6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[FRL -]

Identification of Ozone Areas Attaining the 1-Hour Standard and to Which the 1-Hour Standard is No Longer Applicable

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule

SUMMARY: On January 16, 1998, the EPA published a direct final rule (63 FR 2726) to identify ozone areas where the 1-hour standard is no longer applicable. The 60-day comment period concluded on March 17, 1998. A total of ten adverse comment letters were received in response to this direct final rule. Therefore, on March 16, 1998, the Agency published a withdrawal of the direct final rule (63 FR 12652), thus converting the direct final rule to a proposal (63 FR 2804). Independent of the comments received, the EPA identified typographical errors of certain areas listed in 40 CFR part 81. This final rule summarizes all of the comments and EPA's responses, corrects the typographical errors of certain areas, and finalizes the determination that the 1-hour standard no longer applies for specific areas identified in this final action.

EFFECTIVE DATE: This action will be effective **[insert date of publication]**.

ADDRESSES: Copies of the public comments and EPA's responses are available for inspection at the following address: Air and Radiation Docket and Information Center (6101), Attention: Docket No. A-97-42, U.S. Environmental Protection Agency, 401 M Street SW, Room M-1500, Washington, DC 20460, telephone (202) 260-7548, between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: 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 (919) 541-5246/5238. In addition, the following Regional contacts may be called for individual information regarding monitoring data and policy matters specific for each Regional Office's geographic area:

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I. Public Comments and EPA Responses

The following discussion summarizes and responds to the comments received on the direct final rule published on January 16, 1998 (63 FR 2726).

General Comment: The commenter voiced four major concerns: (1) the rule contradicts the requirements of the Clean Air Act (Act), (2) the rule uses an arbitrary and inconsistent methodology to determine where the 1-hour standard should be determined not to apply, (3) the rule discriminates against downwind areas affected by transported ozone and nitrogen oxides (NOx), and (4) the rule imposes uncertain and unfair burdens on small entities and others in southwestern Pennsylvania. The EPA should revoke the 1-hour standard everywhere, for the entire country.

Comment: The Act does not give EPA the authority to establish different standards for different areas of the

country, nor does it give EPA the authority to selectively revoke previously established standards in some areas of the country but not others.

Response: The procedure for determining that the ozone national ambient air quality standards (NAAQS) no longer applies was established in the NAAQS rulemaking promulgated in July 1997. Since the rule for the new ozone NAAQS has been promulgated, effective September 16, 1997, (62 FR 38856, July 18, 1997), it is too late to raise issues in this rulemaking concerning the continued applicability of the 1-hour ozone standard to areas not attaining that standard.

Comment: Although southwestern Pennsylvania attained the 1-hour standard for 6 straight years from 1989 through 1994, EPA refused to redesignate the region because of a dispute with the Commonwealth of Pennsylvania over whether the other requirements for redesignation had been met. When the Growth Alliance challenged EPA's illegal delay in acting on Pennsylvania's request to redesignate the region and its inappropriate consideration of 1995 emission data, EPA asserted that it would refuse to redesignate the region regardless of the decision about the appropriate air quality data to use because of the other requirements for redesignation. By revoking the standard in areas that may

not have met the requirements for redesignation, EPA is now attempting to circumvent the same requirements of the Act that it has previously been so adamant to enforce in southwestern Pennsylvania.

Response: On May 1, 1996, EPA disapproved the Commonwealth of Pennsylvania's request that EPA redesignate the Pittsburgh nonattainment area to attainment for ozone because the area violated the 1-hour ozone NAAQS and did not meet other Act requirements for redesignation (61 FR 19193). This decision was challenged. In an opinion filed on July 28, 1997, the U.S. Court of Appeals for the Third Circuit denied the Southwestern Pennsylvania Growth Alliance's petition for review and upheld EPA's decisions to disapprove Pennsylvania's redesignation request for the Pittsburgh area. Furthermore, the Pittsburgh area was not in attainment for 6 straight years. Compliance with the ozone NAAQS is determined using 3 consecutive years of data to account for year-to-year variations in emissions and meteorological conditions. The area first had air quality data that met the NAAQS in 1992, considering the years 1990-1992, and continued to meet the standard in 1993 and 1994. Then, in 1995, the area once again violated the NAAQS. The area continues to be out of compliance with the 1-hour ozone NAAQS.

