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Part II

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40 CFR Parts 50, 51 and 81
Final Rule To Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Classification of Areas That Were Initially Classified Under Subpart 1; Revision of the Anti-Backsliding Provisions To Address 1-Hour Contingency Measure Requirements; Deletion of Obsolete 1-Hour Ozone Standard Provision; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50, 51 and 81

[EPA–HQ–OAR–2007–0956; FRL–9668–4]

RIN 2060–AO96

Final Rule To Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Classification of Areas That Were Initially Classified Under Subpart 1; Revision of the Anti-Backsliding Provisions To Address 1-Hour Contingency Measure Requirements; Deletion of Obsolete 1-Hour Ozone Standard Provision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is revising the rules for implementing the 1997 8-hour ozone national ambient air quality standards (NAAQS) to address certain limited portions of the rules vacated by the U.S. Court of Appeals for the District of Columbia Circuit. This final rule assigns Clean Air Act (CAA or Act) classifications and associated state planning and control requirements to selected ozone nonattainment areas. This final rule also addresses three vacated provisions of the 1997 8-hour NAAQS—Phase 1 Implementation Rule (April 30, 2004) that provided exemptions from the anti-backsliding requirements relating to nonattainment area New Source Review (NSR), CAA section 185 penalty fees, and contingency measures, as these three requirements applied for the 1-hour standard. This rule also reinstates the 1-hour contingency measures as applicable requirements that must be retained until the area attains the 1997 8-hour ozone standard. Finally, this rule deletes an obsolete provision that stayed the EPA's authority to revoke the 1-hour ozone standard pending the Agency's issuance of a final rule that revises or reinstates its revocation authority and considers and addresses certain other issues. That rule has now been issued.

DATES: This rule is effective on June 13, 2012.

ADDRESSES: The EPA has established a docket for this rule, identified by Docket ID No. EPA–HQ–OAR–2007–0956. All documents in the docket are listed in *www.regulations.gov.* Although listed in the index, some information is not publicly available, i.e., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: For further general information or information on classification of former subpart 1 areas, contact Mr. Butch Stackhouse, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539–01), Research Triangle Park, NC 27711, phone number (919) 541–2363, fax number (919) 541-0824 or by email at *stackhouse.butch@epa.gov.* For information on the 1-hour contingency measures associated with the 1-hour ozone standard contact Mr. H. Lynn Dail, Office of Air Quality Planning and Standards, (C504–03), U.S. EPA, Research Triangle Park, North Carolina 27711, phone number (919) 541–2363, fax number (919) 541–0824, or by email at *dail.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected directly by this action include State, local, and tribal governments and specifically include the areas identified in Table 1.

TABLE 1—AFFECTED AREAS INITIALLY CLASSIFIED UNDER SUBPART 1

State	Area
Arizona	Phoenix-Mesa.
California	Amador and Calaveras Counties (Central Mountain), Chico, Kern County (Eastern Kern), Mariposa and Tuolumne Counties (Southern Mountain), Nevada County, San Diego, Sutter County (Sutter Buttes).
Colorado	Denver, Boulder, Greeley, Ft. Collins & Loveland.
Nevada	Las Vegas.
New York	Albany-Schenectady-Troy, Buffalo-Niagara Falls, Essex County (Whiteface Mtn.), Jamestown, Rochester.
Pennsylvania	Pittsburgh-Beaver Valley.

Entities potentially affected indirectly by this action include owners and operators of sources of emissions of volatile organic compounds (VOCs) and nitrogen oxides (NO_X), the two pollutants that contribute to ground-level ozone concentrations.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice is also available on the World Wide Web. A copy of this notice will be posted at *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/.*

C. How is this document organized?

The information presented in this Document is organized as follows:

II. What is the background for this rule?

On January 16, 2009, the EPA proposed revisions to the Phase 1 Rule for implementing the 1997 8-hour ozone NAAQS [1] (Phase 1 Rule) to address several of the limited portions of the rule vacated by the U.S. Court of Appeals for the District of Columbia Circuit in *South Coast Air Quality Management District, et al.,* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). (*South Coast*). The proposal addressed the classification system for the subset of initial 8-hour ozone nonattainment areas that the Phase 1 Rule originally covered under CAA title I, part D, subpart 1. The proposal also addressed how contingency measures that are triggered by failure to attain or make reasonable progress toward attainment of the 1-hour standard should apply under the anti-backsliding provisions of the Phase 1 Rule. In addition, the proposal identified the vacated provisions of the rule that provided exemptions from the anti-backsliding requirements relating to 1-hour nonattainment NSR, the CAA section 185 penalty fees for failure to attain the 1-hour standard, and contingency measures as these requirements applied for the 1-hour standard. In the proposal, we planned to remove these provisions from the regulatory text in 40 CFR 51.905(e). Finally, we proposed to delete a provision that stayed the EPA's authority to revoke the 1-hour ozone standard. A more detailed description of the background for this rule appears in the January 16, 2009, notice of proposed rulemaking (74 FR 2936).

[1] 74 FR 2936, January 16, 2009.

III. This Action

A. Classification of 8-Hour Ozone Nonattainment Areas That the EPA Had Classified Under Subpart 1

There are a number of areas currently designated nonattainment for the 1997 8-hour ozone NAAQS (0.08 parts per million (ppm)) that originally did not receive a classification under subpart 2. In this action, the EPA is establishing initial classifications for these 16 areas and immediately finalizing the proposed reclassifications to Moderate for the areas that would be classified as Marginal but that failed to meet the June 15, 2007 attainment date for Marginal areas for the 1997 ozone NAAQS.

Based on the area classifications, the CAA establishes certain planning and control requirements for the areas, and in this rule, the EPA is specifying the deadlines by which states must submit plans to meet these requirements. Once the ozone air quality in these areas meets the 1997 8-hour standard, certain of these requirements may be suspended by a determination of attainment (Clean Data Determination, pursuant to 40 CFR 51.918, 70 FR 71702). The obligation to complete and submit those requirements would be suspended as long as the area continues to attain the standard, and would no longer apply once the area is redesignated to attainment following the requirements of CAA 107(d)(3). However, other requirements will continue to apply, and appropriate SIP elements must be submitted and approved prior to redesignation to attainment.

1. The Proposal

In the January 16, 2009, proposed rule, the EPA proposed that all areas designated nonattainment for the 1997 8-hour ozone standard would be classified under and subject to the nonattainment planning requirements of subpart 2. We proposed to modify the regulatory text to remove current § 51.902(b), which was vacated by the Court and which subjected certain nonattainment areas to regulation only under subpart 1.[2] The Court vacated the Phase 1 rule to the extent it placed certain areas solely under the implementation provisions of subpart 1. Therefore, the proposal addressed which provisions of the CAA should apply to those areas.[3]

We also noted that the classifications that would be established pursuant to this final rule would be the initial classifications for the affected areas for the 1997 ozone standard. Therefore, we proposed to use the 2003 8-hour ozone design values (derived from 2001–2003 air quality data), which were used to designate these areas nonattainment initially, as the basis for classification. We also proposed to use the classification table in 40 CFR 51.903 (established by the Phase 1 Rule) to classify these areas. We noted that CAA section 181(a) provides that ''at the time'' areas are designated for the ozone NAAQS, they will be classified ''by operation of law'' based on the ''design value'' of the areas and in accordance with Table 1 of that section. We concluded that this language specifies that the area will be classified based on the design value that existed for the area at the time of designation. Areas were designated nonattainment in 2004, based on design values derived from data from 2001–2003.

Since the classifications under this proposal would be the initial classifications for the 1997 8-hour standard for the affected areas, the EPA proposed that the provision of CAA section 181(a)(4) would apply to these areas. This provision would allow the Administrator in her discretion to adjust the classification—within 90 days after the initial classification—to a higher or lower classification ''* * * if the design value were 5 percent greater or 5 percent less than the level on which such classification was based.'' The EPA proposed to address requests for such classification adjustments for the newly-classified areas in a manner similar to the way requests were handled for the original round of subpart 2 classifications in 2004. This process is described at 69 FR 23863 *et seq.* (April 30, 2004). We indicated in the proposal, however, that if a state requests a reclassification from Moderate to

[2] As the Court made clear in its decision on rehearing, the CAA does not mandate coverage under subpart 2 of all areas designated nonattainment for an ozone NAAQS. As EPA moves forward to develop an implementation strategy for any future new ozone NAAQS, we may consider whether subpart 1 alone might apply for some areas for purposes of implementing that NAAQS.

[3] We note that areas subject to subpart 2 are also subject to subpart 1 to the extent subpart 1 specifies requirements that are not suspended by more specific obligations under subpart 2.

Marginal for an area that is currently violating the standard, the EPA would not grant the request for the reclassification because the Marginal attainment deadline has already passed.

We noted that the classification table of 40 CFR 51.903 provides an outside attainment date based on the number of years after the effective date of the nonattainment designation (e.g., 3 years for Marginal and 6 years for Moderate). For all nonattainment areas other than Denver, the effective date of designation for the 8-hour standard was June 15, 2004. Thus, Marginal nonattainment areas (with the exception of Denver) had a maximum statutory attainment date of June 15, 2007. Since the Marginal area attainment date has passed, the EPA proposed that any area that would be classified as Marginal based on its 2003 design value and that had not attained by June 15, 2007, or that did not meet the criteria for an attainment date extension under CAA section 181(a)(5)(B) and 40 CFR 51.907, would be reclassified immediately as Moderate under the final rule.

In addition, we noted that a number of areas that were initially placed in subpart 1 under the vacated provision of the Phase 1 Rule have since been redesignated to attainment for the 1997 8-hour standard. We indicated that since these areas are now designated attainment for the 1997 8-hour standard, the classification provisions of the final rule would not apply.

In the proposal, the EPA took the position that transportation conformity requirements, and current transportation plan and transportation improvement program conformity determinations for the 1997 8-hour ozone standard remain valid, and would not be impacted by this final action. These areas are already required to satisfy the applicable CAA section 176(c) conformity requirements for the 1997 8-hour ozone standard based on their nonattainment designation in June 2004. Thus, no new conformity deadline would be triggered for these areas after the areas are classified under subpart 2. These areas would continue to make future conformity determinations according to the applicable requirements of 40 CFR 93.109(d) and (e). The EPA indicated that any areas classified as Moderate that are using the interim emissions tests would be required to meet additional test requirements that do not apply to Marginal areas [40 CFR 93.119(b)(1)]. Moderate ozone nonattainment areas are required to satisfy both interim emissions tests in order to demonstrate conformity. Therefore, any area classified as Moderate would be required to demonstrate that emissions in the build scenario are less than the no-build scenario and that emissions in the build scenario are less than emissions in the 2002 base year. Marginal areas are required to demonstrate conformity using the ''no greater than'' form of one of the two interim emissions tests [40 CFR 93.119(b)(2)(i) and 40 CFR 93.119(b)(2)(ii)(A)&(B)].

The EPA proposed to require states to submit all required State Implementation Plan (SIP) elements of the areas' Marginal or Moderate classification no later than 1 year after the effective date of this final rule. The proposal noted that the EPA believed this to be an appropriate and reasonable amount of time given the attainment dates that will apply to these areas, and that these areas should have made significant progress toward developing SIPs, originally due June 15, 2007, based on the obligations that applied before the subpart 1 provision of the Phase 1 Rule was vacated in December 2006.

2. Final Rule

The final rule generally reflects the approach we proposed. The final rule provides that:

- All areas originally placed under subpart 1 and that remain designated nonattainment for the 1997 8-hour ozone standard at the time of this final rule are now classified under and subject to the nonattainment planning and emissions control requirements of subpart 2, sections 181–185. There are sixteen such areas.
- Initial classifications are based on the 8-hour ozone design values (derived from 2001–2003 air quality data) that were used to designate these areas nonattainment initially.
- The classification table in 40 CFR 51.903 (established by the Phase 1 Rule) is used for the classifications. The classification table of 40 CFR 51.903 provides a maximum attainment date based on a number of years after the effective date of the nonattainment designation (e.g., 3 years for Marginal; 6 years for Moderate). For all areas other than Denver,[4] the effective date of nonattainment designation and classification for the 8-hour standard was June 15, 2004. Thus, other than Denver, Marginal nonattainment areas had a maximum statutory attainment date of June 15, 2007. Since the Marginal area attainment date of June 15, 2007 has passed, any area that would have been initially classified as Marginal, and that did not attain by June 15, 2007 (based on 2004–6 data), and was unable to attain pursuant to the 1-year attainment date extensions allowed under section 181(a)(5)(B) and 40 CFR 51.907, is reclassified from Marginal to Moderate under this rule.
- CAA section 181(a)(4) applies to all areas affected by this final rule. This provision allows the Administrator in her discretion to adjust the classification—within 90 days after the initial classification—to a higher or lower classification ''* * * if the design value were 5 percent greater or 5 percent less than the level on *which* such classification was based.'' The process for making these adjustments is described at 69 FR 23863 *et seq.* (April 30, 2004). However, the EPA will not grant a request for reclassification to a lower classification if (1) the attainment date for that lower classification has passed, and (2) the area is or has violated the standard such that it would not qualify for the first and second 1-year attainment date extensions. Since the Marginal attainment date has passed, no area initially classified Moderate by this notice will be eligible for a downward adjustment to Marginal. Further, since none of the initial Moderate areas affected by this notice had a classification design value within 5 percent of the Serious threshold of 0.107 ppm, no areas are eligible for an upward classification adjustment to Serious.
- Areas originally placed under subpart 1 that have already been redesignated to attainment are not affected by these classification provisions, which apply only to areas that remain designated nonattainment for the 1997 ozone standard.

In this rulemaking, the EPA is responding to the Court's vacatur of the provision that placed certain nonattainment areas solely under subpart 1 and is now classifying those areas under subpart 2. There are sixteen such areas identified in Table 2 that are being initially classified under subpart 2 based on the area's design value at the time of designation. To determine the area's design value, we used 2001–2003 ambient air quality data. We then took the following steps to determine whether any areas classified Marginal should be immediately reclassified to Moderate.

