ORAL ARGUMENT SCHEDULED FOR MAY 12, 2011

No. 10-1056

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF A GUIDANCE DOCUMENT ISSUED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF RESPONDENT

January 7, 2011

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent United States Environmental Protection Agency ("EPA") provides the following information.

A. Parties, Intervenors and Amici

All parties, intervenors and amici are listed in the Petitioner's Brief.

B. Rulings Under Review

NRDC seeks review of a document entitled "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS" ("Guidance") issued by EPA on January 5, 2010.

C. Related Cases

EPA is unaware of any related cases.

/s/ Stephanie J. Talbert
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Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

Act	The Clean Air Act, 42 U.S.C. §§ 7410 et seq.
APA	The Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.
Attainment Alternative	An alternative to the Section 185 fee program described in the Guidance that would deem a State's current implementation plan for a particular nonattainment area an equivalent alternative to the Section 185 fee program because the nonattainment area has achieved attainment with either the one-hour or the eight-hour standard.
CAA	The Clean Air Act, 42 U.S.C. §§ 7410 et seq.
Committee	The Clean Air Act Advisory Committee
Eight-Hour Standard	The national ambient air quality standard limiting daily maximum eight-hour ozone concentrations to 0.08 parts per million. See 40 C.F.R. § 50.10(a).
EPA	The Environmental Protection Agency
Former One-Hour Nonattainment Area	Area designated by EPA as failing to meet the one-hour ozone national ambient air quality standard. Such designations were revoked when EPA revoked the one-hour ozone national ambient air quality standard in 2004.
Guidance	Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, EPA, to Regional Air Division Directors, Regions I-X, EPA, "Guidance for Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS." (January 5, 2010).

Implementation Plan	State Implementation Plan. A plan prepared by a State, and submitted to EPA for approval, that identifies the controls and programs the State will use to timely attain and maintain national ambient air quality standards.
NAAQS	National Ambient Air Quality Standard. Also referred to as "standards."
Nonattainment Area	An area designated by EPA as failing to meet a national ambient air quality standard.
One-Hour Standard	The national ambient air quality standard limiting maximum hourly average ozone concentrations to 0.12 parts per million. See 40 C.F.R. § 50.9(a).
Program Alternatives	Alternative programs to the Section 185 fee program described in the Guidance that would achieve equal emissions reductions or raise the same amount of revenue as the Section 185 fee program would, or a combination of both.
Section 172(e)	A Clean Air Act anti-backsliding provision. 42 U.S.C. § 7502(e).
Section 185 Fee Program	A control measure provided by the Clean Air Act that requires each major stationary source of volatile organic compounds and nitrogen oxides located in a "severe" or "extreme" nonattainment area to pay a fee to the State for emissions above a baseline amount for each calendar year following the nonattainment year until the area is redesignated as an attainment area for ozone.
Subpart 1	Subpart 1 of part D of title I of the Clean Air Act, 42 U.S.C. §§ 7501-7509a.
Subpart 2	Subpart 2 of part D of title I of the Clean Air Act, 42 U.S.C. §§ 7511-7511f.

2004 Rule	A rule promulgated by EPA in 2004 that revoked the one-hour standard for ozone and replaced it with a more stringent eight-hour standard. See National Ambient Air Quality Standard for Ozone, 69 Fed. Reg. 23,951 (Apr. 30, 2004) (codified at 40 C.F.R. § 50.9(b)).

JURISDICTIONAL STATEMENT

(A) Agency: Petitioner Natural Resources Defense Council ("NRDC") correctly states that Respondent Environmental Protection Agency ("EPA") has jurisdiction to prescribe such regulations as are necessary to carry out its functions under the federal Clean Air Act ("CAA"). 42 U.S.C. § 7601(a)(1). However, NRDC is not challenging a regulation. NRDC seeks review of a document entitled "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS" ("Guidance") issued by EPA on January 5, 2010.

(B) Court of Appeals: NRDC correctly states that this Court has jurisdiction to review final actions taken by EPA under the CAA. 42 U.S.C. § 7607(b)(1). However, the Guidance is not a final agency action. Additionally, the Guidance is not ripe for review, and NRDC lacks standing to challenge the Guidance. Accordingly, this Court lacks jurisdiction to hear the petition.

(C) Timeliness: If the Guidance constituted a final agency action and were ripe for review, NRDC's petition would be timely. However, the Guidance is not a final agency action or ripe for review. NRDC will have the opportunity to raise all of the arguments raised in its brief if and when EPA takes final agency action through notice-and-comment rulemaking regarding individual States' implementation plan revisions as anticipated in the Guidance.

STATUTES AND REGULATIONS

Except for 40 C.F.R. §§ 50.9, 50.10 and Part 51, Subpart X, and 42 U.S.C. §§ 7408-7410, which appear in an addendum to this brief, all applicable statutes and regulations are contained in the Addendum to the Opening Brief of Natural Resources Defense Council.

STATEMENT OF ISSUES

1. Whether the Court lacks subject matter jurisdiction over this petition for review, on the grounds of finality, ripeness, and standing, due to the clearly interlocutory and non-binding nature of the Guidance.
2. Whether, even if the Court reaches Petitioner's procedural claims, those claims nonetheless fail because the Guidance is not a legislative rule subject to the notice-and-comment procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553.
3. Whether, even if the Court reaches Petitioner's substantive claims, those claims nonetheless fail because EPA's interpretation of its authority under CAA section 172(e), 42 U.S.C. § 7502(e), to accept implementation plan submissions that include equivalent alternatives to the fee program found in CAA section 185, id. § 7511d, is reasonable.

STATEMENT OF FACTS

The Clean Air Act controls air pollution through a system of shared federal and state responsibility. The Act requires EPA to establish, review, and revise national ambient air quality standards ("standards") for certain common air pollutants. 42 U.S.C. §§ 7408-7409. "Primary" standards protect against adverse effects of these pollutants on public health and "secondary" standards (not implicated here) protect the public welfare. Id. § 7409(a)-(b). Once EPA establishes a new or revised standard, it is implemented through a complex scheme in which areas that do not meet the standard are first designated nonattainment, then classified based upon the area's level of pollution, where appropriate, and given dates by which to attain the standard. Id. §§ 7502(a), 7511(a).

EPA promulgated a one-hour standard for ozone in 1971, and designated as nonattainment areas that did not timely attain that standard. In 1997, however, EPA established a more protective standard based on averaging ozone levels over eight hours. Because the eight-hour standard is more protective than the old one-hour standard, EPA revoked the one-hour standard and the corresponding one-hour nonattainment designations in 2004 ("2004 Rule"), making the only effective standard for ozone the eight-hour standard. National Ambient Air Quality Standard for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 C.F.R. §§ 50.9, 50.10); 69 Fed. Reg. 23,951 (Apr. 30, 2004) (codified at 40 C.F.R.

§ 50.9(b)). This Court upheld EPA's authority to revoke the one-hour standard, as long as EPA introduced adequate provisions to prevent deterioration of air quality, or "backsliding," in South Coast Air Quality Management District v. EPA (South Coast), 472 F.3d 882, 899, 903 (D.C. Cir. 2006), clarified and rehearing denied, 489 F.3d 1245 (D.C. Cir. 2007), cert. denied, 552 U.S. 1140 (2008).

The CAA establishes specific pollution reduction controls and other programs that apply to ozone nonattainment areas, depending partly upon the area's classification and corresponding attainment date. See, e.g., 42 U.S.C. §§ 7511-7511f. Section 110 generally calls on States to impose such controls and programs to attain and maintain the standard through State Implementation Plans ("implementation plans"). Id. § 7410. Under the implementation plan process, States develop, for EPA's approval, plans that set forth required pollution control measures and other programs States will use to timely attain the standard. See 42 U.S.C. §§ 7410(a), 7502(b), 7511(a). For areas designated nonattainment for ozone, the Act imposes additional specific control obligations that must be included in the implementation plan, with more such controls required in areas with more serious pollution problems. Id. § 7511a.

Section 185 prescribes one such control measure for ozone. Id. § 7511d. See also South Coast, 472 F.3d at 903. Specifically, it provides that when a nonattainment area classified "severe" or "extreme" fails to attain the ozone

standard by the required date, the implementation plan must require each major stationary source of volatile organic compounds and nitrogen oxides located in such area to pay a fee to the State for emissions above a "baseline amount" for each calendar year following the nonattainment year; that obligation continues "until the area is redesignated as an attainment area for ozone." 42 U.S.C. § 7511d. In 1990, the CAA set the fee at $5,000.00 per ton of each of these pollutants emitted by the source during the calendar year in excess of the baseline amount. Id. Adjusted for inflation as required, the fee is currently $8,766.00 per ton. Id. § 7511d(3); Guidance, Attachment B [JA 73-74].

In the 2004 Rule revoking the one-hour standard, EPA also interpreted CAA section 172(e) as appropriate to apply by analogy to the tightening of the standard to the eight-hour standard. Section 172(e) is a CAA anti-backsliding provision that requires EPA to apply "no[] less stringent" control measures when the Agency relaxes a standard than those applicable before the relaxation. See 42 U.S.C. § 7502(e).[1] Although section 172(e) did not apply on its face when EPA revoked

[1] Section 172(e), entitled "Future modification of standard," states:

> If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements (footnote continued . . . .)

the one-hour standard because EPA tightened rather than relaxed that standard, EPA concluded that Congress would have intended a similar result in those circumstances. EPA therefore applied section 172(e) by analogy to areas not attaining the tightened standard by requiring those areas to retain controls no less stringent than most of the CAA control measures that were applicable under the one-hour standard to prevent backsliding. However, EPA concluded that the section 185 fee program was not an applicable "control measure" required to be retained under section 172(e). See South Coast, 472 F.3d at 889-90.

In South Coast, this Court held that EPA had the authority to revoke the one-hour standard, and that EPA reasonably interpreted section 172(e) as applicable by analogy when EPA tightens a standard, even though section 172(e) on its face only applies where the Agency relaxes a standard. Id. at 899-900. However, this Court also found that EPA's exclusion of section 185 from the applicable controls was not reasonable. Id. at 902-03. The Court said that because the section 185 fee program was "designed to constrain ozone pollution" it was a control "that section 172(e) requires to be retained." Id. at 903.

> shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. § 7502(e).

After the South Coast decision, members of the Clean Air Act Advisory Committee ("Committee")[2] raised concerns regarding the potential impact of the section 185 fee program and questions regarding EPA's discretion to accept alternatives to the section 185 fee program.[3] See Draft Report of the US EPA Clean Air Act Advisory Committee Task Force on Section 185 of the Clean Air Act ("Draft Report") at 1 [JA 54]. The Committee's primary concern focused on areas that had been classified as severe or extreme nonattainment for the one-hour standard ("former one-hour nonattainment area"). Id. As a result of South Coast, such areas would remain subject to the requirements of section 185 based on their failure to meet a revoked standard even if they attained the currently-applicable eight-hour standard. The Committee questioned how to apply the requirements of section 185 to those areas. Id. at 4-6 [JA 57-59].

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[2] The Clean Air Act Advisory Committee is a policy committee that advises EPA on important policy matters under the Clean Air Act. Its members represent state and local governments, environmental and public interest groups, academic institutions, unions, trade associations, utilities, and industry. See CAAAC – Clean Air Act Advisory Committee, http://www.epa.gov/air/caaac/ (last visited December 21, 2010).

[3] Petitioner discusses details of the Committee's work through a declaration by John Walke. Mr. Walke's declaration is not part of the administrative record in this petition for review, and therefore should not be considered by the Court. See, e.g., Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 521 n.* (D.C. Cir. 2009).

