

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 51**

**[OAR 2003-0079, FRL - ]**

**RIN 2060 - AJ99**

**Implementation of the 8-Hour Ozone National Ambient Air  
Quality Standard - Phase 1: Reconsideration**

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

**ACTION:** Proposed rule; notice of public hearing.

**SUMMARY:** The EPA is requesting comment on two issues raised in a petition for reconsideration action of EPA's rule to implement the 8-hour ozone national ambient air quality standard (NAAQS or standard). In addition, EPA is proposing to clarify two aspects of the implementation rule. On April 30, 2004, EPA issued a final rule addressing key elements of the program to implement the 8-hour ozone NAAQS. Subsequently, on June 29, 2004 and September 24, 2004, three different parties each filed a petition for reconsideration of certain specified aspects of the final rule. By letter dated September 23, 2004, EPA granted reconsideration of three issues raised in the petition for reconsideration filed by Earthjustice on behalf of several environmental organizations. Today, we are providing additional information and soliciting comment on two of the issues on which we granted reconsideration. The issues that we are

addressing today are whether the section 185 fee provisions apply once the 1-hour NAAQS is revoked and the timing for determining what is an "applicable requirement" for purposes of anti-backsliding once the 1-hour NAAQS is revoked. We will shortly address the issue of new source review (NSR) anti-backsliding in a separate action. We are requesting public comment on the issues discussed in this notice, which are described in section III of the Supplementary Information section of this preamble. We plan to issue a final decision on these issues no later than May 20, 2005.

We are also proposing to revise the implementation rule in two respects. First we are proposing to find that contingency measures for failure to make reasonable further progress or attain by the applicable attainment date for the 1-hour ozone standard are no longer required of an area after revocation of that standard. Second, although §51.905 of the rule provided that areas designated nonattainment for the 1-hour NAAQS at the time of designation as nonattainment for the 8-hour NAAQS remain subject to any outstanding 1-hour attainment demonstration requirement, we failed to list the attainment demonstration as an "applicable requirement." We are proposing to revise the definition of "applicable requirement" to include the 1-hour attainment demonstration.

We are seeking comment only on the issues specifically

identified in this document. We do not intend to respond to comments addressing other issues.

**DATES:** Comments must be received on or before [**insert 45 days from date of publication in the Federal Register**]. A public hearing will be held on February 18, 2005 and will convene at 9:00 a.m. and end at 2:00 p.m. Because of the need to resolve the issues in this document in a timely manner, EPA will not grant requests for extensions of the public comment period. For additional information on the public hearing, see the SUPPLEMENTARY INFORMATION section of this preamble.

**ADDRESSES:** Submit your comments, identified by Docket ID No. OAR-2003-0079, by one of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments. Attention E-Docket No. OAR-2003-0079.
- Agency Website: <http://www.epa.gov/edocket>. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments. Attention E-Docket No. OAR-2003-0079.
- E-mail: [A-and-R-Docket@epa.gov](mailto:A-and-R-Docket@epa.gov). Attention E-Docket No. OAR-2003-0079.
- Fax: The fax number of the Air Docket is (202) 566-

1741. Attention E-Docket No. OAR-2003-0079.

- Mail: EPA Docket Center, EPA West (Air Docket), Attention E-Docket No. OAR-2003-0079, Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW., Washington, D.C. 20460.
- Hand Delivery: EPA Docket Center (Air Docket), Attention E-Docket No. OAR-2003-0079, Environmental Protection Agency, 1301 Constitution Avenue, N.W., Room B108; Mail Code 6102T, Washington, D.C. 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. OAR-2003-0079. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at <http://www.epa.gov/edocket>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov websites are "anonymous access" systems, which means EPA will not know

your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the Federal Register of May 31, 2002 (67 FR 38102).

*Docket:* All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either

electronically in EDOCKET or in hard copy at the EPA Docket Center (Air Docket), EPA/DC, EPA West, Room B102, 1301 Constitution Ave., N.W., Washington, D.C. 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1742 and the fax number is (202) 566-1741.