Step 1. If the area would be classified as Marginal based on its design value at the time of designation, we determined if the area attained by the June 15, 2007 attainment date based on 2004–2006 ambient air quality data. If so (and if the area has not been formally redesignated

[4] Denver's special circumstancs as a former EAC area were discussed in the proposal. (74 FR 2939–2941). The nonattainment designation for the Denver area became effective November 20, 2007. (72 FR 53952 and 53953, September 21, 2007).

to attainment) [5] the area remains classified as Marginal. There are 8 areas classified Marginal as a result of this Step. (*See* Table 2 column for ''Status in 2007'', which identifies 8 Marginal areas as ''Attaining''.)

Step 2. If the Marginal area did not attain by the June 15, 2007 attainment date, we determined if the area would be eligible for the first 1-year extension under CAA section 181(a)(5) and 40 CFR 51.907.[6] If the area would not have been eligible for the first 1-year extension, we are reclassifying Amador and Calaveras Counties (Central Mountain), CA to Moderate as a result of this Step.

Step 3. For any Marginal area that was eligible for the first 1-year extension, we reviewed the ambient air quality data from 2005–2007 to determine if the area attained the standard by the end of the first 1-year extension. If so, we are classifying the area as Marginal. No areas are classified Marginal as a result of this Step.

Step 4. For any Marginal area that was eligible for the first 1-year extension, but did not attain by the end of that extension, we then determined if it would have been eligible for the second 1-year extension.[7] If the area would not have been eligible for the second 1-year extension, we are reclassifying the area to Moderate. Mariposa and Tuolumne Counties (Southern Mountain), CA are reclassified to Moderate as a result of this Step.

Step 5. For any Marginal area that was eligible for the second 1-year extension, we then reviewed the ambient air quality data from 2006–2008 to determine if the area attained the standard. If so, we are classifying the area as Marginal. If the area did not attain, we are reclassifying the area as Moderate. No areas are classified Marginal or reclassified Moderate as a result of this Step.

Any Moderate area that did not attain by June 15, 2010 and would not have been eligible for the first or second 1-year extension, would be subject to the CAA's statutory provisions for reclassification (bump-up) to Serious, the next higher classification category. At the time the January 16, 2009 proposed rule was issued, the Moderate area attainment date of June 15, 2010, had not passed. Thus, the proposed rule did not address reclassification from Moderate to Serious. The EPA will address reclassifications from Moderate to Serious, as necessary, in separate rulemaking action.

Table 2 identifies the final subpart 2 classification for each area that was originally classified under subpart 1 pursuant to our Phase 1 Rule (69 FR 23989, April 30, 2004), and that remains nonattainment for the 1997 ozone standard.

TABLE 2—SUMMARY OF NONATTAINMENT AREAS INITIALLY CLASSIFIED UNDER SUBPART 1 RECEIVING RECLASSIFICATION UNDER SUBPART 2

State	Area	2004 Initial classification/ design value 2001–2003 (ppm)	Status in 2007 (based on 2004–2006 data) (ppm)	Current subpart 2 classification
CA	Chico, CA	Marginal (0.089)	Attaining (0.084)	Marginal
CA	Sutter Co. (Sutter Buttes), CA	Marginal (0.088)	Attaining (0.081)	Marginal
NV	Las Vegas, NV	Marginal (0.086)	Attaining (0.083)	Marginal [d e]
AZ	Phoenix-Mesa, AZ	Marginal (0.087)	Attaining (0.083)	Marginal [e]
CO	Denver-Boulder-Greeley-Ft Collins-Loveland, CO.	Marginal [a] (0.087)	Attaining [a] (0.082)	Marginal
NY	Albany-Schenectady-Troy, NY	Marginal (0.087)	Attaining (0.078)	Marginal [d]
NY	Rochester, NY	Marginal (0.088)	Attaining (0.074)	Marginal [d]
NY	Essex Co. (Whiteface Mtn), NY	Marginal (0.091)	Attaining (0.071)	Marginal [d]
CA	Amador and Calaveras Counties (Central Mtn), CA.	Marginal (0.091)	Not attaining (0.093) [b]	Moderate
CA	Mariposa and Tuolumne Counties (Southern Mtn), CA.	Marginal (0.091)	Not attaining (0.086) [c]	Moderate
NY	Buffalo-Niagara Falls, NY	Moderate (0.099)	n/a	Moderate [d]
PA	Pittsburgh-Beaver Valley, PA	Moderate (0.094)	n/a	Moderate [d]
NY	Jamestown, NY	Moderate (0.094)	n/a	Moderate [d]
CA	Kern Co. (Eastern Kern), CA	Moderate (0.098)	n/a	Moderate
CA	Nevada Co. (Western Part), CA	Moderate (0.098)	n/a	Moderate
CA	San Diego, CA	Moderate (0.093)	n/a	Moderate

Notes:

[a] Denver was identified as an Early Action Compact (EAC) area at the time of designation in 2004 and the effective date of its nonattainment designation was deferred pending the EAC process. The EAC program was later terminated and the nonattainment designation for the area became effective on November 20, 2007, based on a 2001–2003 design value of 0.087 ppm placing it in the Marginal classification. The Denver area attained the standard by its attainment date of November 20, 2010 (3 years after the date the area was designated nonattainment) and continues to attain based on 2008–10 data.

[b] Amador and Calaveras Counties did not attain by the attainment date and were not eligible for the first 1-year extension based on 2006 4th highest daily 8-hour average of 0.098 ppm. Thus, the area's classification was changed to Moderate. The area now attains the standard based on 2008–10 data.

[c] Mariposa and Tuolumne Counties did not attain by the attainment date and were eligible for the first 1-year extension based on 2006 4th highest daily 8-hour average of 0.084 ppm. The area was not eligible for the second 1-year extension based on the average of the original attainment year (2006) and first extension year (2007) 4th highest daily 8-hour average of 0.085 ppm. Thus, the area's classification was changed to Moderate. The area now attains the standard based on 2008–10 data.

[d] Albany-Schenectady-Troy, Rochester, Essex County, Buffalo, Pittsburgh, Jamestown, and Las Vegas have received Clean Data Determinations.

[5] Section 107(d)(3) of the CAA allows states to request nonattainment areas to be redesignated to attainment provided certain criteria are met that include an approved SIP, a determination that air quality improvement is due to permanent and enforceable reductions in emissions, an approved maintenance plan, and other section 110 and part D requirements.

[6] Under 40 CFR 51.907, an area would be eligible for the first 1-year extension of its attainment date for the 1997 ozone standard if the 4th highest daily maximum 8-hour average in 2006 is equal to or less than 0.084 ppm.

[7] Under 40 CFR 50.907, an area is eligible for the second 1-year extension if the 2-year average of 4th highest daily maximum 8-hour averages for 2006 and 2007 at the monitor with the highest level is equal to or less than 0.084 ppm.

[e] Las Vegas and Phoenix have requested redesignation to attainment.

Subpart 2 contains SIP requirements that differ from subpart 1. These include different attainment deadlines, different RFP requirements, requirements to adopt RACT-based controls for certain categories of NO_X and VOC sources, specific major source thresholds and NSR offset ratio requirements for each classification. Table 3 lists new subpart 2-related SIP requirements for Marginal and Moderate nonattainment areas. The EPA is aware that many of the subpart 2 SIP requirements have already been satisfied through previous SIP submissions or the requirements have been suspended due to a Clean Data Determination. For example, all of the areas that would be affected by the Moderate area vehicle inspection and maintenance (I/M) program requirement are already implementing approved programs, and the three areas in the Ozone Transport Region (Pittsburgh, PA; Jamestown, NY; and Buffalo-Niagara, NY) have already submitted SIPs to address the VOC and NO_X RACT requirements. Similarly some areas affected by this rulemaking were previously nonattainment under the 1-hour ozone standards, and may have already established an emissions statement rule and completed RACT determinations. Also, 7 of the 16 areas affected by this final rule have received Clean Data Determinations that suspend certain planning requirements.[8]

As indicated in Table 3, attainment demonstrations and RFP plans are suspended by a Clean Data Determination, while the remaining requirements are not. However, it is longstanding EPA policy that if an area submits a complete request for redesignation including a maintenance plan before certain nonattainment area requirements become due, those elements do not need to be submitted in order for the area to be redesignated to attainment.[9]

TABLE 3—ADDITIONAL SIP ELEMENTS ASSOCIATED WITH SUBPART 2 FOR PREVIOUS SUBPART 1 8-HOUR OZONE NONATTAINMENT AREAS

[This table is not inclusive of all CAA requirements]

Ozone subpart 2 SIP requirement (CAA section)	Marginal areas	Moderate areas	Is requirement suspended by clean data determination?
Attainment demonstration including RACM (§ 182(b)(1))	Not Required	Required	Yes.
Reasonable Further Progress (§ 182(b)(1))	Not Required	Required	Yes.
Periodic Emissions Inventory (§ 182(a)(3)(A))	Required	Required	No.
Emissions Statement Rule (§ 182(a)(3)(B))	Required	Required	No.
Subpart 2 RACT for VOCs and NO_X (§ 182(b)(2)(f))	Not Required	Required	No.
Pre-1990 RACT fix-up (§ 182(a)(2)(A))	Required	Not Required	No.
New Source Review (§ 182(a)(2)(C), (a)(4), (b)(5))	Required	Required	No.
Vehicle I/M (§ 182(a)(2)(B), (b)(4))	Not Required	Required[+]	No.

[+] Applies only in nonattainment areas with population >200,000 based on 1990 census. (*See* 74 FR 41818–22, August 19, 2009.)

With respect to transportation conformity, current transportation plan and transportation improvement program conformity determinations for the 1997 8-hour ozone standard remain valid, and are not impacted by this action. Areas formerly classified under subpart 1 were already required to satisfy the applicable CAA section 176(c) conformity requirements for the 1997 8-hour ozone standard based on their designation as nonattainment. Thus, no new conformity deadline is triggered in these areas based on their classification under subpart 2. These areas would make future conformity determinations according to the applicable requirements of 40 CFR 93.109(d) and (e). Any new Moderate areas that are using interim emissions tests will be required to meet additional test requirements that do not apply to Marginal areas (40 CFR 93.119(b)(1)).[10] Also, areas newly classified under subpart 2 that are using budget test 40 CFR 93.118 and whose attainment year is within the timeframe of the transportation conformity determination and transportation plan must analyze the attainment year as required by 40 CFR 93.118(d)(2).

3. Comments and Responses

a. Classification of Former Subpart 1 Areas

Comment: A number of commenters opposed placing all the former subpart 1 areas under subpart 2. Most of these commenters expressed concern that the subpart 2 requirements for local emission controls would be too burdensome for some of the areas, are obsolete, and would not necessarily be effective in bringing down ozone levels. In the case of Cincinnati, two state air agency commenters argued that the requirements would produce absurd results because the area had recently dropped the vehicle I/M program in the wake of meeting the 1-hour ozone

[8] The seven areas that have received Clean Data Determinations are Pittsburgh-Beaver Valley, PA, 76 FR 31237–39, May 31, 2011; Buffalo-Niagara Falls, Jamestown, NY and Essex County (Whiteface Mountain), 74 FR 63993, December 7, 2009; Albany-Schenectady-Troy, NY, Rochester, NY, 73 FR 15672, March 25, 2008; and Clark County (Las Vegas), NV, 76 FR 17343, March 29, 2011.

[9] EPA guidance with respect to redesignations to attainment can be found in a memorandum entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' John Calcagni, Director, Air Quality Management Division, September 4, 1992. *See http://www.epa.gov/ttn/oarpg/t5/memoranda/redesignmem090492.pdf.* This memorandum notes, for example, that, for the purposes of redesignation, a state must meet the applicable requirements of section 110 and Part D that become due prior to the state's submittal of a complete redesignation request to EPA. For the purposes of evaluating a redesignation request, the EPA will not need to consider the required SIP elements that became due after submittal of the redesignation request. However, such requirements remain due until EPA completes final action approving a redesignation request.

[10] Moderate ozone nonattainment areas are required to satisfy both interim emissions tests in order to demonstrate conformity. Therefore, they must demonstrate that emissions in the build scenario are less than the no-build scenario and that emissions in the build scenario are less than emissions in the 2002 base year. (40 CFR 93.119(b)(1)).

standard. Some commenters also argued that certain areas would benefit more from regional controls than from local controls. In addition, some of the affected areas have already made significant progress toward attainment since they were originally designated nonattainment. Another commenter stated that the proposal would take away flexibility that they believe the CAA allows and that the Court had preserved in its ruling by allowing areas with design values below 0.09 ppm to be classified under subpart 1. Two commenters supported placing all the former subpart 1 areas under subpart 2.

Response: In *South Coast,* the Court determined that although the CAA does not mandate that 8-hour ozone nonattainment areas with a design value below 0.09 ppm be placed under subpart 2, the EPA had not identified a reasonable basis for placing any of the 1997 standard ozone nonattainment areas under subpart 1. As noted in the proposed rule, the EPA was unable to develop a reasonable basis for doing so and, despite soliciting comments on potential rationales, none of the commenters on the proposed rule identified any such rationale. Therefore, at this time, the EPA is not placing any 1997 standard nonattainment areas solely under subpart 1.

We disagree with the commenters that suggest that the subpart 2 requirements associated with the 1997 NAAQS would not necessarily be effective in bringing down ozone levels. Even if the mandated programs under subpart 2 are not the most effective programs to achieve emission reductions in a specific area, that does not render the programs ''absurd,'' as the programs will provide benefits by reducing emissions of VOC and NO_X. We also note that the areas being placed under subpart 2 through this rulemaking have been designated nonattainment for the 1997 ozone standard for over 7 years. Some of those areas have attained the 1997 standard and have had an opportunity to seek redesignation to attainment before the mandatory subpart 2 requirements apply. With regard to those that are still not attaining the 1997 standard, we note that the subpart 1 flexibility that has been available to these areas to date has not resulted in attainment for these areas. Thus, it is difficult to argue for these areas that the additional flexibility under subpart 1 is more likely to result in attainment than the mandated programs under subpart 2.

