6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 81

[FRL-]

Rescinding Findings that the 1-Hour Ozone Standard No Longer Applies in Certain Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: Today, EPA is rescinding its prior findings that the 1-hour ozone national ambient air quality standard (NAAQS) and the accompanying designations and classifications no longer apply in certain areas. As part of a transition to a new, more protective 8-hour ozone standard (promulgated in July 1997), in 1998 and 1999, EPA took final action determining that the 1-hour standard would no longer apply in almost 3,000 counties. Now, however, the public health protection that would be afforded by the 8-hour ozone standard is being delayed because continued litigation regarding the 8-hour ozone standard has created uncertainty regarding when and whether EPA may be able to fully implement that standard. It is important to have a fully enforceable Federal ozone standard to help protect people from the respiratory and

other harmful effects of ozone pollution. Under this final rule, the designations and classifications that previously applied in such areas with respect to the 1-hour standard would also be reinstated. This rule will become effective in 90 days for most areas, and will become applicable in 180 days for areas with clean air quality data that had a nonattainment designation when the 1-hour standard was revoked. Furthermore, today EPA is taking final action to amend 40 CFR 50.9(b) to provide by rule (1) that the 1-hour ozone standard will continue to apply to all areas notwithstanding promulgation of the 8-hour ozone standard; and (2) that after the 8-hour standard has become fully enforceable under part D of title I of the Clean Air Act (CAA) and is no longer subject to further legal challenge, the 1-hour standard set forth in section 50.9(a) will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard.

DATES: Effective Date: This rule is effective on **[insert date 90 days after date of publication].**

Applicability Dates: This rule applies on **[insert date 90 days after date of publication]** for all areas where EPA had revoked the 1-hour ozone

standard except for those nonattainment areas with clean data listed in section III. F., Table 1 of the preamble, and applies on **[insert date 180 days after date of publication]** for such areas listed in Table 1.

ADDRESSES:

Public inspection. You may read the final rule (including paper copies of comments and data submitted electronically, minus anything claimed as confidential business information) and the Response to Comments Document at the Docket and Information Center (6102), Docket No. A-99-22, U.S. Environmental Protection Agency, 401 M Street, SW, Waterside Mall, Room M-1500, Washington, DC 20460, telephone (202) 260-7548. They are available for public inspection from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. We may charge a reasonable fee for copying.

FOR FURTHER INFORMATION CONTACT: Questions about this final rule should be addressed to Annie Nikbakht (policy) or Barry Gilbert (air quality data), Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, Ozone Policy and Strategies Group, MD-15, Research Triangle Park, NC 27711, telephone

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SUPPLEMENTARY INFORMATION:

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I. Background

The EPA promulgated a revised 8-hour ozone standard

in July 1997[1] (62 FR 38856, July 18, 1997). At that time, EPA also promulgated 40 CFR 50.9(b), governing when the previous health-based ozone standard – the 1-hour standard – would no longer apply to areas. Several parties challenged EPA's revised ozone standard and EPA's revised particulate matter standard, which was promulgated on the same day. American Trucking Assoc. v. EPA, (D.C. Cir., Nos. 97-1440 and 97-1441) (ATA v. EPA).

On June 5, 1998 (63 FR 31014), July 22, 1998 (63 FR 39432), and June 9, 1999 (64 FR 30911), in accordance with 40 CFR 50.9(b), we issued final rules for many areas that were attaining the 1-hour standard, finding that the 1-hour ozone standard no longer applied to these areas.[2]

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[1] For both the 1-hour and 8-hour ozone standards, EPA has promulgated secondary standards that are identical to the primary standard. Because the primary and secondary standards are identical, EPA refers to the 1-hour and 8-hour standards in the singular. However, both EPA's initial rule determining that the 1-hour standard no longer applied and this rule reinstating the applicability of that standard apply for purposes of both the primary and secondary 1-hour ozone standards. Similarly, EPA's references to the 8-hour standard encompass both the primary and secondary 8-hour standards.

[2] Two of these final actions were challenged and these cases are currently pending. Environmental Defense Fund v. EPA, (D.C. Cir., No. 98-1363) (challenge to June 1998 final rule); Appalachian Mountain Club v. EPA, (1st Cir., No. 99-1880) (challenge to June 1999 rule).

At that time, we amended the Code of Federal Regulations (CFR) to remove the designations and classifications that had applied to those areas for the 1-hour standard under sections 107, 172 and 181 of the CAA.[3]

On May 14, 1999, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an opinion in the cases challenging EPA's revised ozone and particulate matter standards. ATA v. EPA, 175 F.3d 1027 (D.C. Cir., 1999). The court questioned the constitutionality of the CAA authority to review and revise NAAQS, as applied in EPA's revision to the ozone and particulate matter NAAQS. The Court stopped short of finding the statutory grant of authority unconstitutional, instead providing EPA with an opportunity to articulate a determinate principle for revising the ozone and particulate matter NAAQS under the statute. 175 F.3d at 1034-40. The court also addressed EPA's authority to classify areas and to set attainment dates for a revised ozone standard. 175 F.3d at 1034-40.

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[3] These rules are commonly referred to as the "revocation" rules. Technically, however EPA did not revoke the 1-hour standard through these rulemakings. The 1-hour standard remains an effective regulatory standard under EPA's regulations. 40 CFR 50.9(a).

Based on language in sections 172(a) and 181(a) of the CAA, the court concluded that EPA could only classify and set attainment dates for areas for purposes of any ozone NAAQS under the provisions of section 181(a) of the CAA, and that EPA could not enforce an ozone NAAQS more quickly than contemplated under the provisions triggered by classifications under section 181(a) nor could EPA enforce an ozone standard, such as the 8-hour standard, that was more stringent than the 1-hour standard.[4] 175 F.3d at 1049-50. The court also held that EPA must consider the beneficial effects of tropospheric ozone in protecting against the harmful effects of ultraviolet rays (UV-B). 175 F.3d at 1051-53. The court remanded, but did not vacate, the 8-hour standard on the basis that it would not "engender costly compliance activity" in light of the court's decision "that it cannot be enforced by virtue of CAA § 181(a)." 175 F.3d at 1057. The EPA filed a petition for rehearing with respect to these

[4] Sections 172(a) and 181(a) provide EPA with authority to classify areas that are designated nonattainment and to set attainment dates for those areas. Section 172(a) applies generally to any new or revised NAAQS, while section 181(a) is specific to certain ozone nonattainment areas.

three aspects of the court's decision.[5]

On October 25, 1999, EPA published the preamble to the proposed rule, "Rescinding Findings That the 1-Hour Ozone Standard No Longer Applies in Certain Areas," (64 FR 57424), noting that the proposed regulatory language for part 81 would be published shortly. On November 5, 1999, EPA published the proposed regulatory language for part 81 (64 FR 60477). As proposed, the 1-hour ozone standard would be reinstated in areas where it had previously been revoked and the associated designations and classifications that previously applied in such areas with respect to the 1-hour NAAQS also would be reinstated. In today's final rule, EPA is taking final action to reinstate the area designations and classifications that applied prior to revocation. Throughout this final rule all references to reinstating designations refer to reinstating both designations and classifications as well. In addition, EPA proposed to amend 40 CFR 50.9(b) to provide by rule that the 1-hour ozone standard would continue to apply in all areas

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[5] The court decided other issues raised by the petitioners. These issues were not raised on rehearing and are not relevant here.

notwithstanding promulgation of the 8-hour standard, and that after the 8-hour standard has become fully enforceable under part D of title I of the CAA and subject to no further legal challenge, the 1-hour standard set forth in section 50.9(a) would no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard.

On October 29, 1999, the D.C. Circuit issued an opinion addressing EPA's petition for rehearing. ATA v. EPA, 195 F.3d 4 (D.C. Cir. 1999). The three-judge panel that decided the case granted rehearing on limited issues regarding EPA's ability to implement a revised ozone standard. Both the panel and the full court denied all other aspects of EPA's petition for rehearing.[6] With respect to EPA's authority to implement a revised 8-hour standard, the court modified its initial decision to provide that EPA may enforce a revised ozone NAAQS only in conformity with the control requirements triggered by a classification under section 181(a) – i.e., the provisions in subpart 2 of part D of title I of the CAA.

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[6] The full court voted 5-4 in favor of rehearing with two judges not participating. Since a majority vote of the active members of the court is needed to grant rehearing, the request for rehearing was denied.

195 F.3d at 8. Judge Tatel filed a separate opinion, holding that the court should have deferred to EPA's reasonable interpretation of the implementation scheme for the revised NAAQS, but concurring in the majority's decision because it "leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with subpart 2's classifications and attainment dates." 195 F.3d at 11.

At the request of commenters, on December 8, 1999, EPA published a notice in the Federal Register (64 FR 68659) to reopen the comment period for the proposed rulemaking from December 1, 1999 until January 3, 2000, thus affording the public a total of 60 days to comment on the proposed reinstatement action.

On January 27, 2000, EPA filed a petition with the Supreme Court, seeking review of the court of appeals decision regarding the constitutionality of the provisions of the CAA for setting NAAQS and the court's decision regarding implementation of a revised ozone NAAQS. Other parties also sought review by the Supreme Court.[7] The court granted EPA's petition on May 22,

[7] The American Lung Association and the Commonwealth of Massachusetts and State of New Jersey also filed

2000.[8]

II. In summary, what action is EPA finalizing today?

Today, we are taking final action to rescind the findings that the 1-hour standard no longer applies in those areas where the Agency had previously determined that the 1-hour standard had been attained. As a result, the 1-hour standard will again become applicable in nearly 3,000 counties.

Where the 1-hour ozone standard again becomes applicable as a result of this rulemaking, the attainment and nonattainment designations and classifications applicable to such areas prior to the determination of inapplicability will again apply. The designations are inextricably linked to the applicability of the standard and were removed solely because the standard no longer applied. See e.g., Interim Implementation Policy Statement, 61 FR 65752, 65754 (Dec. 13, 1996)("the designations would remain in effect so long as the

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petitions for certiorari. In addition, groups led by the American Trucking Associations and Appalachian Power Company filed conditional cross petitions for certiorari.

[8] The court also granted the industry cross petitions regarding the consideration of costs in setting NAAQS on May 30, 2000.

current 1-hour ozone NAAQS remains in effect”). Thus, since the only basis for removing the designations was the inapplicability of the 1-hour standard, area designations for the standard must also be reinstated upon reinstatement of the 1-hour standard.

Given that the previous designations and classifications of these areas were based upon the 1-hour ozone standard, which will again apply as a result of this reinstatement action, EPA is amending the tables in part 81 of the CFR to identify the designation and classification of the area that applied prior to EPA’s determinations that the 1-hour standard no longer applied. The regulatory language located at the end of this final rule amends the ozone tables in 40 CFR part 81 for each State and provides a list of the areas affected by this rule. A copy of these tables may also be viewed at the following Internet website address: *http://www.epa.gov/ttn/oarpg.* In addition, the areas are identified by air quality designations in the docket for this rulemaking at Docket No. A-99-22.

The EPA’s regulation, 40 CFR 50.9(b), provides that the 1-hour ozone standard would no longer apply once EPA determined that an area attained that standard. Today’s

action revises section 50.9(b) to indicate that the 1-hour standard remains applicable to all areas notwithstanding the promulgation of the 8-hour standard. Furthermore, today's action establishes that after the 8-hour standard has become fully enforceable under part D of title I of the CAA and subject to no further legal challenge, the 1-hour standard set forth in section 50.9(a) will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard.

In light of many areas' needs to quickly develop additional State Implementation Plan (SIP) programs in response to the actions EPA is finalizing today, the actions finalized today will become effective 90 days after today's publication for most areas. However, for areas that were designated nonattainment prior to revocation but that currently have clean air quality data sufficient to support a redesignation to attainment, actions will not generally become applicable until 180 days after today's publication.[9] This additional time

[9] The EPA notes that in the proposal for this action, EPA proposed to make the final reinstatement effective after 90 days for all areas, and specifically requested comment on this issue. Certain commenters requested a longer

will allow areas to submit redesignation requests and, if they do so, for EPA to take appropriate rulemaking action on such requests prior to the applicability date of this rule for the area.

