PUERTO RICO—OZONE (8-HOUR STANDARD)—Continued

Designated area	Designation		Category/classification	
	Date [1]	Type	Date [1]	Type
San Lorenzo Municipio				
San Sebastián Municipio				
Santa Isabel Municipio				
Toa Alta Municipio				
Toa Baja County				
Trujillo Alto Municipio				
Utuado Municipio				
Vega Alta Municipio				
Vega Baja Municipio				
Vieques Municipio				
Villalba Municipio				
Yabucoa Municipio				
Yauco Municipio				

[1] This date is June 15, 2004, unless otherwise noted.

■ 57. In § 81.356, the table entitled "Virgin Islands- Ozone (8-Hour Standard)" is added to read as follows:

§ 81.356 Virgin Islands.

* * * * *

VIRGIN ISLANDS—OZONE (8-HOUR STANDARD)

Designated area	Designation		Category/classification	
	Date [1]	Type	Date [1]	Type
Statewide		Unclassifiable/Attainment.		
St. Croix				
St. John				
St. Thomas				

[1] This date is June 15, 2004, unless otherwise noted.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50, 51 and 81

[OAR 2003–0079, FRL–7651–7]

RIN 2060–AJ99

Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this document, EPA is taking final action on key elements of the program to implement the 8-hour ozone national ambient air quality standard (NAAQS or standard). This final rule addresses the following topics: classifications for the 8-hour NAAQS; revocation of the 1-hour NAAQS (*i.e.*, when the 1-hour NAAQS will no longer apply); how anti-backsliding principles will ensure continued progress toward attainment of the 8-hour ozone NAAQS; attainment dates; and the timing of emissions reductions needed for attainment. We are issuing this rule so that States and Tribes will know how we plan to classify areas and transition from implementation of the 1-hour NAAQS to implementation of the 8-hour NAAQS. The intended effect of the rule is to provide certainty to States and Tribes regarding classifications for the 8-hour NAAQS and their continued obligations with respect to existing requirements. This document is Phase 1 of the program to implement the 8-hour ozone NAAQS. We plan to issue a second rule, Phase 2, within the next several months which will address the remaining 8-hour implementation issues, *e.g.*, requirements for reasonable further progress (RFP), requirements for modeling and attainment demonstrations, and requirements for reasonably available control measures (RACM) and reasonably available control technology (RACT).

DATES: Effective Date: This rule is effective on June 15, 2004.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. OAR- 2003- 0079. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, 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 EDOCKET or in hard copy at the EPA Docket Center (Air Docket), EPA/DC, EPA West, Room B102, 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, and the telephone number for the Office of Air and Radiation Docket and Information Center is (202) 566- 1742.

In addition, we have placed a variety of earlier materials regarding implementation of the 8-hour ozone NAAQS on the Web site: *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr.*

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I. When Did EPA Propose This Rule?

On June 2, 2003 (68 FR 32805), we published a proposed rule to implement the 8-hour ozone NAAQS. The proposal addressed a number of implementation issues, including the two core implementation issues addressed in this final rule, *e.g.*, how the Clean Air Act (CAA or Act) classification provisions will apply for the 8-hour ozone NAAQS and the transition from the 1-hour NAAQS to the 8-hour NAAQS, including when the 1-hour NAAQS will be revoked and anti-backsliding principles. We proposed one or more options for each issue addressed in the proposal. In addition, we included two possible frameworks to implement the 8-hour ozone NAAQS. These frameworks were complete implementation strategies comprised of one option for each implementation issue addressed in the proposed rule. The following principles guided us in the development of the underlying

options and the frameworks to implement the 8-hour ozone NAAQS in the proposed rule: to protect public health, provide incentives for expeditious attainment of the 8-hour ozone NAAQS and avoid incentives for delay; to provide reasonable but expeditious attainment deadlines; to establish a basic, straightforward structure that could be communicated easily; to provide flexibility to States and EPA on implementation approaches and control measures while ensuring that the implementation strategy is supported by the CAA; to emphasize national and regional measures to help areas come into attainment and, where possible, reduce the need for those local controls that are more expensive than national and regional measures; and to provide a smooth transition from implementation of the 1-hour ozone NAAQS to implementation of the 8-hour ozone NAAQS. An additional goal was to clarify the role of Tribes in implementing the 8-hour ozone NAAQS. Section 301(d) of the CAA recognizes that the American Indian Tribal governments are generally the appropriate authority to implement the CAA in Indian country. As discussed in the Tribal Authority Rule (TAR) (63 FR 7262, February 12, 1998, and 59 FR 43960- 43961, August 25, 1994), it is appropriate to treat Tribes in the same manner as States. Therefore, when we discuss the role of the State in implementing this rule we are also referring to the Tribes. Please refer to the proposed rule (68 FR 32802, June 2, 2003) for a detailed discussion and background information on the 8-hour ozone problem and EPA's strategy for addressing it, the 8-hour ozone NAAQS and associated litigation, and the stakeholder process for gathering input into this effort, among other topics.

On August 6, 2002 (68 FR 46536), we published a notice of availability of the draft regulatory text for the proposed rule to implement the 8-hour ozone NAAQS. This notice started a 30-day public comment period on the draft regulatory text. In addition, on October 21, 2003 (68 FR 60054), we reopened the public comment period for 15 days to solicit additional comment on alternative approaches for classifying ozone nonattainment areas, based on comments received during the comment period.

II. What Is EPA's Schedule for Taking Final Action on the Proposal?

In our June 2, 2003 proposal, we stated that we planned to issue the final implementation rule in December of 2003. While there is not a CAA deadline for promulgating a strategy to implement the 8-hour ozone NAAQS, the CAA does establish a deadline for EPA to promulgate designations of nonattainment areas under section 107 of the CAA.[1] We have entered into a consent decree that requires us to promulgate designations by April 15, 2004.[2] Our goal was to issue a final implementation rule by the end of 2003 because the States and Tribes indicated a strong interest in having an opportunity to understand the impacts of being designated nonattainment prior to promulgation of designations for the 8-hour NAAQS. Based on the large number of public comments received on our proposal and our need to consider and respond to those comments before taking final action, we were unable to issue a final rule prior to April 15, 2004 that addresses all issues raised in the proposal. This final rule addresses several key components of the proposed rule: how the classification provisions of the CAA will apply for purposes of the 8-hour ozone NAAQS and the transition from the 1-hour NAAQS to the 8-hour NAAQS, including when the 1-hour NAAQS will be revoked, how anti-backsliding principles will ensure continued progress toward attainment of the 8-hour ozone NAAQS, attainment dates, and the timing of emissions reductions needed for attainment.