In response to the Committee's narrow question, EPA issued the Guidance at issue here on January 5, 2010. The Guidance explains EPA's view that the purpose of the section 185 fee program is to bring about attainment with the standard for ozone after an area has failed to attain by the applicable attainment date. Thus, EPA explains in the Guidance that, consistent with section 172(e), which explicitly allows EPA to provide for controls which are "not less stringent" than previously-applicable controls, a former one-hour nonattainment area can satisfy the obligation to implement the section 185 fee program by revisions to implementation plans that include either the section 185 fee program or an equivalent, *i.e.*, not less stringent, alternative program that would similarly achieve the purpose of the section 185 fee program. The Guidance invites States to develop equivalent alternative programs and to submit those programs as part of implementation plan revisions for EPA approval through notice-and-comment rulemaking as contemplated by section 172(e). See Guidance at 3-6 [JA66-69].

In the Guidance, EPA describes several types of programs that EPA believes it could potentially find equivalent to the section 185 fee program consistent with section 172(e), and offers its assistance to States in developing equivalent alternative programs on a case-by-case basis. Id. Importantly, however, EPA explains in the Guidance that final decisions regarding its views on the substitution of alternative programs for the section 185 fee program under any of the

circumstances described in the Guidance will only be implemented through "EPA actions taken under notice-and-comment rulemaking to address the fee program obligations associated with each applicable nonattainment area," and that the determination of a particular program's adequacy "would be based on the specific parameters of the program adopted." Id. at 3, 5 [JA 66, 68]. Additionally, EPA advises that it will review each implementation plan revision and conduct a preliminary assessment of whether the submitted alternative program is equivalent to the section 185 fee program and, "[i]f [the] preliminary assessment indicates that the alternative program is not less stringent, [EPA] would issue a notice in the Federal Register proposing to make such a determination at the same time [EPA] propose[s] and take[s] action on any accompanying [implementation plan] revision pursuant to [CAA] section 110(k)." Id. at 3 [JA 66]. The public would thus have notice and an opportunity to comment before EPA approved any alternative plan revisions.

STANDARD OF REVIEW

Judicial review under the CAA is limited to "final agency actions." 42 U.S.C. § 7607(b)(1). This Court's review is governed by the standards set forth in the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701-706. Under the APA, agency actions may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.

§ 706(2)(A). This is a narrow, deferential standard that prohibits the Court from substituting its judgment for that of the Agency. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court must consider whether the Agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) (citation omitted). The Agency's determinations must be upheld if they "conform to 'certain minimal standards of rationality.'" Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (citation omitted).

The Court reviews the Agency's interpretation of a statute it administers under the familiar two-step framework established by the Supreme Court in Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Chevron requires that this Court consider "whether Congress has directly spoken to the precise question at issue;" if so, that is the end of the inquiry, and the Court must apply the plain terms of the statute. 467 U.S. at 842-43. If, however, this Court finds that Congress has not directly spoken to the precise question at issue, the Court must determine whether the agency "based [its interpretation] on a permissible construction of the statute." Id. at 843. To uphold EPA's interpretation of section 172(e), as applied here by analogy, the Court need not find that EPA's interpretation is the only permissible construction, or even the

reading the Court would have reached, but only that EPA's interpretation is reasonable. Chevron, 467 U.S. at 843 n.11; Chem. Mfrs. Ass'n v. NRDC, 470 U.S. 116, 125 (1985).

When reviewing an agency action, the Court's review is limited to the "record that was before the [agency] at the time [it] made [its] decision." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). The Court must exclude from its consideration any materials submitted by the parties that were not part of the administrative record. See, e.g., Am. Farm Bureau Fed'n, 559 F.3d at 521 n.*.

SUMMARY OF ARGUMENT

The Guidance is not a final agency action; rather, it is a non-binding policy statement that explains the interlocutory views of the Agency with respect to States' compliance with CAA section 185 now that the one-hour standard has been revoked and the eight-hour standard is in effect. Tellingly, the Guidance is non-binding on its face and as a practical matter. The Guidance explains that States may choose to create and submit alternative, but equivalent, programs to the section 185 fee program and EPA may choose, through notice-and-comment rulemaking, to approve or disapprove such programs.

Furthermore, the Guidance is not ripe for review because no State has thus far submitted an alternative to the section 185 fee program, and therefore EPA has

not approved any such program. The Court's review would benefit from the development of a record showing how the approaches outlined in the Guidance are applied to a specific nonattainment area. Moreover, NRDC will have the same arguments available to it at that time. Accordingly, the Court should withhold its review of the Guidance until the approaches outlined in it are applied in a concrete setting and a record for review is developed through notice-and-comment rulemaking.

Similarly, NRDC lacks standing to challenge the Guidance at this time because it has not suffered a concrete injury traceable to the issuance of the Guidance and any injury it could potentially allege would not be redressed by the relief NRDC is seeking. Accordingly, because the Guidance is not a final agency action and is not ripe for review, and NRDC lacks standing to challenge the Guidance, this Court lacks subject matter jurisdiction to hear the petition. Thus, the petition should be denied.

In the event the Court reaches the merits of the petition, the petition should still be denied because the Guidance is a policy statement, not a substantive rulemaking subject to the APA's notice-and-comment procedures, and the views expressed in the Guidance represent a reasonable interpretation of the Clean Air Act.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THE INSTANT PETITION.

A. THE GUIDANCE IS NOT A FINAL AGENCY ACTION.

Under the Clean Air Act, this Court has jurisdiction only over final actions taken by the EPA Administrator. 42 U.S.C. § 7607(b)(1). An agency action is only "final" for purposes of judicial review if it (1) marks the consummation of EPA's decisionmaking process and (2) imposes an obligation, denies a right, or fixes some legal relationship. Bennett v. Spear, 520 U.S. 154, 177-78 (1997). The action cannot be tentative or interlocutory. Id. In short, "[t]he agency must have made up its mind, and its decision must have 'inflict[ed] an actual, concrete injury' upon the party seeking judicial review." AT&T Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001) (quoting Williamson County Reg'l Planning Comm. v. Hamilton Bank, 473 U.S. 172, 193 (1985)). "Such an injury typically is not caused when an agency merely expresses its view of what the law requires . . . ." Id. Indeed, this Court only has jurisdiction to review agency actions that "bind[] private parties or the agency itself with the 'force of law.'" Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 216 (D.C. Cir. 2007) (quoting Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002)).

1. The Guidance Is Interlocutory.

The Guidance document at issue in this petition neither marks the consummation of EPA's decisionmaking process, nor carries the force of law such that the issuance of the Guidance can be termed a final agency action over which this Court has jurisdiction. The Guidance fails the first Bennett prong because it is merely interlocutory on its face. Specifically, the Guidance itself envisions many more steps that must be taken before the views expressed in it have any implications for the regulated community. See generally Guidance at 3-5 [JA 66-68]; see, e.g., Catawba County, N.C. v. EPA, 571 F.3d 20, 33 (D.C. Cir. 2009) (document "not binding on its face"). The Guidance states that while EPA believes certain alternative programs may satisfy the CAA section 185 fee program requirement if the programs are "not less stringent" consistent with CAA section 172(e), the views expressed in the Guidance "will only be finalized through EPA actions taken under notice-and-comment rulemaking to address the fee program obligations associated with each applicable nonattainment area." Id. at 3 [JA 66].

Indeed, as explained in the Guidance, a State wishing to obtain approval for a program based on an approach outlined in the Guidance must first choose to adopt an alternative program, must submit that program to EPA as part of its implementation plan revision, and must demonstrate that the alternative program in its revision is no less stringent than the otherwise applicable section 185 fee

program. Id. at 3-5 [JA 66-68]. Alternatively, the Guidance anticipates that States could demonstrate to EPA that the area has attained either the one-hour or the eight-hour ozone standard through permanent and enforceable control measures and thus that the existing implementation plan already provides an equivalent alternative program. Id. at 3-4 [JA 66-67].

The Guidance even anticipates that States will work with EPA on a case-by-case basis to ensure States appropriately demonstrate the stringency of the alternative program. Id. at 5 [JA 69]. After submitting an alternative program as an implementation plan revision, EPA anticipates making a preliminary assessment regarding the adequacy of the alternative program. Id. at 3 [JA 66]. If EPA decides the plan is stringent enough to meet CAA section 172(e)'s anti-backsliding requirement, *i.e.*, at least as effective as the section 185 fee program in reducing ozone emissions, EPA states that it will issue a notice in the Federal Register proposing to make that determination when EPA takes action to approve or disapprove the revision. Id. Then EPA would need to complete notice-and-comment rulemaking and respond to comments received in a final decision concluding that the implementation plan revision included an equivalent program. These steps would not be merely procedural. The Guidance anticipates that EPA will engage in a substantive review of each alternative program based on a fact-intensive inquiry for each particular nonattainment area at issue. Id. at 3 [JA 66]

("These interpretations will only be finalized through EPA actions taken under notice-and comment rulemaking to address the fee program obligations associated with *each applicable nonattainment area*"). Only after EPA's final action approving or disapproving the revision, and explaining its action, will the Agency's decisionmaking with regard to the substitution of an alternative program for the section 185 fee program be complete. Accordingly, the Guidance cannot be said to mark the consummation of EPA's decisionmaking with respect to allowing the substitution of any alternative program for the section 185 fee program.

2. The Guidance Is Not Binding.

The Guidance also is not final agency action under the second Bennett prong because it does not bind any party on its face or as a practical matter. It does not "read like a ukase," command, require, order, dictate, or provide any party with "marching orders," expecting such parties to "fall in line." Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000). Indeed, nowhere in the Guidance do the words "shall" or "must" appear in a context in which they are used to order a party to comply with its contents. See generally, Guidance [JA 64-70]. Rather, the Guidance merely describes EPA's view that alternative programs *can* satisfy States' obligations to submit section 185 fee programs for the one-hour standard *if* they are stringent enough to satisfy CAA section 172(e)'s anti-backsliding

provision, invites States to develop such programs, and offers EPA's case-by-case assistance in developing and reviewing such programs. Id. at 3-5 [JA 66-68].

Additionally, the Guidance does not provide an interpretation of the law that has any practical enforcement implications—*i.e.*, any interpretation that EPA plans to follow strictly in reviewing implementation plan revisions or State-issued permits, or that EPA or the States could rely on to require compliance by the regulated community. Cf. Appalachian Power, 208 F.3d at 1022 (the Guidance contains "a position [that EPA] plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply."). EPA does not need the Guidance to review alternative programs for consistency with anti-backsliding principles, nor is EPA bound to accept alternative programs by the views expressed in the Guidance. For example, without relying on the Guidance, the Agency could find that one State's current implementation plan for a former one-hour nonattainment area that is now in attainment with the eight-hour standard is sufficient to achieve attainment and maintenance of the national ambient air quality standards, while rejecting as not sufficiently stringent another State's current implementation plan in similar circumstances because local conditions prevent the plan from sufficiently ensuring attainment and protection of the standards.

Moreover, while some States may have already chosen to begin designing alternative programs, nothing in the Guidance has commanded them to do so, and such voluntary action does not make the Guidance binding. See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 811 (D.C. Cir. 2006) ("It may be that, to the extent that they actually prescribe anything, the agency's guidelines have been voluntarily followed . . . and have become a *de facto* industry standard. . . . But this does not demonstrate that the guidelines have had *legal consequences*.") (emphasis in original); Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005) (Even if the regulated community changes its behavior because of an agency document, "if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review.") Indeed, EPA's *regulations*, not the Guidance, will be the basis for any future implementation plan revision decisions and EPA enforcement proceedings. See 40 C.F.R. Pt. 51, Subpart X.

