106

**Comment:** The commenters asserted that the nonattainment status of compact areas be transparent, and that a nonattainment designation provides the public with crucial information concerning the quality of the air the citizens breathe. The commenters believe that failure to make nonattainment designations under the 8-hour ozone standard deprives the public of its right to know whether it is breathing healthy or unhealthy air.

**Response:** By designating compact areas that are violating the 8-hour ozone standard as nonattainment, but deferring the effective date, we are notifying the public that the air they are breathing is exceeding the level of the standard. Prior to the establishment of the early action compact program, some State and local agencies, as well as representatives from industry, suggested a special designation of transitional for areas that were marginally above the level of the standard; however, we agree with the commenters that the designation needs to clearly send a signal to the public that air quality improvement is needed. Indeed, the stakeholder groups in these compact communities, including local citizens and environmental groups, local businesses, local and county governments and the State agencies are working together to determine the best mix of control strategies that will lead to reductions of emissions sooner that would otherwise be required and will result in earlier implementation and ultimately attainment of the standard by December 31, 2007.

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**Commenters:** Commonwealth of Virginia, Department of Transportation (VA DOT), OAR 2003-0090-0083; Mitsubishi Polyester Film, OAR 2003-0090-0096; BMW Manufacturing Co., LLC OAR 2003-0090; and Michelin N.A., OAR-2003-0083-1389

**Comment:** Several commenters recommended separate designations exclusively for compact areas because they do not like the stigma associated with the nonattainment label. One commenter disagreed with the label for compact areas called “nonattainment” with a deferred effective date of the designation, instead the commenter suggested these areas be called “compact” or “EAC” area. That way, the commenter explained, if the compact failed, the area would be designated to a nonattainment area. (VA DOT, OAR 2003-0090-0083)

Other commenters (Mitsubishi Polyester Film, OAR 2003-0090-0096; BMW Manufacturing Co., LLC, OAR 2003-0090; and Michelin N.A., OAR-2003-0083-1389) recommended two possible ways to address the nonattainment situation for these areas. The preferred remedy is for EPA to issue three deferrals of the nonattainment designation for areas with approved early action compacts, rather than three deferrals of the effective date of the nonattainment designation. This would allow the strategies within the approved early action compact time to bring the area back into compliance with the 8-hour ozone standard 3 years early, without the negative stigma associated with a nonattainment designation.

The second potential option, according to these commenters, is to create a separate category for areas with approved early action compacts. This category would acknowledge that the area is nonattainment, and the area has taken EPA-approved actions to regain compliance with the 8-hour ozone standard 3 years earlier than required. The commenters suggested that the category could be called “Early Action Compact Area.”

**Response:** We believe that a separate category for designations is unnecessary and would only confuse the public. The Clean Air Act specifies three categories of designations: attainment, nonattainment and unclassifiable. By April 15, 2004, we will designate areas either attainment/unclassifiable or nonattainment for the 8-hour ozone standard. For those areas that have entered into a compact with us and have met all milestones up to and including the March 31, 2004 local plan, we will defer the effective date of the nonattainment designation until September 30, 2005.

**Commenter:** North Carolina Department of Environmental and Natural Resources, OAR 2003-0090-0112

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**Comment:** One commenter requested that the actual nonattainment boundaries be listed in the final notice of this deferral action after EPA and the State have completed the boundary discussions.

**Response:** We have identified the specific nonattainment boundaries in Part 81 which is issued with the designations notice along with the final action to defer the effective date of nonattainment designation.

Comments on Designations for Specific Areas

**Commenter:** Chemical Lime, OAR 2003-0090-0098

**Comment:** One commenter located in the San Antonio area supported the continued participation of Comal County in the compact; however, the commenter believes that participation in the compact should be a separate issue from the issue of whether Comal County should be designated as a nonattainment county and included within the San Antonio nonattainment area. According to the commenter, to designate Comal County nonattainment even though its monitors indicate “attainment” would greatly discourage voluntary and early reduction efforts. The commenter presented information which the commenter believes would justify an attainment designation for Comal County.