*Public Hearing.* A public hearing will be held on February 18, 2005 from 9:00 a.m. to 2:00 p.m. at the Environmental Protection Agency, Building C, Room C114, 109 T.W. Alexander Drive, Research Triangle Park, North Carolina 27709.

Persons wishing to speak at the public hearing need to contact: Ms. Kara Syvertsen, E.H. Pechan, at telephone number (919) 493-3144, extension 120 or by e-mail at [kara.syvertsen@pechan.com](mailto:kara.syvertsen@pechan.com). Oral testimony may be limited to 3 to 5 minutes depending on the number of people who sign up to speak. Commenters may also supplement their oral testimony with written comments. The hearing will be limited to the subject matter of this document. The public hearing schedule, including the list of speakers, will be posted on EPA's website at:

<http://www.epa.gov/ttn/naags/ozone/o3imp8hr>. A verbatim transcript of the hearing and written statements will be made available for copying during normal working hours at

the EPA Docket Center (Air Docket) at the address listed above for inspection of documents.

FOR FURTHER INFORMATION CONTACT: Ms. Denise M. Gerth, Office of Air Quality Planning and Standards, Environmental Protection Agency, Mail Code C539-02, Research Triangle Park, NC 27711, phone number (919) 541-5550 or by e-mail at [gerth.denise@epa.gov](mailto:gerth.denise@epa.gov) or Mr. John Silvasi, Office of Air Quality Planning and Standards, Environmental Protection Agency, Mail Code C539-02, Research Triangle Park, NC 27711, phone number (919) 541-5666 or by e-mail at [silvasi.john@epa.gov](mailto:silvasi.john@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

1. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).

b. Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested

changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

## **Outline**

### Supplementary Information

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#### II. Background

#### III. Today's Action

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- B. Reconsideration of the Portion of the Phase 1 Rule Establishing the Time for Determining Which 1-Hour Obligations Remain Applicable Requirements
- C. Contingency Measures in SIPs for the 1-Hour Ozone Standard
- D. Adding Attainment Demonstration to the List of "Applicable Requirements" in §51.900(f)

#### IV. Statutory and Executive Order Reviews



- A. Executive Order 12866: Regulatory Planning and Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
- H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
- I. National Technology Transfer Advancement Act
- J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

## **II. Background**

On July 18, 1997, we promulgated a revised ozone NAAQS of 0.08 parts per million (ppm) as measured over an 8-hour period (62 FR 38856). At the time, we believed that the 8-hour ozone NAAQS should be implemented under the less detailed requirements of subpart 1 of part D of title I of the Clean Air Act (CAA) rather than the more detailed requirements of subpart 2. Various industry groups and States challenged EPA's final rule promulgating the 8-hour NAAQS in the U.S. Court of Appeals for the District of Columbia Circuit.<sup>1</sup> In May 1999, the D. C. Circuit remanded the ozone standard to EPA on the basis that our

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<sup>1</sup>On July 18, 1997, we also promulgated a revised particulate matter (PM) standard (62 FR 38652). Litigation on the PM standard paralleled the litigation on the ozone standard and the court issued one opinion addressing both challenges. Issues regarding implementation of the PM NAAQS were not raised.

interpretation of the standard-setting provisions of the CAA resulted in an unconstitutional delegation of authority. American Trucking Assns., Inc. v. EPA, 175 F.3d 1027, 1034-1040 (ATA I) aff'd, 195 F.3d 4 (D.C. Cir., 1999) (ATA II). In addition, the Court held that the CAA clearly provided for implementation of a revised ozone standard under subpart 2. Id. at 1048-1050.<sup>2</sup> We sought review of these two issues in the U.S. Supreme Court. In February 2001, the Supreme Court held that EPA's action in setting the NAAQS was not an unconstitutional delegation of authority. Whitman v. American Trucking Assoc., 121 S.Ct. 903, 911-914 (2001) (Whitman). In addition, the Supreme Court held that the D.C. Circuit incorrectly determined that the CAA was clear in requiring implementation under subpart 2, but determined that EPA's approach, which did not provide a role for subpart 2 in implementing the 8-hour NAAQS, was unreasonable. Id. at 916-919. Specifically, the Court noted that the CAA funneled areas with specific design values into subpart 2. The Court also stated that we could not ignore the provisions of subpart 2 that "eliminate[] regulatory discretion" allowed by subpart 1, id. at 918, but also identified several portions of the CAA's classification

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<sup>2</sup>The Court addressed a number of other issues, which are not relevant here.

scheme under subpart 2 that are "ill-fitted" to the revised standard. The Court remanded the implementation strategy to EPA to develop a reasonable approach for implementation.