As explained more fully *infra*, the Guidance is merely a policy statement—a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise discretionary power," Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citation omitted), since it operates as a means to invite the States to submit alternative programs no less stringent than the section 185 fee program under the

discretion granted the Agency consistent with CAA section 172(e). See also Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A policy statement announces the agency's tentative intentions for the future."); Catawba County, 571 F.3d at 33-34 (policy statement provides the agency's "current views" but suggests "that those views are open to revision"). As such, the Guidance does not have binding effect. "[T]he document itself would [not] be given any weight at all in [subsequent] proceedings." Molycorp, Inc. v. EPA, 197 F.3d 543, 546 (D.C. Cir. 1999). Rather, EPA will implement final interpretations of applicable regulations and the statute through notice-and-comment rulemaking approving or disapproving any alternative program.

Indeed, absent some concrete application, NRDC has suffered no concrete injury, because the Guidance has no legal effect. Rather, the Guidance "only affects [NRDC's] rights adversely on the contingency of future administrative action." DRG Funding Corp. v. HUD, 76 F.3d 1212, 1214 (D.C. Cir. 1996). Only if and when the views expressed in the Guidance are applied in a concrete setting after notice-and-comment rulemaking, will any legal effect be felt by NRDC, the regulated community, and the public at large in a concrete way, and therefore be challengeable as a final agency action. See NRDC v. EPA, 559 F.3d 561, 565 (D.C. Cir. 2009) (finding EPA's "conditional" statements that had no "legal or practical consequences" because they were about events that were "hypothetical

and non-specific" were not final agency action or ripe for review). Thus, because the Guidance neither marks the consummation of EPA's decisionmaking nor carries the force of law, the Guidance is not a final agency action. Accordingly, this Court must deny the instant petition for lack of jurisdiction.

B. THE MATTER IS NOT RIPE FOR REVIEW.

NRDC's challenge is also not ripe for review. The ripeness doctrine exists, first, to prevent courts from adjudicating disputes prematurely and thereby entangling themselves in abstract policy disagreements, and, second, to protect agencies from judicial interference until they formalize administrative decisions and impose concrete effects on the complaining parties. See Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). To apply the doctrine, this Court examines the fitness of NRDC's claims for immediate review and the hardship NRDC would suffer if review were withheld. Id. at 149.

In evaluating the fitness of the issues for judicial review, an important factor is "whether the court would benefit from an actual application of the challenged agency action." Ass'n of Am. Railroads v. Surface Transp. Bd., 146 F.3d 942, 946 (D.C. Cir. 1998) (citing Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998)). Where, as in this case, the petition challenges a non-binding agency statement, courts often defer review until those statements are applied in a concrete case. See, e.g., Ohio Forestry, 523 U.S. at 734-35 (challenge to forest management

plan not ripe until plan applied in site-specific action); New York v. EPA, 413 F.3d 3, 42-44 (D.C. Cir. 2005) (challenges to EPA rule not ripe until EPA disapproves a state implementation plan based on the rule and a further factual record is developed to show that the rule violates an anti-backsliding provision). Such deferral makes particular sense in the case of guidance documents like the one under review here.

As discussed above, NRDC's challenge arises in a wholly abstract setting. EPA has yet to apply the views expressed in the Guidance to *any* specific implementation plan revision containing an alternative program. In fact, no State has submitted such a revision. Thus, EPA has yet to put its policy into action and, as discussed above and in Part II of the Argument infra, is not bound to do so. Accordingly, NRDC's challenge could prove to be hypothetical because EPA may never approve any alternative program. See, e.g., id. at 43 (holding unripe a challenge that "may yet prove to be a hypothetical issue" because EPA might not act in the manner feared by the petitioner). Thus, there is no concrete controversy embodied in the Guidance that is ripe for judicial review.

Additionally, NRDC challenges not only EPA's authority under the statute to accept *any* alternative equivalent program in the first instance, but also EPA's view that one of those programs could be "no less stringent" than a Section 185 fee program. See NRDC Opening Brief at 21-25. Thus, NRDC cannot argue that its

challenge is one of pure statutory interpretation that would not benefit from further factual development. Without a record containing EPA's evaluation of an alternative program for a particular nonattainment area, the Court cannot determine whether or not EPA improperly exercised its discretion under the CAA to determine the equivalency of an alternative program. In other words, without the benefit of a record containing an alternative program that has been accepted by EPA, and the data supporting the adequacy of such a program to protect public health and welfare in a particular former one-hour nonattainment area, the Court cannot determine whether the program is as stringent as the section 185 fee program, consistent with CAA section 172(e). See, e.g., New York, 413 F.3d at 43-44 (finding unripe a challenge that the rule violated an anti-backsliding provision because no factual record had been developed that would allow the court to assess the rule against the anti-backsliding requirements).

Finally, NRDC will not face "immediate, direct, and significant [hardship]" if this Court withholds review of the Guidance. State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 480 (D.C. Cir. 1986) (citing Abbott Labs., 387 U.S. at 152-53). Because the Guidance is simply a policy statement that lacks the force of law and imposes no obligations on EPA, the States, or the regulated community, neither NRDC nor its members can even be potentially injured until a State submits an alternative program, EPA reviews such program, and either accepts it

or rejects it as part of that State's implementation plan revision through the notice-and-comment process. NRDC will still have available to it at that time—in the context of a timely petition challenging the approval of any such implementation plan revision—all of the arguments it could advance here about the lawfulness of EPA's interpretation of the Act as expressed in the Guidance. See Ohio Forestry, 523 U.S. at 734-35 (finding no practical harm to the petitioner when many more steps were required before Forest Service could permit logging and petitioner would still have ample opportunity to bring the same challenge then, when the harm would be more imminent and more certain). Thus, the instant petition fails both the fitness for immediate review and the hardship prongs of the ripeness analysis. Accordingly, the petition should also be denied as not ripe for review.

C. NRDC LACKS STANDING.

The doctrines of finality, ripeness, and standing are so closely related that the discussion above suffices to show why NRDC also lacks standing to bring its petition for review. The "irreducible constitutional minimum" for standing requires that NRDC show that it has suffered a concrete or particularized, and not conjectural or hypothetical, injury that is (1) actual or imminent, (2) caused by or fairly traceable to the challenged act of EPA, and (3) is likely redressable by the Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and quotations omitted). As a public interest group, NRDC has the additional burden

of establishing associational standing. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-43 (1977).

The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." Lujan, 504 U.S. at 573-74. As the previous discussion demonstrates, NRDC cannot show that it or any of its members can establish an injury fairly traceable to the Guidance that is concrete, actual or imminent, or anything but hypothetical and conjectural. The Guidance is no more than a broad and abstract policy statement that imposes no obligations on anyone, and does not commit EPA or the States to any particular course of action. Instead, NRDC's challenge raises only a generalized grievance that EPA is considering actions that NRDC believes would be unlawful under the CAA if taken, which is insufficient to establish a current injury sufficient to establish standing.

Additionally, a decision in this action would not redress any injury NRDC could allege. In its brief, NRDC states that its injury would be redressable by an opportunity to take part in a rulemaking and cites Center for Energy and Economic Development v. EPA, 398 F.3d 653, 657 (D.C. Cir. 2005). See NRDC Opening

Brief at 12. Center for Energy involved a regulation promulgated by the Agency. Id. As explained infra, the Guidance is not a rulemaking subject to the APA's notice-and-comment procedures. Thus, Petitioner had no right to participate in its issuance. Rather, NRDC will have the opportunity to participate if and when EPA finalizes the views outlined in the Guidance with respect to specific implementation plan revisions through notice-and-comment rulemaking. See Guidance at 3 [JA 66]. Until then, NRDC has not suffered any injury redressable by the Court.

Furthermore, since EPA could review alternative programs in implementation plan revisions under the statute and existing anti-backsliding regulations without relying on the Guidance, NRDC and its members would not be any better off if the Court were to vacate the Guidance. In other words, as explained above, neither EPA's actions nor their effect on the regulated community depends on the Guidance. See Molycorp, 197 F.3d at 547 (enforcement will be based on regulations, not document, thus "Molycorp is no worse off than it would be had the document not been issued at all"). Consequently, a decision setting aside the Guidance as NRDC requests would not redress any injury. In sum, NRDC lacks standing to challenge the Guidance, and the petition should therefore be denied.

II. THE GUIDANCE IS NOT SUBJECT TO NOTICE-AND-COMMENT RULEMAKING PROCEDURES BECAUSE IT IS NOT A LEGISLATIVE RULE.

The APA requires a published notice in the Federal Register of "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). However, the APA specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from these notice-and-comment procedures. 5. U.S.C. § 553(b)(A).

For many of the same reasons the Guidance is not a final agency action or ripe for review, the Guidance is not a substantive rulemaking and therefore did not require public notice and comment as Petitioner claims. As this Court has frequently recognized, determining whether agency pronouncements are legislative, interpretive, or general policy statements is quite often an arduous and fact-intensive task. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93-94 (D.C. Cir. 1997) ("quite difficult to distinguish between substantive and interpretive rules;" "hazy continuum," "enshrouded in considerable smog") (citations omitted); Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (developing four criteria to distinguish between legislative and interpretive

rules); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046-47 (D.C. Cir. 1987) (parameters of policy statements "fuzzy;" fact-intensive, hard to generalize.); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d at 38 (discussing differences between substantive rules and general statements of policy). The Guidance at issue here, however, is not difficult to classify. The Guidance is a policy statement, and thus is not subject to the APA's notice-and-comment procedures.

A. THE GUIDANCE IS A POLICY STATEMENT.

In Pacific Gas v. Federal Power Commission, this Court described the defining characteristics of an agency policy statement:

> A general statement of policy . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because [it] only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.

506 F.2d at 38. More recently, in Catawba County v. EPA, 571 F.3d 20 (D.C. Cir. 2009), this Court emphasized that it is the binding nature of a statement that subjects it to the APA's notice-and-comment procedures. Id. at 33-34. "[W]hether an agency action is the type of action that must undergo notice and comment depends on 'whether the agency action binds private parties or the agency itself with the force of law.'" Id. at 33 (quoting Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002)). "'[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by

the agency in a way that indicates it is binding.'" Id. (quoting Gen. Elec. Co., 290 F.3d at 383).

In Catawba County, this Court found the Holmstead Memo, an EPA guidance document that explained a timeline for certain state CAA submissions and the criteria EPA would employ in reviewing those submissions, was a policy statement because the document was not binding on its face or as applied. Id. at 33-34. The Court noted that the document explicitly stated it was "not binding," provided the agency's "current views," and "preserve[d] the agency's discretion to deviate" from the views stated in the Memo. Id. The Court further pointed out that the Memo "merely clarifie[d] the states' existing duties under the Clean Air Act and explain[ed] the process EPA suggest[ed] for states to follow . . . ." Id. at 34. Finally, the Court noted that the agency did not apply the Holmstead Memo in a binding manner, but only "encouraged" States to follow the process suggested in the Memo. Id.

Like the guidance document at issue in Catawba County, the Guidance at issue here is not binding on its face. See Guidance at 2-5 [JA 65-68]. The Guidance provides EPA's current views with regard to States' existing duties under the CAA—that States have an obligation to submit implementation plan revisions describing how the States will meet their section 185 obligation and that

EPA will entertain implementation plan revisions containing alternative equivalent programs. Id.

Additionally, like the guidance document in Catawba County, the Guidance merely suggests two alternatives that the Agency believes it *might* be able to approve as "not less stringent" than a section 185 fee program after review and approval of specific programs for specific former one-hour nonattainment areas, and nothing in the Guidance limits the Agency's discretion to deviate from the views expressed in the Guidance. See Guidance at 3-5 [JA 66-68] ("We *believe* states can meet this obligation through a SIP revision . . . . EPA *believe*s that an alternative program may be acceptable *if* it is consistent with the principles of section 172(e) . . . . EPA is *electing to consider* alternative programs . . . . We *anticipate* . . . that we *could* approve a program . . . .") (emphasis added). As the Guidance states, final decisions regarding EPA's views on the substitution of alternative programs for the section 185 fee program will only be implemented through "EPA actions taken under notice-and-comment rulemaking to address the fee program obligations associated with each applicable nonattainment area," and the determination of a particular program's adequacy "would be based on the specific parameters of the program adopted." Id. at 3, 5 [JA 66, 68]. EPA also advises that it will review each implementation plan revision and conduct a preliminary assessment of whether the submitted alternative program is equivalent

to the section 185 fee program and, "*[i]f* [the] preliminary assessment indicates that the alternative program is not less stringent, [EPA] would issue a notice in the Federal Register *proposing to make* such a determination at the same time [EPA] *propose[s]* and take[s] action on any accompanying SIP revision pursuant to [CAA] section 110(k)." Id. at 3 [JA 66] (emphasis added). Thus, EPA is not committed to any future action. See Syncor, 127 F.3d at 94 ("[t]he agency retains the discretion and the authority to change its position . . . in any specific case . . . .").