III. What major comments were submitted on the proposed rule and what are EPA's responses to such comments?

In our October 25, 1999 proposal, we solicited comment on whether EPA should rescind findings that the 1-hour ozone standard no longer applies in certain areas, and if EPA acted to rescind the 1-hour ozone standard, what the effects of a rescission would be. In section IV

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delay in the effective date of the rule, and EPA has agreed that for areas with clean data that were previously designated nonattainment a longer period would be appropriate. However, "effective date" is a term of art relating to rules published in the Federal Register, and Office of Federal Register requirements do not allow varying effective dates for a single rule. Therefore, this action as a whole will become effective for all areas 90 days after publication. However, EPA will use the term "applicability date" in the rule to describe the date on which the reinstatement of the 1-hour standard will begin to apply to an area. That date will generally be 180 days after publication for those areas with clean data previously designated nonattainment, as listed in Table 1. In addition, if States are able to submit redesignation requests and EPA is able to process such requests to the point of final action prior to 180 days from publication, the final action approving the redesignation may provide that the applicability date of the reinstatement will be the same date as the effective date of the redesignation approval, so that the redesignations may take effect in a timely manner.

of the proposal, EPA specifically requested comment on the effect of the rescission for five types of areas: (1) areas designated as attainment with no violation since revocation; (2) areas designated attainment (without maintenance plans) with violations since revocation; (3) areas designated attainment (with maintenance plans) with violations since revocation; (4) areas designated nonattainment with no violations since revocation; and (5) areas designated nonattainment with violations since revocation. Also, the Agency requested comment on the programmatic effects of reinstatement, such as the applicability of new source review (NSR) and conformity, as well as how to deal with sanction and Federal Implementation Plan (FIP) clocks that were in effect at the time of the revocations. A total of 72 comment letters were received on the proposal. Most of the commenters generally supported reinstating the 1-hour standard; however, they voiced individual preferences as to how EPA should proceed to carry out this action with respect to designations, planning obligations and timing. For each of the relevant issues, the following discussion summarizes EPA’s proposed action, explains the approach EPA is adopting in this final rule and responds to the

major comments received. All comments are addressed in the separate Response to Comments Document located in the docket.

A. Reinstatement of the Applicability of the 1-Hour Ozone Standard and the Designation and Classification That Existed for Each Area at the Time EPA Determined the Standard No Longer Applied

The EPA generally proposed to reinstate the applicability of the 1-hour standard in all areas for which EPA had taken action determining that the standard no longer applied. In addition, EPA proposed that the designation and classification for each such area would also be reinstated. The EPA proposed to restore areas to the same position they were in at the time EPA determined that the 1-hour standard no longer applied, i.e., that the designation and classification that applied at the time the 1-hour standard was revoked for an area would once again apply upon reinstatement.

Comment: Several commenters believe that the Agency has no legal authority to rescind findings that the 1-hour ozone standard no longer applies in certain areas. Some commenters claim that EPA cited no statutory

authority for its action and that none exists. At least one commenter contends that EPA's regulation at 40 CFR 50.9(b) does not provide a basis for reinstating the 1-hour standard and challenges EPA's statements that the basis for promulgating 40 CFR 50.9(b) was the existence of an enforceable 8-hour standard.

Response: The EPA disagrees with the commenters' allegations that EPA has no authority to rescind its findings that the 1-hour standard no longer applies in certain areas. The EPA made those findings in accordance with its rule at 40 CFR 50.9(b), which provided that the 1-hour standard would no longer apply once an area attained that standard. The EPA promulgated that regulation using its general rulemaking authority under section 301(a) of the CAA and thus has authority to revise that regulation (and to revise or repeal actions taken pursuant to that regulation) under that same authority. The changed circumstances regarding the status of the 8-hour standard provide ample support for EPA to take this regulatory action under section 301(a).

Sections 108 and 109 of the CAA provide for the promulgation or revision of NAAQS on a periodic basis. However, those provisions are silent regarding how areas

should transition from implementation of one NAAQS for a pollutant to a revised, more stringent NAAQS for the same pollutant.[10] Where, as in the rule promulgating the revised 8-hour NAAQS, EPA determines not to retain the pre-existing standard as an independent NAAQS, EPA must determine how areas should transition away from the pre-existing NAAQS. Since the CAA does not include specific provisions addressing this transition, EPA relied on its general rulemaking authority under section 301(a) of the CAA. See 62 FR 38894, July 18, 1997. Section 301(a) provides that the Agency has authority "to prescribe such regulations as are necessary to carry out" its functions under the CAA. In general, the statutory authority for promulgating a regulation also provides authority for an Agency to revise that regulation. The EPA is relying on its general rulemaking authority under section 301(a) to rescind the findings that the 1-hour standard no longer applies.

The present circumstances provide ample support for EPA to take this action rescinding its earlier

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[10] Section 172(e) provides guidance for transitioning from a more stringent NAAQS for a pollutant to a less stringent NAAQS for the same pollutant.

determinations. The EPA promulgated 40 CFR 50.9(b) based on the existence of an implementable 8-hour standard. In promulgating a revised 8-hour standard, EPA determined that it did not need to retain a separate 1-hour standard in order to protect the public health with an adequate margin of safety and to protect public welfare (62 FR 38863, July 18, 1997). Thus, EPA needed to consider how to transition away from the existing 1-hour standard to the revised 8-hour standard. See e.g., Proposed Interim Implementation Policy, (61 FR 65752, December 13, 1996). In the final rule promulgating the revised 8-hour standard, EPA concluded that Congress intended areas to remain subject to the planning requirements of subpart 2[11] of the CAA for as long as they continued to have air quality not meeting the 1-hour standard. In order to facilitate the continued applicability of subpart 2 to

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[11] Subpart 2 of part D of title 1 provides detailed requirements for certain ozone nonattainment areas. These provisions were enacted in 1990 in response to the States' continued failure to meet the ozone standard. Rather than providing continued flexibility and a one-size-fits-all approach, Congress created a tiered planning scheme that provided more and tougher requirements for areas with significant ozone problems, but also provided more time for these areas to meet the standards.

areas that had not yet met that standard, EPA determined to delay removal of the 1-hour standard from its regulations by promulgating 40 CFR 50.9(b). It is clear from the context of the rule and the statements in the preamble to the final 8-hour NAAQS rule that the decision to find that the 1-hour standard no longer applied was based on the existence of an enforceable 8-hour standard that was protective of public health and welfare, such that the 1-hour standard would no longer be necessary to protect public health and welfare. (62 FR 38873, July 18, 1997.)

However, because the court decision has raised doubts about the enforceability of the 8-hour standard and EPA's ability to implement the standard fully at this time, the basis for the regulation revoking the applicability of the 1-hour standard in certain areas no longer exists. Contrary to what EPA believed would occur at the time it promulgated 40 CFR 50.9(b), generally areas are not currently moving forward to implement the 8-hour standard due to the uncertainty created by the litigation over the ozone NAAQS. Thus, EPA believes that it is necessary at this time to retain the 1-hour standard in all areas to protect public health and

welfare at least until the status of the 8-hour standard and any issues concerning its enforceability have been fully resolved.[12]

Comment: Some commenters believe that the proposed action to reinstate the 1-hour ozone standard constitutes promulgation of a new or revised NAAQS under section 109 of the CAA and that the action is therefore subject to a public hearing under section 307(d). Other commenters contend that EPA must or should vacate the 8-hour standard before EPA can reinstate the applicability of the 1-hour standard. These and other commenters contend that section 109 contemplates only a single air quality standard for a particular pollutant in any given area and, therefore, object to having dual standards apply. They also claim that the existence of two ozone standards

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[12] The fact that EPA's regulation at 40 CFR 50.9(b) does not reference the 8-hour standard is not controlling for determining the underlying basis for EPA's promulgation of that regulation. The fact that 50.9(b) was promulgated simultaneous with the 8-hour standard and placed in the subchapter of the CFR governing NAAQS is sufficient evidence that section 50.9(b) was premised on the existence of the 8-hour ozone standard. Furthermore, it is clear from the preamble that EPA believed that the 8-hour standard would be enforceable, (62 FR 38856, July 18, 1997).

is confusing.

Response: The EPA does not believe that the action to reinstate the 1-hour standard constitutes the promulgation of a new or revised NAAQS under section 109 of the CAA. The 1-hour standard EPA is reinstating today is the same 1-hour standard that has been in existence since its original promulgation on February 8, 1979 and that continues to be a part of EPA's regulations at 40 CFR 50.10, (44 FR 8202). The EPA is not revising that standard in any way. The EPA is merely reinstating the applicability of that standard in certain areas. Unlike a regulatory action promulgating a new or revised NAAQS, this rulemaking is not concerned with selecting the appropriate level or form of ozone standards requisite to protect public health and welfare. The particular processes specified in sections 108 and 109, requiring the development of detailed scientific assessments and consultation with science advisory boards, are not implicated by this action. The EPA undertook those processes when it promulgated the 1-hour standard in 1979. This action does not purport to revise or re-promulgate that standard; it only specifies the applicability of the existing 1-hour standard, which is

specified in section 50.10, to certain areas.

Because this action rescinding a previous regulatory determination and revising the regulation governing the transition from the 1-hour to a revised 8-hour NAAQS does not constitute either an amendment or revision to either the 1-hour or the 8-hour ozone NAAQS, EPA disagrees with the commenters that the procedural provisions in section 307(d) are triggered by section 307(d)(1)(A) (requiring compliance with section 307(d) for all rules promulgating or revising any NAAQS). Since the administrative requirements of section 307(d) do not apply, EPA has complied with the public notice and comment process specified under the Administrative Procedure Act, 5 U.S.C. 553, which does not require the Agency to hold a public hearing.

Nor does EPA agree that the proper approach is to vacate the 8-hour standard. In the ATA decision, the D.C. Circuit did not dispute the public-health basis for the NAAQS and did not vacate the 8-hour standard. The EPA sees no reason to take such an action on its own. The EPA has filed with the Supreme Court a petition for review of the D.C. Circuit's decision. The EPA sees no need to vacate the 8-hour standard for the purpose of

revising the transition scheme from the 1-hour standard to the 8-hour standard. Because the CAA does not provide how EPA must transition from one standard for a pollutant to a revised, more stringent standard for that same pollutant, EPA continues to believe it has authority to establish and to revise the appropriate transition scheme. Due to the uncertainty created by the court's opinion, EPA believes it is a reasonable exercise of its authority to revise the transition scheme by reinstating the applicability of the 1-hour standard and the associated designations and classifications. For these reasons, EPA does not agree that it must vacate the 8-hour standard in order to reinstate the applicability of the 1-hour standard.

To the extent the commenters are concerned about the existence of two NAAQS for the same pollutant, EPA made the decision in the 1997 NAAQS rulemaking by determining to retain the 1-hour standard until areas met that standard. As provided above, EPA is not taking action to revise or promulgate a revised NAAQS in this rule and is not re-opening its previous decision that the statute allows the applicability of more than one NAAQS for a pollutant, such as ozone.

Comment: Some commenters claim that EPA cannot restore the designation for areas except through one of the designation processes provided under section 107 of the CAA. Some commenters contend that EPA should treat these designations as initial designations under section 107(d)(1) and that EPA should provide time for Governors to make recommendations before EPA may designate areas. Other commenters contend that EPA must use the redesignation provisions under section 107(d)(3). Under that provision, they contend, EPA must notify the Governor first of its intent to redesignate and then must rely on current air quality data.[13] Some of these commenters agree with EPA that the designation in place at the time EPA revoked the standard should be put back into place. Other commenters suggest that EPA cannot consider air quality data from the period when the standard did not apply and that EPA should reinstate designations based on air quality data from the period after the standard is reinstated.