Comment: Some of the commenters that opposed placing all the former subpart 1 areas under subpart 2 believed that the EPA did not provide sufficient reason for not considering a different threshold for placing areas under subpart 1. They noted that the Court in *South Coast* had set forth the 0.09 ppm 8-hour average as a design value to be used, such that areas with design values below that value could be placed in subpart 1. One commenter recommended that the EPA maximize the use of subpart 1 to the extent it could. However, on this matter, several environmental organizations commented that the Court in *South Coast* expressly rejected all of the EPA's previously stated rationales for placing some areas only under subpart 1. They also commented that the EPA has not identified any alternative rationales to justify such an approach, and allege that no lawful or non-arbitrary rationales exist.

Response: Although the Court determined that an 8-hour design value of 0.09 ppm is the appropriate threshold for determining which areas must be placed under subpart 2 and which areas the Agency has discretion to place under subpart 1, the Court rejected the EPA's rationale in the Phase 1 Rule for placing areas under subpart 1. At the time of proposal, the EPA noted that it had not developed any rationale for placing areas in subpart 1 for the 1997 8-hour ozone standard and expressly solicited comment on potential rationales. However, no commenters presented a rationale that differed from that which the Court rejected in *South Coast.*

Comment: One state air agency supported the proposal to not place under subpart 2 those former subpart 1 areas that have already been redesignated attainment.

Response: As noted in the proposal, because the classification provisions apply to areas designated nonattainment, the final rule does not classify those former subpart 1 areas that have been redesignated to attainment for the 1997 ozone NAAQS.

b. Timing of SIP Submission Under Subpart 2 Classification

Comment: A number of commenters argued that the proposal did not give enough time for states to submit SIPs under the new classification. Some argued that the period of 1 year after the effective date of this rule for classifying areas was unreasonable and arbitrary, and that more time was needed for analysis and the rule adoption process, including public hearing. Some commenters argued that the EPA should allow the statutory time period in CAA section 181(b)(1) from the date of classification (3 years). Several commenters noted that even if a state had prepared a SIP under subpart 1 requirements, a subpart 2 Moderate area SIP requires much more time and effort due to the number of mandatory measures that would have to be adopted.

Response: As noted in the proposal, subpart 1 areas originally had an obligation to submit a SIP under section 172(c), including an attainment demonstration, within 3 years after the June 2004 designations. Although the Court vacated the EPA's placement of areas under subpart 1, the decision did not change the requirement that areas designated nonattainment must attain as expeditiously as practicable. Moreover, we note that areas that would have been subject only to subpart 1 if the EPA's rule had not been vacated would have had an attainment date of June 2009, 1 year earlier than the attainment date for the Moderate classification. While the Court decision did create some uncertainty regarding the specific classification that might eventually apply to an area, we note that areas have been on notice since the EPA's January 2009 proposal that it is likely they would be classified under subpart 2. As noted in the proposal, the EPA had advised states with areas that had been placed under subpart 1, including all of the areas affected by this final rule, to continue making progress toward attainment for these areas.[11] Indeed we are aware that many of these states have been working to adopt and implement measures necessary for the affected areas to attain the 1997 ozone standard, and the EPA believes 1 year is an appropriate amount of additional time to complete that work.

For those areas that are still violating the 1997 8-hour ozone standard, it is critical for them to move forward and achieve the emission reductions needed to ensure timely attainment.

Comment: One state agency commenter recommended that the effective date of the new classifications be 1 year after the rule is issued; if the area attains before the effective date, the rule would be waived for that area.

Response: The CAA requires that areas be classified ''at the time of designation by operation of law.'' The effective date of designation for the 1997 ozone standard was June 15, 2004. While we do not believe it is appropriate to treat the classifications as

[11] Memorandum of March 19, 2007 from William L. Wehrum to EPA Regional Administrators, re: ''Impacts of the Court Decision on the Phase 1 Ozone Implementation Rule'' (response to Question 2) and memorandum of June 15, 2007, from Robert J. Meyers to Regional Administrators, re: ''Decision of the U.S. Court of Appeals for the District of Columbia Circuit on our Petition for Rehearing of the Phase 1 Rule to Implement the 8-Hour Ozone NAAQS'' (Implications for Subpart 1 Areas).

''retroactive,'' such that they would be considered effective over 5 years ago, we also do not believe there is a legal basis for deferring the effective date of the classification for 1 year. Moreover, as noted above, if the Court had not vacated our placement of areas only under subpart 1, the areas affected by this rule would have had an attainment date (June 2009) that is 1 year earlier than the attainment date (June 2010) they would receive if classified as Moderate under this rule. Thus, even if the EPA had a legal basis and discretion to delay the effective date of the classification, and thus delay the planning and attainment obligations, we do not believe in this instance that it would be reasonable to do so.

c. Timing of Attainment Date

Comment: A number of commenters argued that the proposal did not provide newly classified Marginal and Moderate areas sufficient time to attain and that they should have maximum attainment dates of 3 and 6 years (respectively) from the effective date of the new classifications, not the original nonattainment designations in 2004. Several commenters cited the EPA's interpretation of the CAA's attainment date in the Phase 1 Rule for support by referring to section 181(b)(1) that provides that where an area designated attainment or unclassifiable is subsequently redesignated to nonattainment, the area shall be classified under Table 1 of section 181 and shall be subject to the same requirements applicable if it had been classified at the time of notice under section 107(d)(3), ''except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of enactment of the CAA Amendments of 1990 and the date the area is classified under this paragraph.'' The commenters note that while by its terms section 181(b)(1) would not expressly apply to reclassification of a nonattainment area, the section indicates that retroactive application of time requirements is not favored. The commenters note that regarding the proposed rule, the EPA would be classifying areas in 2009, not in 2004, and argue that deadlines should be calculated from 2009, not from 2004. They also argue that even if the EPA believes the deadlines need to be adjusted in some way to address this unique situation, the calculation and adjustment should be done from 2009 after an assessment of the situation as it exists in 2009. The commenters also argue that the EPA seems to be doing exactly what the U.S. Supreme Court warned against in *Whitman* when the Court rejected the idea of mechanically applying subpart 2's method for calculating attainment dates, which is simply to count forward a certain number of years from the effective date of the 1990 CAA amendments. They point out that the Court observed that simplistically using the subpart 2 scheme ''depending on how far out of attainment the area started—seems to make no sense for areas that are first classified under a new standard after November 14, 1990. If for example, areas were classified in the year 2000, many of the deadlines would largely have expired at the time of classification.''

Response: For the reasons articulated in previous responses, we do not believe that it is legally supportable to start the attainment periods from the time of classification pursuant to this rule, nor do we believe that such an approach is reasonable. The primary trigger for planning for attainment of a NAAQS is the designation as nonattainment for that standard. As noted previously, regardless of whether an area is subject only to subpart 1, or is classified as Marginal or higher under subpart 2, the obligation is the same—to attain as expeditiously as practicable. Thus, there is no legal or policy basis to delink the attainment obligation from the time of designation and instead link it to the time of classification. We disagree that this situation is analogous to the situation where an area is newly designated nonattainment and for which section 181(b)(1) provides that any submission dates tied to the date of enactment of the CAA Amendments be extended to account for the time of designation. In such a case, the key is that the area is newly *designated* as nonattainment—not that the area's classification status has changed or been clarified. All of the areas that will receive a subpart 2 classification pursuant to this rule have been designated nonattainment since June 2004 (except for the Denver area, which was designated nonattainment effective November 20, 2007) and thus should be well on their way toward planning for attainment of the 1997 ozone standard as expeditiously as practicable. To the extent that those efforts have been delayed, we see no legal basis or justification to provide additional time.

Comment: One state air agency commenter argued that the 5 percent reclassification provision of the CAA would be rendered meaningless by the timing in the proposal, because the attainment date for Marginal areas has already passed.

Response: We agree as a practical matter that none of the 16 areas affected by this final rule are eligible for a classification adjustment.

Comment: Several commenters argued that the Denver area should have a June 2007 attainment date for its Marginal classification and thus should be reclassified to Moderate because it did not attain by a June 2007 attainment date. They claim that the Early Action Compact (EAC) concept was unlawful. They argue that even assuming the EAC deferral was legally permissible, Denver was in fact identified as a nonattainment area in the EPA's original April 30, 2004, designations action. Moreover, they point out that the EPA agrees, ''as it must under the Act,'' that areas identified as of April 30, 2004, as violating the 1997 ozone NAAAQS (including Denver) must be classified based on their design values as of April 30, 2004. They claim that under § 181 of the Act, such classification occurred by operation of law no later than April 30, 2004. Furthermore, they claim that assigning a November 2010 Marginal area attainment date to Denver (a Marginal area) is also unreasonable and arbitrary, given that the EPA is assigning a June 2007 attainment date to all other areas classified as Marginal based on 2001–03 design values. They argue that even if the Act could be read as giving the EPA some discretion in setting the outside attainment date, the statute expressly requires the attainment date to be ''as expeditiously as practicable.'' They argue that the EPA cites no legal or rational basis, and none exists, for finding that November 2010 is ''as expeditiously as practicable'' for Denver, when every other Marginal area had a 2007 attainment date, nor is there any conceivable justification consistent with the Act and its purposes. They point out that Denver residents are not somehow less deserving of clean air than residents of the other areas, nor is there any rational basis for delaying the stronger controls in Denver that would come from the reclassification to Moderate required for all other Marginal areas that failed to attain by 2007 and were ineligible for attainment date extensions. They argue that the EPA cannot claim that it would be harder for Denver to adopt Moderate area controls than the other areas proposed for Moderate classification, as all of the other areas will have had the same amount of time to prepare and implement SIP requirements. They argue that neither is there any inequity in requiring Denver to adopt the same controls on the same schedules as required for other areas initially

classified as Marginal based on 2001–03 design values. To the contrary, they argue, allowing Denver more time than other Marginal areas not only flouts Congressional intent but is grossly inequitable to the other Marginal areas required to attain by 2007. The commenter also argues that the EPA cannot rely on the EAC deferral of the effective date of Denver's attainment designation and classification because that deferral was itself contrary to the Act. ''Nowhere does the Act allow the EPA to defer the effective dates of ozone nonattainment designations and classifications, or to otherwise delay control requirements triggered by designations. To the contrary, the Act requires nonattainment designations by date-certain deadlines. Section 107(d), 42 U.S.C. 7407(d); Pub. L. 105–178, section 6103, 112 Stat. 465 (June 9, 1998), codified at 42 U.S.C. 7407 Note. Promulgating a non-effective nonattainment designation—i.e., a paper designation that sits in the books without being activated—violates this requirement. Further, the Act contains a detailed array of requirements, likewise governed by date certain deadlines, applicable to nonattainment areas, including submission of implementation plans providing for attainment, rate-of-progress, and various specific programs such as new source review, conformity, and contingency measures. *See,* e.g., CAA sections 181, 182, 110, 172, 173, 176. By refusing to implement these various requirements, the EAC scheme violates those provisions. The Act likewise prescribes requirements governing redesignation of nonattainment areas to attainment (setting forth several prerequisites that must be met before such redesignation can be granted), CAA section 107(d)(3)(E), and requiring the EPA-approved maintenance plans sufficient to remedy any relapse into nonattainment that occurs during the 20-year period following redesignation. CAA sections 107(d)(3)(E)(iv), 175A. By shunting these requirements aside, the EPA would violate those provisions as well.''

Response: The EPA acknowledges the commenters' concerns with the EAC program. However, the EPA's rules regarding EAC areas under the 1997 ozone NAAQS were promulgated in 2004, and the proper time for challenging the legality of the EAC program and the deferral of the effective date of the nonattainment designation for Denver (and other EAC areas) was within 60 days of publication in the **Federal Register** of those final actions (40 CFR Part 81, September 21, 2007 (72 FR 53952) and April 30, 2004 (69 FR 23857)). To the extent the commenters are raising concerns about the effective date of designation for the Denver nonattainment area and the attainment date for that area, those were established in a final rule published September 21, 2007 (72 FR 53952). Thus, these comments are not timely. We note that contrary to the claims of the commenters, the Denver area's classification in this rulemaking is based on the design value that existed at the time the EPA initially published (and deferred the effective date of) the nonattainment designation [April 30, 2004 (69 FR 23858)] and was based on 2001 to 2003 data. With regard to the claims concerning the time periods for SIP submissions, we note that the time periods for attainment and SIP submissions for the Denver area are linked to the effective date of the designation and/or classification of the area, as they are for all areas. With respect to the attainment date, the Denver area, which is classified as Marginal under this rule, had an attainment date of November 2010—3 years following the effective date of designation.

Comment: One state agency commenter argued that for Moderate areas, the requirement to provide reasonable further progress toward attainment is rendered meaningless by the timing of the proposal, since there would be no time to provide progress prior to the attainment date.