As this action is not a redesignation, but rather a determination that the 1-hour NAAQS no longer applies to certain areas, pursuant to the regulations promulgated in July 1997 as part of the rulemaking regarding the ozone NAAQS, the redesignation requirements of section 107(d)(3)(E) do not apply to this action. This action is not an attempt to circumvent the requirements of redesignation, but instead simply follows the regulations previously adopted by EPA.

Comment: There is a pending suit which challenges EPA's ability to redesignate upwind areas to attainment when their States have not complied with the requirements of section 110(a)(2)(D) of the Act, which requires that every State impose emission controls sufficient to prevent negative impacts on downwind areas. By revoking the 1-hour standard in areas that have attained it, but not requiring that the other requirements for redesignation be met, EPA appears to be attempting to escape a potentially adverse ruling.

Response: The Agency views the process of determining where the 1-hour standard no longer applies as not being subject to the requirements for redesignation. The regulations adopted by EPA that govern this process set forth only one criterion - attainment of the 1-hour standard. Section 110(a)(2)(D) continues to apply to upwind States regardless

of the applicability of the 1-hour standard to areas in those States. Therefore, a determination that the 1-hour standard does not apply in an upwind State has no bearing on the obligation of such a State to satisfy the requirements of section 110(a)(2)(D) as to any significant contribution from sources in that State to a downwind area that is not attaining the 1-hour NAAQS. This action is not an attempt to avoid any potentially adverse court ruling but is simply the carrying out of the regulations promulgated in July 1997.

Comment: This method arbitrarily selects the 1994-1996 period of time to determine where the 1-hour standard will be revoked; an area that happens to experience meteorological conditions that were favorable for ozone during 1996 or early 1997 would be doomed to remain subject to the 1-hour standard, while an area that experienced the same meteorological conditions a year later would not. This arbitrariness is particularly unfair because a violation can occur at a particular time, not because of an inappropriate level of emissions, but because of variations in weather and temperature.

Response: The 1994-1996 period was chosen because it was the most recent 3-year period that existed at the time of this rule for which EPA and the States had complete data.

Attainment of the ozone NAAQS is determined using 3 consecutive years of data to account for variations in meteorological conditions, as well as variations in volatile organic compounds (VOC) and NOx emissions. The Ozone NAAQS is designed to take into account such variations. Since EPA cannot control the weather, it must control levels of ozone in the breathable air by controlling the concentration of NOx and VOC in the air. EPA's goal is to ensure that everyone is breathing healthy air, regardless of the weather. Later periods will be used in future actions. For instance, on May 18, 1998, the Agency proposed that the 1-hour standard would no longer apply in 6 additional ozone areas based upon 1995-1997 air quality data (63 FR 27247).

Comment: The EPA is removing the standard in some areas, not because there are no violations of the ozone standard, but because there are no ozone monitors to measure ozone. This discriminates against areas that have more ozone monitors.

Response: The Agency has in place procedures to review all past monitoring and sources that contribute to violations, thus enabling the Agency to locate monitors in areas that are likely to violate. The EPA believes that the monitoring network in place for the 1-hour ozone standard adequately represents the Nation's air quality. Using past air quality

monitoring and modeling data, EPA has located monitors in areas where violations of the 1-hour standard are likely to occur and has not located monitors in areas where the likelihood of violation is low. The design of the ozone network can be found in 40 CFR Part 58.

Comment: The EPA is proposing to revoke the 1-hour standard in upwind areas, while leaving it in place in downwind areas, despite the fact that it has been proven to be impossible for downwind areas to attain the 1-hour standard without additional emission controls in upwind areas. The EPA has failed to enforce section 110(a)(2)(D) which requires that every State impose emission controls sufficient to prevent negative impacts on downwind areas.

Response: The EPA is addressing this issue in the Eastern United States through the NOx State implementation call (SIP) call, which EPA has proposed (62 FR 60318, November 7, 1997). The proposal would place uniform controls for NOx emissions in large geographic upwind areas that contain both attainment and nonattainment areas. The controls would reduce NOx emissions and, as a result, ozone levels. The EPA has also been petitioned, under section 126(b) of the Act, to place controls on upwind stationary sources of NOx emissions. More generally, it should be noted that upwind sources are subject to section 110(a)(2)(D) regardless of

whether the 1-hour standard continues to apply to them. Accordingly, a determination that the 1-hour standard does not apply to upwind areas does not preclude additional reductions in the upwind areas.