Accordingly, the Guidance functions merely as an informational device, explaining the approach EPA plans to use when reviewing implementation plan submissions containing section 185 fee programs or alternative programs. The Guidance does not alter the legal norm—that, pursuant to this Court's decision in South Coast, States must retain section 185 as a control measure for former one-hour nonattainment areas; the Guidance merely conveys EPA's view that under section 172(e), equivalent alternative programs may be sufficient substitutes for the section 185 fee program and describes what kinds of programs might be considered equivalent. As such a device, the Guidance fits squarely within this Court's descriptions of policy statements, and as such it is not subject to notice-and-comment rulemaking procedures.

B. THE GUIDANCE IS AT MOST AN INTERPRETIVE RULE.

Even assuming for the sake of argument that the Guidance is not a policy statement, the Guidance certainly does not rise to the level of a substantive rule and could at most be deemed interpretative. In American Hospital Association v. Bowen, this Court explained the difference between substantive and interpretive rules:

> Substantive rules are ones which grant rights, impose obligations, or produce other significant effects on private interests or which effect a change in existing law or policy. Interpretive rules, by contrast, are those which merely clarify or explain existing law or regulations, are essentially hortatory and instructional, and do not have the full force and effect of a substantive rule but [are] in the form of an explanation of particular terms.

834 F.2d at 1045 (internal citations and quotations omitted). This Court has also offered four criteria to help determine when an agency action is a substantive rule subject to notice-and-comment rulemaking requirements:

> (1) [W]hether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties; (2) whether the agency has published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Congress, 995 F.2d at 1112.

NRDC does not dispute that the second and fourth criteria have not been met here. See NRDC Opening Brief at 14-15. However, contrary to NRDC's

assertions, the first and third criteria have not been met here either. First, in absence of the Guidance, EPA would still be required to review and approve or disapprove state implementation plan revisions containing the CAA's control measures or equivalent controls designed to control ozone pollution consistent with CAA section 172(e). See South Coast, 472 F.3d at 903; 42 U.S.C. § 7502(b). The Guidance merely explains how EPA will approach that task with respect to the control measure established in CAA section 185. Contrary to Petitioner's suggestion, see NRDC Opening Brief at 14, EPA could review alternative programs from the States under the statute and existing anti-backsliding regulations without relying on the Guidance. Thus, the Guidance confers no "benefits" to the States that they did not already have. In any event, the Guidance is not a substantive rulemaking simply because it invites States for the first time to submit alternative programs; this Court has held rules to be interpretive rather than substantive even when they alter primary conduct. See Cent. Tex. Tel. Coop., Inc. v. FCC, 402 F.3d 205, 214 (D.C. Cir. 2005) (collecting cases).

Additionally, contrary to NRDC's assertion that EPA explicitly invoked the rulemaking authority described in section 172(e) in the Guidance, see NRDC Opening Brief at 14, a plain reading of the Guidance makes clear that the Agency merely acknowledged that it has such rulemaking authority, and explicitly stated that it would only engage in such rulemaking when acting on specific

implementation plan revisions in the future. See Guidance at 3 [JA 66]. Thus, contrary to NRDC's argument, the Agency is not modifying the requirements of section 185 by invoking its authority under section 172(e); EPA is explaining how the requirements of section 185 might be met given the Agency's authority to accept alternative equivalent programs through rulemaking. As explained supra, the Guidance grants no rights, imposes no obligations, produces no significant effects on private interests, and effects no changes to existing law or policy. The Guidance merely explains EPA's views of what the CAA requires with regard to the section 185 fee program—it does not bind the Agency, the States, or the regulated community. As such, it is not a substantive rulemaking. Accordingly, the Court should not grant the petition based on EPA's failure to submit the Guidance to the APA's notice-and-comment procedures.

III. EPA'S INTERPRETATION OF CAA SECTION 172(e), AS SET FORTH IN THE GUIDANCE, IS REASONABLE AND SHOULD BE UPHELD.

NRDC challenges the merits of the Guidance for two reasons; first, NRDC argues that EPA has no authority to approve *any* alternative program to the section 185 fee program; second, NRDC argues that EPA has no authority to approve as an alternative a state implementation plan that does not contain a section 185 fee program or alternative for an area that has not met the one-hour standard but has attained the eight-hour standard. NRDC Opening Brief at 16-25.

Both of these arguments address the same issue: whether EPA has authority to define the parameters of a State's compliance with section 185 when EPA has tightened, rather than relaxed, a national ambient air quality standard. If the Court reaches the merits of the instant petition, the Court should uphold as reasonable EPA's interpretation of its authority under section 172(e) as expressed in the Guidance.

Under Chevron Step 1, the precise question at issue is whether EPA may approve implementation plan revisions for ozone nonattainment areas designated "severe" or "extreme" under the revoked one-hour standard that include alternatives to the section 185 fee program where such alternatives are "not less stringent" than section 185 now that EPA has tightened the ozone standard to an eight-hour standard. As this Court acknowledged in South Coast, the statute explicitly provides EPA authority to revise the national ambient air quality standards, see 42 U.S.C. § 7409(d)(1), and requires that EPA apply CAA anti-backsliding control measures or alternative equivalent controls when it relaxes a standard. See 42 U.S.C. § 7502(e); see also South Coast, 472 F.3d at 899. However, nothing in the Clean Air Act addresses what controls apply when EPA tightens a standard. Accordingly, there is a gap in the statute that EPA must fill.

Contrary to NRDC's arguments, "it . . . [is] apparent from the agency's generally conferred authority and other statutory circumstances that Congress

would expect [EPA] to be able to speak with the force of law when it . . . fill[s this] space in the enacted law . . . ." United States v. Mead Corp., 533 U.S. 218, 229 (2001). First, Congress entrusted to EPA the duty to "complete a thorough review of . . . the national ambient air quality standards . . . and . . . make such revisions in such . . . standards and promulgate such new standards as may be appropriate . . . ." 42 U.S.C. § 7409(d)(1). Accordingly, as this Court found in South Coast, EPA has the authority to change, either by relaxing or tightening, standards based on "'the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health' that the pollutant may cause." South Coast, 472 F.3d at 888 (quoting 42 U.S.C. §§ 7408(a), 7409(d)).

Congress also entrusted to EPA review and approval of state implementation plans. See generally 42 U.S.C. § 7410; see also id. § 7502(b) (giving specific authority to review implementation plan revisions addressing nonattainment plans after nonattainment designation). Revision of a national ambient air quality standard necessarily has implications for EPA's review of state implementation plans. Specifically, as happened here, EPA is required to apply the revised standard by identifying and classifying nonattainment areas under the changed standard, triggering an obligation by the States to submit for EPA approval implementation plan revisions for the revised standards, and specifying the control measures to be used to ensure attainment in nonattainment areas. Id. § 7502(b).

Since Congress afforded EPA discretion in deciding what those measures should be when EPA relaxes a standard by allowing EPA to promulgate requirements that are no less stringent than those that applied before the relaxation, see § 7502(e), it follows that Congress would expect EPA to use similar discretion regarding the control measures necessary to prevent backsliding when EPA tightens a standard. Accordingly, under Chevron Step 1, there is an implicit delegation of authority to fill the gap in the statute.

Under Chevron Step 2, the Agency's plan for filling the gap in the statute, as explained in the Guidance, is reasonable. As an initial matter, in the 2004 Rule, when EPA tightened the ozone standard, EPA applied section 172(e)'s anti-backsliding provision by analogy to determine what control measures to apply to areas that had not attained the one-hour standard. In South Coast, this Court endorsed EPA's basic approach, ruling that EPA's interpretation of section 172(e) as applicable by analogy was reasonable where the Agency tightened rather than relaxed the standard. Specifically, the Court pointed out that Congress's intent for the statute as whole was to improve air quality until it reached a safe level and to prevent air quality deterioration thereafter. 472 F.3d at 900. The Court explained that "[t]he Act places states onto a one-way street whose only outlet is attainment." Id. Thus, since EPA's interpretation of section 172(e) in these circumstances was

consistent with the goal of attainment and prevention of deterioration, the Court found it reasonable. Id.

The 2004 Rule did not discuss the possibility of compliance with section 185's control measure through alternative programs as discussed in the Guidance, and thus EPA's authority to do so consistent with section 172(e) was not at issue in South Coast. However, nothing in the South Coast decision suggests that the Court would have approved only the applicability of part of section 172(e), requiring the retention of the CAA's specific control measures when EPA tightens rather than relaxes a standard, and would not also have approved of EPA's interpretation of section 172(e)'s "not less stringent" language as allowing alternative but not less stringent measures, in the same circumstance. In fact, both of these requirements are contained within the same sentence of section 172(e). 42 U.S.C. § 7502(e) ("Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation."). Indeed, this Court did not hold that only the section 185 fee program could satisfy the CAA's anti-backsliding provisions, but rather held that EPA could properly revoke the one-hour standard "so long as adequate anti-backsliding provisions are introduced." South Coast, 472 F.3d at 899. This Court should find EPA's interpretation of section 172(e) contained in the Guidance reasonable for the same reason it found the application of section 172(e) by analogy reasonable in South

Coast—it is consistent with Congress's intent to ensure control measures necessary to provide for attainment and prevention of deterioration.

The Guidance is narrow; it applies only to areas subject to section 185 due to their failure to attain the revoked one-hour standard. The Guidance identifies two implementation plan revisions for such areas that EPA believes it could approve as "not less stringent" than a section 185 fee program after notice and comment and based on a former one-hour nonattainment area's specific characteristics. First, the Guidance envisions a scenario in which a State's current implementation plan could be deemed an adequate alternative because the area has achieved attainment with either the one-hour or the eight-hour standard ("Attainment Alternative"). Second, for areas that have not attained either standard, it envisions three ways that implementation plan revisions, by various combinations of emissions reductions and alternative fee programs, could be deemed equivalent alternatives to the section 185 fee program ("Program Alternatives").

Under the Attainment Alternative, EPA would determine, through notice-and-comment rulemaking, that an area's existing implementation plan is an equivalent alternative to the section 185 fee program because the area is attaining either the one-hour or the eight-hour ozone standard through existing implementation plan measures and enforceable federal measures. Guidance at 3 [JA 66]. Thus, the Attainment Alternative would be no less stringent than a

section 185 fee program because it ensures attainment, the ultimate goal of section 185. Section 185 requires the imposition of fees only when an area "has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date." 42 U.S.C. § 7511d(a). In other words, as the Guidance explains, once an area attains either the one-hour or the eight-hour standard, the purpose of retaining section 185 as an anti-backsliding measure is satisfied because the area has achieved attainment. If the area has attained the one-hour standard, based on permanent and enforceable emissions reductions, the area is subject to controls that are no less stringent than the requirement to attain the one-hour standard and the anti-backsliding principle of Section 172(e) has been implemented. If the area has met the more stringent, currently applicable eight-hour standard and the current implementation plan contains provisions that prevent backsliding out of attainment with that standard, the purpose of section 172(e) has similarly been accomplished. Guidance at 2-4 [JA 65-67].