Id.

Because the D.C. Circuit had not addressed all of the issues raised in the underlying case, the Supreme Court remanded the case to the D.C. Circuit for disposition of the remaining issues. Id. at 919. On March 26, 2002, the D.C. Circuit Court rejected all of the remaining challenges to the ozone and fine particle (PM<sub>2.5</sub>) standards. American Trucking Assoc. v. EPA, 283 F.3d 355 (D.C. Cir., 2002) (ATA III). With that ruling, EPA began to move forward with programs to protect Americans from the wide variety of health problems, such as respiratory illnesses in elderly persons and premature death, with which these air pollutants have been associated.

On June 2, 2003 (68 FR 32802), we proposed various options regarding the transition from the 1-hour to the 8-hour NAAQS and the provisions that would govern implementation of the 8-hour NAAQS. On August 6, 2003 (68 FR 46536), EPA published a notice of availability of draft regulatory text to implement the 8-hour NAAQS. In the summer of 2003, we held three public hearings to solicit comment on the proposal. Because numerous commenters

recommended alternatives to or modifications of the proposed classification schemes, we reopened the public comment period on October 21, 2003 (68 FR 60054) to solicit comment on alternative classification approaches.

On April 30, 2004 (69 FR 23951), we issued a final rule (Phase 1 Rule), which covered some, but not all, of the program elements in the proposed rule. The Phase 1 Rule covered the following key implementation issues: classifications for the 8-hour NAAQS; revocation of the 1-hour NAAQS (i.e., when the 1-hour NAAQS will no longer apply); how anti-backsliding principles will ensure continued progress in achieving ozone reductions as areas transition to implementation of the 8-hour ozone NAAQS; attainment dates for the 8-hour ozone NAAQS; and the timing of emissions reductions needed for attainment of the 8-hour ozone NAAQS. The EPA plans to issue shortly a final rule addressing the remaining issues from the June 2003 proposal (Phase 2 Rule). This final rule will provide EPA's interpretation of many of the planning and control obligations under sections 172 and 182 of the CAA that apply to nonattainment areas for purposes of attaining the 8-hour NAAQS. These include, among other things, reasonable further progress (RFP), reasonably available control technology, attainment demonstrations, maintenance plans and

NSR.

Following publication of the April 30, 2004 final rule, the Administrator received three petitions, pursuant to section 307(d)(7)(B) of the CAA requesting reconsideration of a number of aspects of the final rule.<sup>3</sup> On September 23, 2004, we granted reconsideration of three issues raised in the Earthjustice Petition. The purpose of today's action is to initiate the process to address two of these three issues: 1) the provision that section 185 fees would no longer apply for a failure to attain the 1-hour NAAQS once the 1-hour NAAQS is revoked; and 2) the timing for determination of what is an "applicable requirement." The NSR anti-backsliding issues will be addressed in a separate action.

On January 10, 2005, we granted reconsideration of the overwhelming transport classification issue raised by Earthjustice in their Petition. At the same time, we denied reconsideration of the issues they raised in their Petition

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<sup>3</sup>The petitions for reconsideration of the Phase 1 Rule were filed by: 1) Earthjustice on behalf of the American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy; 2) the National Petrochemical and Refiners Association and the National Association of Manufacturers; and 3) the American Petroleum Institute, American Chemistry Council, American Iron and Steel Institute, National Association of Manufacturers and the U.S. Chamber of Commerce.

dealing with the applicability of reformulated gasoline when the 1-hour NAAQS is revoked and future 8-hour ozone redesignations to nonattainment. In the near future, we will take action on the overwhelming transport classification issue.