Comment: The NOx SIP call will not be in effect until, at the earliest, 2002; southwestern Pennsylvania will continue to suffer from the effects of transported pollution for at least 5 additional years. As a result, under the methodology that EPA has proposed, it is unlikely that the 1-hour standard could be revoked for southwestern Pennsylvania or other areas of the country that are affected by transport until well into the 21st century.

Response: The Agency acknowledges that some areas will remain in nonattainment and subject to the 1-hour standard. Under the Act, areas are designated nonattainment as long as their air quality fails to meet the NAAQS, even if they are the victims of transport from upwind areas that may be designated attainment. The EPA is continuing this approach even when the 1-hour standard ceases to apply for areas that are attaining, but EPA is not thereby creating any inequities.

Comment: Photochemical modeling conducted for southwestern Pennsylvania and approved by EPA demonstrated that even if all manmade emissions in southwestern Pennsylvania were

eliminated the Pittsburgh area would still experience exceedances of the 1-hour standard.

Response: The EPA has completed a preliminary review of the submitted modeling but has not issued any formal approval or disapproval. The modeling for Pittsburgh suggests that the area's air quality is affected by transport, but that manmade emissions from the Pittsburgh area also contribute to the area’s nonattainment problem.

Comment: The continuation of the standard in southwestern Pennsylvania means that this region will be bumped up to a serious nonattainment designation and be subject to additional controls during 1998.

Response: According to section 181(b)(2), if a nonattainment area fails to meet it attainment date, then the nonattainment area is subject to bump-up to the next higher classification. The Agency is considering administrative mechanisms to soften the regulatory burden that may be imposed on areas affected by overwhelming transport.

Comment: It is impossible to determine exactly how the rule will affect any area or entity because EPA has not stated what the implications of the rule will be. In other words, even EPA does not yet know what the implications of its rule are, so it is impossible for it to certify that the rule

will not have a significant impact on a substantial number of small entities.

Response: The Regulatory Flexibility Act (RFA), 5 U.S.C. 601(a), provides that whenever an agency is required to publish a general notice of rulemaking, it must prepare and make available a RFA. An RFA is required only for small entities that are directly regulated by the rule (see Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985)). Determining that the 1-hour standard ceases to apply does not subject any entities to additional requirements. Accordingly, the Administrator is justified in certifying that the rule will not have a significant economic impact on a substantial number of small entities.

Comment: This new regulation will arbitrarily and inappropriately harm southwestern Pennsylvania by imposing a stricter ozone standard in our region than in any other community within 200 miles and by forcing southwestern Pennsylvania businesses to unnecessarily suffer higher regulatory costs than businesses in areas to our south and west. The rule will have potentially serious negative impacts on both air quality and economic development in our region.

Response: The Agency acknowledges that some areas will remain in nonattainment and subject to the 1-hour standard

regardless of the determination that the 1-hour standard ceases to apply elsewhere. Under the Act, areas are designated nonattainment as long as their air quality fails to meet the NAAQS. The goal of the Act, and the goal of EPA in implementing it, is to ensure that everyone is breathing healthy air. The Agency is examining administrative ways of reducing the regulatory burden that may be imposed on areas affected by overwhelming transport. It should also be noted that southwestern Pennsylvania would remain subject to controls under section 184 as part of the Ozone Transport Region (OTR) even if the 1-hour standard ceased to apply for the area.

Comment: The commenter believes that the 1994-1996 data set used for purposes of revoking the 1-hour NAAQS is appropriate because the revisions to the NAAQS occurred in July 1997, and all moderate and lower classified areas should have recorded no violations for the 1994-1996 timeframe. Thus, the commenter urges EPA not to revoke the 1-hour NAAQS based on a data set that includes 1997.

Response: The EPA intends to determine that the 1-hour standard ceases to apply for areas that attain the 1-hour NAAQS on an annual basis in an effort to transition from the 1-hour standard to the new 8-hour standard. Consequently, on May 18, 1998, EPA published a proposal to determine that

the 1-hour NAAQS no longer applies to a number of areas based on complete, quality-assured air monitoring data for the timeframe 1995-1997 (63 FR 27247). Subsequently, such determinations will be based on the most recent 3 years of complete, quality-assured monitoring data, i.e., 1999 determinations will be based on 1996-1998 monitoring data, etc. The commenters' rationale for limiting determinations to 1994-1996 monitoring data is unclear given the purpose of this and similar subsequent actions in transitioning to the new 8-hour ozone standard.