NRDC argues that any area that failed to attain the one-hour standard before it was revoked now has a permanent obligation either to attain that standard or collect section 185 fees from sources in perpetuity. See NRDC Opening Brief at 21. That argument ignores the fact that EPA revoked the one-hour standard and replaced it with a more stringent standard that EPA concluded was a more appropriate measure of air quality protection. It is the attainment of *that* standard

that section 185 aims to promote. See 42 U.S.C. § 7411d(a) (program applies "until the area is redesignated as an attainment area for ozone."). Once the current standard is attained, the fee program is no longer needed for anti-backsliding purposes. Accordingly, EPA's interpretation of section 172(e) as allowing the Attainment Alternative is reasonable because the Attainment Alternative achieves the goal of the CAA—attainment and maintenance of the national ambient air quality standard.

Similarly, the Program Alternatives are also consistent with Congress's intent for the statute. Under the Program Alternatives, States would submit to EPA implementation plan revisions that contain alternative programs that either achieve the same emissions reductions or raise the same amount of revenue as a section 185 program would, or a combination of both. Guidance at 4-5 [JA 67-68]. States would demonstrate the alternative program's equivalency by "comparing expected fees and/or emissions reductions directly attributable to application of section 185 to the expected fees and/or emissions reductions from the proposed alternative program." Id. at 4 [JA 67]. States could craft their own programs that would allow them to shift the fee burden from a specific set of major stationary sources to non-major sources, such as owners of mobile sources, that also contribute to ozone formation. Guidance at 5 [JA 68]. This would address the concern raised by the Clean Air Act Advisory Committee that some major sources that already have the

latest emissions-reducing technology and are unable to further reduce emissions are unfairly penalized under section 185 because they are located in a former one-hour nonattainment area. Guidance at 5 [JA 68]; Draft Report at 3-4 [JA 56-57]. Most importantly, however, the Program Alternatives, if approved as "not less stringent" than the section 185 fee program, would encourage former one-hour nonattainment areas to reach attainment with the eight-hour standard as effectively and expeditiously as a section 185 fee program, if not more so, and therefore satisfy the CAA's goal of attainment and maintenance of the national ambient air quality standard.

NRDC would have the Court believe that EPA is attempting here what the Supreme Court told the Agency it could not do in Whitman and what this Court told the Agency it could not do in South Coast – abandon the requirements of CAA Subpart 2 now that the Agency has promulgated a new standard. NRDC Opening Brief at 19-21 (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) and South Coast). Petitioner complains that EPA is inventing its authority to do so out of statutory silence. Id. at 18. First, EPA is not attempting to abandon Subpart 2. See Guidance at 4 [JA 67]. Rather, EPA is explaining how a specific provision of Subpart 2—section 185—can be implemented in light of the Court's conclusion in South Coast that revoking the one-hour standard was proper so long as the Agency ensured adequate anti-backsliding measures, and that the section 185 fee program

is one such measure. Id. Second, as explained supra, the statute is far from silent about the Agency's authority to implement section 185 in the manner suggested in the Guidance. Far from explicitly prohibiting EPA from accepting alternative equivalent control measures when the Agency changes a standard, the CAA explicitly envisions that EPA will change the standards from time to time based on newly available scientific information, and that when the Agency relaxes a standard, alternatives may be accepted if they are not less stringent. Since the alternatives suggested by EPA in the Guidance serve the purpose of section 185 by guiding former one-hour nonattainment areas toward attainment with the eight-hour standard and preventing backsliding, they are reasonable alternatives to section 185 that EPA may approve under the limited, but clearly implied, authority provided by the statute.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court deny the instant petition for review.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

Pursuant to Fed. R. App. P. 32(a)(7)(C), and exclusive of the components of the brief excluded from the word limit pursuant to Fed. R. App. P. 32(a)(7)(B)(iii), I hereby certify that the foregoing brief contains 9,879 words, in 14 point Times New Roman typeface, as counted by the word count feature of Microsoft Word, which is in compliance with the Court's September 30, 2010 order.

Dated: January 7, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of RESPONDENT'S OPENING BRIEF via Notice of Docket Activity by the Court's CM/ECF system, on January 7, 2011, on the following counsel of record:

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ADDENDUM

TABLE OF CONTENTS

Westlaw.

40 C.F.R. § 50.9

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 50. National Primary and Secondary Ambient Air Quality Standards (Refs & Annos)

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

(a) The level of the national 1-hour primary and secondary ambient air quality standards for ozone measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.12 parts per million (235 <<mu>>g/m³). The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million (235 <<mu>>g/m³) is equal to or less than 1, as determined by Appendix H to this part.

(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 § 50.10. The 1-hour NAAQS set forth in paragraph (a) of this section will no longer apply to an area one year after the effective date of the designation of that area for the 8-hour ozone NAAQS pursuant to section 107 of the Clean Air Act. Area designations and classifications with respect to the 1-hour standards are codified in 40 CFR part 81.

(c) EPA's authority under paragraph (b) of this section to determine that the 1-hour standard no longer applies to an area based on a determination that the area has attained the 1-hour standard is stayed until such time as EPA issues a final rule revising or reinstating such authority and considers and addresses in such rulemaking any comments concerning (1) which, if any, implementation activities for a revised ozone standard (including but not limited to designation and classification of areas) would need to occur before EPA would determine that the 1-hour ozone standard no longer applies to an area, and (2) the effect of revising the ozone NAAQS on the existing 1-hour ozone designations.

[44 FR 8220, Feb. 8, 1979; 62 FR 38894, July 18, 1997; 65 FR 45200, July 20, 2000; 68 FR 38163, June 26, 2003; 69 FR 23996, April 30, 2004]

SOURCE: 36 FR 22384, Nov. 25, 1971; 50 FR 25544, June 19, 1985; 63 FR 7274, Feb. 12, 1998 unless otherwise noted., unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

40 C. F. R. § 50.9, 40 CFR § 50.9

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Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 50. National Primary and Secondary Ambient Air Quality Standards (Refs & Annos)

§ 50.10 National 8-hour primary and secondary ambient air quality standards for ozone.

(a) The level of the national 8-hour primary and secondary ambient air quality standards for ozone, measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.08 parts per million (ppm), daily maximum 8-hour average.

(b) The 8-hour primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, as determined in accordance with Appendix I to this part.

[62 FR 38894, July 18, 1997]

SOURCE: 36 FR 22384, Nov. 25, 1971; 50 FR 25544, June 19, 1985; 63 FR 7274, Feb. 12, 1998 unless otherwise noted., unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

40 C. F. R. § 50.10, 40 CFR § 50.10

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40 C.F.R. § 51.900

Effective: June 27, 2005

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Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.900 Definitions.

The following definitions apply for purposes of this subpart. Any term not defined herein shall have the meaning as defined in 40 CFR 51.100.

(a) 1-hour NAAQS means the 1-hour ozone national ambient air quality standards codified at 40 CFR 50.9.

(b) 8-hour NAAQS means the 8-hour ozone national ambient air quality standards codified at 40 CFR 50.10.

(c) 1-hour ozone design value is the 1-hour ozone concentration calculated according to 40 CFR part 50, Appendix H and the interpretation methodology issued by the Administrator most recently before the date of the enactment of the CAA Amendments of 1990.

(d) 8-Hour ozone design value is the 8-hour ozone concentration calculated according to 40 CFR part 50, appendix I.

(e) CAA means the Clean Air Act as codified at 42 U.S.C. 7401--7671q (2003).

(f) Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the area's classification under section 181(a)(1) of the CAA for the 1-hour NAAQS at designation for the 8-hour NAAQS:

(1) Reasonably available control technology (RACT).

(2) Inspection and maintenance programs (I/M).

(3) Major source applicability cut-offs for purposes of RACT.

(4) Rate of Progress (ROP) reductions.

(5) Stage II vapor recovery.

(6) Clean fuels fleet program under section 183(c)(4) of the CAA.

(7) Clean fuels for boilers under section 182(e)(3) of the CAA.

(8) Transportation Control Measures (TCMs) during heavy traffic hours as provided under section 182(e)(4) of the CAA.

(9) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA.

(10) Transportation controls under section 182(c)(5) of the CAA.

(11) Vehicle miles traveled provisions of section 182(d)(1) of the CAA.

(12) NO_x requirements under section 182(f) of the CAA.

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

(g) Attainment year ozone season shall mean the ozone season immediately preceding a nonattainment area's attainment date.

(h) Designation for the 8-hour NAAQS shall mean the effective date of the 8-hour designation for an area.

(i) Higher classification/lower classification. For purposes of determining whether a classification is higher or lower, classifications are ranked from lowest to highest as follows: classification under subpart 1 of the CAA; marginal; moderate; serious; severe-15; severe-17; and extreme.

(j) Initially designated means the first designation that becomes effective for an area for the 8-hour NAAQS and does not include a redesignation to attainment or nonattainment for that standard.

(k) Maintenance area for the 1-hour NAAQS means an area that was designated nonattainment for the 1-hour NAAQS on or after November 15, 1990 and was redesignated to attainment for the 1-hour NAAQS subject to a maintenance plan as required by section 175A of the CAA.

(l) Nitrogen Oxides (NO_x) means the sum of nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(m) NO_x SIP Call means the rules codified at 40 CFR 51.121 and 51.122.

(n) Ozone season means for each State, the ozone monitoring season as defined in 40 CFR Part 58, Appendix D, section 2.5 for that State.

(o) Ozone transport region means the area established by section 184(a) of the CAA or any other area established by the Administrator pursuant to section 176A of the CAA for purposes of ozone.

(p) Reasonable further progress (RFP) means for the purposes of the 8-hour NAAQS, the progress reductions required under section 172(c)(2) and section 182(b)(1) and (c)(2)(B) and (c)(2)(C) of the CAA.

(q) Rate of progress (ROP) means for purposes of the 1-hour NAAQS, the progress reductions required under section 172(c)(2) and section 182(b)(1) and (c)(2)(B) and (c)(2)(C) of the CAA.

(r) Revocation of the 1-hour NAAQS means the time at which the 1-hour NAAQS no longer apply to an area pursuant to 40 CFR 50.9(b).

(s) Subpart 1 (CAA) means subpart 1 of part D of title I of the CAA.

(t) Subpart 2 (CAA) means subpart 2 of part D of title I of the CAA.

(u) Attainment Area means, unless otherwise indicated, an area designated as either attainment, unclassifiable, or attainment/unclassifiable.

[70 FR 30604, May 26, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR

24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.900, 40 CFR § 51.900

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40 C.F.R. § 51.901

Effective:[See Text Amendments]

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Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

§ 51.901 Applicability of part 51.

The provisions in subparts A through W of part 51 apply to areas for purposes of the 8-hour NAAQS to the extent they are not inconsistent with the provisions of this subpart.

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.901, 40 CFR § 51.901

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40 C.F.R. § 51.902

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Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.902 Which classification and nonattainment area planning provisions of the CAA shall apply to areas designated nonattainment for the 8-hour NAAQS?

(a) Classification under subpart 2 (CAA). An area designated nonattainment for the 8-hour NAAQS with a 1-hour ozone design value equal to or greater than 0.121 ppm at the time the Administrator signs a final rule designating or redesignating the area as nonattainment for the 8-hour NAAQS will be classified in accordance with section 181 of the CAA, as interpreted in § 51.903(a), for purposes of the 8-hour NAAQS, and will be subject to the requirements of subpart 2 that apply for that classification.

(b) Covered under subpart 1 (CAA). An area designated nonattainment for the 8-hour ozone NAAQS with a 1-hour design value less than 0.121 ppm at the time the Administrator signs a final rule designating or redesignating the area as nonattainment for the 8-hour NAAQS will be covered under section 172(a)(1) of the CAA and will be subject to the requirements of subpart 1.