Response: The EPA does not believe it needs to go

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[13] Other commenters, without referencing any specific statutory authority, also claim that EPA should use current air quality data to designate areas.

through the procedures of section 107 of the CAA to reestablish the designations that were in place prior to revocation of the 1-hour standard. In this action, EPA is reversing its revocation of the standard because the recent court decision has called into question the underlying bases for that action. In the revocation action, EPA did not change an area's designation for the 1-hour standard, but determined that since the 1-hour standard no longer applied to an area, the designation associated with that standard also no longer applied.[14]

As explained above, EPA's action today is not the promulgation of new or revised NAAQS. Therefore, the initial designation provisions in section 107(d)(1), which apply only upon promulgation of a new or revised NAAQS, do not apply.

Nor is EPA redesignating areas for purposes of the 1-hour standard. These areas currently do not have in

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[14] In revoking the standard, EPA did not redesignate areas pursuant to section 107 and did not require areas to meet the redesignation requirements of section 107(d)(3)(E), such as development of a maintenance plan. In fact, EPA has been challenged on two of the revocation rules for not following, and not requiring States to follow, redesignation procedures. Environmental Defense Fund v. EPA, (D.C. Cir., No. 98-1363); Appalachian Mountain Club v. EPA, (1st Cir., No. 99-1880).

place a designation for the 1-hour standard. The provisions in section 107(d)(3), which apply only to redesignations from attainment or unclassifiable to nonattainment or from nonattainment to attainment simply do not apply where, as here, there is not a current designation in place for a standard.

The EPA's primary action through this action is to reinstate the applicability of the 1-hour standard. At the time EPA promulgated 40 CFR 50.9(b), it determined that the designations should follow the applicability of the 1-hour standard and that the current designation was inextricably linked with the applicability of the 1-hour standard. Therefore, just as EPA determined that an area's designation no longer applied once the 1-hour standard on which it was based no longer applied, the reinstatement of the 1-hour standard necessarily brings back the applicability of the designation. Similarly, as EPA relied on its general rulemaking authority to revoke the standard and thus the area's designation, EPA is relying on that same authority to reverse the action taken in its earlier rule. Once areas have a designation for the 1-hour standard in place, EPA may redesignate those areas if they meet the requirements of section

107(d)(3)(E). As discussed in section III.F, below, EPA will consider redesignating those areas that have clean air quality data based on the three most recent years of data and that submit a redesignation request meeting the requirements of section 107(d)(3)(E).

Finally, some commenters suggest that EPA is prohibited from considering air quality data that became available after EPA revoked the standard. The EPA disagrees with this comment. Because EPA is reinstating the designations that existed at the time EPA revoked the standard, this rulemaking does not reflect more recent air quality data. However, in future actions to redesignate areas, EPA intends to consider all relevant air quality data including data that became available during the revocation. To the extent these commenters continue to have concerns about this issue, they can raise them in any future rulemaking action EPA may take to redesignate an area on the basis of that data.

Comment: A few commenters stated that we cannot rely on the argument that the 8-hour standard cannot be enforced as the basis for revocation since this is not supported by the Court's October 29, 1999, decision on rehearing. In the October 29 opinion, the Court

retracted its earlier conclusion that “the 8-hour standard cannot be enforced,” providing instead that the 8-hour standard “can be enforced only in conformity with subpart 2" of part D of title I of the CAA. Compare 175 F.3d at 1057 with 195 F.3d at 10. Some commenters also suggest that it is too late for us to reconsider the revocations and to reinstate the applicability of the 1-hour standard. Most commenters, however, support reinstatement on the basis of continued uncertainty regarding the 8-hour standard.

Response: The EPA believes that the uncertainty engendered by the litigation surrounding the 8-hour standard
justifies reinstating the 1-hour standard. It is true, that
on rehearing, the Court revised its original opinion to indicate that EPA can enforce the 8-hour standard in conformity with subpart 2 of the CAA. However, in that same sentence, the Court provided that it was remanding the 8-hour standard. The Court did not vacate the 8-hour standard because “the parties have not shown that the standard is likely to engender costly compliance activities.” As the petitions for certiorari before the

Supreme Court demonstrate, there continues to be uncertainty regarding when the standard could be implemented in light of the ongoing litigation.[15] Because of the continuing litigation and the differing views of the many parties to the litigation, EPA is not currently taking any action that could be construed as inconsistent with the Court's decision.[16] In light of the continuing uncertainty regarding EPA's authority to implement the 8-hour standard, EPA believes it is prudent to reinstate the 1-hour standard to ensure public health protection from ozone.

Contrary to the suggestions of some commenters, EPA

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[15] In addition to EPA, two other parties have requested that the Supreme Court review portions of the D.C. Circuit's decision regarding the ozone and particulate matter NAAQS. Other parties have opposed Supreme Court review of the implementation issues. In their papers before the Court, several of these parties have suggested that EPA is barred from enforcing the more stringent 8-hour NAAQS, while others raise concerns that the Court's opinion is unclear regarding the enforceability of the 8-hour standard.

[16] For example, EPA has stayed the applicability of its final regulatory determinations under section 126 of the CAA to the extent they were based on the 8-hour NAAQS. (65 FR 2674, January 17,2000). Similarly, EPA recently proposed to stay the 8-hour basis of its Nox SIP call rule, which calls on 22 States and the District of Columbia to reduce emissions of nitrogen oxides that contribute to ozone problems in other States. (65 FR 11024, March 1, 2000).

does not believe it is too late to rescind the revocations of the 1-hour standard. The commenter does not cite and EPA is unaware of any limitation on when an Agency may change a regulation based on new information. The EPA acted quickly in response to the uncertainty raised by the Court's decision, proposing action only 5 months after the original decision by the court. During that time, EPA was assessing the impacts of the opinion on implementation of the 8-hour standard, determining options for rehearing and appeal, and developing the proposed rule to rescind the revocations of the 1-hour standard. Based on requests for an extension of the comment period, EPA provided a comment period of 60 days on this action. Thus, EPA is acting in a timely fashion by issuing this rule approximately a year afer the court issued its original decision.

Comment: A few commenters suggested that EPA was proposing to reinstate the standard in too many areas. One set of commenters noted that EPA's goal of providing protection in areas now violating the 1-hour standard could be accomplished by reinstating the standard only in those areas that were violating the 1-hour standard. Other commenters suggested that we not reinstate the 1-

hour standard in States that have adopted the 8-hour standard or where the most recent data for an area indicate that it would be designated attainment for the 8-hour standard. These commenters are concerned that resources will be wasted on meeting the 1-hour standard rather than the more protective 8-hour standard.

Response: The EPA determined that it is critical to have a fully enforceable standard for ozone in each area of the country in order to protect the public health and welfare and to minimize public confusion. The EPA believes that it is important to have a fully-implementable ozone standard in place in order to ensure adequate protection of public health. A fully enforceable 1-hour standard will ensure that sufficient control measures remain in place to prevent violations in areas attaining the standard and to continue improvements in air quality in areas not attaining the standard. The options presented by the commenters would not result in the applicability of a fully-enforceable ozone standard and thus could erode public health protection for people living and working in areas that might violate the standard in coming ozone seasons.

With respect to those commenters that suggest that

EPA not reinstate the standard in areas that have adopted the 8-hour standard, EPA is concerned, in light of the ATA decision, that it will be unable to enforce fully the 8-hour standard in the short term. Without a fully enforceable, Federal 8-hour standard, EPA does not have the ability to require States to implement an 8-hour standard. This is true even in States that may have adopted the 8-hour standard as a State rule. Since State adoption of the 8-hour standard does not ensure implementation and enforcement of that standard in conformity with Federal requirements for clean air, EPA believes it is necessary to reinstate the 1-hour standard in all areas pending resolution of litigation over the 8-hour NAAQS. The EPA acknowledges that it may be more efficient to concentrate resources on planning to implement a more protective 8-hour standard, but EPA lacks the ability to require States to do so at this time. For these reasons, EPA believes that the existence of the 8-hour standard does not provide the same certainty of public health protection as does the 1-hour standard at this time.

Finally, with respect to the comment that EPA not reinstate for areas that will be designated attainment

for the 8-hour standard, EPA has not designated any areas for the 8-hour standard. The States have not recommended boundaries for purposes of the 8-hour standard and EPA has not yet determined boundaries or designated any 8-hour areas. In fact, EPA guidance on the determination of boundaries was issued only recently. (Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS or Standard), March 28, 2000). The EPA has advised States to consider the guidance and make recommendations to EPA by June 30, 2000. The EPA must then respond to those recommendations and give States 4 months comment on its response. Only after this process could EPA make final designations. Given the many steps that must occur before EPA promulgates designations for the 8-hour standard, EPA believes it is far too early to presume precisely which areas would be designated attainment for the 8-hour standard.

B. Revision to 40 CFR Section 50.9(b) to Provide That EPA Will Again Determine the 1-Hour Ozone Standard No Longer Applies to an Area Once EPA's Authority to Implement and Fully Enforce the 8-Hour Standard is No Longer in Question.

The EPA proposed to revise 40 CFR 50.9(b) to provide that once the 8-hour ozone standard is fully enforceable and no longer subject to legal challenge, the 1-hour standard will no longer apply to an area if EPA determines that the area has air quality meeting the 1-hour standard.[17] The EPA's final rule adopts this position.

Comment: Some commenters disagree with EPA's proposed revision to section 50.9(b). These commenters feel that the promulgation of an 8-hour standard should not be the basis for revoking the applicability of the 1-hour standard. Some of the commenters believe that removing the applicability of a NAAQS and associated control measures based solely on air quality is inconsistent with the law and that we should consider both the 1-hour and 8-hour ozone standards. Some commenters believe that future revocations should not be allowed without first following the redesignation process

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[17] If the 8-hour standard promulgated in July 1997 does not become enforceable because of Agency action taken in response to any unappealable decision by the court in the ATA v. EPA litigation, then the second sentence of 40 CFR 50.9(b) would not have any legal effect. As appropriate, EPA could reconsider this regulation at the time it takes any action in response to an unappealable decision.

as prescribed by the CAA. Other commenters suggest that once the 8-hour ozone standard is enforceable, we should revoke the 1-hour standard everywhere regardless of what the air quality is. Finally, one commenter claims that EPA should not amend section 50.9(b) now since the 8-hour standard may never be enforceable.

Response: The EPA believes that it has the authority upon issuance of a new or revised standard to determine the continued validity of the pre-existing standard and when, if ever, it should no longer apply. In the final rule promulgating the 8-hour standard, EPA determined that the 1-hour standard was no longer necessary to protect public health and welfare in light of the revised 8-hour standard, which States would be required to implement and enforce. However, EPA also determined that Congress intended areas that remained nonattainment for the 1-hour standard to meet the requirements of subpart 2, until the 1-hour standard is attained. As EPA explained in the preamble to the NAAQS rule, section 109 of the CAA clearly authorizes EPA to promulgate revisions to a standard, which necessarily includes the authority to revoke previous standards that have been revised (62 FR 38857, July 18, 1997). On the other hand, subpart 2

of the CAA sets out numerous requirements specifically applicable to areas not attaining the 1-hour ozone standard. To accommodate both of these provisions, EPA concluded that after promulgation of the 8-hour standard, subpart 2 must continue to apply as a matter of law in each area until the 1-hour standard is attained (62 FR 38873). Thus, to facilitate continued applicability of the subpart 2 requirements, EPA established a transition scheme in 40 CFR section 50.9(b) that provided the 1-hour standard would continue to apply until an area had air quality meeting the 1-hour standard.