Comment: The EPA has failed to consider data collected from earlier periods which is "most recent" for some areas. During 1991, data which were collected as part of the Lake Michigan Ozone Study support maintaining applicability of the 1-hour standard for several counties in Michigan, namely Benzie, Delta and Oceana. The commenter provides 1991 data from these three counties: Benzie County - 3 exceedances in 1991; Delta County - 2 exceedances in 1991; and Oceana County - 4 exceedances in 1991.

Response: The EPA is making these determinations based on areas having air quality meeting the 1-hour standard. The 1994-96 average expected exceedance in Benzie County was 0.3 with 3 years of complete data. Therefore, Benzie County is clearly measuring attainment and for this reason, EPA is

determining that the 1-hour standard no longer applies.

Delta County had 2 exceedances in 1991 and no data at that monitor since. Since the monitor recorded less than 3.2 total number of estimated exceedances over a 3 year period, there is no violation. Furthermore, another monitor in the county had 2 years of data in 1992 and 1993 with no exceedances. Therefore, the 1-hour standard no longer applies to Delta County.

Oceana County had 4 exceedances of the 1-hour ozone standard in 1991 and has collected no data since. This was a clear violation of the 1-hour standard. In addition, the two monitors immediately to the south and north of Oceana County– Muskegon County and Mason County, respectively, currently monitor violations of the 1-hour standard. For these reasons, EPA believes that there is a strong likelihood that the air quality in Oceana County continues to violate the one-hour standard. Thus, the 1-hour standard will still apply in Oceana County.

Comment: The commenter states that air quality data alone are insufficient to determine attainment since Congress mandated redesignation requirements in section 107(d)(3)(E) of the Act. It is imperative that areas designated nonattainment meet these requirements before revocation of

the 1-hour NAAQS, including an attainment demonstration with fully implemented rules and section 110(k)(5) issues addressed.

Response: The criteria used to redesignate areas from nonattainment to attainment mandated by Congress are in section 107(d)(3)(E) of the Act. The first criteria is to demonstrate attainment of the NAAQS. For ozone, ambient air quality data have been used exclusively to demonstrate actual attainment of the ozone standard to meet the first criteria for redesignation. The other redesignation requirements of section 107(d)(3)(E) are to ensure that the measures that contributed to attainment of the NAAQS remain in place, that a level of emissions is established that would ensure continued maintenance of the NAAQS, and that a contingency plan is in place in the event the NAAQS is violated in the future. A determination that the 1-hour standard no longer applies is intended, in part, to be a process to transition to the newly promulgated 8-hour ozone standard for which EPA will designate areas in 2000. Thus, requiring areas to satisfy the other redesignation requirements in light of a new standard is not practical since their purpose is to continue maintenance of the 1-hour standard.

Comment: Any areas covered by EPA's NOx SIP call need to

take action to mitigate interstate transport of ozone. Consequently, the commenter urges EPA to withdraw dropping the 1-hour NAAQS in these States. Furthermore, EPA should withdraw dropping the 1-hour NAAQS in States that have been shown to contribute to ozone transport such as Texas, Louisiana, and Arkansas.

Response: The EPA believes it is not a question as to whether or not the 1-hour standard applies, but that areas significantly contributing to transport must take action to mitigate such effects. The EPA proposed to apply the NOx SIP call (62 FR 60318, November 7, 1997) to the appropriate States regardless of designations with respect to the 1-hour standard within these States. The SIP call is based on one of the general provisions of the Act, section 110(a)(2)(D)(I), which requires that a SIP be designed so that emissions from a State do not contribute significantly to nonattainment or interfere with maintenance of any primary or secondary NAAQS. Therefore, whether or not to continue the 1-hour standard in these States will have no effect on the impact of the NOx SIP call. Determining that the 1-hour NAAQS does not apply for a State subject to the proposed NOx SIP call has no effect on that State's responsibility to respond to the SIP call. The November 7, 1997, proposal indicates that the NOx reductions will reduce

ozone transport and, consequently, contribute toward attainment of the 1- and 8-hour standards. It should also be noted that in the proposed NOx SIP call, EPA proposed to determine that Louisiana, Arkansas and Texas do not contribute significantly to nonattainment or maintenance problems downwind.