Within the next several months, we plan to issue a second final rule, Phase 2, which will address many of the planning and control obligations under sections 172 and 182 of the CAA that will apply for purposes of implementing the 8-hour ozone NAAQS. These include, among other things, RFP, RACT, attainment demonstrations and maintenance plans, and new source review (NSR). Neither Phase 1 nor Phase 2 will address the appropriate tests under the 8-hour ozone NAAQS for demonstrating conformity of Federal actions to State implementation plans (SIPs). A proposed rule was published on November 5, 2003 (68 FR 62689) addressing transportation conformity requirements applicable in 8-hour ozone nonattainment areas. In addition, EPA is revising its general conformity regulations and plans to issue a proposed rule in the spring of 2004.

[1] Section 107(d) of the CAA sets forth a schedule for designations following the promulgation of a new or revised NAAQS. The Transportation Equity Act for the Twenty-first Century (TEA- 21) revised the deadline to promulgate nonattainment designations to provide an additional year (to July 2000) but HR3645 (EPA's appropriation bill in 2000) restricted EPA's authority to spend money to designate areas until June 2001 or the date of the Supreme Court ruling in the litigation challenging the NAAQS, whichever came first.

[2] American Lung Association v. EPA (D.D.C. No. 1:02CV02239).

III. What Is Included in This Rule?

Today's action, Phase 1 of the implementation rule, focuses on two key implementation issues: (1) Classifying areas for the 8-hour NAAQS and (2) transitioning from the 1-hour to the 8-hour NAAQS, which includes revocation of the 1-hour NAAQS and the anti-backsliding principles that should apply upon revocation.[3] In addition, it addresses several additional, related issues. We believe that classifications and anti-backsliding are key elements of the implementation program that are of primary interest to the States and Tribes prior to the final designations. In addition, because section 182(a) of the CAA provides that classifications will occur "by operation of law" at the time of designation, EPA believes it is critical that the public understands at the time of designations how the classification provisions will apply.

IV. In Short, What Does This Final Rule Contain?

This summary is intended to give only a convenient overview of our final rule. It should not be relied on for the details of the actual rule. The final rule (regulatory text) and the discussion of it in the next section below should be consulted directly.

Both the preamble and the rule may use the following terms to discuss four categories of areas for purposes of the anti-backsliding provisions: (1) 8-hour NAAQS Nonattainment/1-hour NAAQS Nonattainment; (2) 8-hour NAAQS Nonattainment/1-hour NAAQS Maintenance; (3) 8-hour NAAQS Attainment/1-hour NAAQS Nonattainment; (4) 8-hour NAAQS Attainment/1-hour NAAQS Maintenance. These categories are, respectively: (1) Areas that remain designated nonattainment for the 1-hour NAAQS at the time of designation as nonattainment for the 8-hour NAAQS; (2) Areas that are maintenance areas for the 1-hour NAAQS at the time of designation as nonattainment for the 8-hour NAAQS; (3) Areas that remain designated nonattainment for the 1-hour NAAQS at the time of designation as attainment for the 8-hour NAAQS; and (4) Areas that are maintenance areas for the 1-hour NAAQS at the time of designation as attainment for the 8-hour NAAQS.

[3] We use the term "revocation" as shorthand for a determination under 40 CFR 50.9(b) that the 1-hour NAAQS no longer applies to one or more areas.

A. How Will EPA Reconcile the Classification Provisions of Subparts 1 and 2? How Will EPA Classify Nonattainment Areas for the 8-Hour Standard?

The final rule incorporates Option 2 of the proposal. Each area with a current 1-hour design value at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of subpart 2) will be classified under subpart 2 based on its 8-hour design value. All other areas will be covered under subpart 1 using their 8-hour design values.

In brief, this approach works as follows:

- First, we will determine which 8-hour areas will be covered under subpart 2 and which under subpart 1. Any area with a 1-hour ozone design value (at the time of designation) that meets or exceeds the statutory level of 0.121 ppm that Congress specified in Table 1 of section 181 will be classified under subpart 2 and will be subject to the control obligations associated with its classification.[4] Any area with a 1-hour design value (at the time of designation) that is below the level of 0.121 ppm will be covered under subpart 1 and subject to the control obligations in section 172.
- Second, subpart 2 areas will be classified as marginal, moderate, serious, severe or extreme based on the area's 8-hour design value (at the time of designation). Since Table 1 is based on 1-hour design values, and application of the Table as written would produce absurd results, we are promulgating a regulation translating the thresholds in Table 1 of section 181 from 1-hour values to 8-hour values.

Under the Final Classification Approach, How Will EPA Classify Subpart 1 Areas?

We are adopting the second option but modified as a result of comments. We are creating an overwhelming transport classification that will be available to subpart 1 areas that demonstrate they are affected by overwhelming transport of ozone and its precursors and demonstrate they meet the definition of a rural transport area in section 182(h). However, areas would not have to demonstrate that transport was due solely to sources from outside the State (interstate transport) as was implied by the June 2, 2003 proposal. All other areas that do not qualify for the overwhelming transport classification would not be classified.

[4] In the Phase 2 rule, we will address the control obligations that apply to areas under both subpart 1 and subpart 2.

Proposed Incentive Feature

We are not including the proposed incentive feature in the final rule.

B. How Will EPA Treat Attainment Dates for the 8-Hour Ozone Standard?

We are adopting the time periods for attainment that we proposed for areas under both subpart 1 and subpart 2 of the CAA. For areas subject to subpart 2 of the CAA, the maximum period for attainment will run from the effective date of designations and classifications for the 8-hour standard and will be the same periods as provided in Table 1 of section 181(a):

- Marginal- 3 years
- Moderate- 6 years
- Serious- 9 years
- Severe- 15 or 17 years
- Extreme- 20 years

Consistent with section 172(a)(2)(A), for areas subject to subpart 1 of the CAA, the period for attainment will be no later than 5 years after the effective date of the designation. However, EPA may grant an area an attainment date no later than 10 years after designation, if warranted based on the factors provided in section 172(a)(2)(A).

How Will EPA Address the Provision Regarding 1-Year Extensions?