The EPA does not agree that in order to determine a pre-existing standard no longer applies, EPA must require areas to meet the requirements for redesignation and formally redesignate an area from nonattainment to attainment under section 107(d)(3). As a general matter, Congress has not specified any procedure for determining that a pre-existing NAAQS no longer applies once EPA promulgates a revised standard. Moreover, although Congress gave some guidance on how to transition to a less stringent NAAQS, see CAA section 172(e), it did not provide clear guidance on how to transition to a more stringent NAAQS. The EPA believes that in determining

how to transition to a revised NAAQS, it must make common-sense decisions, considering the intent of Congress in light of the statutory scheme, including how best to ensure public health protection without imposing unduly burdensome requirements on States and sources.[18]

With respect to the transition from the 1-hour standard to the 8-hour standard, EPA determined that Congress intended areas to remain subject to the 1-hour standard until such time as that standard is met. Since all areas of the country were subject to the revised, more stringent 8-hour standard, EPA determined that it did not make sense to require areas that had met the 1-hour standard but remained designated nonattainment to

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[18] EPA's scheme for transitioning to the 8-hour ozone standard is consistent with the Agency's approach in the one other case where it promulgated a more stringent NAAQS revision. See 52 FR 24672 (July 1, 1987). When EPA revised the particulate matter standard to change the indicator from total suspended particulates (TSP) to particulate matter with a diameter of 10 microns or less (PM-10), it retained the TSP designations for a limited purpose because the statutory limitations for certain areas under the Prevention of Significant Deterioration (PSD) program were linked to TSP designations. See CAA section 163. Congress subsequently codified EPA's decision in section 107(d)(4)(B) of the CAA. Similarly, EPA here is retaining the 1-hour standard and associated designations for purposes of continued application of subpart 2 of the CAA, until the purpose of subpart 2 – attainment of the 1-hour standard – is met.

complete a maintenance plan since generally these areas would be required to develop an attainment plan for the more stringent 8-hour standard. The EPA continues to believe that, if a fully enforceable 8-hour standard were in effect, it would be unreasonable to require States to demonstrate that an area will maintain the 1-hour standard for 10 years (with a later update for a subsequent 10 years) when these areas would be developing attainment plans and, ultimately, maintenance plans for the more stringent 8-hour standard.

This interpretation is consistent with the approach Congress employed in the one area where the statute does address revocation of a prior standard. Section 172(e) of the CAA provides that where EPA relaxes a standard, it must require all areas that have not yet attained the more stringent prior standard to provide for controls that are at least as stringent as those that applied to areas designated nonattainment of the prior standard. This provision both clarifies that Congress intended EPA to revoke standards and associated control requirements in certain circumstances where they have been revised, and that an appropriate criterion for determining when a prior standard should be revoked is whether or not an

area has attained that standard. Congress did not, however, require redesignation of areas with development of maintenance plans prior to removal of control obligations. Rather, Congress required only that control measures continue to apply until an area has attained a prior standard and implicitly allows for revocation of the prior standard.

The EPA also disagrees with the commenter who suggests that EPA should not amend section 50.9(b) because it has been struck down by the court and that the 8-hour standard might never be enforceable. The EPA disagrees with the claim that the court struck down 40 CFR 50.9(b). The court did not vacate any aspect of EPA's July 1997 rulemaking, which included the promulgation of section 50.9(b).[19] The EPA believes that its proposed revision to section 50.9(b) addresses the contingency that the 8-hour standard may never become enforceable. The EPA believes that it is better to promulgate revisions to section 50.9(b) at this time so that interested parties are aware of EPA's planned

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[19] Furthermore, no party in the ATA case challenged EPA's promulgation of 40 CFR 50.9(b) and the court did not address this regulatory provision in either its May 14, 1999 or its October 29, 1999 decisions.

transition approach if and when the 8-hour standard becomes fully enforceable.

Finally, for the reasons explained above, EPA believes that subpart 2 continues to apply as a matter of law to all areas that have not yet attained the 1-hour standard. Therefore, EPA does not believe it has the authority to determine the 1-hour standard inapplicable to any area that has not yet attained that standard, even after the 8-hour standard has become fully enforceable.

C. Areas Designated as Attainment With No Violations Since Revocation

The EPA proposed that upon reinstatement of the standard, areas designated as attainment with no violations after revocation would not be subject to any new planning requirements under subpart 2 of the CAA, beyond continuing compliance with any requirements in an approved maintenance plan. The EPA is adopting this position in today's action.

Comment: Some commenters contend that all areas designated as attainment should be treated on an equal basis. The EPA should either require all attainment areas to have maintenance plans, including the obligation to comply with conformity, or free all areas from the

maintenance plan requirement.

Response: The EPA does not have the authority to require all areas designated as attainment either to have a maintenance plan or to relieve them of that obligation. The CAA specifically provides that areas seeking redesignation from nonattainment to attainment must develop and submit maintenance plans. Upon redesignation, these areas are required to continue to implement their maintenance plans, including complying with the conformity provisions. Areas that were initially designated as attainment after the 1990 CAA Amendments are not subject to this requirement. In addition, section 176(c)(5)(B) of the CAA makes clear that areas with maintenance plans continue to be subject to conformity and that areas that have historically been designated as attainment are not subject to conformity.

D. Areas Designated Attainment (Without Maintenance Plans) With Violations Since Revocation

The EPA proposed to provide areas designated attainment without maintenance plans, that have had violations since revocation, a reasonable time to come back into attainment prior to taking action to designate them as nonattainment. There are only four areas which

fall into this category: Berrien Co., MI; Hamilton Co., IN; Hamilton Co., TN; Rowan Co., NC.

Comment: Several commenters asked that we define what is a "reasonable time frame" to bring areas back into attainment. Some commenters reference measures that States have already taken to address ozone problems.

Response: The CAA does not mandate that EPA redesignate areas from attainment to nonattainment. Rather, section 107(d)(3)(A) provides the general criteria that EPA may consider in determining whether to redesignate an area.[20] In particular, EPA may consider air quality data, planning and control considerations or any other air-quality related considerations.

The Agency commends areas for any initiatives they may have taken, such as voluntary emission reduction programs, to help improve air quality. The EPA will consider this information in determining whether and when to move forward with a redesignation to nonattainment. States should work with the appropriate EPA Regional Offices to determine whether additional measures are

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[20] For areas designated as nonattainment seeking redesignation to attainment, section 107(d)(3)(E) sets forth additional criteria that must be met before EPA may redesignate the area.

necessary to address a recent violation.

To the extent additional measures are needed, EPA believes that it is reasonable for States to adopt measures to address any violations within 6-9 months of the effective date of this final action. The EPA is recommending 6-9 months as the presumptive period for action, however, each State should work with the relevant EPA Regional Office to develop a strategy for specific areas. States have been on notice of EPA's planned reinstatement of the standard and should have begun an analysis of measures to address any violation. In addition, since reinstatement for these areas will not be effective until 90 days after publication of this final action in the Federal Register, this approach will allow States 9-12 months from promulgation of this final rule to adopt any necessary measures and well over a year from the time of EPA's proposal to reinstate the standard. The EPA believes that this period is comparable to the 1-year time period provided under section 179(d) for States to adopt measures based on a finding that the State failed to attain the standard.

E. Areas Designated Attainment (With Maintenance Plans) With Violations Since Revocation

For areas designated attainment with maintenance plans and with violations since revocation, EPA proposed that the contingency measures in the area's approved SIP should be implemented to address any violations of the 1-hour ozone standard. If a State had removed any contingency measures after EPA determined the 1-hour standard no longer applied, EPA proposed the State should place the contingency measure back into the SIP. There are seven areas which fall into this category: Charlotte-Gastonia, NC; Huntington-Ashland, WV-KY; Knoxville, TN; Nashville, TN; Portland-Vancouver Air Quality Management Area, OR-WA; Richmond, VA; Sheboygan, WI.

Comment: Several commenters question whether it is appropriate to require States to implement contingency measures and question whether contingency measures will provide any real air quality benefits. They disagree that automatic implementation of such measures is the correct solution to addressing the current air quality problem. Some commenters believe that since the 1-hour standard did not apply in the areas after revocation, the areas cannot be considered to be violating the 1-hour standard based on data from that time; thus in their view, violations that occurred after revocation but prior

to reinstatement cannot trigger contingency measures. Some commenters argue that even if a violation occurred during the period in which the standard was revoked, the most recent 3 years of air quality data should have precedence. They state that if those data indicate the area is not violating the standard, the State should not be required to implement contingency measures.

In addition, some commenters were concerned that the schedule specified in the SIPs for implementation of contingency measures is often triggered as of the date of the violation. Thus, under these SIPs, some portion of the implementation period may already have passed by the time the reinstatement becomes effective.

Other commenters claim that EPA should use its authority under section 110(k)(6) to place deleted contingency measures back into the SIP. Section 110(k)(6) provides that EPA may revise its prior approval removing the contingency measures if it determines that the approval action was in error.

Response: Section 175A(d) of the CAA requires that a maintenance plan include such contingency measures as are necessary to promptly correct any violation of the NAAQS that occurs after redesignation of the area. The EPA

believes that areas designated as attainment that have maintenance plans in place and that have had violations of the NAAQS since revocation, are required by the CAA and by their approved SIPs to move forward to implement contingency measures. Since the purpose of these measures is to protect public health, EPA believes it is appropriate to require areas to implement contingency measures to ensure that future air quality will meet or be lower than the NAAQS.

The EPA has allowed States a great deal of flexibility with respect to contingency measures. First, EPA has allowed flexibility in terms of the selection and adoption of contingency measures for the maintenance plan. The EPA does not require that contingency measures be fully adopted in order for the maintenance plan to be approved. The maintenance plan need only ensure that the contingency measures be adopted expeditiously once they are triggered. (Procedures for Processing Requests to Redesignate Areas to Attainment, September 4, 1992, John Calcagni).

In addition, when an area violates the standard, States have discretion in selecting which of the contingency measures in the approved maintenance plan

should be implemented. In the past, EPA has allowed States to substitute and implement new, more appropriate and effective contingency measures. (64 FR 28753 and 64 FR 28757, May 27, 1999). The EPA would allow States with areas violating the standard to do so here through the SIP process, if substitution of measures would not unreasonably delay air quality benefits. Therefore, if, as at least one commenter suggests, existing, approved contingency measures may no longer be appropriate or effective, the State may seek a substitution. However, the fact that existing contingency measures may not be effective or appropriate does not support a decision not to require implementation of contingency measures to address the air quality problem.

Finally, although EPA has indicated that it would provide a reasonable period of time for violating attainment areas without maintenance plans to correct their air quality problem before designating them to nonattainment, EPA does not believe it has the ability to delay the triggering of the States' obligation to select and adopt contingency measures for areas with maintenance plans that are experiencing violations. The CAA contemplates that contingency measures will be

implemented “promptly” in such areas. In addition, the terms of the maintenance plans themselves require adoption and implementation of contingency measures upon violations. Thus, the CAA requires areas to adopt appropriate contingency measures once violations occur. States may submit SIP revisions to substitute appropriate measures at any time.

The EPA disagrees that violations are not valid if they occurred during the period when the 1-hour standard did not apply for an area. The fact that an air quality standard does not apply during a period of time does not invalidate air quality data gathered at that time or invalidate the exceedances or violations demonstrated by that data. In fact, the statutory period for initial designations belies that interpretation. Under section 107(d)(1), Governors must recommend designations within 1-year of promulgation of a standard and EPA must designate areas within 2 years of promulgation. For standards that are measured over a period of longer than 2 years, such as the 1-hour and 8-hour ozone standards, EPA would necessarily be required to consider monitoring data that preceded promulgation of the standard in making designations. In addition, the State and sources are not

unreasonably disadvantaged. The EPA is not requiring that the time for States to implement contingency measures runs from the time of the violation, but rather from the effective date of the reinstatement of the standard.

This approach is consistent with the approach EPA is taking concerning tolling of applicable clocks for conformity obligations and sanctions. As EPA states elsewhere in this notice (sections III.I and III.J), EPA believes that clocks related to the timing of conformity determinations and sanctions should not be considered to have run during the period that the 1-hour standard was not applicable to an area. It would be unfair to areas to have such clocks expire during a time that the area was not subject to the planning obligations associated with the clocks. Thus, EPA has concluded that any such clocks would be tolled during the time the standard was not applicable. When this rule becomes applicable, the clock will begin to run again based on whatever time remained when EPA revoked the standard for an area. Similarly, EPA believes that the duty to implement contingency measures should be triggered on the effective date of this reinstatement action rather than the date of

any past violation.