Response: Given the timing of the maximum statutory attainment date (June 15, 2010) and SIP submission date (1 year after the effective date of this rulemaking) for Moderate areas, any RFP plan not already in effect will not have an effect on attainment by the attainment date since the attainment date for Moderate areas has already passed. However, under the CAA, an RFP plan (to obtain 15 percent VOC emissions reductions from baseline emissions within the first 6 years after the applicable base year) would still be a required SIP element, even though the 6-year period might end after the Moderate area attainment date, depending on the base year for the state's RFP calculation. We note that under the Clean Data Policy, codified at 40 CFR 51.918 (70 FR 71702, November 29, 2005), if the area attains the standard, a Clean Data Determination under the Clean Data Policy provision would suspend the obligation to submit the RFP SIP. The suspension would remain in place until such time as the EPA redesignates the area to attainment, at which time the requirement would no longer apply, or until EPA determines the area has violated the 1997 standard, at which time the obligation would apply once again.

d. Data Used for Classification

A number of the commenters argued that the EPA should use more recent data for the classification of the former subpart 1 areas. There were several arguments made in these comments, and we address them separately here:

Comment: Commenters claim that using the 2001–2003 data for the initial designations ignores the improvements in emissions reductions (e.g., through the NO_X SIP call) and ambient ozone reductions that have occurred since designations were made in 2004. Some commenters note that several of the areas are close to attaining the standard and would be subjected to mandatory controls that would not be necessary to attain the standard. Another commenter notes that Appendix A of the January 16, 2009 proposal shows that, with one exception, the current subpart 1 areas for which a 2005–2007 design value is available had a lower design value in those years than they did for 2001–2003, and the one exception (Las Vegas) had the same design value in both periods; thus using the earlier data would more likely subject areas to a higher classification. Another commenter notes that section 181(a) directed the EPA in 1990 to classify areas using the most recent data (i.e., data from 1990, or actually, a future time when designations would be made), not data from 6 years earlier. The commenter also notes that section 181(a) does not state that the data used to classify areas must be the data that existed at the time of designation. They argue that section 181(a) instead specifies only that the classification occur at the time of designation. They point out that classification is precisely the thing that did not lawfully occur at the time of designation in 2004, through no fault of the states. They argue that the temporal connection between classification and designation has been irretrievably broken. They argue that a second temporal connection in section 181(a), namely the connection between classification of areas and data used to classify areas, has not been broken and should be preserved by using the most recent data. They claim that doing so allows the EPA to better assess where states are now and where mandatory requirements of a higher classification are really needed to address ozone nonattainment. It avoids creating artificial deadlines based on retroactive application of time periods and classification based on a backward-looking review of data. It avoids

depriving states of the opportunity to develop strategies to attain the revised standard based upon where the state's air quality is, not was. They argue this is particularly true for areas like Columbus and Cincinnati in Ohio that have attained the 1-hour standard that was addressed by subpart 2, and already have or are close to attaining the 1997 standard. They claim that these areas do not need to be abruptly classified at the tougher Moderate classification with its mandatory emission control measures.

Response: As we noted in the proposal, the classifications would be the initial classifications for these areas for the 1997 ozone standard. We noted that CAA section 181(a) provides that ''at the time'' areas are designated for a NAAQS, they will be classified ''by operation of law'' based on the ''design value'' of the areas and in accordance with Table 1 of that section. We believe this language requires that the area be classified based on the design value that existed for the area ''at the time'' of designation. Areas were designated nonattainment in 2004, based on design values derived from data from 2001–2003.

We also note that arguments that areas should be able to develop plans to attain based on what the air quality ''is,'' not what it ''was,'' would only serve to further delay the progress that should already have been made. As noted previously, if the area had remained solely subject to subpart 1, the area would have been required to attain the 1997 standard by June 2009. Those areas that have attained and have been redesignated as of the effective date of this final rule will not be classified under subpart 2. The EPA has previously reminded states that they should remain on track with planning for attainment despite the Court's remand of the subpart 1 classification.

We also note that it would be inequitable to most areas previously classified under subpart 2 to classify a former subpart 1 area with similar air quality using current air quality data. Most of the areas classified under subpart 2 in 2004 now have cleaner air than they did in 2004 and thus, if they were being classified now based on more recent air quality data, they too would receive a lower classification.

Comment: One commenter alleged that using the 2001–2003 data for Allegan County, MI, produces an absurd result, requiring mandatory local emission controls when the problem is clearly transport from outside the state. The commenter cites the study, ''Western Michigan Ozone Study—Draft Report'' of November 2008, prepared by the Lake Michigan Air Directors Consortium (LADCO) for the EPA, to comply with a provision within the Energy Policy Act of 2005. That commenter notes that in *NRDC* v. *EPA,* 22 F.3d 1125 (D.C. Cir. 1994), the D.C. Circuit Court addressed the EPA's failure to meet a November 15, 1991 deadline in the CAA for publication of guidance for states' preparation of SIPs for ''enhanced'' vehicle inspection and maintenance. Those SIPs were due by November 15, 1992. Because the EPA failed to publish the necessary guidance until nearly a year after the statutory deadline for that guidance, states could not be held to *their* deadline, and the states' SIP submissions deadline was ''properly extended to further the CAA's purposes.'' The commenter concludes that for purposes of the proposed rule, the EPA's failure in 2004 to meet its statutory obligation to classify ozone nonattainment areas lawfully, is no cause for the EPA to now use the data it would have used at that time in classifying areas, where those data would disadvantage the areas. They comment that the effect of the EPA's proposed approach on this issue is to penalize states, areas, and sources unfairly for the EPA's legally deficient action.

Response: We disagree with the commenter's suggestion that it would be an ''absurd result'' to use designation-era data for classification. As we noted previously in relation to the concept of allowing exemptions from requirements under subpart 2, the judicial precedents in which courts have allowed exceptions from the strict language of a law are fairly narrow. For instance, in the final Phase 2 Rule, we said: ''In general, we note that to demonstrate an absurd result, a State would need to demonstrate that application of the requirement would result in more harm than benefit. For example, the programs mandated under subpart 2 are generally effective in reducing emissions of the two ozone precursors—NO_X and VOC—and because reductions of those precursors generally lead to improved air quality, we believe that such a demonstration could be made, if at all, only in rare instances.'' *See* 70 FR at 71620; November 29, 2005. We do not find that the situation at issue here meets the criteria implied by judicial precedents.

We also disagree with the commenter's statement where the commenter relies upon *NRDC* v. *EPA* to argue against using the data from the time of designation. In *NRDC,* the Court faced an impossibility argument. Under the CAA, States were required to develop I/M SIPs consistent with the EPA guidance. Because the EPA was late in issuing that guidance (which it determined needed to be issued through rulemaking), States were unable to submit timely SIPs that were consistent with the guidance. There is no impossibility argument here. The data from 2001–2003 exist and can be used to classify areas. To the extent that SIP submission dates for these areas have passed, the EPA is providing additional time for submission of those plans. To the extent that a Marginal area affected by this rule did not attain the standard by the June 15, 2007, attainment date (or the extended deadline), the EPA is reclassifying the area to Moderate.[12] Furthermore, we note that the subpart 2 classifications based on 2001–2003 data are not ''punishment'' for the EPA's failure to classify areas correctly in the initial Phase 1 Rule. Using the 2001–2003 data places the areas in the position they would have been in if the EPA had initially classified all areas under subpart 2 in the initial Phase 1 Rule.

Comment: Another commenter notes that 40 CFR Part 50, Appendix I states: ''the 3-year average annual fourth-highest maximum 8-hour average ozone concentration is also the air quality design value for the site.'' The appendix states in section 2.2 that ''The 3-year average shall be computed using the *three most recent,* consecutive calendar years of monitoring data meeting the data completeness requirements described in this appendix.'' The commenter notes that the definition of ''design value'' in the CFR requires that the three most recent years be used to calculate it.

Response: We disagree with commenters that rely on 40 CFR Appendix I to argue that there is only one ''design value'' for an area and that it is based on the most recent 3 years of data. We agree that the current design value for an area is based on the most recent 3 years of data, but that does not mean design values for previous 3-year periods of time are no longer relevant. As explained previously, we believe that the language in section 181(a) of the

[12] We do not agree with arguments that we should allow for a Marginal area classification with an attainment date in the future. As noted in several places, Marginal areas are presumed capable of attaining quickly without the adoption of additional local controls. For that reason, there are virtually no mandated local control requirements for Marginal areas under section 182(a), nor is there a requirement to develop an attainment demonstration. Thus, to the extent an area would have been classified as Marginal based on its 2001–2003 design value yet failed to attain by June 2007, we see no argument that such areas would have attained if EPA had ''correctly'' classified them as Marginal in 2004. (We note that many of the areas originally identified as subpart 1 have indeed attained and been redesignated as attainment.)

Act provides that classifications be based on the design value used for designation.

Comment: Another commenter claims that ignoring current air quality data is out of step with the EPA's new emphasis on science-based decisions.

Response: The EPA is not ignoring current air quality data, but must classify areas based on the law as described above.

Comment: Environmental organization commenters argue that the EPA should use the air quality data available at the time of designation for initial classification.

Response: The EPA agrees for the reasons stated in the proposed rule and above in response to comments.

e. Other Comments on Classification of Former Subpart 1 Areas

Comment: One state air agency commented that the proposed rule does not adequately address situations like Allegan County, MI, which is largely affected by transport but yet is not provided any relief under the CAA such as coverage under the rural transport area provision of section 182(h).

Response: We agree that the CAA does not provide relief in the form of being identified as a ''rural transport area'' for areas such as Allegan County, MI, whose nonattainment area boundary is adjacent to a metropolitan statistical area. Part of the EPA's rationale in the Phase 1 Rule for using subpart 1 was to address situations such as that with Allegan County. However, the court in *South Coast* found that Congress intended to constrain such discretion. The commenter has not suggested any specific relief available under the CAA that the EPA could have applied in this final rule.

B. Anti-Backsliding Under Revoked 1-Hour Ozone Standard—In General

1. Proposal

The EPA codified anti-backsliding provisions governing the transition from the revoked 1-hour ozone NAAQS to the 1997 8-hour ozone NAAQS in 40 CFR 51.905(a). These provisions, as promulgated, retained most of the 1-hour ozone requirements as ''applicable requirements'' [defined in 40 CFR 51.900(f)]. A requirement listed as an ''applicable requirement'' is retained for an area if the requirement applied in the area based on the area's 1-hour ozone designation and classification as of the effective date of its 8-hour designation (for most areas, June 15, 2004). 40 CFR 51.900(f).

Section 51.905(b) provides that an area remains subject to the 1-hour standard obligations defined as ''applicable requirements'' until the area attains the 8-hour NAAQS. Furthermore, § 51.905(b) provides that such obligations cannot be removed from a SIP, even if the area is redesignated to attainment for the 8-hour NAAQS, but must remain in the SIP as applicable requirements or as contingency measures, as appropriate.

Section 51.905(e), as promulgated in 2004, indicated that certain 1-hour standard requirements would no longer apply after revocation of the 1-hour standard. Among other things, these included 1-hour NSR, section 185 penalty fees for the 1-hour NAAQS, and 1-hour contingency measures for failure to attain or make reasonable progress toward attainment of the 1-hour NAAQS.[13] The Court vacated these exemption provisions, and in the January 16, 2009, proposed rule, the EPA proposed to delete these three vacated provisions from the *Code of Federal Regulations*.[14]

2. Final Rule

This final rule addresses how anti-backsliding principles will ensure continued progress toward attainment of the 8-hour ozone NAAQS. The final rule removes three vacated provisions of the Phase 1 Rule that provided exemptions from the anti-backsliding requirements relating to nonattainment NSR, CAA section 185 penalty fees, and contingency measures as these requirements applied for the 1-hour standard. This rule also reinstates 1-hour contingency measures as applicable requirements that must be retained until the area attains the 1997 ozone standard. The EPA has issued separate guidance[15] and a separate proposed rule addressing the now-applicable 1-hour requirements for NSR (75 FR 51960, August 24, 2010). The EPA will also address reinstatement of the section 185 fee program obligations in separate action.

3. Comments and Responses

Comment: One group of environmental organizations supported the proposal to remove the three exemptions from the regulations, but stated that NSR and the section 185 fee requirement must be added to the list of ''applicable requirements'' at 40 CFR 51,900(f). Several commenters expressed other concerns about the implications of removing the 1-hour NSR and section 185 fee program exemptions.

Response: In this final rule, the EPA is only removing the regulatory language at 40 CFR 50.9(c) that provided for the exemptions from 1-hour NAAQS requirements in accordance with the court vacatur. The EPA has addressed in a separate proposed rulemaking exactly how the regulatory provisions should address the now-applicable 1-hour NSR requirements (75 FR 51960, August 24, 2010), and plans to address application of section 185 fee program requirements for the 1-hour standard in separate actions.

Comment: A state agency commented that the Court never addressed the requirements that should still apply to prevent backsliding in areas that had already achieved timely attainment of the 1-hour ozone standard and only focused on whether NSR was a required control for the purposes of CAA section 172(e) anti-backsliding provisions for areas not attaining the 1-hour standard (such as South Coast Air Basin).

The commenter stated that section 51.905(e)(4), which states that upon revocation of the 1-hour ozone NAAQS, a 1-hour nonattainment area's implementation plans must meet requirements contained in paragraphs (e)(4)(ii) through (e)(4)(iv) of this section, should not be deleted. Instead, this section should be retained and supplemented with further language to appropriately address the circumstances of 1-hour standard nonattainment areas

[13] Note that if the area is nonattainment for the 1997 8-hour standard, for purposes of the 1997 standard, it is subject to nonattainment NSR, contingency measures and (if classified as Severe or Extreme for the 1997 ozone NAAQS) the section 185 penalty fee provision.

[14] We noted in the proposal that the Court's June 2007 clarification, *South Coast,* 489 F3d 1245, confirms that the December 2006 decision was not intended to establish a requirement that areas continue to demonstrate conformity under the 1-hour ozone standard for anti-backsliding purposes. Therefore, no revisions were proposed to 40 CFR 51.905(e)(3). Section 40 CFR 51.905(e)(3) establishes that conformity determinations for the 1-hour standard are not required beginning 1 year after the effective date of the revocation of the 1-hour standard and any state conformity provisions in an applicable SIP that require 1-hour ozone conformity determinations are no longer federally enforceable. This provision does not require revision in light of the Court's decision and clarification, because the Court did not require conformity determinations for the 1-hour standard, and existing regulations already implement the Court's holding that 8-hour ozone nonattainment and maintenance areas must use 1-hour ozone budgets to determine conformity to the 1997 8-hour standard until such time as 8-hour ozone budgets are approved or found adequate for the area. Therefore, current transportation conformity-related regulations set forth in 40 CFR part 93 and 40 CFR 51.905(e)(3), and the general conformity regulations in 40 CFR part 93 are consistent with the Court's decision and clarification on the Phase 1 Rule and do not require revision.