Comment: The commenter objects to the EPA's proposal to revoke the 1-hour NAAQS in portions of the Consolidated Metropolitan Statistical Areas (CMSAs) of Evansville-Henderson, Indiana-Kentucky, Grand Rapids-Muskegon-Holland, Michigan, and Longview, Texas. Since EPA has determined that the 1-hour NAAQS remains applicable in other portions of these CMSAs (Warrick, Indiana; Muskegon, Michigan; and Gregg, Texas), the NAAQS should remain applicable to the entire CMSA. The CMSAs are identified as follows: Posey, Warrick, Henderson and Vanderburgh Counties in the Evansville-Henderson, Indiana-Kentucky CMSA; Ottawa, Muskegon, Kent and Allegan Counties in the Grand Rapids-Muskegon-Holland, Michigan CMSA; and Gregg, Harrison and Upshur County in the Longview, Texas CMSA.

Response: The geographic boundaries of the area for which the 1-hour standard no longer applies is based upon the established nonattainment/attainment area boundaries. Default CMSA boundaries are not mandatory for moderate and

lower-classified areas for SIP planning purposes, but instead are discretionary and based upon many factors. With respect to the Evansville-Henderson, Indiana-Kentucky area, at the time of the 1991 designations, the EPA agreed with the State of Indiana to limit the nonattainment area to Vanderburgh County due to the lack of valid ambient monitoring data showing violations of the 1-hour standard.

The EPA is not determining that the 1-hour standard no longer applies for the Grand Rapids-Muskegon-Holland area in today's action. Furthermore, when the current designations were promulgated in 1991, the EPA based them on the most recent MSA-CMSA information available from the Census Bureau at that time. As a result, the Grand Rapids area, Muskegon area and Allegan County (Holland) were designated as separate areas. More recent census information merges these three areas into one. However, EPA believes that it is neither appropriate nor necessary to change its treatment of these areas at this time. Nonattainment area boundaries may be redefined with designations based on the new 8-hour ozone NAAQS. Therefore, when Grand Rapids (Kent and Ottawa Counties), Muskegon County or Allegan County have air quality meeting the 1-hour ozone NAAQS, then they will qualify separately for a determination that the 1-hour standard no longer applies.

The Tyler/Longview area presents a unique situation to the Agency. Although the Gregg County ozone monitor recorded a violation of the ozone standard in 1995, EPA did not take action to designate the area nonattainment. Instead, a Flexible Attainment Region Memorandum of Agreement (MOA) was developed for five counties in the Tyler/Longview area. This MOA requires that additional ozone control strategies be put in place to reduce ambient ozone levels. The only ozone monitor present in this region operates in Gregg County. Since the Tyler/Longview CMSA is considered to be in attainment with respect to the 1-hour ozone standard, the 1-hour ozone standard will only apply to the county with the monitored violation. However, even though Upshur, Harrison, Smith and Rusk Counties are no longer required to meet the 1-hour standard under this approach, these counties must continue to meet the ozone control strategy outlined in the MOA.

Comment: The commenter is troubled by EPA's labeling of areas as attainment for the 1-hour standard where the 1-hour standard is still applicable. Instead, areas such as Grand Rapids-Muskegon-Holland and Detroit-Ann Arbor should be bumped-up to serious. LaPorte, Indiana should be included in the Chicago-Gary nonattainment area and designated severe-17.

Response: Again, the purpose of today's notice is not to designate, reclassify or bump-up areas for the 1-hour standard but to transition into the new 8-hour NAAQS by determining the nonapplicability of the 1-hour NAAQS in areas that have air quality meeting the 1-hour standard in recent years. The Detroit-Ann Arbor area (Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne Counties) and the Grand Rapids area (Kent and Ottawa Counties) satisfied the section 107(d)(3)(E) requirements and were redesignated to attainment by notices dated March 7, 1995 and June 21, 1996, respectively. One of the redesignation requirements is that the area demonstrate attainment of the 1-hour standard. Furthermore, as previously discussed, the Grand Rapids area consists of Kent and Ottawa Counties and does not include Muskegon and Allegan Counties. Moreover based on 1995-1997 data showing attainment of the 1-hour standard, EPA has proposed a determination that the 1-hour standard should no longer apply to the Grand Rapids and Detroit areas (63 FR 27247, May 18, 1998). Finally, LaPorte, Indiana, was not designated with the original 1991 designations since it did not have data showing a violation of the 1-hour standard and the area was and is not part of the Chicago CMSA.