We are continuing to review the issues raised in the National Petrochemical and Refiners Association and American Petroleum Institute Petitions. Copies of the Petitions for Reconsideration and actions EPA has taken regarding the Petitions may be found at:

[www.epa.gov/ttn/naags/ozone/o3imp8hr](http://www.epa.gov/ttn/naags/ozone/o3imp8hr).

We are proposing to find that contingency measures for failure to make RFP or attain by the applicable attainment date for the 1-hour ozone standard are no longer required of an area after revocation of that standard. We are also proposing to revise the definition of "applicable requirement" in §51.900(f) to include the 1-hour attainment demonstration. For more detailed background information, the reader should refer to the Phase 1 Rule (April 30, 2004; 69 R 23956).

### **III. Today's Action**

#### **A. Reconsideration of the Portion of the Phase 1 Rule**

##### **Addressing the Continued Applicability of the Section 185**

##### **Fee Provision for Areas that Fail to Attain the 1-Hour NAAQS**

1. Background. The Phase 1 Rule provided that once the 1-hour standard is revoked for an area, certain requirements would no longer apply. For example, we stated that: 1) EPA will no longer make findings of failure to attain the 1-hour NAAQS; 2) EPA will no longer reclassify areas to a higher classification for the 1-hour NAAQS based on a finding of failure to attain; and 3) States are no longer obligated to impose fees under sections 181(b)(4) and 185 of the CAA ("Fee Provisions") in severe or extreme areas that fail to attain the 1-hour standard by the area's 1-hour attainment date (69 FR 23984).

The petitioners claim that we did not include the issue of whether States would be required to impose fees under the Fee Provisions in the portion of the proposed rule discussing which obligations would no longer apply once the 1-hour standard is revoked. Thus, they claim they did not have an opportunity to comment on this portion of the final rule.

We agree with the Petitions that we did not specifically state in our proposed rule that after the effective date of the revocation of the 1-hour NAAQS, States would no longer be obligated to impose fees under the Fee Provisions in severe and extreme areas that fail to attain the 1-hour NAAQS by their 1-hour attainment date. For this

reason, we are today requesting comments on whether States must impose fees in severe and extreme areas if an area fails to attain the 1-hour NAAQS by its 1-hour attainment date.

In the final rule, we explained that our interpretation was a logical extension of our proposal as the obligation to impose a fee is triggered by a finding of failure to attain. We also noted that our final rule regarding the Fee Provisions was consistent with appendix B of the June 2, 2003 proposal (68 FR 32866), which did not identify the section 185 fee provision as an applicable requirement.

For severe and extreme areas, the Fee Provisions operate in lieu of reclassification. And, in our proposal, we proposed that we would no longer be obligated to reclassify areas for the 1-hour NAAQS after that NAAQS was revoked. As with all of the requirements that we determined no longer apply, the Fee Provisions are linked to whether or not the area has met the 1-hour NAAQS, which the Agency determined in 1998 was no longer necessary to protect public health. Thus, for the Fee Provisions and the other requirements that we determined would no longer apply, we concluded in the Phase 1 Rule that areas should focus their resources on attainment of the 8-hour standard. We noted that it would be counterproductive to continue efforts



linked to whether or not an area met the 1-hour standard after areas were designated for the 8-hour standard and had begun planning for the 8-hour standard.

2. Request for Public Comments. Today, we are soliciting comment on whether, once the 1-hour standard is revoked, the Fee Provisions should continue to apply if an area fails to attain the 1-hour standard by its 1-hour attainment date. We continue to believe, as stated in our final rule, that there is no basis for determining whether an area has met the 1-hour NAAQS once the 1-hour NAAQS has been revoked. Once the 1-hour NAAQS is revoked, there will not be an applicable 1-hour classification or an applicable 1-hour attainment date. Since there is no longer an applicable 1-hour attainment date, there cannot be a failure to meet such a date. Thus, the consequences that would apply based on such a failure would not be triggered.