If an area has a SIP in which the timing for contingency measures is triggered on the date of the violation, EPA believes that it would be appropriate to interpret the violation as occurring on the effective date of the reinstatement. If States still remain concerned about the approved language in existing SIPS regarding the timing for triggering contingency measures, they should work with the relevant EPA Regional Office to determine an appropriate manner to address the issue. Since the 1-hour standard was not in effect for the area during the revocation period, EPA does not believe that the area should be subject to a shorter time than contemplated in the State's adoption and EPA's approval of the SIP.

With respect to commenters that claim that an area may have had a violation (during 1996-1998) and once again is attaining (during 1997-1999), EPA believes that such areas should work with the relevant EPA Regional Office to determine an appropriate course of action. If there are additional control measures that applied during 1999, but did not apply during the period of the violation, it may not be necessary to implement further

contingency measures at this time.

The EPA allowed States to remove contingency measures from approved SIPs where they were linked to the 1-hour standard or air quality ozone concentrations and EPA had taken action to determine that the 1-hour standard no longer applied. See "Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM10 NAAQS," from Richard D. Wilson, Acting Assistant Administrator for Air and Radiation, December 29, 1997. The EPA believed that such revisions would be consistent with section 110(l) of the CAA since EPA was determining that the 1-hour standard no longer applied and, therefore, removal of the contingency measures would not interfere with any applicable requirement concerning attainment and reasonable progress, or any other applicable requirement of the CAA. Id.

Because EPA believes it is now appropriate and necessary to reinstate the 1-hour standard, EPA believes it is no longer appropriate for States not to have those contingency measures in the approved SIP. States will need to move forward to put contingency measures back into the SIP. The EPA believes that States should have some discretion in selecting these contingency measures

considering what measures would be appropriate, and adopting such measures, as necessary. Thus, at this time, EPA is not moving forward to use section 110(k)(6) to retract its earlier approval of SIP revisions removing contingency measures. Since EPA is not now proposing to move forward under section 110(k)(6), EPA is not addressing whether that provision provides the legal authority to take the action suggested by the commenters.

F. Areas Designated Nonattainment With No Violations Since Revocation

For areas designated nonattainment with no violations since the standard was revoked in these areas, EPA proposed that the nonattainment designation would again apply, but recommended that the State submit a redesignation request that meets the requirements of section 107(d)(3)(E). In addition, EPA noted that its May 10, 1995, "Clean Data Policy" could provide relief from some subpart 2 measures for these areas as long as they continued to have clean data. However, other subpart 2 requirements would apply unless and until an area was redesignated to attainment. There are 45 areas which fall into this category. The following table

(Table I) lists the areas in this category:

Table 1. Areas Designated Nonattainment With No Violations Since Revocation
Includes 45 areas (96 counties) that are not violating the 1-hour standard based on 1996-98 data.

SERIOUS CLASSIFICATION
Boston-Lawrence-Worcester (E. MA), MA-NH (12 counties)
Portsmouth-Dover-Rochester, NH (1 county)
Providence (All RI), RI (5 counties)

MODERATE CLASSIFICATION
Atlantic City, NJ (2 counties)
Knox & Lincoln Cos., ME (2 counties)
Lewiston-Auburn, ME (2 counties)
Muskegon, MI (1 county)
Portland, ME (3 counties)
Poughkeepsie, NY (3 counties)

MARGINAL CLASSIFICATION
Albany-Schenectady-Troy, NY (6 counties)
Allentown-Bethlehem-Easton, PA-NJ (4 counties)
Altoona, PA (1 county)
Buffalo-Niagara Falls, NY (2 counties)
Door Co., WI
Erie, PA (1 county)
Essex Co., NY
Harrisburg-Lebanon-Carlisle, PA (4 counties)
Jefferson Co., NY
Johnstown, PA (2 counties)
Manchester, NH (1 county)
Reno, NV (1 county)
Scranton-Wilkes-Barre, PA (5 counties)
Smyth Co., VA (White Top Mtn)
York, PA (2 counties)
Youngstown-Warren-Sharon, OH-PA (3 counties)

SECTION 185A AREAS (Section 185A areas, previously called transitional areas, had 3 complete years of clean data from 1987-89)
Chico, CA (1 county)
Denver-Boulder, CO (6 counties)
Flint, MI (1 county)
Yuba City, CA (2 counties)

INCOMPLETE DATA CLASSIFICATION (Incomplete data areas had no data or less than 3 complete years of data at time of classification)
Allegan Co., MI
Cheshire Co., NH
Crawford Co., PA
Franklin Co., PA
Greene Co, PA
Juniata Co., PA

Lawrence Co., PA
Northumberland Co., PA
Pike Co., PA
Saginaw-Bay City-Midland, MI (3 counties)
Salem, OR (2 counties)
Schuylkill Co., PA
Snyder Co., PA
Susquehanna Co., PA
Warren Co., PA
Wayne Co., PA

Comment: A number of commenters were opposed to reinstating prior designations and classifications, particularly in the case of areas that were designated nonattainment at the time of the revocation and that have remained clean. They want EPA to consider current monitoring data as the basis of an area's designation. These commenters claim that EPA's proposed approach creates inequities among the various types of areas where the standard would be reinstated. For example, they point to areas that will be designated attainment but that are violating the 1-hour standard. The commenters contend that it is inequitable that those areas will not be subject to subpart 2 control requirements, including new source review and conformity, but that certain nonattainment areas that have remained clean since revocation will be. One commenter did not seem to object to this approach, but recommended that EPA approve pending redesignation requests within 1 to 3 months of

the final reinstatement.

Other commenters supported EPA's proposal to restore the designations and classifications that applied at the time of the revocation action. Several of these commenters claimed that EPA should not or could not consider violations that occurred while the standard was not applicable. Others recommended that EPA designate as nonattainment all areas that have current violations of the 1-hour standard.

Specifically, some commenters request that EPA now designate as attainment areas that were designated as nonattainment and that have never been approved for redesignation in accordance with the criteria in section 107(d)(3)(E). Thus, the commenters request EPA to rely on its revocation action as a justification for avoiding those requirements.

Response: As provided in section III.A, above, in today's action EPA is only reversing its earlier determination that the 1-hour standard no longer applies in these and other areas. Therefore, EPA is not considering current air quality data in establishing designations under this action as EPA would do when establishing initial designations for areas under section

107(d)(1) or redesignating areas under section 107(d)(3). In promulgating 40 CFR 50.9(b), EPA determined that the designations and classifications were linked to the applicability of the 1-hour standard. On that basis, in applying section 50.9(b), EPA removed not just the applicability of the 1-hour standard, but also the associated designation and classification for the 1-hour standard. Because EPA is rescinding its prior findings concerning the applicability of the 1-hour standard, the designations and classifications that accompanied that standard at the time of revocation come back into place with the standard.

The EPA disagrees with the commenters as a matter of law and policy. It is clear from the CAA, as amended in 1990, that Congress intended areas to meet specific criteria for redesignation with respect to an existing, applicable NAAQS. As discussed above in section III.A & B, EPA believes it was appropriate to transition from the 1-hour ozone standard to the 8-hour ozone NAAQS by requiring only that areas attain the 1-hour standard – one of the five criteria[21] for redesignation. However,

[21] Section 107(d)(3)(E) provides that EPA may not redesignate an area from nonattainment to attainment

EPA believes it would circumvent Congressional intent to reinstate the 1-hour standard because of the uncertainty surrounding the 8-hour standard and permit areas effectively to be redesignated from nonattainment to attainment without meeting the other four redesignation criteria. The EPA does not believe that it can rely on its rule determining the 1-hour standard no longer applies, the basis for which has been undermined by the ATA decision, as support for sidestepping the redesignation criteria.

Moreover, because EPA cannot be sure how long it will take to resolve the issues surrounding the 8-hour standard, EPA believes that it is important to ensure that areas will maintain the 1-hour standard. The statutory redesignation criteria are designed to accomplish that goal. Thus, EPA believes it is essential that they be met.

However, EPA believes that it is appropriate to provide additional time to nonattainment areas with clean

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unless EPA: (1) determines that the area has attained the relevant NAAQS; (2) has fully approved the area's SIP; (3) determines that the improvement in air quality is due to permanent and enforceable reductions in emissions; (4) has fully approved a maintenance plan for the area; and (5) has determined that the State has met all of the applicable SIP planning requirements.

air quality data since revocation in order to complete the redesignation process. Therefore, EPA is taking final action today to delay the applicability date of the final rule for up to 180 days for areas that were designated nonattainment at the time of revocation and continue to have clean data, in order to allow States to submit redesignation requests and EPA time to act on them prior to the applicability date. These areas are identified in Table 1. In the proposed action to reinstate the standard, EPA recommended that areas begin to develop redesignation requests (or revise, as necessary, any existing requests) so that EPA could move forward quickly to approve the requests upon reinstatement. The EPA understands that some States are now ready, or close to being ready, to submit these requests to EPA. If requests are submitted within the next 2 months, EPA believes it can complete action on them before this rule becomes applicable. The EPA will work with States to ensure that review of redesignation requests occurs expeditiously. In addition, if States are able to submit redesignation requests and EPA is able to process such requests to the point of final action prior to 180 days from publication, the final action

approving the redesignation may provide that the applicability date of the reinstatement will be the same date as the effective date of the redesignation approval, so that the redesignations will occur simultaneously with the reinstatement.

Once EPA approves a redesignation request, an area would be subject to the requirements of the approved maintenance plans. Redesignation to attainment does not relieve an area of its conformity obligations.

With respect to all of the areas previously designated nonattainment which currently have clean air quality data, as listed in Table 1, EPA concluded at the time of revocation that these areas had clean air quality data. These findings remain applicable unless more recent air quality data indicates that a violation has occurred. The EPA intends to complete rulemaking prior to the applicability date of this rule to determine the eligibility of these areas to use EPA's May 10, 1995 clean data policy. (Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard, John S. Seitz).

The EPA acknowledges that reinstating the

designations as they were prior to revocation arguably may produce some inequities among areas; however, these potential inequities are inherent in the redesignation process set forth in section 107. As provided in section III.D, above, Congress provided EPA with discretion in determining whether to redesignate areas from attainment to nonattainment and specified factors for EPA to consider. In comparison, Congress prohibited EPA from redesignating an area from nonattainment to attainment unless EPA determined that the area meets five specific criteria. In addition, any redesignation must occur through notice-and-comment rulemaking. Thus, at any point in time, an area can be attaining the standard, yet still be designated nonattainment, or designated attainment and be violating the standard, including the period while rulemaking to effect a redesignation is proceeding.[22]

Areas where EPA is today reinstating the

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[22] One court, in an unpublished opinion, upheld EPA's interpretation of the redesignation provisions of the CAA that an area must attain the standard and remain in attainment during the time that a redesignation request is pending in order to qualify for redesignation. Commonwealth of Kentucky, et al. v. US EPA, No. 96-4274 (6th Cir. Sept. 2, 1998).

applicability of the 1-hour standard will be placed back into the same position they were in prior to revocation. The EPA does not believe that this creates any additional inequities for these areas. It is true that EPA had previously relieved areas of the obligation to develop a maintenance plan for the 1-hour standard since they were to begin implementing the 8-hour standard. However, since it is now uncertain when areas will be required to implement the 8-hour standard, EPA does not believe it is inequitable to require these areas, as any other area, to develop maintenance plans prior to redesignating them to attainment.

Comment: A few commenters made requests that specific types of areas not be designated nonattainment. One commenter suggested that EPA should designate as attainment areas that were previously designated marginal or rural transport areas and that are clean without requiring redesignation. A few commenters suggested that EPA not penalize areas with violations where the cause of the violations is clearly one of transport and dislike the “unfair” label of nonattainment.