[15] Robert J. Meyers Memorandum, October 3, 2007, New Source Review (NSR) Aspects of the Decision of the U.S. Court of Appeals for the District of Columbia Circuit on the Phase 1 Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS).

that attained the 1-hour standard. For example, the further language could specify that section 51.905(e)(4) is not applicable in the circumstances that were present with the South Coast Air Basin. Alternatively, the further language could specify that section 51.905(e)(4) is applicable only in certain circumstances, including those that were present for the Greater Chicago Ozone Nonattainment Area, which attained the 1-hour standard prior to the November 2007 Severe area deadline.

Response: In *South Coast,* the Court vacated the regulatory provision that did not retain the obligation for States to have 1-hour major NSR requirements as part of their approved SIPs. The Court held that removing such provisions from a SIP ''would constitute impermissible backsliding.'' 472 F.3d 882 (2006), clarified, 489 F.3d 1245 (DC Cir. 2007), cert. denied, 76 U.S.L.W. 3095 (U.S. Jan. 14, 2008).

In this final rule, we are removing the vacated provision that did not retain 1-hour NSR obligations from the regulations at 40 CFR part 51 in order to ensure the published regulatory text is consistent with the Court's vacatur. The *South Coast* decision means that states remain obligated to have in their SIPs the 1-hour major NSR thresholds and offsets in those 8-hour nonattainment areas that had not been redesignated to attainment for the 1-hour ozone NAAQS as of the date of designation for the 1997 8-hour ozone NAAQS. The Phase 1 Rule (69 FR 23972) established the date of the designation for the 1997 8-hour ozone NAAQS (June 15, 2004 for most areas) as the relevant date for determining what anti-backsliding requirements would apply to areas (i.e., the requirements that applied based on the area's 1-hour designation and classification as of the effective date of designation for the 8-hour standard). In a separate rulemaking, we plan to address the circumstances in which 1-hour NSR requirements might be removed from a SIP, specifically addressing areas that currently attain the 1-hour standard such as Chicago.

We disagree with the commenter that the Court's decision only addressed the specific circumstances applicable to the South Coast Air Quality Management District (SCAQMD). While SCAQMD, as the ''lead petitioner,'' lent its name to the case, the challenges to the rule were broad and concerned the anti-backsliding requirements as they applied to all types of areas. Furthermore, we note that the anti-backsliding rules applied in the same manner in the Chicago area as they did in SCAQMD. Under the rules, the requirements that were retained for an area were those that applied as of the effective date of designation for the 1997 8-hour NAAQS. Both the Chicago area and the SCAQMD were designated nonattainment for the 1-hour standard at the time of designation for the 8-hour standard and were designated nonattainment for the 8-hour standard. Thus, both areas were subject to the anti-backsliding provisions in 40 CFR 51.905(a)(1) that address requirements for ''8-Hour NAAQS Nonattainment/1-Hour NAAQS Nonattainment.'' Furthermore, the provisions in 40 CFR 51.905(e) that did not retain certain 1-hour requirements applied in the same manner to both areas. Thus, to the extent the *South Coast* decision addresses these regulatory provisions, it applies in the same manner to both areas.

Comment: One commenter maintained that we should ensure and confirm that the proposed rules do not have retroactive effect. Speaking in terms of NSR, the commenter said any changes to the 8-hour ozone implementation rule that impose additional or new requirements on designated areas should not be effective until after the implementation rule is adopted and any necessary SIP revision is adopted and approved on a timely basis. To support their comment, they referenced *Sierra Club* v. *Whitman,* 285 F.3d 63 (DC Cir. 2002). They also commented that the Administrative Procedure Act severely restricts retroactive rulemaking and Congress did not take the unusual step of giving U.S. EPA the ability to implement rules retroactively. The requirement that 1-hour NSR continues to apply to 8-hour nonattainment areas that attain the 1-hour NAAQS will not be officially adopted until mid-2009, at the earliest. Hence, for all units that commence construction (e.g., contract commitments are in place or building has begun) between 2004 and 2009, in areas re-designated as attaining the 1-hour NAAQS, 1-hour NSR has not applied. They asserted the *South Coast* court could not have intended the retroactive application of the requirement. Further the commenter maintained that retroactive application of this rule to sources that have already committed contracts is contrary to fairness and predictability in regulatory environments.

Response: In this final rule, we are removing from the regulations at 40 CFR part 51 the provision that did not retain 1-hour NSR obligations in order to ensure the published regulatory text is consistent with the Court's vacatur. We view the portions of the Court's decision on the anti-backsliding provisions as self-implementing; thus, at a minimum, as of the date of the Court's mandate (August 29, 2007), areas that were designated nonattainment for the 1-hour standard as of the effective date of designation as nonattainment for the 1997 8-hour standard, have been obligated to adopt and implement an NSR program consistent with their 1-hour classification as of the effective date of designation for the 1997 ozone standard. We note that we have urged states to take steps to comply with the decision without waiting for further EPA rulemaking. *See e.g.,* Memorandum from Robert Meyers to Regional Administrators (October 3, 2007). The necessary actions to achieve such compliance may vary depending on the specific situation.

Because this rule merely removes the vacated regulatory text, it has no ''retroactive effect'' as suggested by the commenter. As noted above, at a minimum, as of the date the mandate issued, areas designated nonattainment for the 1997 8-hour standard have been obligated to ensure that their SIP includes a 1-hour NSR program consistent with their classification for the 1-hour standard as of the effective date of designation for the 1997 ozone standard and to implement such program. Thus, for any permitting actions that have occurred since the issuance of the Court's mandate, we do not believe there is any argument that the requirement to meet 1-hour NSR obligations is ''retroactive.''

To the extent the commenter raises the issue of retroactivity, the issue is relevant only to the extent to which the Court's vacatur has retroactive effect. In some instances, a vacated regulation has been held to be ''void ab initio''; in other words, the regulation is treated as if it had never existed. *See, e.g., United States* v. *Goodner Bros. Aircraft, Inc.,* 966 F.2d 380 (8th Cir. 1992). In addition, the D.C. Circuit has held that there is a presumption of retroactivity for adjudications when such adjudications clarify existing law, and that the presumption is departed from only when to do otherwise would lead to manifest injustice. *Qwest Services Corp.* v. *F.C.C.,* 509 F.3d 531 (D.C. Cir. 2007). The D.C. Circuit has stated that vacatur has ''the effect of restoring the status quo ante.'' *Air Transport Association of Canada* v. *FAA,* 254 F.3d 271, 277 (D.C. Cir. 2001). The EPA will work with states and sources to resolve any issues arising from permitting actions taken between June 15, 2004 and

August 29, 2007,[16] based on a permit program that was consistent with the waiver in 40 CFR 51.905(e)(4).

C. Contingency Measures

1. Proposed Rule

The Court in *South Coast Air Quality Management District, et al.,* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245, vacated 40 CFR 51.905(e)(2)(iii), which did not retain the anti-backsliding requirement concerning contingency measures, on the basis that they were control measures that must continue to apply. Therefore, the EPA proposed that states be required to retain 1-hour contingency measures in their SIPs that apply based on a failure to meet 1-hour RFP milestones or upon a failure to attain the 1-hour standard by the area's attainment date. Furthermore, consistent with the EPA's proposal to retain these 1-hour contingency measure requirements as anti-backsliding measures, we also proposed to add ''contingency measures under sections 172(c)(9) and 182(c)(9) of the CAA'' to the list of applicable requirements under § 51.900(f). The proposal noted that in situations where an area attains the 1-hour NAAQS by the applicable attainment date for that standard, the area is not subject to the requirement to implement contingency measures for failure to attain the standard by its attainment date. As a result, any area that has met its attainment deadline for the 1-hour standard (or meets its deadline if it has not yet passed), would not be required to implement the contingency measures for failure to attain the standard by its attainment date for purposes of anti-backsliding even if the area subsequently lapses into nonattainment. Additionally, the contingency measures for failure to meet RFP milestones would not be triggered if the area has met those milestones.

The proposal also noted that in situations where a 1-hour ozone nonattainment area is in attainment of that standard based on current air quality, the EPA can make a finding of attainment. *See* Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, entitled, ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone Ambient Air Quality Standard,'' dated May 10, 1995. Under this policy, which is referred to as the ''Clean Data Policy,'' if the EPA determines through rulemaking that the area is meeting the 1-hour ozone standard, the requirements for the state to submit an attainment demonstration and related components such as contingency measures for failure to attain or make reasonable further progress are suspended as long as the area continues to attain the 1-hour ozone NAAQS. (We note that such a determination does not relieve an area of the requirement to comply with a contingency measure provision in an approved SIP, but merely suspends any outstanding submission requirement.) If the area subsequently violates the ozone NAAQS for which the determination was made (in this example, the 1-hour ozone NAAQS), the EPA would initiate notice-and-comment rulemaking to withdraw the determination of attainment, which would reinstate the requirement for the state to submit such plans.

The proposal noted that three federal courts of appeal have upheld the EPA rulemakings applying the Clean Data Policy. *See Sierra Club* v. *EPA,* 99 F.3d 1551 (10th Cir. 1996); *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004) and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Cir. June 28, 2005) memorandum opinion. Since the proposal, the U.S. Court of Appeals for the District of Columbia Circuit has also upheld the Clean Data Policy, which was codified in 40 CFR 51.918 for purposes of implementing the 1997 ozone NAAQS, in *NRDC* v. *EPA,* 571 F.3d 1245 (DC Cir. 2009).

Thus if the EPA makes a determination of attainment of the 1-hour ozone standard as provided by the Clean Data Policy, the EPA would find that the requirement under the anti-backsliding provisions (40 CFR 51.905) to submit any outstanding section 172 and 182 contingency measures under the 1-hour standard would be suspended for so long as the area continues to attain the 1-hour standard.

2. Final Rule

The final rule takes the same approach as proposed, namely, that areas designated nonattainment for the 1997 8-hour ozone NAAQS must adopt, if not already adopted, and retain in their SIPs, contingency measures for failure to meet 1-hour RFP milestones and for failure to attain the 1-hour standard by the area's attainment date. This requirement applies where an area remained designated nonattainment for the 1-hour standard at the time of the area's designation to nonattainment for the 1997 8-hour ozone standard. To clarify that this requirement continues to apply, we are including ''contingency measures under sections 172(c)(9) and 182(c)(9) of the CAA'' in the section 51.900(f) list of ''applicable requirements.'' Consistent with 40 CFR 51.905(b), areas remain obligated to adopt and retain these requirements in their SIPs until they attain and are redesignated for the 1997 8-hour ozone NAAQS. The rule at § 51.905(b) provides that an 8-hour nonattainment area will remain subject to the applicable requirements listed in § 51.900(f) until it attains the 8-hour standard and that after an area attains the 8-hour standard, the state may request that the 1-hour obligations be shifted to contingency measures, but may not remove them completely from the SIP.[17] In addition, if prior to attaining the 1997 8-hour ozone standard, the area attains the 1-hour standard, the EPA may make a determination of attainment for the 1-hour standard which would suspend the obligation to submit such contingency measures if the state has not already done so.

3. Comments and Responses

Comment: One environmental organization commenter recommended that contingency measures for the 8-hour standard should be at least as stringent as those for the 1-hour standard.

Response: The proposal addresses the contingency measure requirement as it relates to anti-backsliding for the 1-hour standard, which was vacated by the Court. It does not interpret the contingency measure obligations for the 8-hour standard. Because states have discretion in selecting the measures to adopt as contingency measures, concerns regarding the adequacy of contingency measures are best addressed in the context of a specific SIP rulemaking.

Comment: Several commenters noted that the preamble to the proposed rule describes two situations in which states would no longer need to retain or implement 1-hour contingency measures: (1) Where a nonattainment area meets or has met its 1-hour attainment date, even if the area

[16] That is, between the effective date of the initial area designations for the 1997 8-hour standard and the date of the final D.C. Circuit Court ruling on rehearing of the *South Coast* case.

[17] The preamble to the Phase 1 Rule clarified that, ''it is appropriate to maintain these mandated controls to remain as part of the implemented SIP until an area attains the 8-hour NAAQS and is redesignated to attainment.'' (69 FR 23983). This accompanying preamble text clarifies that an area must not only attain, but also must be redesignated to attainment prior to shifting any ''applicable requirements'' to contingency measures. (69 FR 23982–83). This is further supported by the portion of § 51.905(b) that provides for the shifting of the 1-hour anti-backsliding measures to contingency measures. Such a shift can occur only in the context of an approved section 175A maintenance plan.

subsequently lapses into nonattainment; and (2) where—whether before or after its 1-hour attainment date—a nonattainment area has 1-hour attainment air quality and the EPA makes a finding of 1-hour attainment pursuant to the Clean Data Policy that has been in effect since 1995. They recommended that the EPA reaffirm these principles in its final action in this rulemaking.

Response: The EPA reaffirms the position stated in the proposal that contingency measures for failure to attain would not be triggered where an area attains the 1-hour standard by its attainment date, even if the area subsequently lapses into nonattainment. However, the commenter misinterprets the scope of the Clean Data Policy. Clean Data Determinations under the Clean Data Policy only suspend the requirement to submit certain outstanding planning requirements (such as contingency measures that would be triggered by a failure to attain by the applicable attainment date). In addition, the obligation to submit such a SIP is suspended only for so long as the area remains in attainment. If the area is redesignated to attainment, the obligation to make such submission would no longer apply. Furthermore, when an area is redesignated to attainment, it may also move adopted contingency measures linked to a failure to attain to the contingency measure portion of the maintenance plan. To the extent contingency measures have been adopted and approved into the SIP, a Clean Data Determination under the Clean Data Policy does not authorize the state to remove them from the SIP. Nor does a Clean Data Determination affect the requirement that areas comply with SIP-approved measures, such as contingency measures. Thus, if an area fails to attain by its attainment date and contingency measures approved into the SIP are triggered by that failure, a Clean Data Determination that is issued subsequently would not suspend the obligation to implement the contingency measures consistent with terms of the approved SIP.