## **B. Reconsideration of the Portion of the Phase 1 Rule**

### **Establishing the Time for Determining Which 1-Hour**

#### **Obligations Remain Applicable Requirements**

1. Background. Under the Phase 1 Rule, the 1-hour control measures that would continue to apply under the anti-backsliding portion of the rule are called "applicable requirements." The Phase 1 Rule provided that the "applicable requirements" would be those 1-hour control

measures that applied in an area as of the date of signature of the Phase 1 Rule (i.e., April 15, 2004).<sup>4</sup> In the June 2003 proposal, EPA had proposed that the applicable requirements would be those that applied as of the effective date of the 8-hour designations (i.e., for most areas June 15, 2004). (June 2, 2003, 68 FR 32821). The draft regulatory text released for public comment in August 2003 defined the applicable requirements as those 1-hour requirements that applied as of the date of revocation of the 1-hour NAAQS (i.e., for most areas, June 15, 2005). (See e.g., 51.905(a) of Draft Regulatory Text.) The petitioners claim that since EPA did not propose the date of signature of the designation rule (i.e., April 15, 2004) as the date for determining which 1-hour control measures would continue to apply, they did not have an opportunity to comment on this portion of the final rule.

We agree with the Earthjustice Petition that we did not propose that the applicable requirements be based on the

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<sup>4</sup> The Phase 1 Rule provides in §51.900(f) that: "Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the areas's classification under section 181(a)(1) of the CAA for the 1-hour NAAQS at the time the Administrator signs a final rule designating the area for the 8-hour standard as nonattainment, attainment or unclassifiable..." (69 FR 23997). Phase 1 of the final rule to implement the 8-hour ozone NAAQS was signed by the Administrator on April 15, 2004.

time at which the Phase 1 Rule was signed, but rather proposed two options that were later in time - publication of the designation rule or revocation of the 1-hour NAAQS. Thus, we are reopening for comment the issue of what should be the date for determining the applicable requirements.

We believe it is important for areas to understand early in the process which requirements will remain in place. This is particularly true for areas with an outstanding attainment demonstration obligation. Our Phase 1 Rule provides that such areas can elect to submit a 5 percent plan or an early 8-hour attainment demonstration in lieu of the outstanding 1-hour State implementation plan (SIP) and that those alternative plans are due no later than 1 year after the effective date of 8-hour designations. Thus, States need to know early whether a 1-hour attainment SIP obligation remains in place so that they may develop and submit that SIP or one of the two alternatives. For that reason, we do not believe the date in the draft regulatory text - the date on which the 1-hour standard is revoked - is appropriate, as it would be the same date such SIPs are due.

2. Request for Public Comments. Today, we are soliciting public comment on what date should be used for the purpose of defining the applicable requirements. We are proposing to adopt, consistent with our June 2003 proposal, the

effective date of the 8-hour designation (i.e., for most areas June 15, 2004) as the date for determining which 1-hour control measures continue to apply in an area once the 1-hour standard is revoked. Under this approach, the 1-hour obligations that are applicable requirements in an area as of June 15, 2004 would continue to apply under the anti-backsliding provisions of the Phase 1 Rule. We believe that June 15, 2004 is more consistent with the other aspects of our implementation rule that are keyed to the effective date of the designations rather than the signature date. In other words, we are proposing to define the "applicable requirements" as those that applied to an area for the area's 1-hour ozone classification under section 181(a)(1) of the CAA at the time of the effective date of the 8-hour designation for the area.

If we take final action to change the date for defining "applicable requirements" for purposes of anti-backsliding from April 15, 2004 to June 15, 2004, two areas will be affected by the change. Both of these areas were reclassified (bumped up) to a higher classification for the 1-hour NAAQS with an effective date after April 15, 2004, but before June 15, 2004. The first area, Beaumont/Port Arthur, Texas, was reclassified to serious with an attainment date as expeditiously as practicable but no later

than November 15, 2005. The reclassification was effective on April 29, 2004 (69 FR 16483; March 30, 2004). The other area, San Joaquin Valley, California, requested a voluntary bump to extreme with an attainment date as expeditiously as practicable but no later than November 15, 2010. The bump up was effective on May 17, 2004 (69 FR 20550; April 16, 2004). These areas will have to implement the serious and extreme CAA requirements, respectively, for purposes of anti-backsliding if we change the date for determining which "applicable requirements" apply from April 15, 2004 to June 15, 2004.