We are adopting the interpretation that we proposed on June 2, 2003. Under both sections 172(a)(2)(C) and 181(a)(5), an area will be eligible for the first of the 1-year extensions under the 8-hour standard if, for the attainment year, the area's 4th highest daily 8-hour average is 0.084 ppm or less. The area will be eligible for the second extension if the area's 4th highest daily 8-hour value, averaged over both the original attainment year and the first extension year, is 0.084 ppm or less.

C. How Will EPA Implement the Transition From the 1-Hour to the 8-Hour Standard in a Way To Ensure Continued Momentum in States' Efforts Toward Cleaner Air?

There are two key issues that EPA considered together regarding the transition from the 1-hour standard to the 8-hour standard: (1) When will the 1-hour standard no longer apply (*i.e.*, be "revoked"); and (2) what protections are in place to ensure that, once the 1-hour standard is revoked, air quality will not degrade and that progress toward attainment will continue as areas transition from implementing the 1-hour standard to implementing the 8-hour standard. As in the proposed rule, the second key issue has three components: (1) What requirements that applied based on an area's classification for the 1-hour standard must continue to apply to that area; (2) for how long; and (3) in what area. Below, we set forth our final transition approach in four parts: (1) When will the 1-hour standard no longer apply (*i.e.*, when will it be revoked); (2) what 1-hour obligations should continue to apply once the 1-hour standard is revoked; (3) how long should those requirements continue to apply; and (4) what is the geographic area subject to the requirement.

1. When Will EPA Revoke the 1-Hour Standard?

We are adopting Option 1. We will revoke the 1-hour standard in full, including the associated designations and classifications, 1 year following the effective date of the designations for the 8-hour NAAQS.

2. What Requirements That Applied in an Area for the 1-Hour NAAQS Continue To Apply After Revocation of the 1-Hour NAAQS for That Area?

The approach we are adopting in the final rule is summarized below under the individual sections discussing each category of area and type of control obligation.

a. *Section 51.905(a)(1): 8-Hour NAAQS Nonattainment/1-Hour NAAQS Nonattainment*

(i) *Mandatory control measures.* We are adopting the approach we proposed. All areas designated nonattainment for the 8-hour ozone NAAQS and designated nonattainment for the 1-hour ozone NAAQS at the time of designation for the 8-hour NAAQS remain subject to control measures that applied by virtue of the area's classification for the 1-hour standard.

(ii) *Discretionary control measures.* We are adopting the approach we set forth in our proposed rule. A State may revise or remove discretionary control measures (including enforceable commitments) contained in its SIP for the 1-hour standard so long as the State demonstrates consistent with section 110(l) that such removal or modification will not interfere with attainment of or progress toward the 8-hour ozone NAAQS (or any other applicable requirement of the CAA).

(iii) *Measures to address growth.* We are not adopting the approach set forth in our proposed rule. For areas designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS and that are designated nonattainment for the 8-hour NAAQS, the major source applicability cut-offs and offset ratios for the area's 1-hour classification would not continue to apply after revocation of the 1-hour NAAQS.

(iv) *Planning SIPs.*

(A) *Outstanding rate of progress (ROP) Obligation.* We are adopting the approach set forth in our proposed rule for this category of areas. States remain obligated to meet the CAA-mandated ROP emission reduction targets that applied for the 1-hour standard, but discretionary measures adopted to meet those targets may be modified, if the State makes the necessary showing under section 110(l).

(B) *Unmet attainment demonstration obligations.* In the final rule, we are allowing the States to choose among three options that are tailored after the approaches addressed in the proposed rule. Thus, rather than establishing one mandatory approach, we are adopting a rule that will allow States to choose any one of the following three options:

- *Option 1.* Submit a 1-hour attainment demonstration.
- *Option 2.* Submit, no later than 1 year after the effective date of the 8-hour designations, an early five percent increment of progress plan toward the 8-hour standard.
- *Option 3.* Submit an early 8-hour ozone attainment demonstration SIP that ensures that the first segment of RFP is achieved early.

b. *Section 51.905(a)(2): 8-Hour NAAQS Nonattainment/1-Hour NAAQS Maintenance*

(i) *Mandatory control measures.* We are adopting the approach we took in the proposal and the draft regulatory text. This category of areas must continue to implement mandatory control requirements (*i.e.*, "applicable requirements") that have been approved into the SIP. However, since maintenance areas do not have any outstanding obligation to adopt mandatory control obligations for the 1-hour standard, the provision only addresses implementation, not adoption. In addition, this section recognizes that maintenance areas had the flexibility to move mandatory controls to the contingency measures portion of their maintenance plan.

(ii) *Discretionary control measures.* As with discretionary control measures for 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment areas, 1-hour NAAQS nonattainment/1-hour NAAQS maintenance areas will retain the discretion to modify any discretionary control measures upon a demonstration under section 110(l). We are not promulgating regulatory text because sections 110(l) and 193 of the CAA govern such SIP revisions.

(iii) *Measures to address growth.* We are adopting the approach we proposed, but our rationale relies on the final rule's provision that NSR under the 1-hour standard will no longer be a required implementation plan element as of revocation of the 1-hour standard. If an area has been redesignated to attainment for the 1-hour standard as of the effective date of the 8-hour nonattainment designation and is no longer required to implement a nonattainment NSR program, the area will not be required to revert back to the program it had for purposes of the 1-hour ozone standard.

As noted elsewhere, NSR offset ratios and major stationary source applicability provisions under the 1-hour standard are not being defined as "applicable requirements" after the 1-hour standard is revoked.

(iv) *Planning SIPs.* We are adopting the approach taken in the draft regulatory text. In redesignating an area to attainment, EPA must conclude that the area has met all requirements applicable under section 110 and part D. Thus, maintenance areas do not have continuing progress and attainment demonstration requirements.

c. *Section 51.905(a)(3): 8-Hour NAAQS Attainment/1-Hour NAAQS Nonattainment*

(i) *Mandatory control obligations.* We are adopting an approach consistent with our proposed rule. We have determined that mandatory control obligations will no longer apply once an area attains the 8-hour standard. Thus, because these areas are attaining the 8-hour standard, the State may request that obligations under applicable requirements be shifted to contingency measures once the 1-hour standard is revoked, consistent with sections 110(l) and 193 of the CAA. However, the State cannot remove the obligations from the SIP.

(ii) *Discretionary control obligations.* 8-hour NAAQS attainment/1-hour NAAQS nonattainment areas will retain the discretion to modify any discretionary controls upon a demonstration under section 110(l). However, such controls must remain in the SIP as contingency measures.