**Response:** The EPA’s response to this comment is located in “Responses to Comments on EPA’s Designation and Classification of Areas for the 8-Hour Ozone National Ambient Air Quality Standard” (Docket Number OAR-2003-0083), April 15, 2004.

## **I.7 PROCESS CONCERNS**

Federal Enforceability of Compact Commitments

**Commenter:** Ozone Transport Commission (OTC), OAR 2003-0090-0090

**Comment:** One commenter expressed concern that all commitments by compact areas must be federally enforceable to reduce emissions early for attainment of the 8-hour ozone standard.

**Response:** States are required to submit revisions to their SIPs to EPA by December 31, 2004, that must include the adopted control measures and a demonstration of attainment. Those measures that areas included in the attainment demonstration are federally enforceable.

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Determination of Significance of Regulatory Action

**Commenters:** New York State Dept of Environmental Conservation (DEC), OAR 2003-0090-0092; Northeast States for Coordinated Air Use Management (NESCAUM), OAR 2003-0090-0097

**Comment:** Two commenters disagreed with EPA's assessment that the proposed rule does not constitute a "significant regulatory action" because the compact program is a novel approach.

**Response:** Historically, designation actions are not considered "significant" for OMB review purposes. In the same notice where we designate areas for the 8-hour ozone standard, we are taking final action to defer the first effective date of nonattainment designation for EAC areas that are violating the standard, but have met compact milestones through March 31, 2004. The OMB has determined that the entire rule is not a significant regulatory action, and therefore, not subject to OMB review.

**I.8 COMMENTS ON TRADING PROGRAMS FOR EAC AREAS**

**Commenter:** ESTEC Enterprises, Inc., OAR-2003-0090-0150

**Comment:** One commenter encourages EPA to continue to use and develop more free market approaches to reduce ozone precursor emissions. The commenter believes that cap and trade systems should be replaced with "cap and earn" systems that (a) have strong declining caps to force the market place to purchase emissions credits; (b) that promotes trading; and (c) that is driven by industrial and residential consumer demand. The commenter included a description of a cap and earn trading program.

**Response:** The EPA encourages and supports market approaches to reduce ozone precursor emissions. The January 2001 document "Improving Air Quality with Economic Incentive Programs (EPA-452/R-01-001) provides EPA's policy on discretionary economic incentive programs (EIPs). EIPs use market-based strategies to encourage people to reduce emissions of air pollutants in the most efficient manner. This guidance provides the information needed to develop a discretionary EIP, submit it to the EPA, and receive approval from the EPA. This guidance pertains to discretionary EIPs that are or will be measures in State implementation plans (SIPs) and Tribal implementation plans (TIPs). This guidance applies to you if your State or Tribe wants to establish a discretionary EIP for attaining or maintaining the national ambient air quality standards (NAAQS) for criteria pollutants. However, EPA cannot mandate states to adopt such programs. A discretionary EIP is a program that a State or Tribe elects to adopt. Any government agency with the authority to administer a SIP or TIP may adopt a discretionary EIP.



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With regard to interpollutant trading requirements, EPA guidance is contained in the EIP at section 16.9, "Provisions for ozone interprecursor trading." In general, dispersion modeling is needed to show that such trading will reduce or maintain ozone levels, include the necessary geographic restrictions, establish the appropriate interprecursor trading ratio, and address the applicable new source review requirements.

**I.9 APPLICATION OF EAC PROCESS TO OTHER NAAQS**

**Commenters:** Virginia Department of Environmental Quality (VA DEQ), OAR 2003-0090-0089; Georgia Department of Natural Resources (GA DNR), OAR 2003-0090-0091; Northern Shenandoah Valley, OAR 2003-0090-0093; Roanoke Valley Area Metropolitan Planning Organization (MPO), OAR 2003-0090-0101

**Comment:** Several commenters urged EPA to extend the EAC program and the deferred effective date of nonattainment designation to other NAAQS, such as the fine particulate matter (PM<sub>2.5</sub>) standard.