In addition to being consistent with the trigger date for other obligations under the Phase 1 Rule, changing the date for determining "applicable requirements" to June 15, 2004 would ensure that these two areas meet obligations that were recently triggered. Beaumont was recently reclassified to serious based on its failure to attain the 1-hour NAAQS by its 1999 attainment date. Since 1999, Beaumont has continued to experience violations of the 1-hour NAAQS and is currently violating the 8-hour NAAQS with a 2001-2003 8-hour ozone design value of 0.091 ppm. The State of California requested that San Joaquin Valley be reclassified to extreme because the State and the San Joaquin Valley Unified Air Pollution Control District were unable to

develop a SIP that demonstrated attainment by 2005 based on its severe-15 classification. California submitted a new 1-hour plan including a demonstration that the San Joaquin Valley area will meet rate of progress requirements for 2008 and attain the 1-hour NAAQS by no later than 2010, the extreme area deadline. The San Joaquin Valley area is classified as serious with respect to the 8-hour ozone NAAQS and has an 8-hour ozone design value of 0.115 ppm.

Based on this information, we believe these areas should implement the additional 1-hour requirements of the higher classifications to ensure continued progress toward reducing ambient ozone levels and meeting the 8-hour ozone standard.

**C. Contingency Measures in SIPs for the 1-Hour Ozone Standard**

1. Background. Section 172(c)(9) of the CAA requires that nonattainment area SIPs contain contingency measures that would be implemented if an area fails to attain the NAAQS or fails to make RFP toward attainment. The issue of what would happen to contingency measures that have been approved into an area's 1-hour ozone attainment SIP once the 1-hour NAAQS is revoked and whether areas that had not submitted contingency measures would still be required to do so was not expressly addressed in the proposed (68 FR 32802) or

final Phase 1 Rule (69 FR 23951). Today, EPA is addressing the issue and requesting comments on our proposed approach.

Regarding contingency measures within maintenance plans under section 175A of the CAA, the Phase 1 Rule provided that areas with approved 1-hour maintenance plans could modify their maintenance plans to remove the obligation to implement contingency measures upon violation of the 1-hour NAAQS. The Phase 1 Rule also provided that such requirements would remain enforceable as part of the approved SIP until such time as we approved a SIP revision removing such obligations.

2. Summary of Today's Proposal. Today, we are proposing that sections 172(c)(9) and 182(c)(9) contingency measures, which are triggered upon a failure to attain the 1-hour standard or to meet reasonable progress milestones for the 1-hour standard, will no longer be required once the 1-hour NAAQS is revoked. This means that after revocation of the 1-hour standard, an area that has not submitted a 1-hour attainment demonstration or a specific 1-hour RFP SIP would no longer need to submit contingency measures in conjunction with those SIPs. Additionally, an area with approved 172 and 182 contingency measures could remove them from the SIP.

We believe that the contingency measures are linked to the other requirements that EPA determined would no longer

apply once the 1-hour standard is revoked. After revocation of the 1-hour standard, we will no longer make findings that areas failed to attain or make progress towards the 1-hour NAAQS. We have previously concluded that these findings are no longer necessary since they are for a NAAQS that is no longer applicable. Similarly, since these contingency measures are only triggered by a finding that an area has failed to attain or make progress toward a NAAQS that no longer applies, findings that we will no longer be making, they will not be triggered. Therefore, we believe States should not be required to submit contingency measures with their 1-hour attainment demonstrations or 1-hour RFP SIPs. The basis for concluding that 1-hour contingency measures should no longer apply once the 1-hour standard is revoked is the same as the basis for concluding that the Fee Provisions should no longer apply once the 1-hour NAAQS is revoked.