(iii) *Measures to address growth.* We are adopting the approach we set forth in our proposed rule for this category of areas. After the 1-hour standard is revoked, the CAA requires such areas to comply with prevention of significant deterioration (PSD), not NSR.

(iv) *Planning SIPs.* We are adopting our proposal with some modification. An area of this category will not be required to develop and submit outstanding attainment demonstration and ROP plans for the 1-hour standard for so long as the area continues to maintain the 8-hour NAAQS. However, if the area violates the 8-hour NAAQS prior to having an approved 8-hour maintenance plan under section 110(a)(1), the area will be required to submit a SIP revision to address outstanding ROP and attainment demonstration plans.

(v) *Maintenance plans for the 8-hour NAAQS.* We are adopting the approach we proposed. Areas that are either 8-hour NAAQS attainment/1-hour NAAQS nonattainment or 8-hour NAAQS attainment /1-hour NAAQS maintenance must adopt and submit a maintenance plan consistent with section 110(a)(1) within 3 years of designation as attainment for the 8-hour NAAQS. The maintenance plan should provide for continued maintenance of the 8-hour standard for 10 years following designation for the 8-hour NAAQS and should include contingency measures.

d. *Section 51.905(a)(4): 8-Hour NAAQS Attainment/1-Hour NAAQS Maintenance*

In the final rule, we created a section 51.905(a)(4) to apply to this category of areas. It covers obligations in an approved SIP and maintenance plans similar in manner to areas that are attainment for the 8-hour standard and were attainment for the 1-hour standard and had a maintenance plan.

3. For How Long Do These Obligations Continue To Apply?

We are adopting Option 2- control obligations an area is required to retain in the approved SIP for an area's 1-hour classification must continue to be implemented under the SIP until the area attains and is redesignated to attainment for the 8-hour NAAQS. At that time, the State may relegate such controls to the contingency measure portion of the SIP if the State demonstrates in accordance with section 110(l) that doing so will not interfere with maintenance of the 8-hour NAAQS or any other applicable requirement of the CAA. If at the time the area is redesignated to attainment for the 8-hour standard the State has an outstanding obligation to adopt a control requirement under the 1-hour standard, it remains obligated to do so, but may adopt it as a contingency measure.

4. Which Portions of an Area Designated for the 8-Hour NAAQS Remain Subject to the 1-Hour NAAQS Obligations?

The final rule incorporates most aspects of the approach as that contained in the proposal and in the draft regulatory text. The final rule provides that only the portion of the designated area for the 8-hour NAAQS that was designated nonattainment for

the 1-hour NAAQS is required to comply with the planning obligations, except in one circumstance: if the State elects to provide an early increment of progress or an early 8-hour attainment demonstration in lieu of an outstanding 1-hour attainment demonstration (for an 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment area under 51.905(a)(1)(ii)(B) and (C)), the increment of progress or early 8-hour attainment plan must apply for purposes of the entire 8-hour nonattainment area.

The final rule does not follow the approach in the proposal for the maintenance plan requirement for 8-hour attainment areas. The maintenance plans required for these areas must demonstrate maintenance only for the area designated nonattainment for the 1-hour NAAQS at the time of designation of the 8-hour standard.

5. What Obligations That Applied for the 1-hour NAAQS Will No Longer Apply After Revocation of the 1-hour NAAQS for an Area?

We are revising the approach we set forth in our proposed rule. In addition to the obligations noted in our proposal that would no longer apply after the 1-hour NAAQS is revoked, we are also providing clarification regarding the penalty obligations under sections 181(b)(4) and 185 of the CAA that apply in severe and extreme areas that do not attain the 1-hour standard by the applicable attainment date. The final rule also would not retain NSR under the 1-hour NAAQS. The final rule provides that as of the effective date of revocation of the 1-hour standard:

- We will no longer make findings of failure to attain the 1-hour standard and, therefore, (a) we will not reclassify areas to a higher classification for the 1-hour standard based on such a finding, and (b) areas that were classified as severe or extreme for the 1-hour NAAQS are not obligated to impose fees as provided under sections 181(b)(4) and 185 of the CAA under the 1-hour standard.
- Areas will not be obligated to continue to demonstrate conformity for the 1-hour NAAQS as of the effective date of the revocation of the 1-hour NAAQS.
- An area with an approved 1-hour maintenance plan under section 175A of the CAA may modify the maintenance plan to remove obligations related to developing a second 10-year maintenance plan for the 1-hour NAAQS and the obligation to implement contingency measures upon a violation of the 1-hour NAAQS.
- NSR under the 1-hour NAAQS will no longer be a required implementation plan element in areas that are 8-Hour NAAQS nonattainment/1-Hour NAAQS nonattainment. Instead, NSR under the 8-hour NAAQS will apply.

6. What Is the Continued Applicability of the NO_X SIP Call After Revocation of the 1-hour NAAQS?

We are adopting the approach we set forth in our proposed rule and draft regulatory text. States must continue to adhere to the emission budgets established by the NO_X transport rules after the 1-hour standard is revoked. States retain the authority to revise control obligations they have established for specific sources or source categories under the NO_X SIP Call rule so long as the State demonstrates consistent with section 110(l) that such modification will not interfere with attainment of or progress toward meeting the 8-hour NAAQS or any other applicable requirement of the CAA.

D. What Is the Required Timeframe for Obtaining Emissions Reductions to Ensure Attainment by the Attainment Date?

We are adopting the approach we set forth in our proposed rule, namely that emissions reductions needed for attainment must be implemented by the beginning of the ozone season immediately preceding the area's attainment date.