**Response:** The EPA has no plans for an EAC program with deferred nonattainment designation for PM-2.5 areas. There is little time for early SIPs because designations are expected in December, and the conventional SIP process begins at that point. When we considered this issue some time ago, EPA decided that certain inputs needed for adequate local attainment modeling for PM<sub>2.5</sub> would not be available early enough to support the EAC approach. (i.e., meteorological and emissions data at the fine-grid level).

The EPA does, however, encourage efforts by States, communities and the private sector to make early reductions in PM<sub>2.5</sub> to protect public health. The EPA regulatory analyses have estimated that even small reductions in PM<sub>2.5</sub> levels can reduce the number of incidences of premature mortality. Also, these analyses have shown that monetized benefits of reductions in direct PM, SO<sub>2</sub> and NO<sub>x</sub> clearly exceed their costs.

Early reduction efforts can include diesel retrofit programs, school bus retrofits, and a long list of other measures for direct PM and precursors. To encourage early reductions, EPA already has issued guidance stating that any emissions reductions achieved since 2002 will be credited towards meeting reasonable further progress requirements. The EPA's proposed rule will describe further incentives available under the Clean Air Act for areas that meet the PM<sub>2.5</sub> standard early, including suspension of certain requirements once an area has clean data.

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**Section II**

**Response to Comments Received on the Early Action Compacts  
Section VIII.A of  
Proposed Rule to Implement the  
8-Hour Ozone National Ambient Air Quality Standard  
(68 FR 32802, June 2, 2003)**

The EPA received a number of comments on Section VIII.A of the 8-hour ozone implementation proposal that addressed Early Action Compacts (EAC). The June 2, 2003 proposal included a description and background information concerning EACs, but made it clear that we were not proposing any rulemaking on EACs in that notice. Those comments are addressed in this section of this document or in the preamble to the EAC final rule.

**II.1 COMMENTS RELATED TO THE PROPOSED 8-HOUR OZONE  
CLASSIFICATION OPTIONS**

In the proposed implementation plan for the 8-hour ozone NAAQS, EPA outlined two options for classifying 8-hour ozone nonattainment areas. Under Option 1, EPA would classify all 8-hour ozone nonattainment areas under subpart 2 based on the areas 8-hour ozone design values. Under Option 2, EPA would implement the 8-hour ozone standard under subpart 1 for some areas and under subpart 2 for other areas depending on the areas 1-hour ozone design value. (See proposed rule at 68 FR 32812, June 2, 2003, for detailed information on the classification options.)

**Commenters:** Travis County Transportation and Natural Resources, OAR-2003-0079-0182; Capital Area Metropolitan Planning Organization, OAR-2003-0079-0301; City of Austin, OAR-2003-0079-0341; City of San Antonio, OAR-2003-0079-0195; Virginia Dept of Environmental Quality (VDEQ), OAR-2003-0079-0231; Oklahoma Dept of Environmental Quality, OAR-2003-0079-0253

**Comment:** Commenters stated that under Option 1 an EAC area classified as Marginal because the 8-hour readings fall between 0.085 and 0.092 would under Subpart 2 have 3 years after designations become final to attain the standard, which would be sooner than under an EAC. The commenters believed it would be impossible to justify requiring areas under traditional nonattainment to come into attainment quicker than areas that have committed to an EAC.

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**Response:** Marginal areas under both Options 1 and 2 would have 3 years to attain the 8-hour standard. Thus, to the extent the commenters see an issue with Option 1, it applies equally to option 2. We believe Congress intended areas that are violating based on a design value just above the standard to attain the standard within 3 years. The Agency did not consider the EAC concept in the proposed implementation rule or in developing the final implementation rule. The commenter is correct that a traditional nonattainment area designated on April 15, 2004 and classified as marginal, at the same time EAC areas are designated, would be required to attain sooner than an EAC area, unless the traditional nonattainment area qualifies for a 1- or 2-year extension of the original attainment date. Any EAC area with a deferred effective date will be required to attain no later than December 31, 2007, in accordance with the early action protocol and EPA guidance. An EAC (deferred) area is not eligible for an extension of the attainment date. Traditional nonattainment areas classified as marginal would be required to attain 3 years after the effective date of designation, or June 15, 2007, unless the area qualifies for an extension of the attainment date, in which case the attainment date would be no later than June 15, 2009.