Comment: One state agency commenter supported removing the vacated provision of the regulations that provided that states need not retain 1-hour standard contingency measures for failure to attain or make reasonable further progress toward attaining the 1-hour standard.

Response: The EPA has removed the vacated provision from the regulatory text.

Comment: One state agency commenter supported use of the Clean Data Policy for the 1-hour standard but does not agree with the portion of the policy that would require states to meet any planning requirements stayed pursuant to the policy if there is a subsequent violation of a revoked standard.

Response: We note first that the proposed rule did not set forth any proposal concerning the Clean Data Policy, but merely described a situation in which the Clean Data Policy might be applied. As noted in the Clean Data Policy and the regulation codifying that policy for purposes of the 1997 8-hour ozone standard, a determination of attainment suspends the obligation to submit certain planning requirements for only so long as the area continues to attain the standard. We note that redesignation of the area to attainment for the 1997 8-hour standard would relieve the area permanently of the obligation to submit such planning SIPs.

D. Section 185 Fee Program for 1-Hour NAAQS

1. Proposal

The EPA proposed to remove the language relating to the vacated provisions of the Phase 1 Rule that did not retain the requirement for areas that were classified as Severe or Extreme for the 1-hour standard at the time of designation for the 1997 8-hour standard to include in their SIP a CAA section 185 penalty fee program for the 1-hour standard (i.e., 40 CFR 51.905(e)(2)(ii)). In *South Coast,* the Court vacated this exemption provision.

2. Final Rule

We are removing the language in 40 CFR 51.905(e)(2)(ii) that did not retain the requirement for areas that were classified as Severe or Extreme for the 1-hour standard at the time of designation for the 1997 8-hour standard to include a CAA section 185 penalty fee program for the 1-hour standard in their SIP.

3. Comments and Responses

Comment: Several commenters expressed support for not defining the 1-hour section 185 fee provision as an ''applicable requirement'', as promulgated in § 51.905(e), and indicated that the fees should only apply until an area attains the 1-hour standard.

Response: The EPA believes that not defining the section 185 fee provision as an ''applicable requirement'' is in conflict with the ruling of the Court. Nevertheless, in this rulemaking, the only issue the EPA is addressing regarding the applicability of section 185 requirements is the removal of the regulatory provision that was vacated by the Court in *South Coast.* Exactly how the EPA plans to address this applicable anti-backsliding requirement for section 185 fee programs will be addressed in separate action.

Comment: Several commenters oppose the requirement to have 3 years of attaining air quality data under the Clean Data Policy in order to suspend section 185 fees temporarily. They believe fees should be suspended for any year with data indicating compliance with the 1-hour standard. They believe requiring a 3-year period of attainment is a more appropriate criterion for permanent cessation of the 1-hour section 185 fees.

Response: In this rulemaking, the only issue the EPA is addressing regarding the section 185 requirements is the removal of the regulatory provision that was vacated by the Court in *South Coast.* The EPA plans to address anti-backsliding requirements for section 185 fee programs in separate action.

E. Deletion of Obsolete 1-Hour Ozone Standard Provision

1. Proposal

The EPA proposed to delete 40 CFR 50.9(c) because it is obsolete. In the proposal the EPA explained that when we promulgated the 8-hour ozone standard on July 18, 1997 (62 FR 38856), we also revised 40 CFR 50.9 to provide that the 1-hour ozone standard would be revoked for an area once the EPA determined that the area had air quality meeting the 1-hour standard. Subsequently, because the pending litigation over the 1997 8-hour NAAQS created uncertainty regarding the 8-hour NAAQS and associated implementation requirements, we revised 40 CFR 50.9 to place two limitations on our authority to apply the revocation rule: (1) The 1997 8-hour NAAQS must no longer be subject to legal challenge, and (2) it must be fully enforceable.[18] (65 FR 45182, July 20, 2000). These limitations were codified as § 50.9(c). In the final Phase 1 Rule, we again revised § 50.9, this time to revise § 50.9(b) to provide for revocation of the 1-hour standard 1 year after designation of areas for the 1997 8-hour ozone standard. However, according to our proposal, in promulgating the Phase 1 rule, we neglected to remove paragraph (c) which was no longer necessary since the

[18] In addition, in June 2003, we stayed our authority to apply the revocation rule pending our reconsideration in the implementation rule for the 1997 NAAQS of the basis for revocation. (68 FR 38160, June 26, 2003). We completed that reconsideration in the Phase 1 Rule, which was published in the **Federal Register** of April 30, 2004. (69 FR 23951).

8-hour standard is no longer subject to legal challenge and the standard has been upheld and is enforceable. *American Trucking Assoc.* v. *EPA,* 283 F.3d 355. (D.C. Cir. 2002) (resolving all remaining legal challenges to the 8-hour ozone standard and upholding the EPA's rule establishing that standard.)

2. Final Rule

In reviewing the regulatory text in light of one of the comments received on the proposal, we realized that we incorrectly described the obsolete regulatory text in 50.9(c). The language described in the proposal, which stayed the EPA's authority to revoke the 1-hour ozone standard while the 8-hour standard remained subject to legal challenge, was language that was actually removed in the Phase 1 Rule (69 FR 23951, Apr. 30, 2004). That language was added to the second sentence of 50.9(b) at the time that the status of the 1997 8-hour standard remained uncertain because of the ongoing litigation challenging that standard and our ability to enforce it. (65 FR 45200, July 20, 2000.) Because the litigation challenging the 1997 standard and our ability to enforce that standard was fully resolved, we deleted that regulatory language in the Phase 1 Rule.

However, in June 2003, consistent with a settlement agreement in a lawsuit challenging the revocation provision we had promulgated simultaneous with the 1997 ozone standard, we separately stayed our authority to revoke the 1-hour ozone standard. (68 FR 38163, June 26, 2003). Specifically, we added 40 CFR 50.9(c), which provides that our authority to revoke the 1-hour ozone standard is stayed until ''EPA issues a final rule revising or reinstating'' the revocation authority and considers and addresses certain issues in that rulemaking process. We considered and addressed those issues in the rulemaking for implementing the 1997 ozone standard and as part of the final Phase 1 Rule. We revised and reinstated our authority to revoke the 1-hour standard. (68 FR 32818–19, June 2, 2003; 69 FR 23969–71, April 30, 2004). However, we neglected at that time to remove 40 CFR 50.9(c), which became obsolete upon the issuance of the Phase 1 Rule.

Despite the confusion created by our incorrect description in the proposed rule, we are deleting 40 CFR 50.9(c). As provided above, the provision is obsolete because the future rulemaking it refers to is the Phase 1 Rule, which was promulgated in April 2004. Although we incorrectly described the provision in the proposal, we correctly indicated that the provision was obsolete and thus we are deleting it in this final action as proposed.

3. Comments and Responses

Comment: One commenter expressed concern about the background statements and explanation regarding the removal of 40 CFR 50.9(c). The commenter claims there is an incorrect citation in the preamble. In the Background discussion at 74 FR 2938, col 2, paragraph B, the proposal said, referring to the two limitations we placed on our authority to apply the revocation rule, that ''These limitations were codified as § 50.9(c).''

Response: As provided above, we recognize that the explanation in the proposal was confusing because we described regulatory text that was removed from 40 CFR 50.9(b) at the time we promulgated the Phase 1 Rule, rather than describing the regulatory text we planned to delete, which is provided in 40 CFR 50.9(c). However, as explained above, the regulatory text in 50.9(c) is obsolete as noted in the proposal and thus we are moving forward to remove it from the CFR as proposed.

Comment: One environmental commenter expressed concern about confusing language in 40 CFR 50.9(b) and recommended that the second sentence of that provision be removed.

Response: Paragraph (b) of § 50.9 states that the 1-hour standards set forth in the 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 the 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.

The commenter does not specify why the sentence is confusing and we disagree that it is. Rather, that sentence is the operative sentence for revoking the 1-hour standard. Pursuant to this sentence of the regulation, the 1-hour standard was revoked for most areas on June 15, 2005, the date 1 year after their effective date of designation for the 1997 8-hour standard. For 13 EAC [19] areas with a deferred effective date of designation, the 1-hour standard was revoked April 15, 2009, the date 1 year following their effective date of designation as attainment for the 1997 NAAQS. For the Denver EAC area, which was designated nonattainment for the 1997 NAAQS effective November 20, 2007, the 1-hour standard was revoked November 20, 2008. We believe that it is important to retain this sentence because it specifies the time at which the 1-hour standard, identified in 40 CFR 51.9(a), no longer applied to areas.

F. Other Comments

Comment: Several commenters advised that this rulemaking addressing the 1997 ozone standard should be integrated with planning to address the 2008 ozone NAAQS. Several commenters recommended that addressing the 1997 standard should not result in additional paperwork beyond what is needed for the 2008 standard. One commenter recommended that the EPA rulemaking focus on implementation of the 2008 ozone NAAQS and deal with implementation deficiencies of the 1997 standard within the context of implementing the 2008 NAAQS. One local air agency commenter argued that reclassification of subpart 1 areas should not be a priority concern when viewed against other more important priorities, such as implementation of the 2008 ozone NAAQS.

Response: The Court in *South Coast* vacated portions of the Phase 1 Rule that addressed certain anti-backsliding provisions for the 1-hour standard and the portion of the rule that classified certain 1997 8-hour standard nonattainment areas under subpart 1. We plan to address the transition from the 1997 standard to the 2008 standard in separate rulemaking.

Comment: One commenter noted that there are several provisions of subpart X that continue to refer to subpart 1 even though the EPA has now proposed to classify all nonattainment areas for the 1997 ozone standard under subpart 2. These include §§ 51.908(b), 51.910(b), 51.912(c) and the portions of § 51.915 that are subject to § 51.902(b). The commenter suggests that these provisions may be extraneous if there are no areas covered under subpart 1.

Response: As an initial matter, we note that the general implementation requirements in subpart 1 also apply to areas classified under subpart 2; thus, we cannot automatically conclude that the provisions referred to by the commenter are extraneous. We choose to err on the side of retaining provisions that may not apply to any areas rather

[19] Early Action Compacts (EAC) allowed states to pledge to meet the 1997 8-hour ozone standard earlier than required. State seeking an EAC must meet a number of criteria and must agree to meet certain milestones. The most significant milestone was that the EAC areas had to be in attainment by December 31, 2007, based on air quality data from 2005, 2006, and 2007.

than to remove them in this final rule without notice and an opportunity for comment.

Comment: One environmental organization commenter indicated support for the proposal only if the rule could be interpreted as requiring Marginal areas to meet the CAA reasonably available control measures (RACM) requirement. The commenter noted that the Denver area was a former EAC area that failed to attain and was subsequently designated nonattainment. Under the proposed rule, Denver would be classified as Marginal. The commenter pointed out that the table in the proposal that summarized CAA requirements applicable under both subparts 1 and 2 indicates that RACM (under subpart 1) applies to subpart 2 areas also and thus should apply to Marginal areas.

Response: It is true that the RACM requirement, which is contained in subpart 1, applies to areas classified under subpart 2. However, the EPA has interpreted the RACM requirement for many years in the context of the requirement to demonstrate attainment as expeditiously as practicable and subpart 2 specifically exempts Marginal areas from the requirement to submit an attainment demonstration. In light of that exemption, the EPA has historically not required Marginal areas to meet the RACM test required of Moderate and higher classified areas. However, we note that under our EAC regulations, we required EAC areas that were subsequently designated nonattainment (like Denver) to submit an attainment demonstration within 1 year of the effective date of designation. 40 CFR 81.300(e)(3)(ii)(D). Therefore, the RACM requirements currently apply to the Denver nonattainment area.

Comment: One state air agency commenter recommended that the EPA should approve requests for redesignation to attainment for the 1-hour ozone standard.

Response: Because the EPA revoked the 1-hour ozone standard, the EPA indicated in the Phase 1 Rule that we were no longer obligated to redesignate areas to attainment or nonattainment for the 1-hour standard because once that standard was revoked it was no longer effective in an area. *See* 40 CFR 51.905(e). We are not reconsidering that issue as a part of this rulemaking.

Comment: Several environmental commenters alleged that there were incorrect statements in the discussion of conformity in the anti-backsliding portion of the proposal. In one comment, the commenter says:

> On page 2940, column 1 of the proposal, the EPA states: ''Areas that would be reclassified under subpart 2 are already satisfying the applicable CAA section 176(c) conformity requirements for the 1997 8-hour ozone standard.'' The EPA offers no evidence and analysis to support this claim, which goes far beyond the scope of the rulemaking proposal. It is neither necessary nor appropriate for the EPA to make a blanket statement that areas that would be reclassified are already in fact satisfying applicable conformity requirements. What the EPA can say is that areas that would be reclassified under subpart 2 are already required to satisfy applicable section 176(c) conformity requirements for the 8-hour standard.

In another comment they say:

> The EPA is also incorrect in stating (at 2941 n.18) that 40 C.F.R. § 51.905(e)(3) does not require revision. That rule includes language stating that ''any state conformity provisions in an applicable SIP that require 1-hour ozone conformity determinations are no longer federally enforceable.'' The DC Circuit has ruled that the EPA cannot declare conformity provisions of an approved SIP to be unenforceable. *Environmental Defense v. EPA,* 467 F.3d 1329, 1337 (D.C. 2 Cir. 2006). The approved provisions of a SIP remain enforceable until the state submits and the EPA approves their revocation. Id. Accordingly, 40 CFR § 51.905(e)(3) must be revised to delete the above-quoted clause.

Response: We agree with the first comment that the quoted sentence was worded poorly. We did not intend by that statement to make a determination that any specific area is satisfying the conformity requirements. We agree with the commenter's suggestion as to how the statement could have been better phrased.