V. EPA's Final Rule

A. How Will EPA Reconcile the Classification Provisions of Subparts 1 and 2? How Will EPA Classify Nonattainment Areas for the 8-hour NAAQS? (Section VI.A. of Proposal; See 68 FR 32811; Section 51.902 of Draft and Final Rules)

1. Background

a. *Statutory framework and Supreme Court decision.* The CAA contains two sets of requirements- subpart 1 and subpart 2- that establish requirements for State plans implementing the ozone NAAQS in nonattainment areas. (Both are found in title I, part D.) Subpart 1 contains general, less prescriptive, requirements for SIPs for nonattainment areas for any pollutant- including ozone- governed by a NAAQS. Subpart 2 provides more specific requirements for ozone nonattainment SIPs.[5]

When we promulgated the 8-hour ozone NAAQS on July 18, 1997, we indicated that we anticipated that States would implement the 8-hour NAAQS under the less prescriptive subpart 1 requirements. More specifically, we concluded that the CAA required areas designated nonattainment for the 1-hour ozone NAAQS to remain subject to the subpart 2 requirements for purposes of the 1-hour NAAQS until such time as they met that NAAQS (62 FR 38872). We also stated that those areas and all other areas would be subject only to subpart 1 for purposes of planning for the 8-hour ozone NAAQS. We determined not to immediately revoke the 1-hour NAAQS for all areas but to promulgate a rule (40 CFR 50.9(b)) providing that the 1-hour NAAQS and the associated designation would no longer apply to an area once EPA determined the area had attained the 1-hour NAAQS. Thus, areas that had not yet attained the 1-hour NAAQS retained their designation for that NAAQS and remained subject to the control obligations associated with their classification for the 1-hour NAAQS until they met it.

In February 2001, the Supreme Court ruled that the statute was ambiguous as to the relationship of subparts 1 and 2 for purposes of implementing the 8-hour NAAQS. *Whitman* v. *American Trucking Associations,* 531 U.S. 457, 481- 86 (2001). The Court concluded, however, that the implementation approach set forth in the final NAAQS rule, which provided no role for subpart 2 in implementing the 8-hour NAAQS, was unreasonable. *Id.* Specifically, with respect to classifying areas, the Supreme Court stated: [D]oes subpart 2 provide for classifying nonattainment ozone areas under the revised standard? It unquestionably does." *Whitman,* 531 U.S. at 482.

Despite recognizing that the classification provisions of subpart 2 (section 181(a)) apply for purposes of the 8-hour NAAQS, the Supreme Court also recognized that the subpart 2 classification scheme does not entirely fit with the revised 8-hour NAAQS and left it to EPA to develop a reasonable resolution of the roles of subparts 1 and 2 in classifying areas for and implementing a revised ozone NAAQS. *Id.* at 482- 486.

In particular, the Court noted three portions of section 181- the classification provision in subpart 2- that it indicated were "ill-fitted to implementation of the revised standard." Id. at 483.

- First, the Court recognized that "using the old 1-hour averages of ozone levels * * * as subpart 2 requires * * * would produce at best an inexact estimate of the new 8-hour averages * * *" *Id.*

[5] State Implementation Plans; General Preamble for the Implementation of Title of the CAA Amendments of 1990; Proposed Rule." April 16, 1992 (57 FR 13498 at 13501 and 13510).

• Second, the Court recognized that the design values in Table 1 is based on the level of the 1-hour NAAQS (0.12 ppm) and noted that "to the extent the new ozone standard is stricter than the old one, * * * the classification system of Subpart 2 contains a gap, because it fails to classify areas whose ozone levels are greater than the new standard (and thus nonattaining) but less than the approximation of the old standard codified by Table 1." *Id.*

• Third, the Court recognized that "Subpart 2's method for calculating attainment dates- which is simply to count forward a certain number of years from November 15, 1990 * * * seems to make no sense for areas that are first classified under a new standard after November 15, 1990." More specifically, the Court recognized that attainment dates for marginal (1993), moderate (1996), and serious (1999) areas had passed. *Id.* at 483- 484.

b. *EPA's proposed rule and notice reopening the comment period.* In light of the Supreme Court's ruling, we examined the statute to determine the manner in which the subpart 2 classifications should apply for purposes of the 8-hour ozone NAAQS. We paid particular attention to the three portions of section 181 that the Supreme Court noted were ill-fitted for implementation of the revised 8-hour NAAQS. We examined those provisions in light of the legislative history and the overall structure of the CAA to determine what Congress intended for purposes of implementing a revised, more stringent ozone NAAQS.

On June 2, 2003 (68 FR 32802), we issued a proposed rule which identified two options for classifying areas for the 8-hour ozone NAAQS. Under Option 1 (68 FR 32812), we proposed to classify 8-hour ozone nonattainment areas according to the severity of their ozone pollution based on 8-hour design values.[6] Because the subpart 2 classification table is based on 1-hour design values, we proposed to translate the classification thresholds in Table 1 of section 181 to 8-hour design values. Under this option, all 8-hour nonattainment areas would be classified under subpart 2 as marginal, moderate, serious, severe or extreme.

Under Option 1, the threshold for the marginal classification would be an 8-hour design value of 0.085 ppm. Each of the 8-hour classification thresholds would be the same percentage above the 8-hour NAAQS as the corresponding statutory 1-hour threshold is above the 1-hour NAAQS. For example, since the statutory 1-hour ozone level for the moderate classification is 15 percent above the 1-hour NAAQS, the 8-hour ozone level for the moderate classification would be 15 percent above the 8-hour NAAQS.

The EPA developed a second option designed to provide States with greater flexibility on the measures included in their plans for meeting the 8-hour NAAQS. Under Option 2 (68 FR 32812), which we indicated was our preferred option, we proposed a two-step system for determining classifications for areas. We proposed as a first step, to divide areas into two groups based on each area's current 1-hour ozone design value. In accordance with the portion of the Supreme Court decision which indicated that there was no gap in the statute for those areas with a 1-hour design value above 0.121 ppm- the lowest level in Table 1 in section 181(a)- we proposed that areas with a current (*i.e.*, determined at the time of designation) 1-hour ozone design value greater than or equal to 0.121 ppm would be classified under subpart 2 for the 8-hour NAAQS. For areas with a 1-hour design value less than 0.121 ppm, *i.e.*, those areas the Court stated fell into the gap, we concluded that we must make a reasonable determination whether they should be covered under subpart 1 or subpart 2. We proposed that all of these areas would be covered under subpart 1. For the areas that did not fall into the gap and which must be classified under subpart 2, we proposed to classify them based on our translation of Table 1 in section 181(a), as described under Option 1.

We received a large number of comments on the classification options that we proposed, including recommendations for other approaches, most of which were variations on the options we proposed. On October 21, 2003 (68 FR 60054), we reopened the comment period on the proposed rule for 15 days to provide the public with an opportunity for additional comment on alternative approaches for classifying areas for the 8-hour ozone NAAQS that were suggested during the comment period. We also included two alternative strategies (Alternatives A and B) for classifying areas that EPA developed by combining ideas suggested by different commenters during the initial comment period.[7]

Alternatives A and B were designed to place more areas in higher classifications, which would provide areas with more time to attain but would impose additional mandatory control requirements. These alternatives also were designed to avoid or reduce instances in which a subpart 1 area could have higher 8-hour ozone levels than a subpart 2 area.