**D. Adding Attainment Demonstration to the List of**

**"Applicable Requirements" in §51.900(f)**

1. Background. Most 1-hour ozone nonattainment areas have fully approved attainment demonstrations for the 1-hour NAAQS. Therefore, our rule focused on the few areas without approved attainment demonstrations either because the areas did not meet the CAA deadlines or because they were



reclassified (bumped up) to a higher classification for failure to attain by their attainment date. In our final rule, we allowed States to choose among three options for meeting their unmet attainment demonstration obligations (69 FR 23975).

a. Submit a 1-hour attainment demonstration;

b. Submit, no later than 1 year after the effective date of the 8-hour designations, an early increment of progress plan toward the 8-hour NAAQS, which provides a 5 percent increment of reductions from the 2002 emissions baseline (NO<sub>x</sub> and/or VOC); or

c. Submit an early 8-hour ozone attainment demonstration SIP 1-year after the effective date of 8-hour designations.

When we defined "applicable requirements" in §51.900(f), we neglected to include the term attainment demonstrations.

2. Summary of Proposed Rule. Today, we are proposing that the term "attainment demonstration" be added to §51.900(f) which states that:

Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the area's classification under section 181(a)(1) of the CAA for

the 1-hour NAAQS at the time the Administrator signs a final rule designating the area for the 8-hour standard as nonattainment, attainment or unclassifiable...

The term "attainment demonstration" will be included in §51.900(f) as "(13) Attainment demonstration or an alternative as provided under §51.905(a)(ii)." In the final rule, we stated that an attainment demonstration was an applicable requirement for purposes of §51.905 but did not include it under the definitions of §51.900(f). Our intent in this proposal is to clarify that an attainment demonstration is an "applicable requirement."

#### **IV. Statutory and Executive Order Reviews**

##### **A. Executive Order 12866: Regulatory Planning and Review**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "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 entitlements, 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 proposed rule is not a "significant regulatory action." The reconsideration put forth today does not propose to substantially change the final Phase 1 Rule. With respect to one issue, we propose to retain the position we adopted in the final rule. As to the second issue, we propose to modify a date in the rule so that it is consistent with our original proposal. Finally, we are promulgating regulatory text to make two clarifications to the final rule. We believe that these do not substantially modify the intent of the final rule but rather clarify two issues.

**B. Paperwork Reduction Act**

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act,

44 U.S.C. 3501 et seq.

**C. Regulatory Flexibility Act**

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

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards. (See 13 CFR part 121.); (2) a governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of 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 proposed rule will not

impose any requirements on small entities. The Phase 1 Rule interpreted the obligations required of 1-hour ozone nonattainment areas for purposes of anti-backsliding once the 1-hour NAAQS is revoked. This proposed reconsideration addresses two aspects of that final rule that the Agency was requested to reconsider and clarifies two other aspects of the rule. Since the Phase 1 Rule does not impose requirements on small entities our further action on aspects of that rule also does not impose requirements on 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 the 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 to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of

regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. In promulgating the Phase 1 Rule, we concluded that

it was not subject to the requirements of sections 202 and 205 of the UMRA. For those same reasons, our reconsideration and clarification of several aspects of that rule is not subject to the UMRA.

The EPA has determined that this proposed rule contains no regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments. Nonetheless, EPA carried out consultations with governmental entities affected by this rule.

**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" is 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."

This proposed rule 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 proposed reconsideration addresses two aspects of the Phase 1 Rule that the Agency was requested to reconsider and clarifies two other aspects of the rule. For the same reasons stated in the Phase 1 Rule, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

**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.

The purpose of this proposed rule is taking comment on two issues from the Phase 1 Rule that EPA has agreed to



grant for reconsideration, in addition to two other issues from the Phase 1 Rule. These issues concern the implementation of the 8-hour ozone standard in areas designated nonattainment for that standard. The CAA provides for States and Tribes to develop plans to regulate emissions of air pollutants within their jurisdictions. The Tribal Authority Rule (TAR) gives Tribes the opportunity to develop and implement CAA programs such as the 8-hour ozone NAAQS, but it leaves to the discretion of the Tribes whether to develop these programs and which programs, or appropriate elements of a program, they will adopt.