Comment: The commenters requested that eastern Kern County be included in the list of areas attaining the 1-hour ozone

standard and to which the 1-hour standard is no longer applicable. They contend that, in 1991, EPA erroneously included eastern Kern County in the San Joaquin Valley serious nonattainment area when it should have been excluded as a rural portion of the Metropolitan Statistical Area (MSA); that eastern Kern County is now under the jurisdiction of the Kern County Air Pollution Control District while western Kern County and the rest of the San Joaquin Valley nonattainment area is under the jurisdiction of the San Joaquin Valley Unified Air Pollution Control District; and that ambient air quality monitoring data show that eastern Kern County meets the 1-hour ozone standard.

Response: This comment involves two issues: a change to the nonattainment area boundary originally established in 1991, and a finding that eastern Kern County is not violating the 1-hour ozone standard. Both issues are outside the scope of this rulemaking.

Furthermore, with respect to the question of whether or not eastern Kern County is violating the 1-hour ozone standard, there are monitoring data indicating that eastern Kern County is in fact violating the 1-hour ozone standard. In EPA's review of Aerometric Information Retrieval System data, we found that two exceedances of the 1-hour standard were registered at the Tehachapi monitoring station which operated only during 1995. These exceedances indicate that

eastern Kern County is in violation of the 1-hour standard. The California Air Resources Board, in a March 9, 1998 letter to the Department of the Navy, confirmed that these "exceedances indicate that [eastern Kern County] has not demonstrated compliance with the one-hour ozone standard."

Comment: The commenters urged EPA to revise its proposal so that the 1-hour standard either is retained for the entire Nation or revoked in all designated attainment and maintenance areas. They believe that EPA's proposal leads to unfair treatment of the San Francisco Bay Area, a maintenance area that is currently proposed for redesignation to nonattainment of the 1-hour ozone standard. They contend that the EPA incorrectly interpreted the President's "Implementation Plan for Revised Air Quality Standards" (Plan) with regard to identification of areas to which the 1-hour ozone standard will cease to apply. They believe that the President directed EPA to revoke the one-hour standard for all existing maintenance areas and nonattainment areas that have attained the standard, emphasizing that the revocation should apply, regardless of current air quality, if at some point in the past EPA determined the area to be attaining and redesignated the area to attainment. They interpret the Plan's requirement that areas be "not violating" or "meeting" the standard (in the present tense) as referring only to designated

nonattainment areas.

Response: The EPA is following the clear language of 40 CFR 50.9(b), which provides that the 1-hour standard no longer applies “once EPA determines that the area has air quality meeting the 1-hour standard.” This language clearly states that an area is to have air quality meeting the standard at the time of the determination. Second, EPA disagrees that the memorandum called for EPA to determine the nonapplicability of the 1-hour ozone standard for all areas currently designated as maintenance or attainment areas. The Memorandum clearly indicates that current air quality should be the basis of EPA’s determination in all areas, not just designated nonattainment areas. The introductory paragraph of the section in the Memorandum labeled "Phase-out of 1-hour standard" states that "the 1-hour standard will continue to apply to areas not attaining it" (62 FR 38424). The use of the term "attaining" refers to an area’s air quality relative to the standard and not to an area’s current designation under the Act section 107. This is clarified later when the Memorandum states that "for areas where the air quality does not currently attain the 1-hour standard, the 1-hour standard will continue in effect" (62 FR 38424). The EPA’s action to determine the nonapplicability of the 1-hour standard only in areas whose air quality shows that they are not currently violating the

standard is consistent with the Memorandum and follows the language of 40 CFR 50.9(b), which EPA must do. Because the San Francisco Bay Area monitoring data show that the area is currently violating the 1-hour ozone standard, it is not eligible to be included in the list of areas to which the 1-hour standard no longer applies.

Comment: Retention of the 1-hour standard in maintenance and attainment areas will not promote early attainment of the new 8-hour standard.