Alternative A would classify areas solely on the basis of 8-hour design values. The key feature of this alternative was that EPA would create a classification table of 8-hour values starting from an 8-hour design value that, to the extent possible, would be approximately equivalent to the 1-hour design value of 0.121 ppm in Table 1. Thus, the lowest level in the regulatory table was the 8-hour approximation of the 1-hour NAAQS as suggested by commenters, *i.e.*, 0.091 ppm. Areas with an 8-hour design value less than 0.091 ppm would be covered under subpart 1. Areas with an 8-hour design value at or above this level would be classified under subpart 2. To place areas in higher classifications, we narrowed the range for each classification to use 50 percent (instead of 100 percent) of the percentages that the classification thresholds were above the 1-hour NAAQS in our proposed June 2003 translation of Table 1. In other words, since the moderate threshold for the 1-hour NAAQS is 15 percent above the 1-hour NAAQS, we would adjust the moderate threshold for purposes of the 8-hour NAAQS to be 7.5 percent above 0.091 ppm (the lowest level in Table 1 for Alternative A).

Alternative B, a modified version of Option 2, retained the first step of Option 2, where we divide the areas based on their current 1-hour design value. As in Option 2, areas with 1-hour design values exceeding the statutory 0.121 ppm level would be regulated under subpart 2. In addition, any "gap" area (*i.e.*, those with a 1-hour design value less than 0.121 ppm) with a moderate-level (or higher) design value would be classified under subpart 2. All

[6] The design value of an area is based on the monitor for the area recording the highest ozone levels and indicates whether the area is violating or meeting the ozone NAAQS. For the 1-hour ozone NAAQS, the design value for an area is generally the 4th highest monitored ozone level at the monitor over a 3-year period. *See* 40 CFR part 50, appendix H and Memorandum of June 18, 1990 from William G. Laxton re "Ozone and Carbon Monoxide Design Value Calculations." Available at *http://www.epa.gov/ttn/naaqs/ozone/ozonetech/laxton.htm.* For the 8-hour ozone NAAQS, the design value is the average of each yearly 4th highest reading at a monitor over a 3-year period. *See* 40 CFR part 50, appendix I.

[7] The notice also solicited comment on additional issues that would arise if we selected one of the approaches identified in the notice reopening the comment period: (1) Whether we should modify the 5 percent reclassification feature of section 181(a)(4) of the CAA if we change our classification scheme to have a narrower range for each classification; (2) whether we should adopt the suggestion by commenters on the June 2, 2003 proposal that we change the 1-hour ozone threshold to 0.125 ppm rather than 0.121 ppm to determine if an area falls into subpart 1 vs. subpart 2 under classification Option 2; and (3) whether an adjustment other than 50 percent would be more appropriate for narrowing the range of each classification.

other gap areas would be covered by subpart 1. As with Alternative A, to place subpart 2 areas in higher classifications, we narrowed the range for each classification to 50 percent of the range in Table 1 of section 181. In other words, the moderate threshold would be 7.5 percent above the 8-hour NAAQS (0.085 ppm).

2. Summary of Final Rule

After considering all of the comments that were submitted, we are adopting Option 2. Each area with a current 1-hour design value at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of subpart 2) will be classified under subpart 2 based on its 8-hour design value. All other areas will be covered under subpart 1 using their 8-hour design values.

In brief, this approach works as follows:

- First, we will determine which 8-hour areas will be covered under subpart 2 and which under subpart 1. Any area with a 1-hour ozone design value (at the time of designation) that meets or exceeds the statutory level of 0.121 ppm that Congress specified in Table 1 of section 181 will be classified under subpart 2 and will be subject to the control obligations associated with its classification.[8] Any area with a 1-hour design value (at the time of designation) that is below the level of 0.121 ppm will be covered under subpart 1 and subject to the control obligations in section 172.
- Second, subpart 2 areas will be classified as marginal, moderate, serious, severe or extreme based on the area's 8-hour design value (at the time of designation). Since Table 1 of section 181 is based on 1-hour design values, and application of the Table as written would produce absurd results, we are promulgating a regulation translating the thresholds in Table 1 of section 181 from 1-hour values to 8-hour values. (*See* Table 1 "Classification for 8-Hour NAAQS for Areas Subject to Section 51.902(a)" in section 51.903.)
- Third, in accordance with section 181(a)(4) and 181(b)(3), the State may request a lower or higher classification.
- Finally, as described in more detail below, section 172(a)(1) provides EPA with discretion whether to classify areas under subpart 1 and we are creating one classification- for qualifying areas affected by overwhelming transport. All other areas covered under subpart 1 will not be classified.

a. *Why did EPA select Option 2?* The EPA carefully considered the many comments we received on classification options and, in fact, sought additional input on alternatives presented and developed pursuant to comments received on the June 2003 proposal. The commenters were deeply divided on the merits of the options. Even after the conclusion of the October 2003 comment period, most commenters still favored Option 2 or Option 1. Only a few favored either Alternative A or Alternative B. Those commenters who suggested alternatives to Option 1 or Option 2 during the initial 60-day comment period did not support Alternatives A and B (which blended several suggestions from the initial comments) and they remained convinced that their suggested approach was the best classification approach.

Because the commenters were strongly divided over the appropriate classification approach, EPA re-examined the various alternatives in light of their consistency with the CAA, as interpreted by the Supreme Court, and their consistency with EPA's stated goals. While EPA believes that Options 1 and 2 and Alternatives A and B are all legally supportable under the CAA, we concluded that Option 2 best fits with the policy goals enunciated by EPA in the proposal and re-affirmed here. Thus, EPA has selected Option 2. We explain below why Option 2 will best accomplish the policy goals of EPA and why we believe it is consistent with the CAA.