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.902, 40 CFR § 51.902

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Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.903 How do the classification and attainment date provisions in section 181 of subpart 2 of the CAA apply to areas subject to § 51.902(a)?

(a) In accordance with section 181(a)(1) of the CAA, each area subject to § 51.902(a) shall be classified by operation of law at the time of designation. However, the classification shall be based on the 8-hour design value for the area, in accordance with Table 1 below, or such higher or lower classification as the State may request as provided in paragraphs (b) and (c) of this section. The 8-hour design value for the area shall be calculated using the three most recent years of air quality data. For each area classified under this section, the primary NAAQS attainment date for the 8-hour NAAQS shall be as expeditious as practicable but not later than the date provided in the following Table 1.

Table 1.--Classification for 8-Hour Ozone NAAQS for Areas Subject to § 51.902(a)

Area class		8-hour design value (ppm ozone)	Maximum period for attainment dates in state plans (years after effective date of nonattainment designation for 8-hour NAAQS)
Marginal	from	0.085	3
	up to [FN1]	0.092	
Moderate	from	0.092	6
	up to [FN1]	0.107	
Serious	from	0.107	9
	up to [FN1]	0.120	
Severe-15	from	0.120	15
	up to [FN1]	0.127	
Severe-17	from	0.127	17
	up to [FN1]	0.187	
Extreme	equal to	0.187	20
	or above		

[FN1] but not including.

(b) A State may request a higher classification for any reason in accordance with section 181(b)(3) of the CAA.

(c) A State may request a lower classification in accordance with section 181(a)(4) of the CAA.

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.903, 40 CFR § 51.903

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40 C.F.R. § 51.904

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Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.904 How do the classification and attainment date provisions in section 172(a) of subpart 1 of the CAA apply to areas subject to § 51.902(b)?

(a) Classification. The Administrator may classify an area subject to § 51.902(b) as an overwhelming transport area if:

(1) The area meets the criteria as specified for rural transport areas under section 182(h) of the CAA;

(2) Transport of ozone and/or precursors into the area is so overwhelming that the contribution of local emissions to observed 8-hour ozone concentration above the level of the NAAQS is relatively minor; and

(3) The Administrator finds that sources of VOC (and, where the Administrator determines relevant, NO_x) emissions within the area do not make a significant contribution to the ozone concentrations measured in other areas.

(b) Attainment dates. For an area subject to § 51.902(b), the Administrator will approve an attainment date consistent with the attainment date timing provision of section 172(a)(2)(A) of the CAA at the time the Administrator approves an attainment demonstration for the area.

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.904, 40 CFR § 51.904

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40 C.F.R. § 51.905

Effective: September 2, 2005

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

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

(a) What requirements that applied in an area for the 1-hour NAAQS continue to apply after revocation of the 1-hour NAAQS for that area?

(1) 8-Hour NAAQS Nonattainment/1-Hour NAAQS Nonattainment. The following requirements apply to an area designated nonattainment for the 8-hour NAAQS and designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS for that area.

(i) The area remains subject to the obligation to adopt and implement the applicable requirements as defined in § 51.900(f), except as provided in paragraph (a)(1)(iii) of this section, and except as provided in paragraph (b) of this section.

(ii) If the area has not met its obligation to have a fully-approved attainment demonstration SIP for the 1-hour NAAQS, the State must comply with one of the following:

(A) Submit a 1-hour attainment demonstration no later than 1 year after designation;

(B) Submit a RFP plan for the 8-hour NAAQS no later than 1-year following designations for the 8-hour NAAQS providing a 5 percent increment of emissions reduction from the area's 2002 emissions baseline, which must be in addition to measures (or enforceable commitments to measures) in the SIP at the time of the effective date of designation and in addition to national or regional measures and must be achieved no later than 2 years after the required date for submission (3 years after designation).

(C) Submit an 8-hour ozone attainment demonstration no later than 1 year following designations that demonstrates attainment of the 8-hour NAAQS by the area's attainment date; provides for 8-hour RFP for the area out to the attainment date; and for the initial period of RFP for the area (between 2003-2008), achieve the emission reductions by December 31, 2007.

(iii) If the area has an outstanding obligation for an approved 1-hour ROP SIP, it must develop and submit to EPA all outstanding 1-hour ROP plans; where a 1-hour obligation overlaps with an 8-hour RFP requirement, the State's 8-hour RFP plan can be used to satisfy the 1-hour ROP obligation if the 8-hour RFP plan has an emission target at least as stringent as the 1-hour ROP emission target in each of the 1-hour ROP target years for which the 1-hour ROP obligation exists.

(2) 8-Hour NAAQS Nonattainment/1-Hour NAAQS Maintenance. An area designated nonattainment for the 8-hour NAAQS that is a maintenance area for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS for that area remains subject to the obligation to implement the applicable requirements as defined in § 51.900 (f) to the extent such obligations are required by the approved SIP, except as provided in paragraph (b) of this section. Applicable measures in the SIP must continue to be implemented; however, if these measures were shifted to contingency measures prior to designation for the 8-hour NAAQS for the area, they may remain as contingency measures, unless the measures are required to be implemented by the CAA by virtue of the area's requirements under the 8-hour NAAQS. The State may not remove such measures from the SIP.

(3) 8-Hour NAAQS Attainment/1-Hour NAAQS Nonattainment--

(i) Obligations in an approved SIP. For an area that is 8-hour NAAQS attainment/1-hour NAAQS nonattainment, the State may request that obligations under the applicable requirements of § 51.900(f) be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA, after revocation of the 1-hour NAAQS; however, the State cannot remove the obligations from the SIP. For such areas, the State may request that the nonattainment NSR provisions be removed from the SIP on or after the date of revocation of the 1-hour NAAQS and need not be shifted to contingency measures subject to paragraph (e)(4) of this section.

(ii) Attainment demonstration and ROP plans.

(A) To the extent an 8-hour NAAQS attainment/1-hour NAAQS nonattainment area does not have an approved attainment demonstration or ROP plan that was required for the 1-hour NAAQS under the CAA, the obligation to submit such an attainment demonstration or ROP plan

(1) Is deferred for so long as the area continues to maintain the 8-hour NAAQS; and

(2) No longer applies once the area has an approved maintenance plan pursuant to paragraph (a)(3)(iii) of this section.

(B) For an 8-hour NAAQS attainment/1-hour NAAQS nonattainment area that violates the 8-hour NAAQS, prior to having an approved maintenance plan for the 8-hour NAAQS as provided under paragraph (a)(3)(iii) of this section, paragraphs (a)(3)(ii)(B)(1), (2), and (3) of this section shall apply.

(1) In lieu of any outstanding obligation to submit an attainment demonstration, within 1 year after the date on which EPA publishes a determination that a violation of the 8-hour NAAQS has occurred, the State must submit (or revise a submitted) maintenance plan for the 8-hour NAAQS, as provided under paragraph (a)(3)(iii) of this section, to--

(i) Address the violation by relying on modeling that meets EPA guidance for purposes of demonstrating maintenance of the NAAQS; or

(ii) Submit a SIP providing for a 3 percent increment of emissions reductions

from the area's 2002 emissions baseline; these reductions must be in addition to measures (or enforceable commitments to measures) in the SIP at the time of the effective date of designation and in addition to national or regional measures.

(2) The plan required under paragraph (a)(3)(ii)(B)(1) of this section must provide for the emission reductions required within 3 years after the date on which EPA publishes a determination that a violation of the 8-hour NAAQS has occurred.

(3) The State shall submit an ROP plan to achieve any outstanding ROP reductions that were required for the area for the 1-hour NAAQS, and the 3-year period or periods for achieving the ROP reductions will begin January 1 of the year following the 3-year period on which EPA bases its determination that a violation of the 8-hour NAAQS occurred.

(iii) Maintenance plans for the 8-hour NAAQS. For areas initially designated attainment for the 8-hour NAAQS, and designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS, the State shall submit no later than 3 years after the area's designation for the 8-hour NAAQS, a maintenance plan for the 8-hour NAAQS in accordance with section 110(a)(1) of the CAA. The maintenance plan must provide for continued maintenance of the 8-hour NAAQS for 10 years following designation and must include contingency measures. This provision does not apply to areas redesignated from nonattainment to attainment for the 8-hour NAAQS pursuant to CAA section 107(d)(3); such areas are subject to the maintenance plan requirement in section 175A of the CAA.

(4) 8-Hour NAAQS Attainment/1-Hour NAAQS Maintenance--

(i) Obligations in an approved SIP. For an 8-hour NAAQS attainment/1-hour NAAQS maintenance area, the State may request that obligations under the applicable requirements of § 51.900(f) be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA, after revocation of the 1-hour NAAQS; however, the State cannot remove the obligations from the SIP.

(ii) Maintenance Plans for the 8-hour NAAQS. For areas initially designated attainment for the 8-hour NAAQS and subject to the maintenance plan for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS, the State shall submit no later than 3 years after the area's designation for the 8-hour NAAQS, a maintenance plan for the 8-hour NAAQS in accordance with section 110(a)(1) of the CAA. The maintenance plan must provide for continued maintenance of the 8-hour NAAQS for 10 years following designation and must include contingency measures. This provision does not apply to areas redesignated from nonattainment to attainment for the 8-hour NAAQS pursuant to section 107(d)(3); such areas are subject to the maintenance plan requirement in section 175A of the CAA.

(b) Does attainment of the ozone NAAQS affect the obligations under paragraph (a) of this section? A State remains subject to the obligations under paragraphs (a)(1)(i) and (a)(2) of this section until the area attains the 8-hour NAAQS. After the area attains the 8-hour NAAQS, the State may request such obligations be shifted to contingency measures, consistent with sections 110(l) and 193 of the

CAA; however, the State cannot remove the obligations from the SIP.

(c) Which portions of an area designated for the 8-hour NAAQS remain subject to the obligations identified in paragraph (a) of this section?

(1) Except as provided in paragraph (c)(2) of this section, only the portion of the designated area for the 8-hour NAAQS that was required to adopt the applicable requirements in § 51.900(f) for purposes of the 1-hour NAAQS is subject to the obligations identified in paragraph (a) of this section, including the requirement to submit a maintenance plan for purposes of paragraph (a)(3)(iii) of this section. 40 CFR part 81, subpart C identifies the boundaries of areas and the area designations and classifications for the 1-hour NAAQS in place as of the effective date of designation for the 8-hour NAAQS.

(2) For purposes of paragraph (a)(1)(ii)(B) and (C) of this section, the requirement to achieve emission reductions applies to the entire area designated nonattainment for the 8-hour ozone NAAQS.

(d) [Reserved]

(e) What obligations that applied for the 1-hour NAAQS will no longer apply after revocation of the 1-hour NAAQS for an area?--

(1) Maintenance plans. Upon revocation of the 1-hour NAAQS, an area with an approved 1-hour maintenance plan under section 175A of the CAA may modify the maintenance plan: To remove the obligation to submit a maintenance plan for the 1-hour NAAQS 8 years after approval of the initial 1-hour maintenance plan; and to remove the obligation to implement contingency measures upon a violation of the 1-hour NAAQS. However, such requirements will remain enforceable as part of the approved SIP until such time as EPA approves a SIP revision removing such obligations. The EPA shall not approve a SIP revision requesting these modifications until the State submits and EPA approves an attainment demonstration for the 8-hour NAAQS for an area initially designated nonattainment for the 8-hour ozone NAAQS or a maintenance SIP for the 8-hour NAAQS for an area initially designated attainment for the 8-hour NAAQS. Any revision to such SIP must meet the requirements of section 110(l) and 193 of the CAA.

(2) Findings of failure to attain the 1-hour NAAQS.