Regarding the second statement, we disagree that 40 CFR 51.905(e)(3) requires revision. That regulatory provision states that ''[u]pon 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.'' Since there is no 1-hour NAAQS, there is no ongoing conformity requirement for that NAAQS under section 176(c). The regulation also specifically refers to section 176(c)(5), which states that conformity determinations apply only in nonattainment and maintenance areas. Therefore, the intent of the regulations is to clarify that SIP provisions requiring conformity demonstrations for the revoked 1-hour NAAQS are essentially meaningless in light of section 176(c)(5). Of course, 1-hour ozone budgets in approved SIPs must be used to demonstrate conformity to the 8-hour ozone NAAQS if no 8-hour ozone budget exists.

Comment: Several environmental commenters allege that the Clean Data Policy is unlawful. One commenter states that for reasons explained in briefs filed in *NRDC* v. *EPA,* No. 06–1045 (D.C. Cir.) (which were incorporated by reference, and attached to the comment), the EPA is completely without authority to suspend the Act's mandates for submission and implementation of these SIP components merely because an area is meeting standards at a given point in time. They note that the Act provides no exception or waiver for submission of these SIP elements on grounds of temporary attainment. To the contrary, they note that section 175A(c) of the Act makes crystal clear that all requirements for nonattainment areas must remain in full force and effect unless and until the area is redesignated to attainment and has an approved maintenance plan. For all of these same reasons, they claim the EPA cannot suspend any Part D requirements retained pursuant to the Act's anti-backsliding provisions merely because an area is temporarily meeting either the 1-hour or 8-hour standards. They assert that the EPA's ''clean data'' policy is nothing more than an illegal attempt to circumvent the Act's redesignation provisions, section 107(d)(3)(E) and 175A(c).

Another environmental organization commenter also alleged that the EPA lacks authority to suspend controls from a SIP by finding the area is meeting the 1-hour standard. That commenter alleged that the CAA's redesignation procedures of section 107 provide a specific method that a nonattainment area must follow in order to remove controls from a SIP. They note that the CAA is silent on any alternative manner for a nonattainment area to remove controls from its SIP, besides being redesignated to a different classification. They thus claim it is clear that Congress intended the extensive redesignation process described in section 107 to be the only manner in which an area was to be permitted to remove controls from its SIP. The commenter also notes that the proposed rule ignores the statutorily-required redesignation procedures provided in section 107. The commenter further claims that even assuming the Clean Data Policy is valid as written, it cannot be used to waive fees required under section 185 of the CAA. They point out that the 1995 Seitz memorandum has never even applied to waive the section 185 fees controls, only other planning requirements. Thus, the EPA would take the Seitz memorandum reasoning beyond the situations to

which it purported to apply, yet the EPA does not even acknowledge this extension, much less explain why the Seitz memo rationale can be extended to section 185 fees. The commenter further notes that the 1-hour standard is no longer the standard that the EPA deems requisite to protect public health with an adequate margin of safety. Therefore, they argue, attaining the 1-hour standard should have no bearing on whether a state may remove contingency measures from its SIP.

Response: The Clean Data Policy, first articulated by the EPA in 1995 with regard to the 1-hour ozone standard, and subsequently upheld by several Courts of Appeals, is not unlawful. The EPA's interpretation of the Clean Data Policy for the 1-hour ozone standard is the basis for its Clean Data Policy regulation for the 8-hour ozone standard, which was codified at 40 CFR 51.918 and upheld by the D.C. Circuit in *NRDC* v. *EPA* 571 F.3d 1245 (D.C. Cir. 2009).

A commenter objects to the Clean Data Policy because it is not ''a valid manner of removing controls from a SIP,'' and that it ''permits EPA to remove applicable controls from an area's SIP by merely making a 'factual finding' of attainment.'' This comment misconstrues the Clean Data Policy—it is not applied to remove any controls from the SIP. Rather, it is the EPA's interpretation that the obligation to submit certain requirements, including those for RFP and contingency measures, is suspended for so long as an area attains the standard. Once SIP provisions have been approved into the SIP, the Clean Data Policy does not operate to remove them. The same commenter contends that attainment of the 1-hour standard should have no significance because it has been ''discarded.'' Although the 1-hour standard has been revoked, the 1-hour designation and classification status of an area at the time of designation for the 8-hour standard remains the basis for determining the 1-hour ozone anti-backsliding requirements for that area. Independent of and in addition to the 1-hour standard, the EPA continues to separately implement the 8-hour ozone standard and all requirements applicable under that NAAQS. As the EPA noted in its proposal, attainment of and redesignation for the 8-hour standard also affects the anti-backsliding requirements under the 1-hour standard. 40 CFR 51.905(b) Proposal at 74 FR 2942.

The EPA's Clean Data Policy does not expressly address the suspension of the requirement that affected emissions sources submit section 185 fees. Substantive issues concerning when and how section 185 fees apply for purposes of the 1-hour standard are not addressed as part of this rulemaking action and thus we are not addressing substantive comments on such issues here.

G. A Correction to a Footnote in Proposed Rule

The January 16, 2009, proposed rule, in the discussion of contingency measures, stated, ''In situations where a 1-hour ozone nonattainment area is in attainment based on current air quality (e.g., after the area's attainment date), EPA can propose to make a finding of attainment.'' Footnote 16 followed that sentence and read as follows: ''This applies even if the area did not attain by the attainment date; however, the CAA requires EPA in these cases to make a finding of failure to attain by the attainment date and either reclassify the area or apply other requirements (such as section 185) as specified for the area's classification.'' (74 FR at 2941, 2942; January 16, 2009.) The text ''however, the CAA requires EPA in these cases to make a finding of failure to attain by the attainment date and either reclassify the area or apply other requirements (such as section 185) as specified for the area's classification'' was in error and should have been deleted. The wording would have been appropriate had the situation applied to an existing ozone standard, such as the 1997 8-hour standard. However, for the revoked 1-hour standard, EPA has adopted a regulation, that was not challenged, providing that upon revocation of the NAAQS, the EPA would no longer be obligated to make findings of failure to attain the 1-hour standard or to reclassify areas for failure to attain the 1-hour standard by the area's attainment date under the 1-hour standard. (*See* 40 CFR 51.905(e)(2)(i).) Thus, the EPA is clarifying that the portion of footnote 16 stating that the EPA remains obligated to make a finding of failure to attain the 1-hour ozone standard by an area's attainment date (under section 181(b)(2) or section 179(c)) and to reclassify the area was erroneous and in conflict with § 51.905(e)(2)(i).

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a significant regulatory action because it raises novel legal or policy issues arising out of legal mandates. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action sets forth the EPA's rule for addressing portions of the partial vacatur of the EPA's Phase 1 Rule for implementation of the 1997 8-hour ozone NAAQS. However, OMB has previously approved the information collection requirements contained in the existing Phase 1 Rule (April 30, 2004; 69 FR 23951) and the Phase 2 Rule (November 29, 2005; 70 FR 71612) regulations and has been assigned OMB Control Number 2060–0594. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

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

After considering the economic impact of these revisions to the regulations on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not impose any requirements on small entities. The EPA is aware that the two small entities listed in Table 2, Essex County and Jamestown, NY, have either satisfied the requirements through previous SIP

revisions or certain requirements have been suspended due to receiving a Clean Data Determination.

D. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This rule restores provisions that existed under the 1-hour ozone standard and that would have continued under the 1-hour standard had not the EPA issued a revised ozone standard. Those provisions were revoked when the EPA revoked the 1-hour standard itself. Although a court upheld the EPA's right to revoke the 1-hour standard, the court ruled that the EPA erroneously revoked several 1-hour NAAQS provisions and vacated those portion of the EPA's rule. Thus, the court's own ruling restored the former 1-hour NAAQS provisions. This rule merely sets forth a corrective regulatory mechanism for restoring the 1-hour provisions that the court had already restored. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The EPA has determined that these regulation revisions contain no regulatory requirements that may significantly or uniquely affect small governments, including tribal governments.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have Federalism implications.'' Policies that have ''Federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have Federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule restores provisions that existed under the 1-hour ozone standard and that would have continued under the 1-hour standard had not the EPA issued a revised ozone standard. Those provisions were revoked when the EPA revoked the 1-hour standard itself. Although a court upheld the EPA's right to revoke the 1-hour standard, the court ruled that the EPA erroneously revoked several 1-hour NAAQS provisions and vacated those portion of the EPA's rule. Thus, the court's own ruling restored the former 1-hour NAAQS provisions. This rule merely sets forth a corrective regulatory mechanism for restoring the 1-hour provisions that the court had already restored. Thus, Executive Order 13132 does not apply to these regulation revisions.

In the spirit of Executive Order 13121 and consistent with the EPA policy to promote communications between EPA and state and local governments, the EPA solicited comments on the proposal from state and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It does not have a substantial direct effect on one or more Indian tribes, since no tribe has to develop a SIP under these regulatory revisions. Furthermore, these regulation revisions do not affect the relationship or distribution of power and responsibilities between the Federal government and Indian tribes. The CAA and the Tribal Air Rule establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. Thus, Executive Order 13175 does not apply.

The EPA specifically solicited additional comment on the proposed revisions to the regulations from tribal officials.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to Executive Order 13045 because these rule revisions address NAAQS-related SIP obligations of the CAA. The NAAQS are promulgated to protect the health and welfare of sensitive populations, including children. However, the EPA solicited comments on whether the proposed action would result in an adverse environmental effect that would have a disproportionate effect on children. No comments were received on this specific topic.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the

environment. The revisions to the regulations revise SIP obligations related to the ozone NAAQS, which are designed to protect all segments of the general populations. As such, they do not adversely affect the health or safety of minority or low income populations and are designed to protect and enhance the health and safety of these and other populations.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective June 13, 2012.

L. Determination Under Section 307(d)

Pursuant to sections 307(d)(1)(E) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.''

V. Statutory Authority

The statutory authority for this action is provided 42 U.S.C. 7409; 42 U.S.C. 7410; 42 U.S.C. 7511–7511f; 42 U.S.C. 7601(a)(1).

List of Subjects

40 CFR Part 50

Environmental protection, Air pollution control, Ozone.

40 CFR Part 51

Air pollution control, Intergovernmental relations, Ozone, Transportation, Nitrogen oxides, Volatile organic compounds.

40 CFR Part 81

Air pollution control.

Dated: April 27, 2012.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

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

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

§ 50.9 [Amended]

■ 2. Section 50.9 is amended by removing paragraph (c).

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

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

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

Subpart X—[Amended]

■ 4. Section 51.900 is amended by adding paragraph (f)(14) to read as follows:

§ 51.900 Definitions.

* * * * *

(f) * * *

(14) Contingency measures required under CAA sections 172(c)(9) and 182(c)(9) that would be triggered based on a failure to attain the 1-hour NAAQS by the applicable attainment date or to make reasonable further progress toward attainment of the 1-hour NAAQS.

* * * * *

■ 5. Section 51.902 is revised to read as follows:

§ 51.902 Which classification and nonattainment area planning provisions of the CAA shall apply to areas designated nonattainment for the 1997 8-hour NAAQS?

(a) An area designated nonattainment for the 1997 8-hour NAAQS will be classified in accordance with section 181 of the CAA, as interpreted in § 51.903(a), for purposes of the 1997 8-hour NAAQS, and will be subject to the requirements of subpart 2 that apply for that classification.

(b) [Reserved].

■ 6. Section 51.905 is amended by:

■ a. Revising the section heading.

■ b. Adding a sentence to the end of paragraph (b).

■ c. Removing and reserving paragraphs (e)(2)(ii) and (e)(2)(iii).

■ d. Removing paragraph (e)(4).

The revisions and addition read as follows:

§ 51.905 How do areas transition from the 1-hour NAAQS to the 1997 8-hour NAAQS and what are the anti-backsliding provisions?

* * * * *

(b) * * * Once an area attains the 1-hour NAAQS, the section 172 and 182 contingency measures under the 1-hour NAAQS can be shifted to contingency measures for the 1997 8-hour ozone NAAQS and must remain in the SIP until the area is redesignated to attainment for the 1997 8-hour NAAQS.

* * * * *

(e) * * *

(2) * * *

(ii) [Reserved]

(iii) [Reserved]

* * * * *

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 7. The authority citation for part 81 continues to read as follows:

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

Subpart C—Section 107 Attainment Status Designations

■ 8. In § 81.303, the table entitled ''Arizona—Ozone (8-Hour Standard)'' is amended by revising the entries for Phoenix-Mesa, AZ: Maricopa County (part) and Pinal County (part) to read as follows:

§ 81.303 Arizona.

* * * * *

ARIZONA—OZONE [8-HOUR STANDARD]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
Phoenix-Mesa, AZ:				
Maricopa County (part)		Nonattainment	6/13/12	Subpart 2/Marginal.