(i) *Why will Option 2 best accomplish the policy goals of EPA?* One of EPA's stated goals at proposal was to provide flexibility to States and Tribes on implementation approaches and control measures within the structure of the CAA. As compared with the other alternatives considered, Option 2 places more areas under the more flexible provisions of the CAA (subpart 1), which will provide the States and Tribes with greater discretion in determining the mix of controls needed to expeditiously attain the 8-hour NAAQS. For example, Option 1 would place all areas under subpart 2, which mandates a number of specific control measures, thus limiting the States and Tribes ability to consider whether there are more effective and less costly ways to achieve the same level of emission reductions.[9] For example, an area might be able to achieve greater air quality improvement at less cost from local NO_X reductions than from local volatile organic compounds (VOC) reductions of 15 percent mandated for certain subpart 2 areas. This will enable some areas to meet the 8-hour NAAQS at less cost than under the other classification options because the States and Tribes will have greater flexibility in determining which control requirements to adopt to meet the NAAQS. Because areas are required to attain the NAAQS as expeditiously as practicable under both subpart 1 and subpart 2, Option 2 should not result in longer attainment periods than Option 1, with the exception of areas significantly affected by transported pollution (discussed below).

Additionally, placing some areas in subpart 1 provides States and EPA with greater flexibility to determine appropriate controls for areas that would have difficulty attaining the 8-hour NAAQS due to interstate pollution transport. In the 13 years since the CAA Amendments of 1990 were enacted (at which time, Congress created subpart 2), we have learned much about the long-range transport of ozone and the importance of employing regional controls in addition to local controls. Subpart 2 does not allow EPA and the States to consider transported pollution in determining the feasibility and benefits of mandated controls or in determining the appropriate attainment date for an area. Because of our increased understanding of transported pollution since Congress enacted the more restrictive provisions of subpart 2, we believe it makes sense to adopt an approach that does not shift "gap" areas into subpart 2. In other words, where Congress has not explicitly mandated that areas are subject to subpart 2, we don't believe it makes sense to adopt an approach that would shift some or all of those "gap" areas to subpart 2, which provides significantly less flexibility for bringing areas affected by transported pollution into attainment. (We discuss in more detail the flexibility provided by subpart 1 and how it better allows consideration of the current scientific knowledge regarding ozone formation and transport in the section below discussing why we place all of the "gap" areas in subpart 1.)

The EPA recognizes that the flexibility of Option 2 comes with some added complexity. One of EPA's stated goals was to establish an approach that is easy to understand. While Option 1 (classifying all areas under subpart 2) is simpler, we believe our goals regarding flexibility outweigh the simplicity of Option 1.

Another of EPA's stated aims at proposal was to ensure expeditious but reasonable attainment dates for the 8-hour NAAQS. The EPA believes that Option 2 is consistent with this

[8] In the Phase 2 rule, we will address the control and planning obligations that apply to areas under both subpart 1 and subpart 2.

[9] Similarly, Alternatives A and B would result in fewer areas being placed under subpart 1. (*See* 68 FR 60060, Table 2. October 21, 2003).

principle. Compared to Alternatives A and B, Option 2 will place more areas in lower classifications with shorter maximum attainment dates, encouraging expeditious attainment. While some commenters believed that maximum attainment dates under Option 2 would not allow enough time for some areas to meet the NAAQS, we believe that Option 2 provides sufficient time for most areas and that to the extent some areas may have difficulty, the CAA provides an avenue for relief, which is discussed below.

Based on information concerning the hypothetical nonattainment areas,[10] [11] we are confident that under Option 2 most areas currently exceeding the 8-hour NAAQS will be able to meet the NAAQS within the time limits provided for their classification, taking into consideration projected improvements in air quality under current programs and the potential for adoption of further national, regional and local measures.

EPA notes that there are uncertainties at this time about the time periods needed for attainment, especially for the limited number of areas needing substantial emissions reductions to attain. For example, it is difficult to determine in advance of State development of attainment plans when such an area will be able to attain the NAAQS. These plans are based on high-resolution local air quality modeling, refined emissions inventories and detailed analyses of the impacts and costs of potential local control measures.

Another factor is that new methods of achieving cost effective emissions reductions are continuing to be developed. Our repeated experience over the past three decades is that market forces stimulated by the CAA have repeatedly led to technological advances and learning through experience, making it possible over time to achieve greater emissions reductions at lower costs than originally anticipated.[12]

Other uncertainties reflect use of the most recent three years of air quality data for the actual designations and classifications, and use of more refined and area-specific modeling methodologies for projecting future ozone concentrations.

Regarding the use of later air quality data, we have interpreted the CAA's requirements under section 181 such that we must classify nonattainment areas that are covered under subpart 2 based on the most recent ozone design values, which are based on three years of data. Because of year-to-year variations in meteorology, this "snapshot in time" may not be representative of the normal magnitude of problems that a number of areas face.

Regarding modeling methodologies, national/regional modeling may indicate that a number of moderate areas may face difficulty attaining the standard by the maximum attainment date required for an area's classification. However, when a State using photochemical grid modeling predicts concentrations that are above the NAAQS after application of SIP controls, an optional weight of evidence determination which incorporates, but is not limited to, other analyses, such as air quality and emissions trends, may be used to address uncertainty inherent in the application of photochemical grid models. (Issues related to implementation of the standard-including issues on the attainment demonstration and modeling- will be addressed in the second phase of rulemaking.)

We are aware that some 8-hour nonattainment areas in the Eastern U.S. that are classified moderate using 2001-2003 air quality data will have difficulty attaining the NAAQS by the attainment date of 2010 (6 years after designation). We encourage States to request reclassification upward where the State finds that an area may need more time to attain than their classification would permit. In addition, EPA will consider bumping up areas subject to the five percent provision of section 181(a)(4) of the CAA on our own initiative where there is evidence that an area is unlikely to attain within the period allowed by their classification. The rulemaking that sets forth designations and classifications for the 8-hour standard discusses criteria we would use if we take this action.

If a State finds during the attainment planning process that feasible controls are not available and an area may need more time to attain the 8-hour NAAQS than their classification would permit, the statute provides a remedy. A State can receive more time to attain by voluntarily submitting a request to EPA for a higher classification. Section 181(b)(3) of the CAA directs EPA to grant a State's request for a higher classification and to publish notice of the request and EPA's approval. Although the area would have to meet the additional requirements for the higher classification, the same would be true if the area had been initially classified higher, under a system that placed more areas in higher classifications. Voluntary reclassification may be an attractive option if the State is unable to develop a plan that demonstrates an area will attain within the time period for its assigned classification. Some commenters were concerned that it may be difficult to develop support for a voluntary reclassification among interested parties. However, we believe such dialogue will lead the State to undertake a thorough analysis and balancing of how expeditiously the area can attain the NAAQS and the cost of the measures needed for attainment as these issues will be foremost in the stakeholders' minds.