(i) Upon revocation of the 1-hour NAAQS for an area, EPA is no longer obligated--

(A) To determine pursuant to section 181(b)(2) or section 179(c) of the CAA whether an area attained the 1-hour NAAQS by that area's attainment date for the 1-hour NAAQS; or

(B) To reclassify an area to a higher classification for the 1-hour NAAQS based upon a determination that the area failed to attain the 1-hour NAAQS by the area's attainment date for the 1-hour NAAQS.

(ii) Upon revocation of the 1-hour NAAQS for an area, the State is no longer required to include in its SIP provisions for CAA section 181(b)(4) and 185 fees on emissions sources in areas classified as severe or extreme based on a failure to meet the 1-hour attainment date. Upon revocation of the 1-hour NAAQS in an area, the State may remove from the SIP for the

area the provisions for complying with the section 185 fee provision as it applies to the 1-hour NAAQS.

(iii) Upon revocation of the 1-hour NAAQS for an area, the State is no longer required to include in its SIP contingency measures under CAA sections 172(c)(9) and 182(c)(9) that would be triggered based on a failure to attain the 1-hour NAAQS or to make reasonable further progress toward attainment of the 1-hour NAAQS. A State may not remove from the SIP a contingency measure that is an applicable requirement.

(3) Conformity determinations for the 1-hour NAAQS. Upon revocation of the 1-hour NAAQS for an area, conformity determinations pursuant to section 176(c) of the CAA are no longer required for the 1-hour NAAQS. At that time, any provisions of applicable SIPs that require conformity determinations in such areas for the 1-hour NAAQS will no longer be enforceable pursuant to section 176(c)(5) of the CAA.

(4) Nonattainment area new source review under the 1-hour NAAQS.

(i) Upon revocation of the 1-hour ozone NAAQS, for any area that was designated nonattainment for the 1-hour ozone NAAQS, the area's implementation plan provisions satisfying sections 172(c)(5) and 173 of the CAA (including provisions satisfying section 182) based on the area's previous 1-hour ozone NAAQS classification are no longer required elements of an approvable implementation plan. Instead, the area's implementation plan must meet the requirements contained in paragraphs (e)(4)(ii) through (e)(4)(iv) of this section.

(ii) If the area is designated nonattainment for the 8-hour ozone NAAQS, the implementation plan must include requirements to implement the provisions of sections 172(c)(5) and 173 of the CAA based on the area's 8-hour ozone NAAQS classification under part 81 of this chapter, and the provisions of § 51.165.

(iii) If the area is designated attainment or unclassifiable for the 8-hour ozone NAAQS, the area's implementation plan must include provisions to implement the provisions of section 165 of the CAA, and the provisions of § 51.166 of this part, unless the provisions of § 52.21 of this chapter apply in such area.

(iv) If the area is designated attainment or unclassifiable but is located in an Ozone Transport Region, the area's implementation plan must include provisions to implement, consistent with the requirements in section 184 of the CAA, the requirements of sections 172(c) and 173 of the CAA as if the area is classified as moderate nonattainment for the 8-hour ozone NAAQS.

(f) What is the continued applicability of the NO_x SIP Call after revocation of the 1-hour NAAQS? The NO_x SIP Call shall continue to apply after revocation of the 1-hour NAAQS. Control obligations approved into the SIP pursuant to 40 CFR 51.121 and 51.122 may be modified by the State only if the requirements of §§ 51.121 and 51.122, including the statewide NO_x emission budgets, continue to be met and the State makes a showing consistent with section 110(l) of the CAA.

[70 FR 30604, May 26, 2005; 70 FR 44474, Aug. 3, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990;

56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.905, 40 CFR § 51.905

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40 C.F.R. § 51.906

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➡ § 51.906 Redesignation to nonattainment following initial designations for the 8-hour NAAQS.

For any area that is initially designated attainment or unclassifiable for the 8-hour NAAQS and that is subsequently redesignated to nonattainment for the 8-hour ozone NAAQS, any absolute, fixed date applicable in connection with the requirements of this part is extended by a period of time equal to the length of time between the effective date of the initial designation for the 8-hour NAAQS and the effective date of redesignation, except as otherwise provided in this subpart.

[70 FR 71700, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.906, 40 CFR § 51.906

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40 C.F.R. § 51.907

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➡ § 51.907 For an area that fails to attain the 8-hour NAAQS by its attainment date, how does EPA interpret sections 172(a)(2)(C)(ii) and 181(a)(5)(B) of the CAA?

For purposes of applying sections 172(a)(2)(C) and 181(a)(5) of the CAA, an area will meet the requirement of section 172(a)(2)(C)(ii) or 181(a)(5)(B) of the CAA pertaining to 1-year extensions of the attainment date if:

(a) For the first 1-year extension, the area's 4th highest daily 8-hour average in the attainment year is 0.084 ppm or less.

(b) For the second 1-year extension, the area's 4th highest daily 8-hour value, averaged over both the original attainment year and the first extension year, is 0.084 ppm or less.

(c) For purposes of paragraphs (a) and (b) of this section, the area's 4th highest daily 8-hour average shall be from the monitor with the highest 4th highest daily 8-hour average of all the monitors that represent that area.

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.907, 40 CFR § 51.907

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40 C.F.R. § 51.908

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Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.908 What modeling and attainment demonstration requirements apply for purposes of the 8-hour ozone NAAQS?

(a) What is the attainment demonstration requirement for an area classified as moderate or higher under subpart 2 pursuant to § 51.903? An area classified as moderate or higher under § 51.903 shall be subject to the attainment demonstration requirement applicable for that classification under section 182 of the Act, except such demonstration is due no later than 3 years after the area's designation for the 8-hour NAAQS.

(b) What is the attainment demonstration requirement for an area subject only to subpart 1 in accordance with § 51.902(b)? An area subject to § 51.902(b) shall be subject to the attainment demonstration under section 172(c)(1) of the Act and shall submit an attainment demonstration no later than 3 years after the area's designation for the 8-hour NAAQS.

(c) What criteria must the attainment demonstration meet? An attainment demonstration due pursuant to paragraph (a) or (b) of this section must meet the requirements of § 51.112; the adequacy of an attainment demonstration shall be demonstrated by means of a photochemical grid model or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.

(d) For each nonattainment area, the State must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season.

[70 FR 71700, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.908, 40 CFR § 51.908

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Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

§ 51.909 [Reserved]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.909, 40 CFR § 51.909

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Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.910 What requirements for reasonable further progress (RFP) under sections 172(c)(2) and 182 apply for areas designated nonattainment for the 8-hour ozone NAAQS?

(a) What are the general requirements for RFP for an area classified under subpart 2 pursuant to § 51.903? For an area classified under subpart 2 pursuant to § 51.903, the RFP requirements specified in section 182 of the Act for that area's classification shall apply.

(1) What is the content and timing of the RFP plan required under sections 182(b)(1) and 182(c)(2)(B) of the Act for an area classified as moderate or higher pursuant to § 51.903 (subpart 2 coverage)?

(i) Moderate or Above Area.

(A) Except as provided in paragraph (a)(1)(ii) of this section, for each area classified as moderate or higher, the State shall submit a SIP revision consistent with section 182(b)(1) of the Act no later than 3 years after designation for the 8-hour NAAQS for the area. The 6-year period referenced in section 182(b)(1) of the Act shall begin January 1 of the year following the year used for the baseline emissions inventory.

(B) For each area classified as serious or higher, the State shall submit a SIP revision consistent with section 182(c)(2)(B) of the Act no later than 3 years after designation for the 8-hour NAAQS. The final increment of progress must be achieved no later than the attainment date for the area.

(ii) Area with Approved 1-hour Ozone 15 Percent VOC ROP Plan. An area classified as moderate or higher that has the same boundaries as an area, or is entirely composed of several areas or portions of areas, for which EPA fully approved a 15 percent plan for the 1-hour NAAQS is considered to have met section 182(b)(1) of the Act for the 8-hour NAAQS and instead:

(A) If classified as moderate, the area is subject to RFP under section 172(c)(2) of the Act and shall submit no later than 3 years after designation for the 8-hour NAAQS a SIP revision that meets the requirements of paragraph (b)(2) of this section, consistent with the attainment date established in the attainment demonstration SIP.

(B) If classified as serious or higher, the area is subject to RFP under section 182(c)(2)(B) of the Act and shall submit no later than 3 years after designation for the 8-hour NAAQS an RFP SIP providing for an average of 3 percent per year of VOC and/or NO_x emissions reductions for

(1) the 6-year period beginning January 1 of the year following the year used for the baseline emissions inventory; and

(2) all remaining 3-year periods after the first 6-year period out to the area's attainment date.

(iii) Moderate and Above Area for Which Only a Portion Has an Approved 1-hour Ozone 15 Percent VOC ROP Plan. An area classified as moderate or higher that contains one or more areas, or portions of areas, for which EPA fully approved a 15 percent plan for the 1-hour NAAQS as well as areas for which EPA has not fully approved a 15 percent plan for the 1-hour NAAQS shall meet the requirements of either paragraph (a)(1)(iii)(A) or (B) below.

(A) The State shall not distinguish between the portion of the area that previously met the 15 percent VOC reduction requirement and the portion of the area that did not, and

(1) The State shall submit a SIP revision consistent with section 182(b)(1) of the Act no later than 3 years after designation for the 8-hour NAAQS for the entire area. The 6-year period referenced in section 182(b)(1) of the Act shall begin January 1 of the year following the year used for the baseline emissions inventory.

(2) For each area classified as serious or higher, the State shall submit a SIP revision consistent with section 182(c)(2)(B) of the Act no later than 3 years after designation for the 8-hour NAAQS. The final increment of progress must be achieved no later than the attainment date for the area.

(B) The State shall treat the area as two parts, each with a separate RFP target as follows:

(1) For the portion of the area without an approved 15 percent VOC RFP plan for the 1-hour standard, the State shall submit a SIP revision consistent with section 182(b)(1) of the Act no later than 3 years after designation for the 8-hour NAAQS for the area. The 6-year period referenced in section 182(b)(1) of the Act shall begin January 1 of the year following the year used for the baseline emissions inventory. Emissions reductions to meet this requirement may come from anywhere within the 8-hour nonattainment area.

(2) For the portion of the area with an approved 15 percent VOC plan for the 1-hour NAAQS, the State shall submit a SIP as required under paragraph (b)(2)of this section.

(2) What restrictions apply on the creditability of emission control measures for the RFP plans required under this section? Except as specifically provided in section 182(b)(1)(C) and (D) and section 182(c)(2)(B) of the Act, all SIP-approved or federally promulgated emissions reductions that occur after the baseline emissions inventory year are creditable for purposes of the RFP requirements in this section, provided the reductions meet the requirements for creditability, including the need to be enforceable, permanent, quantifiable and surplus, as described for purposes of State economic incentive programs in the requirements of § 51.493 of this part.

(b) How does the RFP requirement of section 172(c)(2) of the Act apply to areas subject to that requirement?

(1) An area subject to the RFP requirement of subpart 1 pursuant to § 51.902(b) or a moderate area subject to subpart 2 as covered in paragraphs (a)(1)(ii)(A) of this section shall meet the RFP requirements of section 172(c)(2) of the Act as provided in paragraph (b)(2) of this section.

(2) The State shall submit no later than 3 years following designation for the 8-hour NAAQS a SIP providing for RFP consistent with the following:

(i) For each area with an attainment demonstration requesting an attainment date of 5 years or less after designation for the 8-hour NAAQS, the attainment demonstration SIP shall require that all emissions reductions needed for attainment be implemented by the beginning of the attainment year ozone season.

(ii) For each area with an attainment demonstration requesting an attainment date more than 5 years after designation for the 8-hour NAAQS, the attainment demonstration SIP--

(A) Shall provide for a 15 percent emission reduction from the baseline year within 6 years after the baseline year.

(B) May use either NO_x or VOC emissions reductions (or both) to achieve the 15 percent emission reduction requirement. Use of NO_x emissions reductions must meet the criteria in section 182(c)(2)(C) of the Act.