Response: The Agency is retaining the 1-hour NAAQS for the San Francisco Bay Area, not because it may facilitate attainment of the 8-hour NAAQS, but because the area is currently violating the 1-hour NAAQS. The Agency believes that progress toward meeting the 1-hour NAAQS will contribute to attainment of the 8-hour NAAQS prior to the due date of the SIP for the 8-hour NAAQS. The decision to retain the 1-hour standard was explained when the Agency promulgated the ozone NAAQS on July 18, 1997 and issued

guidance for implementing the 1-hour ozone and pre-existing particulate matter (PM-10) NAAQS on December 29, 1997.

Comment: A number of commenters, contend that EPA does not have the legal authority to determine that the 1-hour ozone NAAQS no longer applies to an area without satisfying the requirements of section 107(d)(3)(E) for redesignation to

attainment, including the requirement of an approved maintenance plan under section 175A. The commenters further contend that even if EPA had the legal authority to remove the nonattainment designation of areas as it has proposed, its action would be unlawful since it is arbitrary and capricious, an abuse of discretion and is procedurally flawed.

Response: The EPA's authority for this action is based on the regulatory provisions adopted when it promulgated the 8-hour ozone NAAQS in July 1997 (62 FR 38856 (July 18, 1997)). Those regulations, in 40 CFR 50.9(b), provide that the "1-hour standard 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." Those regulations specify a single criterion for the revocation of the standard--the determination by EPA that an area has air quality meeting the 1-hour standard. The EPA believes that is the only criterion that may be applied in this rulemaking, and that it has been satisfied in the case of all the areas covered by this action. This view is made clear by the memorandum from President Clinton to the Administrator outlining a strategy for implementing the revised PM and ozone NAAQS that was published on the same day as the revised NAAQS (62 FR 38421 (July 18, 1997)). That memorandum stated that "to streamline the process and minimize the burden on existing

nonattainment areas, the 1-hour standard will cease to apply to an area upon a determination by the EPA that an area has attained air quality that meets the 1-hour standard. In light of the implementation of the new 8-hour standard, which is more stringent than the existing 1-hour standard, States will not have to prepare maintenance plans for those areas that attain the 1-hour standard" (62 FR 38424 (July 18, 1997)). Thus, it was abundantly clear when EPA promulgated the regulation, on which today's action is based, that it would not be requiring maintenance plans as a prerequisite to its determination that the 1-hour standard no longer applies. In essence, the commenters' complaint, properly viewed, is not with the action being taken at this time, but with the regulatory provision on which this action is based. That regulation was promulgated in July 1997, however, and the commenters' attempt to raise these issues at this point is simply too late. Moreover, EPA is not bound to follow the provisions of section 107(d)(3)(E) when a NAAQS has been revised and the NAAQS on which a nonattainment designation was based has been replaced by a new NAAQS, whose implementation will supersede the implementation of the old NAAQS. As for the fact that certain areas will still be subject to conformity, while others will not, that is simply a consequence of the conformity provisions of the statute, which make it

applicable only to areas that are designated nonattainment or that have maintenance plans approved under section 175A. Such a result is not arbitrary or capricious nor an abuse of discretion. Any areas that do violate the new ozone NAAQS will be designated nonattainment for that NAAQS and subjected to conformity requirements at that time.

Similarly, the commenters' contention that this action is procedurally flawed because it does not conform to a proposed policy published in the Federal Register in December 1996 is erroneous. The rule finalized in this action is being taken pursuant to 40 CFR 50.9(b), which was promulgated after the proposed policy referred to by the commenters was published. That proposed policy was not the proposal on which this final action is based, and the reason it is not being followed here was evident in the proposal that did underlie this action--the existence of 40 CFR 50.9(b).

Comment: The commenters questioned the Agency's authority and the basis for retaining the 1-hour standard. They oppose the imposition of two ozone standards.

Response: These issues were dealt with in the final promulgation of the ozone NAAQS (62 FR 38856) on July 18, 1997. Specifically, EPA discussed its basis for retaining the one-hour standard at (62 FR 38885). Consequently, the commenters' attempt to raise these issues in this

rulemaking, which simply carries out the provisions of 40 CFR 50.9(b), is too late.

Comment: The commenters question whether the Act provides EPA the authority to reclassify areas from "nonattainment" to "not applicable" when section 107(d)(1) of the Act only provides for designations of "nonattainment," "attainment," and "unclassifiable."