**Commenters:** Ozone Transport Commission (OTC), OAR-2003-0079-0112, OAR-2003-0079-0289; Pennsylvania Department of Environmental Protection (PADEP), OAR-2003-0079-0294

**Comment:** Two commenters urged EPA to implement the 8-hour ozone standard under Option 1 (subpart 2). One of these commenters questioned whether the potentially significant delays under the EAC program provided for under subpart 1 had been analyzed and if an analysis would show that the subpart 1 option could meet the rule's objectives. (OAR-2003-0079-0112, OAR-2003-0079-0289, OTC) The other commenter stated that EAC areas classified under Subpart 1 that fail to demonstrate attainment by the end of 2007 could have as long as 10 more years to attain the 8-hour standard. The commenter believes this could adversely affect areas downwind of the EAC areas. (OAR-2003-0079-0294, PADEP)

**Response:** As we have stated previously, the EAC concept has not formed the basis for any part of the implementation rule. However, we note that section 172(a)(2)(A) (in subpart 1) requires areas to attain as expeditiously as practicable, but within 5 years of designations, unless the area can demonstrate that attainment is infeasible based on the severity of pollution and the availability and feasibility of controls. The areas that have taken steps to participate as EACs all have ozone levels that are close to the level of the 8-hour standard and, in addition, these local areas and their States have been able to identify a variety of controls that they are adopting or considering for adoption. These EAC measures will be implemented no later than December 2007. Based on the information currently before us, we do not believe any such area would need the full initial 5-year period to attain, much less would be able to demonstrate that it needs the 5-year extension provided under section 172(a)(2)(A) of the CAA.

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**II.2 CONCERNS ABOUT THE REVOCATION OF THE 1-HOUR OZONE STANDARD**

**Commenters:** Texas Commission on Environmental Quality (TCEQ), OAR-2003-0079-0149, OAR-2003-0079-0259, OAR-2003-0079-0260, and OAR-2003-0079-0472; Travis County Transportation and Natural Resources, OAR-2003-0079-0182; Capital Area Metropolitan Planning Organization, OAR-2003-0079-0301; City of Austin, OAR-2003-0079-0341; State of Louisiana Dept of Environmental Quality, OAR-2003-0079-0230; Vanderburgh County (Indiana) Health Dept and City of Evansville (Indiana), OAR-2003-0079-0295; South Carolina Bureau of Air Quality, OAR-2003-0079-0314

**Comment:** A number of comments addressed the issue of revocation of the 1-hour ozone standard for EAC areas. Although many commenters supported complete revocation of the 1-hour ozone standard, they expressed concern about the proposed timing (one year after the effective date of the designation of the area for the 8-hour ozone NAAQS). These commenters were concerned that an EAC area would be subject to both the 1-hour and 8-hour standards at the same time for a period of several years more than other areas that did not voluntarily take proactive measures. Several commenters believe this may act as a disincentive to EAC participation, add a layer of differing requirements, and present planning and management difficulties.

These commenters urged EPA to consider other options regarding the timing of the 1-hour ozone standard. Some commenters suggested that the 1-hour standard be revoked for the EAC areas on the same time frame as for the rest of the areas in the country. One commenter suggested that EAC areas should be designated attainment for the 8-hour standard whenever designations are made for the rest of the county, have the 1-hour standard revoked one year later, and if those areas do not attain the 8-hour standard (and other possible agreed upon milestones), they then be redesignated to nonattainment.

**Response:** For EAC areas, the 1-hour ozone standard will be revoked one year after the effective date of designation. Tying revocation of the 1-hour standard to the effective date of designation is consistent with how the EPA is treating all other areas of the country with respect to timing of the revocation.