(C) For each subsequent 3-year period out to the attainment date, the RFP SIP must provide for an additional increment of progress. The increment for each 3-year period must be a portion of the remaining emission reductions needed for attainment beyond those reductions achieved for the first increment of progress (e.g., beyond 2008 for areas designated nonattainment in June 2004). Specifically, the amount of reductions needed for attainment is divided by the number of years needed for attainment after the first increment of progress in order to establish an "annual increment." For each 3-year period out to the attainment date, the area must achieve roughly the portion of reductions equivalent to three annual increments.

(c) What method should a State use to calculate RFP targets? In calculating RFP targets for the initial 6-year period and the subsequent 3-year periods pursuant to this section, the State shall use the methods consistent with the requirements of sections 182(b)(1)(C) and (D) and 182(c)(2)(B) to properly account for non-creditable reductions.

(d) What is the baseline emissions inventory for RFP plans? For the RFP plans required under this section, the baseline emissions inventory shall be determined at the time of designation of the area for the 8-hour NAAQS and shall be the emissions inventory for the most recent calendar year for which a complete inventory is required to be submitted to EPA under the provisions of subpart A of this part or a more recent alternative baseline emissions inventory provided the State demonstrates that the baseline inventory meets the CAA provisions for RFP and provides a rationale for why it is appropriate to use the alternative baseline year rather than 2002 to comply with the CAA's RFP provisions.

[70 FR 71700, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.910, 40 CFR § 51.910

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Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

→ § 51.911 [Reserved]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

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40 C.F.R. § 51.912

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➡ § 51.912 What requirements apply for reasonably available control technology (RACT) and reasonably available control measures (RACM) under the 8-hour NAAQS?

(a) What is the RACT requirement for areas subject to subpart 2 in accordance with § 51.903?

(1) For each area subject to subpart 2 in accordance with § 51.903 of this part and classified moderate or higher, the State shall submit a SIP revision that meets the NO_x and VOC RACT requirements in sections 182(b)(2) and 182(f) of the Act.

(2) The State shall submit the RACT SIP for each area no later than 27 months after designation for the 8-hour ozone NAAQS, except that for a State subject to the requirements of the Clean Air Interstate Rule, the State shall submit NO_x RACT SIPs for electrical generating units (EGUs) no later than the date by which the area's attainment demonstration is due (prior to any reclassification under section 181(b)(3)) for the 8-hour ozone national ambient air quality standard, or July 9, 2007, whichever comes later.

(3) The State shall provide for implementation of RACT as expeditiously as practicable but no later than the first ozone season or portion thereof which occurs 30 months after the RACT SIP is due.

(b) How do the RACT provisions apply to a major stationary source? Volatile organic compounds and NO_x are to be considered separately for purposes of determining whether a source is a major stationary source as defined in section 302 of the Act.

(c) What is the RACT requirement for areas subject only to subpart 1 pursuant to § 51.902(b)? Areas subject only to subpart 1 pursuant to § 51.902(b) are subject to the RACT requirement specified in section 172(c)(1) of the Act.

(1) For an area that submits an attainment demonstration that requests an attainment date 5 years or less after designation for the 8-hour NAAQS, the State shall meet the RACT requirement by submitting an attainment demonstration SIP demonstrating that the area has adopted all control measures necessary to demonstrate attainment as expeditiously as practic- able.

(2) For an area that submits an attainment demonstration that requests an attainment date more than 5 years after designation for the 8-hour NAAQS, the State shall submit a SIP consistent with the requirements of § 51.912(a) and (b) except the State shall submit the RACT SIP for each area with its request pursuant to Clean Air Act section 172(a)(2)(A) to extend the attainment date.

(d) What is the Reasonably Available Control Measures (RACM) requirement for areas designated nonattainment for the 8-hour NAAQS? For each nonattainment area required to submit an attainment demonstration under § 51.908, the State shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all RACM necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.

[70 FR 71701, Nov. 29, 2005; 72 FR 31749, June 8, 2007]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.912, 40 CFR § 51.912

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Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.913 How do the section 182(f) NO_x exemption provisions apply for the 8-hour NAAQS?

(a) A person may petition the Administrator for an exemption from NO_x obligations under section 182(f) for any area designated nonattainment for the 8-hour ozone NAAQS and for any area in a section 184 ozone transport region.

(b) The petition must contain adequate documentation that the criteria in section 182(f) are met.

(c) A section 182(f) NO_x exemption granted for the 1-hour ozone standard does not relieve the area from any NO_x obligations under section 182(f) for the 8-hour ozone standard.

[70 FR 71701, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

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➡ § 51.914 What new source review requirements apply for 8-hour ozone nonattainment areas?

The requirements for new source review for the 8-hour ozone standard are located in § 51.165 of this part.

[70 FR 71702, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

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→ § 51.915 What emissions inventory requirements apply under the 8-hour NAAQS?

For each nonattainment area subject to subpart 2 in accordance with § 51.903, the emissions inventory requirements in sections 182(a)(1) and 182(a)(3) of the Act shall apply, and such SIP shall be due no later 2 years after designation. For each nonattainment area subject only to title I, part D, subpart 1 of the Act in accordance with § 51.902(b), the emissions inventory requirement in section 172(c)(3) of the Act shall apply, and an emission inventory SIP shall be due no later 3 years after designation. For purposes of defining the data elements for the emissions inventories for these areas, the ozone-relevant data element requirements under 40 CFR part 51 subpart A apply.

[70 FR 71702, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.915, 40 CFR § 51.915

Current through December 16, 2010; 75 FR 78874

Westlaw.

40 C.F.R. § 51.916

Effective: January 30, 2006

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.916 What are the requirements for an Ozone Transport Region under the 8-hour NAAQS?

(a) In General. Sections 176A and 184 of the Act apply for purposes of the 8-hour NAAQS.

(b) RACT Requirements for Certain Portions of an Ozone Transport Region.

(1) The State shall submit a SIP revision that meets the RACT requirements of section 184 of the Act for each area that is located in an ozone transport region and that is--

(i) Designated as attainment or unclassifiable for the 8-hour standard;

(ii) Designated nonattainment and classified as marginal for the 8-hour standard; or

(iii) Designated nonattainment and covered solely under subpart 1 of part D, title I of the CAA for the 8-hour standard.

(2) The State is required to submit the RACT revision no later than September 16, 2006 and shall provide for implementation of RACT as expeditiously as practicable but no later than May 1, 2009.

[70 FR 71702, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.916, 40 CFR § 51.916

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40 C.F.R. § 51.917

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Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

➡ § 51.917 What is the effective date of designation for the Las Vegas, NV, 8-hour ozone nonattainment area?

The Las Vegas, NV, 8-hour ozone nonattainment area (designated on September 17, 2004 (69 FR 55956)) shall be treated as having an effective date of designation of June 15, 2004, for purposes of calculating SIP submission deadlines, attainment dates, or any other deadline under this subpart.

[70 FR 71702, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.917, 40 CFR § 51.917

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Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

→ § 51.918 Can any SIP planning requirements be suspended in 8-hour ozone nonattainment areas that have air quality data that meets the NAAQS?

Upon a determination by EPA that an area designated nonattainment for the 8-hour ozone NAAQS has attained the standard, the requirements for such area to submit attainment demonstrations and associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIPs related to attainment of the 8-hour ozone NAAQS shall be suspended until such time as: the area is redesignated to attainment, at which time the requirements no longer apply; or EPA determines that the area has violated the 8-hour ozone NAAQS.

[70 FR 71702, Nov. 29, 2005]

SOURCE: 36 FR 22398, Nov. 25, 1971; 52 FR 24712, July 1, 1987; 55 FR 14249, April 17, 1990; 56 FR 42219, Aug. 26, 1991; 57 FR 32334, July 21, 1992; 57 FR 52987, Nov. 5, 1992; 58 FR 38821, July 20, 1993; 60 FR 40100, Aug. 7, 1995; 62 FR 8328, Feb. 24, 1997; 62 FR 43801, Aug. 15, 1997; 62 FR 44903, Aug. 25, 1997; 63 FR 24433, May 4, 1998; 64 FR 35763, July 1, 1999; 65 FR 45532, July 24, 2000; 69 FR 23996, April 30, 2004; 72 FR 28613, May 22, 2007, unless otherwise noted.

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

40 C. F. R. § 51.918, 40 CFR § 51.918

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42 U.S.C.A. § 7408 Page 1

Effective: November 10, 1998

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant--

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on--

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO_2 over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitro- gen.

(d) Publication in Federal Register; availability of copies for general public

The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

(e) Transportation planning and guidelines

The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after November 15, 1990, and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards. Such guidelines shall include information on--

(1) methods to identify and evaluate alternative planning and control activities;

(2) methods of reviewing plans on a regular basis as conditions change or new information is presented;

(3) identification of funds and other resources necessary to implement the plan, including interagency agreements on providing such funds and resources;

(4) methods to assure participation by the public in all phases of the planning process; and

(5) such other methods as the Administrator determines necessary to carry out a continuous planning process.

(f) Information regarding processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health

(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after November 15, 1990, and from time to time thereafter--

(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to--

(i) programs for improved public transit;

(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

(iii) employer-based transportation management plans, including incentives;

(iv) trip-reduction ordinances;

(v) traffic flow improvement programs that achieve emission reductions;

(vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;

(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;

(viii) programs for the provision of all forms of high-occupancy, shared-ride services;

(ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;

(x) programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas;

(xi) programs to control extended idling of vehicles;

(xii) programs to reduce motor vehicle emissions, consistent with subchapter II of this chapter, which are caused by extreme cold start conditions;

(xiii) employer-sponsored programs to permit flexible work schedules;

(xiv) programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity;

(xv) programs for new construction and major reconstructions of paths, tracks or areas solely for the use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest. For purposes of this clause, the Administrator shall also consult with the Secretary of the Interior; and

(xvi) program to encourage the voluntary removal from use and the marketplace of pre-1980 model year light duty vehicles and pre-1980 model light duty trucks.

(B) information on additional methods or strategies that will contribute to the reduction of mobile source related pollutants during periods in which any primary ambient air quality standard will be exceeded and during episodes for which an air pollution alert, warning, or emergency has been declared;

(C) information on other measures which may be employed to reduce the impact on public health or protect the health of sensitive or susceptible individuals or groups; and

(D) information on the extent to which any process, procedure, or method to reduce or control such air pollutant may cause an increase in the emissions or formation of any other pollutant.

(2) In publishing such information the Administrator shall also include an assessment of--

(A) the relative effectiveness of such processes, procedures, and methods;

(B) the potential effect of such processes, procedures, and methods on transportation systems and the provision of transportation services; and

(C) the environmental, energy, and economic impact of such processes, procedures, and methods.

(g) Assessment of risks to ecosystems

The Administrator may assess the risks to ecosystems from exposure to criteria air pollutants (as identified by the Administrator in the Administrator's sole discretion).

(h) RACT/BACT/LAER clearinghouse

The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 108, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 104, 105, Title IV, § 401(a), 91 Stat. 689, 790; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 108(a) to (c), (o), 111, 104 Stat. 2465, 2466, 2469, 2470; Nov. 10, 1998, Pub.L. 105-362, Title XV, § 1501(b), 112 Stat. 3294.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator--

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 109, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1679, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 106, 91 Stat. 691.)

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Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibil- ity,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated

with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or re-

voke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations--

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan;

transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409

(D) For purposes of this paragraph--

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such pro-

mulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub.L. 101-549, Title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that--

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or incre-

ment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines--

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum cri- teria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination

and the basis thereof shall be provided to the State and public.

(*l*) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of Novem-

ber 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680, and amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; S.Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub.L. 97-23, § 3, 95 Stat. 142; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), Title IV, § 412, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

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