Response: The Agency is not altering designations, per se, rather the Agency is determining the nonapplicability of the 1-hour standard in areas attaining the 1-hour NAAQS and is applying the term "Not Applicable" to so indicate.

II. Discovered Errors in 40 CFR Part 81 Ozone Table

Alabama

The EPA recognized that the county of "Cherokee" was inadvertently omitted from the January 16, 1998 notice. Therefore, part 81 for ozone has been amended to reflect this correction.

Alaska

The EPA recognized that the Boroughs of "Denali" and "Lake and Peninsula" were inadvertently omitted from the January 16, 1998 notice, under AQCR 9 and AQCR 10, respectively. Therefore, part 81 for ozone has been amended to reflect these corrections.

California

The EPA recognized that the county of "Santa Clara" was

incorrectly spelled as “San Clara” in the January 16, 1998 notice. In addition, the description for Sonoma County (part) was inadvertedly omitted and has been added. Therefore, part 81 for ozone has been amended to reflect these corrections.

Mississippi

The EPA recognized that the county of “De Soto” was incorrectly spelled as “DeSota” in the January 16, 1998 notice. Therefore, part 81 for ozone has been amended to reflect this correction.

Puerto Rico

The EPA recognized that four municipios in Puerto Rico listed in the January 16, 1998 notice were incorrectly spelled. Specifically, “Caba Rojo Municipio” should be corrected to read “Cabo Rojo Municipio”; “Coama Municipio” should be corrected to read “Coamo Municipio”; “Comeria Municipio” should be corrected to read “Comerio Municipio”; “Trujilla Alto Municipio” should be corrected to read “Trujillo Alto Municipio”. Therefore, part 81 for ozone has been amended to reflect these corrections.

South Carolina

The EPA recognized that two of the South Carolina counties listed in the January 16, 1998 notice were incorrectly spelled. Specifically, “Manon County” should be corrected to read “Marion County” and that “Saloda County” be

corrected to read “Saluda County.” Therefore, part 81 for ozone has been amended to reflect these corrections.

III. Final Rulemaking Action

The ozone tables codified in today’s action are significantly different from the ozone tables now included in 40 CFR part 81. The current 40 CFR part 81 designation listings (revised as of November 6, 1991) include, by State and NAAQS pollutant, a brief description of areas within the State and their respective designation. Today’s action includes completely new tables for ozone which indicate areas where the 1-hour standard no longer applies, as well as where the 1-hour standard remains in effect. Also, the ozone tables codified today include the corrections from the proposed rulemaking noted above in Section II. Discovered Errors in 40 CFR Part 81 Ozone Table.

IV. Other Regulatory Requirements

A. Executive Order 12866

The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

B. Rule Effective Date

The EPA finds that there is good cause for this action to become effective immediately upon publication because a delayed effective date is unnecessary due to the nature of this action, which is a determination that the 1-hour ozone standard no longer applies. The immediate effective date

for this action is authorized under both 5 U.S.C. 553 (d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction" and section 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule."

C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S. C. 601 et seql, 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 rule will not have a significant impact on a substantial number of small entities, because the determination that the 1-hour standard ceases to apply does not subject any entities to any additional requirements .

D. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), EPA must prepare a budgetary impact

statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under Section 205, EPA must select the most cost effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that today's approval action, as promulgated, would not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate or to the private sector. This Federal action imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

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. 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 preceedings to enforce its requirements (see section 307(b)(2)).

G. Applicability of Executive Order (E.O.) 13045

On April 21, 1997, the President signed an Executive Order (13045) entitled "Protection of Children from Environmental Health Risks and Safety Risks." This is the primary directive to Federal agencies and departments that Federal health and safety standards now must include an evaluation of the health or safety effects of the planned regulation on children. For rules subject to the Executive Order, agencies are further required to issue an explanation as to why the planned regulation is preferable to other

potentially effective and reasonable feasible alternatives considered by the Agency.

This final rule is not subject to E.O. 13045, entitled “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by E.O. 12866, and it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

List of Subjects in 40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

_____ Dated

_____
Carol M. Browner
Administrator

For the reasons set out in the preamble, title 40, chapter 1 of the code of Federal Regulations is amended as follows:

Part 81-[Amended]

(Insert Revised Table)