Response: For the reasons provided above, EPA does not see a legal avenue for changing the designation of

marginal or rural nonattainment areas or areas affected by transport based solely on the reinstatement of the standard. Nor do the commenters identify a legal mechanism for treating these areas differently from other nonattainment areas with clean data.[23] Some commenters set forth conflicting arguments, arguing that EPA should generally establish the designations that were in place at the time of the revocation while simultaneously claiming that certain types of areas should be designated based on current air quality. The EPA does not see how it can reconcile these conflicting positions. As provided above, EPA believes the only proper interpretation of this reinstatement action is that prior actions are reversed such that prior designations are put back into place. The EPA will consider current air quality data in determining whether to redesignate areas

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[23] One commenter suggests that we could do so as we did in revoking the standard. However, that was not a case of simply telling areas that they did not need to submit maintenance plans notwithstanding their nonattainment designation. It was a case of telling areas that they were no longer subject to any obligations with respect to the 1-hour standard based on expected implementation of the 8-hour standard, which would no longer be the case for marginal or rural nonattainment areas or areas affected by transport where the 1-hour standard is reinstated.

under section 107(d)(3).

In addition, EPA already has provided relief to areas subject to transport in a number of ways. Such areas may continue to take advantage of appropriate EPA policy relating to areas affected by transport.[24] In addition, EPA has issued final rules requiring States or sources to address transported NOX and ozone in accordance with section 110(a)(2)(D) of the CAA. Final NOX SIP Call Rule (63 FR 57356, October 27, 1998); Final Rule on Section 126 Petitions (64 FR 28250, May 25, 1999). Areas affected by transport will benefit from these rules.

Comment: Some commenters were concerned about redesignation requests and maintenance plans submitted prior to the time that EPA determined that the 1-hour standard no longer applied. These commenters thought that it would be unfair for EPA to require the areas to update the maintenance plan to provide maintenance for 10 years from the time of EPA's approval.

Response: The EPA appreciates the concerns of those

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[24] E.g.,"Extension of Attainment Dates for Downwind Transport Areas," from Richard Wilson, Acting Assistant Administrator for Air and Radiation, dated July 16, 1998, published at 64 FR 14441, March 25, 1999.

few areas that may have had pending redesignation requests that demonstrate continued maintenance for some period shorter than 10 years from the time of EPA's final action, due to the passage of time. In such areas, EPA will work with those States and respective transportation agencies to develop technically sound future budgets. Such future emissions projections will consider growth for existing and future sources, forecasting for vehicle miles traveled, other federally mandated programs, particularly the more recent mobile fuels rules and other applicable measures; the resulting budgets will undergo normal public process review. The EPA will work with the affected areas on an individual basis to determine the extent to which additional maintenance demonstrations may be needed to support redesignation, and will take appropriate final action on maintenance demonstrations in connection with future action on pending redesignation requests.

G. Areas Designated Nonattainment With Violations Since Revocation.

For areas designated nonattainment with violations since the standard was revoked in those areas, EPA proposed that the nonattainment designation would again

apply and that the area would be subject to the subpart 2 requirements once the reinstatement became effective. The EPA proposed that these areas have a reasonable time to meet the applicable planning requirements and that EPA would work with each area to establish a submittal schedule. This only applies to one area, Sussex Co., DE., based on 1996-98 data. *Comment*: Most commenters did not raise separate issues with respect to this specific group of areas. A few commenters specifically noted that they supported reinstating the nonattainment designation for these areas. Some commenters requested EPA to be clear about what the implications are for reinstatement. In particular, they were concerned about what planning and control requirements might apply and what would be the timing.

Response: The planning and control requirements that will apply for this area are the applicable planning and control requirements in subpart 2 of the CAA. The EPA will work with Delaware to determine appropriate SIP submittal deadlines for any programs that have not yet been submitted.

H. Effective Date and Applicability Dates of Reinstatement

The EPA proposed to delay the effective date[25] of any final reinstatement notice by 90 days in order to provide areas with a short period of time in which to prepare for the applicability of conformity and new source requirements which will be triggered by the reinstatement of the 1-hour standard and the designations for that standard. In the final rule, EPA has retained the 90-day effective date. However, for areas that were designated as nonattainment at the time EPA revoked the 1-hour standard and that have continued to have clean air quality since revocation, EPA is establishing an applicability date for the reinstatement of up to 180 days after publication of the final rule. These areas are listed in Table 1. During this period, EPA will review any pending redesignation requests or requests that may be submitted shortly after this final action is published. If EPA is able to complete final rulemaking action to redesignate an area to attainment during that 180-day period, EPA will provide in the final redesignation rule that the area will be designated attainment as of the applicability date of this rule, so

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[25] See footnote 9, above.

that by the time reinstatement is applicable for any such area, the area will receive an attainment designation. In addition, if States are able to submit redesignation requests and EPA is able to process such requests to the point of final action prior to 180 days from publication, the final action approving the redesignation may provide that the applicability date of the reinstatement will be the same date as the effective date of the redesignation approval, so that the redesignations will occur simultaneously with the reinstatement. As mentioned before, the 45 areas listed in Table 1 may elect to submit redesignation requests.

Comment: Some commenters disagreed with the proposed 90-day delay in effectiveness, claiming it would be too short a time frame to complete conformity determinations on transportation improvement plans (TIPs) or for redesignation to occur. One commenter suggested a 180-day delay in the effective date. Other commenters believed that the final action reinstating the standard and the associated designation should be effective immediately. Finally, some commenters supported EPA's proposal to make the reinstatement and the associated designations effective 90 days after publication.

Response: With respect to the effective date of the rule, EPA has determined, based upon the comments submitted, that a 90-day delayed effective date is an appropriate time period for most areas. The time from the October 25th proposal to the end of the 90-day period is approximately 10 months. The EPA believes this period is sufficient for States to complete air quality analyses for conformity determinations on transportation plans prior to the effective date of the final rule. Thus, areas should not experience any delays in transportation projects. At the same time, reinstatement of the standard with the associated public health and welfare protections will not be significantly delayed. The EPA does not anticipate that areas will attempt to complete transportation activities inconsistent with reinstatement of the 1-hour standard prior to the effective date, but rather that they will use the delay to ensure they are ready to meet the applicable requirements when the reinstatement becomes effective. Thus, EPA concludes that a 90-day delayed effective date is a reasonable accommodation between the competing interests of public health protection and transportation planning for most areas.

The EPA agrees with commenters to the extent it concludes that up to a 180-day delay in the applicability of this rule is appropriate for areas that were designated nonattainment prior to revocation but that currently have clean air quality data sufficient to support a redesignation to attainment. Since these areas have continued to have clean air since revocation, EPA believes it is appropriate to provide up to an additional 90-day delay in the applicability of the rule to allow these areas time to quickly complete and submit redesignation requests and for EPA to act on submitted requests. Where EPA approves such requests on or before the applicability date of this rule, the area would be designated attainment at the time the reinstatement of the 1-hour standard becomes applicable. The EPA notes again that if EPA is taking final action to approve a redesignation prior to 180 days from publication of this rule, the final action approving the redesignation may provide that the applicability date of the reinstatement will be the same date as the effective date of the redesignation approval, so that the redesignations will occur simultaneously with the reinstatement. Where EPA does not approve a redesignation request or one is not

submitted, the area will receive the nonattainment designation which applied to the area prior to revocation upon the applicability date of this rule.

The EPA notes that all of these areas will again be subject to conformity upon the applicability date of the reinstatement of the 1-hour standard and associated designations, since conformity applies to both nonattainment and maintenance areas. As indicated above, EPA anticipates that areas will use the delay to complete modeling efforts and the consultation process so that they can have a conforming plan and TIP in place by the applicability date.

I. Sanction and FIP Clocks

The EPA's proposed rule provided that any sanctions and FIP clocks that were running at the time of the revocation should restart at the point that they left off. In other words, if there were 6 months remaining in the 2-year period for promulgation of a FIP, those remaining 6 months would start to run for that area on the applicability date of this action. The EPA is retaining this approach in the final rule.

Comment: Some commenters stated that areas should not be subject to any penalties or sanctions. Another

commenter requested that EPA impose sanctions immediately not only for those areas for which a clock was running but also for those areas which may not have submitted a required SIP but for which EPA never made a finding that started sanctions and FIP clocks. This commenter suggested that sanctions should be imposed no later than 90 days after the effective date of the reinstatement for all such areas. In contrast, a number of commenters supported EPA's approach. These commenters generally contended that treating the clocks as if they continued to run during the time when the standard did not apply would be considered enforcing the standard when it was not in effect. One commenter seemed to support starting the clock where it left off at the time of the revocation, but noted that sanction clocks with time remaining should not allow States to delay progress. The commenter states that areas violating the 1-hour standard or contributing to violations in other areas must move forward "as expeditiously as practicable."

Response: The EPA believes that the most equitable approach is to restart clocks for sanctions or FIPs where they left off at the time of the revocation. Because States and sources relied on EPA's final rule determining

that the standard no longer applied, States were not affirmatively moving forward with 1-hour SIPs.[26] Thus, EPA believes that it would be unfair to States and affected sources to treat those clocks as if they continued to run during the time that the 1-hour standard no longer applied.

Similarly, EPA does not believe that it has authority, nor would it be appropriate, to begin these clocks over again upon reinstatement or to treat these clocks as no longer in effect. The FIP and sanctions obligations under sections 110 and 179 of the CAA were previously triggered for a State's failure to make a complete SIP submission or an approvable submission as required under the CAA. By today's action, areas will once again be subject to the same requirements to make submissions. There is no basis for ignoring or discharging the State's obligation with respect to these submissions. Moreover, EPA agrees that sanctions clocks

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[26] One commenter suggests that EPA's actions revoking the 1-hour standard and related designations were not legally valid at the time they were taken. Thus, this commenter claims, that rule cannot support a further delay in sanctions or FIPs. The EPA disagrees. The EPA revoked the standard in full compliance with its regulation, 40 CFR 50.9(b), which was not challenged at the time it was promulgated.

should not be treated by States as a “grace period” that allows deferral of compliance dates. Where a sanctions clock is in place, States should submit plans to stop the clock as expeditiously as practicable and should not delay submission until the last minute before sanctions are put into place.

Because EPA is taking action to put areas back in the place they were in prior to the revocation, the most appropriate course of action is to restart these clocks where they left off. Therefore, upon the applicability date of today’s action, any sanctions or FIP clocks that were running based on a State’s default for a required submission will restart at the point it was on the effective date of the revocation. States should work to submit SIPs as expeditiously as practicable. Any questions regarding the status of a sanction or FIP clock for a specific area should be directed to the appropriate EPA Regional Office. Finally EPA has no authority to impose sanctions where EPA has not made appropriate findings to trigger clocks under section 179.

J. Conformity

The EPA proposed that conformity would apply upon the effective date of the rule to all areas again

designated nonattainment. The EPA noted that these areas would need to have a conforming transportation plan and program in place by the effective date of the rule in order to fund new transportation projects after that date. The EPA also noted that conformity has continued to apply to all attainment areas with maintenance plans even after revocation, and that conformity does not apply at all to attainment areas without maintenance plans. Upon the applicability date[27] of this final action, conformity will apply to all designated nonattainment and maintenance areas as proposed.

Several commenters expressed concerns about the conformity requirements that apply to nonattainment and maintenance areas and the timing of conformity determinations. The specific comments and responses follow.

Comment: The transportation conformity rule requires conformity to be determined at least every 3 years. Commenters requested that we not consider the 3-year clock to have been running in nonattainment areas where the 1-hour ozone standard was revoked and conformity did

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[27] See footnote 9 and section H. above for explanation of terms “effective date” and “applicability date.”

not apply.

Response: We agree that in ozone nonattainment areas where the ozone standard was revoked and conformity stopped applying, any of the 3[27]-year or 18-month clocks (described in 40 CFR 93.104[28]) that were running at the time of the revocation were stayed on the effective date of the revocation. On the applicability date of this final rule, those clocks will pick up again at the point where they left off.