ARIZONA—OZONE [8-HOUR STANDARD]—Continued

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
T1N, R1E (except that portion in Indian Country); T1N, R2E; T1N, R3E; T1N, R4E; T1N, R5E; T1N, R6E; T1N, R7E; T1N, R1W; T1N, R2W; T1N, R3W; T1N, R4W; T1N, R5W; T1N, R6W; T2N, R1E; T2N, R2E; T2N, R3E; T2N, R4E; T2N, R5E, T2N, R6E; T2N, R7E; T2N, R8E; T2N, R9E; T2N, R10E; T2N, R11E; T2N, R12E (except that portion in Gila County); T2N, R13E (except that portion in Gila County); T2N, R1W; T2N, R2W; T2N, R3W; T2N, R4W; T2N, R5W; T2N, R6W; T2N, R7W; T3N, R1E; T3N, R2E; T3N, R3E; T3N, R4E; T3N, R5E; T3N, R6E; T3N, R7E; T3N, R8E; T3N, R9E; T3N, R10E (except that portion in Gila County); T3N, R11E (except that portion in Gila County); T3N, R12E (except that portion in Gila County); T3N, R1W; T3N, R2W; T3N, R3W; T3N, R4W; T3N, R5W; T3N, R6W; T4N, R1E; T4N, R2E; T4N, R3E; T4N, R4E; T4N, R5E; T4N, R6E; T4N, R7E; T4N, R8E; T4N, R9E; T4N, R10E (except that portion in Gila County); T4N, R11E (except that portion in Gila County); T4N, R12E (except that portion in Gila County); T4N, R1W; T4N, R2W; T4N, R3W; T4N, R4W; T4N, R5W; T4N, R6W; T5N, R1E; T5N, R2E; T5N, R3E; T5N, R4E; T5N, R5E; T5N, R6E; T5N, R7E; T5N, R8E; T5N, R9E (except that portion in Gila County); T5N, R10E (except that portion in Gila County); T5N, R1W; T5N, R2W; T5N, R3W; T5N, R4W; T5N, R5W; T6N, R1E (except that portion in Yavapai County); T6N, R2E; T6N, R3E; T6N, R4E; T6N, R5E; T6N, R6E; T6N, R7E; T6N, R8E; T6N, R9E (except that portion in Gila County); T6N, R10E (except that portion in Gila County); T6N, R1W (except that portion in Yavapai County); T6N, R2W; T6N, R3W; T6N, R4W T6N, R5W T7N, R1E (except that portion in Yavapai County); T7N, R2E; (except that portion in Yavapai County); T7N, R3E; T7N, R4E; T7N, R5E; T7N, R6E; T7N, R7E; T7N, R8E; T7N, R9E (except that portion in Gila County); T7N, R1W (except that portion in Yavapai County); T7N, R2W (except that portion in Yavapai County); T8N, R2E (except that portion in Yavapai County); T8N, R3E (except that portion in Yavapai County); T8N, R4E (except that portion in Yavapai County); T8N, R5E (except that portion in Yavapai County); T8N, R6E (except that portion in Yavapai County); T8N, R7E (except that portion in Yavapai County); T8N, R8E (except that portion in Yavapai and Gila Counties); T8N, R9E (except that portion in Yavapai and Gila Counties); T1S, R1E (except that portion in Indian Country); T1S, R2E (except that portion in Pinal County and in Indian Country); T1S, R3E; T1S, R4E; T1S, R5E; T1S, R6E; T1S, R7E; T1S, R1W; T1S, R2W; T1S, R3W; T1S, R4W; T1S, R5W; T1S, R6W; T2S, R1E (except that portion in Indian Country); T2S, R5E; T2S, R6E; T2S, R7E; T2S, R1W; T2S, R2W; T2S, R3W; T2S, R4W; T2S, R5W; T3S, R1E; T3S, R1W; T3S, R2W; T3S, R3W; T3S, R4W; T3S, R5W; T4S, 1E; T4S, R1W; T4S, R2W; T4S, R3W; T4S, R4W; T4S, R5W.				
Pinal County (part)	.....	Nonattainment	6/13/12	Subpart 2/Marginal.
Apache Junction: T1N, R8E; T1S, R8E (Sections 1 through 12)				
* * * * * * *				

[a] Includes Indian Country located in each county or area, except otherwise noted.
[1] This date is June 15, 2004, unless otherwise noted.

* * * * *

■ 9. In § 81.305, the table entitled ''California—Ozone (8-Hour Standard)'' is amended by revising the entries for the following:

■ a. Amador and Calaveras Cos (Central Mtn), CA
■ b. Chico, CA
■ c. Kern Co. (Eastern Kern), CA
■ d. Mariposa and Tuolumne Cos. (Southern Mtn), CA
■ e. San Diego, CA
■ f. Sutter Co. (part), CA
■ g. Nevada Co. (Western Part), CA

§ 81.305 California.

* * * * *

CALIFORNIA—OZONE [8-HOUR STANDARD]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
Amador and Calaveras Cos., CA: (Central Mountain Cos.)				
Amador County	.....	Nonattainment	6/13/12	Subpart 2/Moderate.
Calaveras County	.....	Nonattainment	6/13/12	Subpart 2/Moderate.
Chico, CA:				
Butte County	.....	Nonattainment	6/13/12	Subpart 2/Marginal.
Kern County (Eastern Kern), CA	.....	Nonattainment	6/13/12	Subpart 2/Moderate.
Kern County (part)				

CALIFORNIA—OZONE [8-HOUR STANDARD]—Continued

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
That portion of Kern County (with the exception of that portion in Hydrologic Unit Number 18090205—the Indian Wells Valley) east and south of a line described as follows: Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Liebre Land Grant to the point of intersection with the range line common to Range 16 West and Range 17 West, San Bernardino Base and Meridian; north along the range line to the point of intersection with the Rancho El Tejon Land Grant boundary; then southeast, northeast, and northwest along the boundary of the Rancho El Tejon Grant to the northwest corner of Section 3, Township 11 North, Range 17 West; then west 1.2 miles; then north to the Rancho El Tejon Land Grant boundary; then northwest along the Rancho El Tejon line to the southeast corner of Section 34, Township 32 South, Range 30 East, Mount Diablo Base and Meridian; then north to the northwest corner of Section 35, Township 31 South, Range 30 East; then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of Section 18, Township 31 South, Range 31 East; then east to the southeast corner of Section 13, Township 31 South, Range 31 East; then north along the range line common to Range 31 East and Range 32 East, Mount Diablo Base and Meridian, to the northwest corner of Section 6, Township 29 South, Range 32 East; then east to the southwest corner of Section 31, Township 28 South, Range 32 East; then north along the range line common to Range 31 East and Range 32 East to the northwest corner of Section 6, Township 28 South, Range 32 East, then west to the southeast corner of Section 36, Township 27 South, Range 31 East, then north along the range line common to Range 31 East and Range 32 East to the Kern-Tulare County boundary.				
* * *	*	*	*	*
Mariposa and Tuolumne Cos., CA: (Southern Mountain Counties)				
Mariposa County	.....	Nonattainment	6/13/12	Subpart 2/Moderate.
Tuolumne County	.....	Nonattainment	6/13/12	Subpart 2/Moderate.
San Diego, CA	.....	Nonattainment	6/13/12	Subpart 2/Moderate.
San Diego County (part)				
That portion of San Diego County that excludes the areas listed below: La Posta Areas #1 and #2 [b], Cuyapaipe Area [b], Manzanita Area [b], Campo Areas #1 and #2. [b]				
* * *	*	*	*	*
Sutter County (part), CA:	.....	Nonattainment	6/13/12	Subpart 2/Original.
Sutter County (part).				
(Sutter Buttes) That portion of the Sutter Buttes mountain range at or above 2,000 feet in elevation.				
* * *	*	*	*	*
Nevada County (Western part), CA	.....	Nonattainment	6/13/12	Subpart 2/Moderate.
Nevada County (part)				
That portion of Nevada County, which lies west of a line, described as follows: beginning at the Nevada-Placer County boundary and running north along the western boundaries of Sections 24, 13, 12, 1, Township 17 North, Range 14 East, Mount Diablo Base and Meridian, and Sections 36, 25, 24, 13, 12, Township 18 North, Range 14 East to the Nevada-Sierra County boundary.				

CALIFORNIA—OZONE [8-HOUR STANDARD]—Continued

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
* * *	*	*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise noted.
[b] The boundaries for these designated areas are based on coordinates of latitude and longitude derived from EPA Region 9's GIS database and are illustrated in a map entitled ''Eastern San Diego County Attainment Areas for the 8-Hour Ozone NAAQS,'' dated March 9, 2004, including an attached set of coordinates. The map and attached set of coordinates are available at EPA's Region 9 Air Division office. The designated areas roughly approximate the boundaries of the reservations for these tribes, but their inclusion in this table is intended for CAA planning purposes only and is not intended to be a federal determination of the exact boundaries of the reservations. Also, the specific listing of these tribes in this table does not confer, deny, or withdraw Federal recognition of any of the tribes so listed nor any of the tribes not listed.
[1] This date is June 15, 2004, unless otherwise noted.

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■ 10. In § 81.306, the table entitled ''Colorado—Ozone (8-Hour Standard)'' is amended by revising the entry for Denver-Boulder-Greeley-Ft. Collins-Loveland, CO as follows:

§ 81.306 Colorado.

* * * * *

COLORADO—OZONE [8-HOUR STANDARD]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
Denver-Boulder-Greeley-Ft. Collins-Loveland, CO:				
Adams County	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
Arapahoe County	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
Boulder County (includes part of Rocky Mtn. Nat. Park)	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
Broomfield County	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
Denver County	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
Douglas County	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
Jefferson County	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
Larimer County (part)	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
(includes part of Rocky Mtn. Nat. Park). That portion of the county that lies south of a line described as follows: Beginning at a point on Larimer County's eastern boundary and Weld County's western boundary intersected by 40 degrees, 42 minutes, and 47.1 seconds north latitude, proceed west to a point defined by the intersection of 40 degrees, 42 minutes, 47.1 seconds north latitude and 105 degrees, 29 minutes, and 40.0 seconds west longitude, thence proceed south on 105 degrees, 29 minutes, 40.0 seconds west longitude to the intersection with 40 degrees, 33 minutes and 17.4 seconds north latitude, thence proceed west on 40 degrees, 33 minutes, 17.4 seconds north latitude until this line intersects Larimer County's western boundary and Grand County's eastern boundary.				
Weld County (part)	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
That portion of the county that lies south of a line described as follows: Beginning at a point on Weld County's eastern boundary and Logan County's western boundary intersected by 40 degrees, 42 minutes, 47.1 seconds north latitude, proceed west on 40 degrees, 42 minutes, 47.1 seconds north latitude until this line intersects Weld County's western boundary and Larimer County's eastern boundary.				
* * *	*	*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise noted.
[1] This date is June 15, 2004, unless otherwise noted.
[2] Early Action Compact Area, effective date deferred until November 20, 2007.

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■ 11. In § 81.329, the table entitled ''Nevada—Ozone (8-Hour Standard)'' is amended by revising the entry for Las Vegas, NV as follows:

§ 81.329 Nevada.

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NEVADA—OZONE [8-HOUR STANDARD]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
Las Vegas, NV:				
Clark County	[2]	Nonattainment	6/13/12	Subpart 2/Marginal.
That portion of Clark County that lies in hydrographic areas 164A, 164B, 165, 166, 167, 212, 213, 214, 216, 217, and 218 but excluding the Moapa River Indian Reservation and the Fort Mojave Indian Reservation.[b]				
* * *	*	*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise noted.
[b] The use of reservation boundaries for this designation is for purposes of CAA planning only and is not intended to be a federal determination of the exact boundaries of the reservations. Nor does the specific listing of the Tribes in this table confer, deny or withdraw Federal recognition of any of the Tribes listed or not listed.
[1] This date is June 15, 2004, unless otherwise noted.
[2] The effective date is September 13, 2004.

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■ 12. In § 81.333, the table entitled ''New York—Ozone (8-Hour Standard)'' is amended by revising the entries for the following:

■ a. Albany-Schenectady-Troy, NY
■ b. Buffalo-Niagara Falls, NY
■ c. Essex County (Whiteface Mtn.), NY—Essex County (Part)
■ d. Jamestown, NY
■ e. Rochester, NY

§ 81.333 New York.

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NEW YORK—OZONE [8-HOUR STANDARD]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
Albany-Schenectady-Troy, NY:				
Albany County		Nonattainment	6/13/12	Subpart 2/Marginal.
Greene County		Nonattainment	6/13/12	Subpart 2/Marginal.
Montgomery County		Nonattainment	6/13/12	Subpart 2/Marginal.
Rensselaer County		Nonattainment	6/13/12	Subpart 2/Marginal.
Saratoga County		Nonattainment	6/13/12	Subpart 2/Marginal.
Schenectady County		Nonattainment	6/13/12	Subpart 2/Marginal.
Schoharie County		Nonattainment	6/13/12	Subpart 2/Marginal.
Buffalo-Niagara Falls, NY:				
Erie County		Nonattainment	6/13/12	Subpart 2/Moderate.
Niagara County		Nonattainment	6/13/12	Subpart 2/Moderate.
Essex County (Whiteface Mtn.), NY:				
Essex County (part).				
The portion of Whiteface Mountain above 1,900 feet in elevation in Essex County.		Nonattainment	6/13/12	Subpart 2/Marginal.
* * *	*	*	*	*
Jamestown, NY:				
Chautauqua County		Nonattainment	6/13/12	Subpart 2/Moderate.
* * *	*	*	*	*
Rochester, NY:				
Genesee County		Nonattainment	6/13/12	Subpart 2/Marginal.
Livingston County		Nonattainment	6/13/12	Subpart 2/Marginal.
Monroe County		Nonattainment	6/13/12	Subpart 2/Marginal.
Ontario County		Nonattainment	6/13/12	Subpart 2/Marginal.
Orleans County		Nonattainment	6/13/12	Subpart 2/Marginal.
Wayne County		Nonattainment	6/13/12	Subpart 2/Marginal.
* * *	*	*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise noted.
[1] This date is June 15, 2004, unless otherwise noted.
[2] The effective date is September 13, 2004.

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■ 13. In § 81.339 the table entitled ''Pennsylvania—Ozone (8-Hour Standard)'' is amended by revising the entries for Pittsburgh-Beaver Valley, PA as follows:

§ 81.339 Pennsylvania.

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PENNSYLVANIA—OZONE [8-HOUR STANDARD]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
* * *	*	*	*	*
Pittsburgh-Beaver Valley, PA:				
Allegheny County		Nonattainment	6/13/12	Subpart 2/Moderate.
Armstrong County		Nonattainment	6/13/12	Subpart 2/Moderate.
Beaver County		Nonattainment	6/13/12	Subpart 2/Moderate.
Butler County		Nonattainment	6/13/12	Subpart 2/Moderate.
Fayette County		Nonattainment	6/13/12	Subpart 2/Moderate.
Washington County		Nonattainment	6/13/12	Subpart 2/Moderate.
Westmoreland County		Nonattainment	6/13/12	Subpart 2/Moderate.
* * *	*	*	*	*

[a] Includes Indian Country located in each county or area, except otherwise noted.
[1] This date is June 15, 2004, unless otherwise noted.
[2] The effective date is September 13, 2004.

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