For the same reasons stated in the Phase 1 Rule, this proposed rule does not have Tribal implications as defined by Executive Order 13175. It does not have a substantial direct effect on one or more Indian Tribes, since no Tribe has implemented a CAA program to attain the 8-hour ozone NAAQS at this time. Furthermore, this proposed rule does not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the TAR establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and this proposed rule does nothing to modify that relationship. Because this proposed rule does not have Tribal implications, Executive Order 13175 does not

apply.

While the proposed rule would have Tribal implications upon a Tribe that is implementing such a plan, it would not impose substantial direct costs upon it nor would it preempt Tribal law.

Although Executive Order 13175 does not apply to this proposed rule, EPA consulted with Tribal officials in developing this proposed rule. The EPA has supported a national "Tribal Designations and Implementation Work Group" which provides an open forum for all Tribes to voice concerns to EPA about the designation and implementation process for the 8-hour ozone standard.

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

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

preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule addresses two aspects of the Phase 1 Rule that the Agency was requested to reconsider and clarifies two other aspects of the rule. Neither the Phase 1 Rule nor this proposal imposes requirements on small entities. The proposed rule is not subject to Executive Order 13045 because the Agency does not have reason to believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. Nonetheless, we have evaluated the environmental health or safety effects of the 8-hour ozone NAAQS on children. The results of this evaluation are contained in 40 CFR part 50, National Ambient Air Quality Standards for Ozone, Final Rule (62 FR 38855-38896; specifically, 62 FR 38854, 62 FR 38860 and 62 FR 38865).

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

This proposed rule is not a "significant energy action" as defined in Executive Order 13211, "Actions That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Information on the methodology and data regarding the assessment of potential energy impacts is found in Chapter 6 of U.S. EPA 2002, *Cost, Emission Reduction, Energy, and Economic Impact Assessment of the Proposed Rule Establishing the Implementation Framework for the 8-Hour, 0.08 ppm Ozone National Ambient Air Quality Standard*, prepared by the Innovative Strategies and Economics Group, Office of Air Quality Planning and Standards, Research Triangle Park, N.C., April 24, 2003.

**I. National Technology Transfer Advancement Act**

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

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any

VCS.

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

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

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionate high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations.

The EPA concluded that the Phase 1 Rule should not raise any environmental justice issues; for the same reasons, this proposal should not raise any environmental justice issues. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS. The level is designed to be protective with an adequate margin of safety. The proposed rule provides a framework for improving environmental quality and reducing health risks for areas

that may be designated nonattainment.


**List of Subjects**

**40 CFR Part 51**

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

Jan 27, 2005

Dated

  
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Jeffrey R. Holmstead,  
Assistant Administrator for Air and Radiation

For the reasons stated in the preamble, Title 40, Chapter I of the Code of Federal Regulations, is proposed to be amended as follows:

PART 51 - AMENDED

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

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

Subpart X - Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard

2. §51.900 is amended by revising paragraph (f) introductory text and adding paragraph (f)(13) to read as follows:

§51.900 Definitions.

\* \* \*

(f) Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the area's classification under section 181(a)(1) of the CAA for the 1-hour NAAQS at the time of the effective date of the final rule designating the area for the 8-hour standard as nonattainment, attainment, or unclassifiable:

\* \* \*

(13) Attainment demonstration or an alternative as provided under §51.905(a)(1)(ii).

\* \* \*

3. §51.905 is amended by revising paragraph (e)(2)(ii) and by adding paragraph (e)(2)(iii) as follows:

§51.905 How do areas transition from the 1-hour NAAQS to the 8-hour NAAQS and what are the anti-backsliding provisions?

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(ii) The State is no longer required to impose under CAA sections 181(b)(4) and 185 fees on emissions sources in areas classified as severe or extreme based on a failure to meet the 1-hour attainment date.

(iii) The State is no longer required to implement contingency measures under CAA section 172(c)(9) based on a failure to attain the 1-hour NAAQS or to make reasonable further progress toward attainment of the 1-hour NAAQS.

\* \* \* \* \*