In practice, this means that if an ozone nonattainment area had a conforming TIP at the time of the revocation and did not amend the plan and TIP with respect to any non-exempt projects during the time conformity did not apply, the transportation plan and TIP would continue to be considered "currently conforming" even if more than 3 years have elapsed since the conformity determination.

The area would need to document that the

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[28] The EPA's conformity regulations require States to redetermine conformity for all transportation plans and programs every 3 years. 40 CFR 93.104(b)(3) and (c)(3). The regulations also require a conformity determination within 18 months of various SIP submittal and approval actions. 40 CFR 93.104(e).

transportation plan and TIP have not changed since the time of the last conformity determination in a manner that would have required a new conformity determination. The area should also clearly identify how much time remains on the 3-year clock and any 18-month clock that was triggered by 40 CFR 93.104.

We are not concerned that the temporary halt of the clocks in 40 CFR 93.104 will result in transportation plans and TIPs that are relying on very old conformity determinations. The Department of Transportation (DOT) requires transportation plans and TIPs to be regularly updated, and those planning clocks have been running regardless of the revocation. The plan and TIP updates require conformity determinations. Therefore, any plans and TIPs with conformity determinations from before the revocation will be updated soon under DOT's planning regulations.

For any plans and TIPs that were amended with respect to non-exempt projects while the ozone standard was revoked, a new conformity determination will be required by the time the reinstatement is applicable. This is because these plans and TIPs will generally not yet have been found to conform and would have to be found

to conform by the applicability date of reinstatement to enable projects to proceed.

Comment: One commenter asked what process is required for areas that voluntarily complied with conformity requirements while the ozone standard was revoked.

Response: If an area amended its plan and TIP while the ozone standard was revoked, but the amendment(s) fully met the requirements of the conformity rule (including public participation), the area would simply need to document this and receive confirmation from the Federal agencies that the transportation plan and TIP are considered “currently conforming.”

Comment: Some commenters were concerned that they do not have enough time to determine conformity before the reinstatement is applicable, and/or that it is burdensome to determine conformity of the current plan and TIP when they are updating the plan and TIP very soon (which will also require a conformity determination).

Response: We understand that this final rule changes the usual cycle for determining conformity. Counting from the time we proposed to reinstate the standard, areas will have had at least ten months to complete the

conformity process prior to the applicability date of this rule. We believe this is a reasonable time frame, although we recognize that the timing for this conformity process may not be optimal for some areas.

We must balance the desire for additional time for transportation planning with the need to protect public health with the 1-hour ozone standard and statutory requirement for conformity determinations. In some areas, transportation investments were planned or approved during the revocation without a demonstration that they will not interfere with attainment of the one-hour ozone standard. It is important to conduct such a demonstration expeditiously so that areas do not irreversibly commit to transportation projects that are inconsistent with healthy air.

Comment: One commenter stated that the proposed criteria for conformity are not consistent with the March 2, 1999 decision of the Court of Appeals in EDF v. EPA, 167 F.3d 641,650 (1999) on conformity. The commenter argues that the court required EPA to develop a test to ensure conformity consistent with CAA 176(c)(1) and that this must be done now for all areas where the standard is to be reinstated.

Response: Conformity determinations should comply with the CAA, as recently interpreted in the EPA and DOT guidance issued in response to the March 1999 court decision (EPA's May 14, 1999 guidance entitled, "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision" and DOT's June 18, 1999 guidance entitled, "Additional Supplemental Guidance for the Implementation of the Circuit Court Decision Affecting Transportation Conformity"). We believe that these guidance documents are consistent with the court's decision and that conformity determinations performed consistent with the guidance are legally sound. We will be formally proposing to amend the transportation conformity rule to incorporate this guidance, pursuant to CAA section 176(c)(4)(A).

The commenter appears to believe that the court decision required EPA to develop additional criteria to satisfy the obligations of section 176(c)(1) of the CAA, which require Federal agencies and Metropolitan Planning Organizations (MPOs) to determine that Federal actions will not interfere with timely attainment, in situations where they are determining conformity to budgets in submitted SIPs. However, EPA believes that the court in

actuality merely remanded EPA's rules, stating that "where EPA fails to determine the adequacy of motor vehicle emissions budgets in a SIP revision within 45 days of submission, ... there is no reason to believe that transportation plans and programs conforming to the submitted budgets will [meet the statutory tests in section 176(c)(1)(B)]." The EPA interprets this aspect of the decision to require it to revise its regulations to mandate that EPA make affirmative findings of adequacy on all submitted SIPs before they can be used for conformity purposes. The procedure for doing this is outlined in the guidance mentioned above. The EPA does not believe the court addressed any deficiency in EPA's regulations governing conformity determinations in situations where EPA has made a positive finding of adequacy. The EPA concludes that the court only remanded the aspect of EPA's regulations at 40 CFR 93.118(e)(1) which allows use of submitted SIPs which EPA has not yet found adequate, since it did not remand either EPA's regulations at 40 CFR 93.118(e)(4) establishing criteria for finding budgets adequate or 93.118(e)(6) requiring additional findings by Federal agencies and MPOs where conformity determinations are made to submitted SIPs.

Therefore, EPA believes that conformity determinations consistent with these two provisions and our guidance on finding budgets adequate fully satisfy the requirements of the CAA and we intend to revise our regulations consistent with that guidance. Of course, commenters will have the opportunity to comment on those regulatory changes when they are proposed and to raise any issues associated with EPA's interpretation of the court opinion at that time. The EPA does not believe that such comments are directly relevant to this rulemaking and, therefore, is not making any changes to the conformity rules in connection with this final action.

Comment: One commenter argued that conformity to adequate SIP budgets in nonattainment areas, should continue even after any future revocations until new adequate budgets are submitted for the 8-hour standard.

Response: Section 176(c)(5) of the CAA clearly provides that conformity requirements only apply in nonattainment areas and areas that had been nonattainment and were subsequently redesignated to attainment and are subject to the requirement to develop a maintenance plan. Since nonattainment areas where EPA may in the future revoke the 1-hour standard once an 8-hour standard

becomes fully enforceable will no longer be designated nonattainment or subject to the requirement to submit a maintenance plan, for the reasons explained above, EPA concludes that it would have no authority under section 176(c) to require conformity to previously submitted 1-hour budgets after any future revocations.

K. New Source Review

In the October 25th proposal, EPA solicited comment on what NSR requirements should apply in areas that had, subsequent to our findings that the 1-hour standard no longer applied, revoked their nonattainment NSR programs. Specifically, EPA asked whether 40 C.F.R. part 51, Appendix S should be followed or the higher offset/major source thresholds in subpart 2 of the CAA should be followed in nonattainment areas where the SIP lacks the applicable nonattainment NSR provisions.

Comment: Several commenters wanted flexibility in applying NSR requirements. There was a mixed reaction for and against using 40 CFR appendix S. As to the question of whether States must issue permits consistent with the additional requirements of subpart 2, even in the absence of an approved NSR SIP, one commenter stated that it was not supportive of any EPA action that would

cause enforcement of NSR on facilities that were or are under no legal obligation to comply with NSR requirements. Another commenter urged EPA to require sources to comply with subpart 2 notwithstanding the lack of an approved SIP, citing a 1992 EPA policy memorandum as support.

Response: The EPA solicited comment on how to address areas that were designated nonattainment prior to the findings that the 1-hour standard no longer applied and which, since revocation, had amended their SIPs to remove the applicable nonattainment NSR provisions. The EPA has determined that it is unnecessary to resolve this question in this rulemaking, as we have determined that no area has amended its SIP since the nonattainment designations were removed. Thus, the applicable SIPs in each area will specify the nonattainment NSR responsibilities of sources in the area, without any action by EPA.

Comment: Sources that have applied for PSD permits during the period that the 1-hour ozone standard did not apply should not have to seek part D NSR permits. Allowing sources with complete applications to avoid more stringent requirements is consistent with EPA policy.

Such an approach is also consistent with how EPA acted following the adoption of PM_{10} as the indicator for particulate matter in 1987. At that time, EPA allowed sources with complete PSD permit applications that did not account for the sources' PM_{10} emissions to be grandfathered.

Response: Whether or not sources must apply for part D nonattainment NSR permits upon reinstatement of the 1-hour standard will be determined by the applicable SIP. The EPA expects that most, if not all, SIPs already specify that sources in designated nonattainment areas must obtain part D permits. Accordingly, some sources may have to revise their permit applications. Even if EPA were to agree that it would be appropriate to allow such sources to obtain PSD permits rather than nonattainment NSR permits, EPA cannot override by policy the legal requirements of a more stringent applicable SIP. Regarding the PM_{10} transition policy to which the commenter refers, that policy is inapplicable in the present situation because it did not deal with the kind of situation at issue currently -- where areas will be switching from one designation status (no designation) to nonattainment. The EPA had concluded in that rulemaking

that part D, including part D NSR, did not apply at all to the revised particulate matter NAAQS, so there was not a question about which NSR program would apply. See 52 FR 24672, 24678 (July 1, 1987).

L. Miscellaneous Comments

Comment: One commenter noted that EPA should notify the public of the terms of a stipulation agreement reached between EPA and the Environmental Defense Fund (EDF) wherein EPA agreed to accept comment on certain items in the reinstatement notice.

Response: In its notice reopening the comment period on Dec. 8, 1999, EPA explicitly provided that it would accept comment on the list of issues recited in the stipulation filed in EDF v. EPA, (D.C. Cir., No. 98-1363). (64 FR 68659, December 8, 1999).

Comment: Several commenters supported applying the reinstatement retroactively, such that areas would be treated as if the standard and the associated designations have always applied. Some were not supportive of retroactively applying the 1-hour standard during the time it was revoked. With respect to conformity determinations, one commenter believed that we shouldn't allow "grandfathering" of projects if prior

conformity determinations would have lapsed during the time the standard was not applicable; they believe that in cases where it is not possible to reverse actions, then they must be subject to some mitigation procedure to address actions that allowed for emission increases during that time.

Response: The EPA concludes that it is not appropriate to apply the reinstatement of the 1-hour standard retroactively. The EPA believes that it had full authority to revoke the 1-hour standard initially, and that its actions were legal and proper at the time they were taken. Although EPA now concludes that it should rescind those actions due to changed circumstances, it would be unfair to areas that had relied on the initial revocations (and to sources located in those areas) to apply the rescissions retroactively. Many areas took actions during the period of time that the 1-hour standard was not applicable that properly relied on the inapplicability of that standard. Rules altering prior actions are generally applied only prospectively and are applied retroactively only in unusual cases, for instance where an agency did not have the authority to take a prior action initially. Courts

generally view retroactive application of administrative rules with disfavor unless such application is specifically sanctioned by statute. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). The CAA does not specifically provide for retroactive application of regulations under title I. Therefore, although EPA might have authority to apply the reinstatement retroactively if a court determined that EPA's action in revoking the standard was illegal, EPA does not believe it is appropriate to do so here where EPA believes it was fully authorized to revoke the standard at the time it took such action. The EPA also concludes for similar reasons that it would not be appropriate for conformity purposes to treat conformity determinations as having lapsed during the time that the 1-hour standard was not applicable to an area. Because the 1-hour standard no longer applied during that period, areas were not on notice that conformity determinations were to lapse. It would be equally unfair to areas to achieve a similar result by denying grandfathering status under the conformity rules to any project approved during a time period when conformity status would have lapsed if the standard had been applicable. The EPA concludes that

areas should be allowed to continue to rely on the inapplicability of the 1-hour standard during the period between revocation and reinstatement because EPA had the authority to revoke the standard and properly revoked it initially.[29]

For these same reasons, EPA concludes that where highway projects or new sources have already been constructed, areas should not be required to immediately implement mitigation measures to remedy any resulting emissions increases. Areas will effectively have to provide for mitigation in future transportation and air quality planning once the 1-hour standard is reinstated. All future air quality planning for attainment and reasonable further progress as well as conformity determinations will have to account for emissions from such activities. However, EPA believes that it would be

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[29] One commenter notes that some areas should have been on notice that revocations were questionable since one action promulgating revocations was not published in the Federal Register until after May 14, 1999, the date of the adverse court decision in ATA (64 FR 30911, June 9, 1999). However, that final action of the Administrator was taken (final rulemaking notice signed by the Administrator) on May 12, 1999, prior to the court decision; only publication occurred after the decision. The EPA did not take any further actions revoking the 1-hour standard in any areas after the date of the ATA decision.

inequitable to require areas to immediately institute specific mitigation measures to account for any emissions increases that may have occurred during the time that the standard was not applicable to an area.

Comment: Several commenters took the opportunity to comment on the 8-hour ozone standard. Many requested that designations for the 8-hour standard not be made until legal issues are resolved. Many asked for guidance to States on meeting the 8-hour standard in the interim. Several called upon the Agency to revoke the 8-hour standard.

Response: The numerous comments concerning the 8-hour standard, including those relating to designations under the 8-hour standard, guidance on implementation of the 8-hour standard, and requests for revocation of the 8-hour standard, are not relevant to this rulemaking on reinstatement of the 1-hour standard. The EPA will address issues relating to the 8-hour standard in separate rulemaking actions or guidance documents.

Comment: One commenter suggested that we explore the Flexible Attainment Region (FAR) approach to provide flexibility to States in determining measures to prevent air quality deterioration and to improve air quality.

The commenter suggests that EPA give these “voluntary programs” time to work before triggering nonattainment designations. The same commenter also requests EPA to extend to ozone areas the flexibility provided in EPA’s draft guidance for PM-10 nonattaiment areas with respect to limited maintenance plans.

Response: The EPA has used the FAR approach in the past with respect to areas designated attainment but that are violating the ozone standard. As provided above, EPA has some discretion in deciding whether to redesignate such areas as nonattainment. In exercising that discretion, EPA may consider “planning and control” activities. Thus, in the past, EPA has not moved forward to redesignate to nonattainment attainment areas that were voluntarily adopting and implementing measures to address violations. The EPA plans to continue this approach for such areas as explained in sections III.D and E, above. However, as also explained above, EPA does not believe it has the authority to reinstate the standard and not designate as nonattainment those areas designated as nonattainment at the time of the revocation action. These areas would be subject to the specific planning requirements that Congress provided under the

CAA until they qualify for redesignation. The EPA cannot ignore the statutory mandate in favor of more flexible means of achieving attainment that could be allowed under the FAR approach. Therefore, designated nonattainment areas cannot use a FAR because the statutory requirements apply.

With respect to the comment regarding EPA's draft limited maintenance plan guidance for PM-10 areas seeking redesignation from nonattainment to attainment, EPA notes that it has an existing limited maintenance plan policy for ozone ("Limited Maintenance Plan Option for Nonclassifiable Ozone Nonattainment Areas," November 16, 1994, Sally Shaver) This policy provides some flexibility, e.g., no requirement to project emissions out into the future, no need for maintenance demonstration since met by meeting the NAAQS, etc. The commenter appears not to recognize that such a policy exists and does not further explain what flexibilities in the draft PM-10 policy they would like extended to ozone areas.

IV. What administrative requirements are considered in today's final rule?

A. Executive Order 12866: Regulatory Impact Analysis

Under Executive Order 12866, [58 FR 51,735 (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.

It has been determined that this final rule is a "significant regulatory action" under the terms of

Executive Order 12866; therefore, it was submitted to OMB for their review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604), unless EPA certifies that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000. The EPA is certifying that this final rule will not have a significant impact on a substantial number of small entities because the determination that the 1-hour standard again applies does not itself directly impose any new requirements on small entities. See Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985) (agency's certification need only consider the rule's impact on entities subject to the requirements of the rule). Instead, this rule merely establishes that the 1-hour standard again applies in certain areas. For the most part, any requirements applicable to small

entities that may indirectly apply as a result of this action would be imposed independently by the State under its SIP, not by EPA through this action. Moreover, to the extent this rule would automatically trigger the applicability of certain SIP requirements to small entities (e.g., NSR), this rule cannot itself be tailored to address small entities that would be subject to those requirements.

One requirement that may apply immediately upon this action to all designated nonattainment areas is the requirement under CAA section 176(c) and associated regulations to demonstrate conformity of Federal actions to SIPs. However, those rules only apply directly to Federal agencies and MPOs, which by definition are designated only for metropolitan areas with a population of at least 50,000 and thus do not meet the definition of small entities under the RFA. Therefore, I certify that this action will not have a significant impact on a substantial number of small entities within the meaning of those terms for RFA purposes.

C. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, establishes requirements for Federal

agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable 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 mush have developed

under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's final action does not include a Federal mandate within the meaning of UMRA that may result in expenditures of $100 million or more in any one year by either State, local, or tribal governments in the aggregate or to the private sector. This rule would reinstate the applicability of the 1-hour ozone standard and alter the designation status of areas. The consequences of this action may result in some additional costs within the affected areas, but these costs would not exceed $100 million per year in the aggregate.[30] In view of recent concerns about increased gas prices in certain areas, we specifically note that this action will

[30] See Docket A-99-22,III-B-04, "Preliminary Assessment of the Incremental Burden Associated with Reinstatement of the 1-Hour Ozone Standard for UMRA, dated October 14, 1999.

not impose any requirements on gasoline and will not affect current gas prices.

One mandate that may apply as a consequence of this action to all designated nonattainment areas is the requirement under CAA section 176(c) and associated regulations to demonstrate conformity of Federal actions to SIPs. These rules apply to Federal agencies and MPOs making conformity determinations. The EPA concludes that such conformity determinations will not cost $100 million or more in the aggregate annually.[31]

In addition, some areas with recent air quality violations will have to take the additional steps specified in their maintenance plans to limit emissions of air pollutants. These measures could, for example, include revising the threshold for NSR, establishing reasonable available control technology (RACT) level control for additional sources, and establishing or enhancing inspection and maintenance (I/M) programs within the area. These measures vary substantially in terms of the expected emissions reductions and their potential cost. Because the affected jurisdictions have

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[31] See footnote #30.

some flexibility to choose among these measures, it is difficult to estimate the overall cost of these additional controls. The EPA believes that the affected areas are already carrying out many of the other obligations associated with this action. For example, most areas that would have a nonattainment designation reinstated upon reinstatement of the 1-hour standard already have NSR requirements under their existing SIP programs. In addition, many of these areas are located in the Northeast Ozone Transport Region and are already carrying out many of the requirements associated with the reinstatement of the 1-hour standard. Therefore, EPA believes that any new controls imposed as a result of this action will not cost in the aggregate $100 million or more annually. Thus, this Federal action will not impose mandates that will require expenditures of $100 million or more in the aggregate in any one year.

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

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined

under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a 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.

The EPA interprets E.O. 13045 as applying only to those major regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This final rule is not subject to E.O. 13045 because it does not meet either of the above criteria. It is not economically significant as defined under E.O. 12866, and it implements a previously promulgated health or safety-based Federal standard and does not itself involve decisions that affect environmental health or safety risks.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small

Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

F. 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."

Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and

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

As indicated in the proposal, EPA does not believe that this final rule has federalism implications within the meaning of the Executive Order. EPA has reached this conclusion for several reasons. As discussed above in connection with UMRA, this action will not impose substantial direct compliance costs on the States nor will it alter the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. As noted previously, this rule simply reinstates the applicability of the 1-hour ozone standard and the associated air quality designations for various areas that had applied prior to revocation. These actions do not preempt any State authority or otherwise

affect State flexibility to comply with the Clean Air Act. Although reinstatement will alter the number of areas within various states that are designated under the 1-hour standard, it will not alter the relationships that currently exist between the States and the federal government with respect to areas designated under the 1-hour standard. Thus, EPA concludes that the requirements of section 6 of the Executive Order do not apply to this rule.

In the spirit of the Executive Order however, the Agency has consulted extensively with representatives of State and local governments, including elected officials. As EPA was developing the proposal and again when EPA issued the proposal, we phoned elected officials or their staff for many of the areas that could be affected by the rule to notify them that EPA was considering reinstating the 1-hour ozone standard and to solicit their advice and concerns. The EPA also notified national organizations of state and local government officials and made EPA staff available to discuss the proposed action with the organization staff and their members. These organizations included the U.S. Conference of Mayors (USCM), the National Conference of Black Mayors, the

National Governors Association, the National Council of State Legislators, the National Association of Counties, ECOS, STAPPA/ALAPCO, the National Association of Local Government Environmental Professionals, and the Ozone Transport Commission. For example, EPA's Assistant Administrator for Air and Radiation held a conference call with the USCM Energy and Environment Committee members when the proposal was announced. In addition, EPA sent letters to the Governors and their environmental commissioners to ensure that they were aware of the proposal and could comment on it. It was in response to concerns raised by these contacts that EPA proposed to delay the effective date of the reinstatement for 90 days so that areas would have adequate time to comply with any requirements triggered by reinstatement. In addition, based on comments received from States after publication of the proposal, EPA decided to provide a 180-day delayed applicability date for areas that were designated nonattainment but currently have clean air data. EPA also notes that, while it received no adverse comments regarding the statements in the proposal concerning the lack of federalism implications of this rule, it received numerous comments on the rule from state and local

governments. EPA has responded fully to all comments raised by the various State and local governments, as explained above in the sections of this notice describing the comments and EPA's response to them.

G. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments

Under E.O. 13084, EPA may not issue a regulation that is not required by statute that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, E.O. 13084 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, E.O. 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments

"to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's final rule does not significantly or uniquely affect the communities of Indian tribal governments. This final action does not involve or impose any requirements that directly affect Indian tribes. Under EPA's tribal authority rule, tribes are not required to implement CAA programs but, instead, have the opportunity to do so. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

H. Paperwork Reduction Act

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

I. Executive Order 12898: Environmental Justice

Under E.O. 12898, each Federal agency must make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. Today's final action to reinstate the applicability of

the 1-hour standard in certain areas does not have a disproportionate adverse affect on minorities and low-income populations.

J. National Technology Transfer and Advancement Act

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

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

K. Rule Effective Date and Applicability Dates

The EPA finds that there is good cause for this final action to become effective[32] and applicable either 90 or 180 days after publication, depending upon type of area, since this would afford areas time to get programs, such as conformity SIPs or redesignation requests, in

[32] See footnote 9, above.

place. The EPA believes these are reasonable periods of time to accommodate the competing interests of efficient air quality and transportation planning and prompt public health protection. The EPA has general administrative authority under section 301(a) of the CAA and 5 USC 553(d) to establish the effective date and applicability dates of a rule provided any delay in effective date or applicability dates is reasonable. ASG Industries v. Consumer Product Safety Commission, 593 F.2d 1323, 1335 (D.C. Cir. 1979). A 90- or 180 day delay in effective or applicability date for a rule where areas will have to develop various SIP emission control programs by the effective or applicability date of the rule is reasonable. See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983)(EPA's decision to grant an 8-month period between date of promulgation and effective date was reasonable where regulated entities needed time to implement controls). The longer time period for areas that are not experiencing violations is reasonable because no violations are occurring in these areas. Moreover, EPA will need additional time to take final action to redesignate areas as attainment after States submit their plans to EPA.

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days from date of publication]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects

40 CFR Part 50

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

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated:

Carol M. Browner,

Administrator.

For the reasons stated in the preamble, Parts 50 and 81 of chapter I, title 40 of the Code of Federal Regulations are revised as follows:

Part 50 - [AMENDED]

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

Authority: 42 U.S.C. 7401 et seq.

2. Section 50.9 is revised to read as follows:

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

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(b) The 1-hour standards set forth in this section will remain applicable to all areas notwithstanding the promulgation of 8-hour ozone standards under section 50.10. In addition, after the 8-hour standard has become fully enforceable under part D of title I of the CAA and subject to no further legal challenge, the 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations and classifications with respect to the 1-hour standards are codified in 40 CFR part 81.

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Part 81 - [insert Table]