The EPA prefers Option 2 rather than the alternatives that place more areas into higher classifications because in addition to providing a longer maximum timeframe in which to attain, the higher classifications impose additional statutorily-mandated requirements. While the additional requirements might be appropriate for areas that truly need the longer period to attain, it is likely that a number of areas that do not need a longer period to attain would also be placed in a higher classification under these alternatives. For example, several areas that would be covered by subpart 1 under Option 2, and which EPA projects are likely to attain the 8-hour levels NAAQS within 3 years based on existing programs, would be classified

[10] Revised: Background Information Document, Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-Hour Ozone National Ambient Air Quality Standard in Relation to Re-Opened Comment Period- Illustrative Analysis Based on 2000- 2002 Data. U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards. Draft. October 2003. Available at: *http://www.epa.gov/ttn/naaqs/ozone,o3imp8hr/.*

[11] Qualitative Assessment of Alternative Coverage and Classification Options. First Addendum to "Cost, Emission Reduction, Energy, and Economic Impact Assessment of the Proposed Rule Establishing the Implementation Framework for the 8-hour, 0.08ppm Ozone National Ambient Air Quality Standard." Prepared by Innovative Strategies and Economics Group, Air Quality Strategies and Standards Division, Office of Air Quality Planning and Standards, Office of Air and Radiation, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina. April 8, 2004.

[12] For instance, the cost of selective catalytic reduction (SCR) catalyst (for control of NO_X) has gone from $11,000- $14,000/cubic meter in 1998 to $3,500- $5,500/cubic meter currently. Advancements in low NO_X burner (LNB) technology and staged combustion have resulted in sharp NO_X reductions at much lower costs. New burner technologies have lowered NO_X emissions reductions by as much as 50 percent from previous designs. Costs have decreased from $25- 38/kW in 1993 to about $15/kW in 2003. Memorandum of October 10, 2003 from Jim Staudt, Andover Technology Partners, Re: Prime Contract 68- W- 03-028; Subcontract Agreement 23BL00114; ATP Contract #:C- 03- 007.

as moderate areas under Alternative B.[13] In those areas, the additional moderate-area control requirements are unlikely to be needed for expeditious attainment.

The EPA believes that under any of the classification approaches that were considered there will be areas that are "misclassified"- *i.e.*, the classification will not reflect the time the area needs to attain and the level of controls needed. The statute does not allow EPA to reclassify an area to a lower classification, except as provided in section 181(a)(4) regarding an initial 5 percent adjustment. It does, however, as described above, provide continuing authority for areas to be reclassified to a higher classification. For that reason, EPA believes the better approach is to use a scheme that may classify areas too low and areas that need more time to attain can use the voluntary reclassification provision of the CAA to obtain the appropriate classification.

(ii) *How is Option 2 consistent with the CAA as Interpreted by the Supreme Court?* The legal framework for Option 2 is described in detail in the June 2, 2003 proposed rule (68 FR 32813). In short, EPA relies on the Supreme Court's recognition that there is a gap in the statute with respect to areas "whose ozone levels are greater than the new standard (and thus not attaining) but less than the approximation of the old standard codified by Table 1." Thus, for areas with a 1-hour design value above the level codified in Table 1, EPA interprets the Supreme Court as determining that the CAA mandates that they be classified under subpart 2. For all other areas, the Court indicates there is a gap and EPA must determine a reasonable approach for classifying these areas. Option 2 is consistent with the CAA as interpreted by the Supreme Court because it places all areas with a 1-hour design value of 0.121 ppm or greater in subpart 2 and, for the reasons provided below, EPA's decision to classify all "gap" areas under subpart 1 is reasonable.

As we noted in the June 2, 2003 proposal (68 FR 32814), when faced with a similar issue following enactment of the CAA Amendments of 1990, we determined that areas that Congress did not mandate fall into the classification scheme of subpart 2 should be subject to only the planning obligations of subpart 1.[14] We believe it is appropriate to continue that interpretation of the CAA for 8-hour ozone areas- despite the fact that a significant number of areas designated nonattainment for the 8-hour NAAQS will fall into this group. This decision is reasonable because subpart 2 was developed by Congress 13 years ago and our scientific understanding of the causes of ozone pollution and the transport of ozone and its precursors has significantly advanced. In addition, subpart 1 was developed at the time that the 1-hour NAAQS was the NAAQS of concern. At that time, many areas had a long-term ozone problem that they had been unable to solve under the more flexible pre-1990 provisions of the CAA. The 8-hour NAAQS is different in many ways from the 1-hour NAAQS. Moreover, the areas that will be subject to subpart 1 are primarily areas that have not had the long-term pollution problem that Congress was concerned about when it created subpart 2.

Congress enacted subpart 2 with the understanding that all areas (except marginal areas, for which few, if any, controls for existing sources were required) would have to employ additional local controls to meet the 1-hour ozone NAAQS in a timely fashion. Since then, many local, regional and national control measures have been implemented, our understanding of the importance of interstate pollution transport has improved, and we have promulgated interstate NO_X transport rules to address transported pollution (the NO_X SIP call, October 27, 1998, 63 FR 53756). Today, regional modeling by EPA indicates that the majority of potential 8-hour nonattainment areas that fall into the gap will attain the 8-hour NAAQS by 2007 based on reductions from the NO_X SIP Call, the Federal Motor Vehicle Emissions Control Program, and other existing Federal and State control measures, without further local controls.

Some gap areas would be classified as moderate areas if placed under subpart 2. The EPA regional modeling shows that many of these are projected to attain by 2007 through existing regional or national measures. (The proposal provides estimates of the numbers of areas, *see* 68 FR 32814, col. 3).[15] If these areas were to be classified as moderate, they would be required to implement statutorily specified controls for moderate areas. We believe it is reasonable to adopt an approach that would not mandate new local controls in areas projected to meet the NAAQS within 3 years through emissions reductions required by existing programs.

Some commenters contended that placing these areas in subpart 1 created an "equity" problem because other areas with a similar 8-hour ozone design value would be placed under subpart 2. The EPA considered this issue when it reopened the comment period and set forth alternatives that would have placed areas with similar 8-hour design values in the same classification. While in one light such a situation may be perceived as inequitable, EPA believes that this is generally not the case. As an initial matter, EPA notes that the areas that fall under subpart 2 are areas with higher ozone 1-hour peak concentrations- *i.e.*, areas with levels above the 1-hour NAAQS.[16] Thus, the areas classified under subpart 1 do not have the same type of ozone problem as those classified under subpart 2 and the same control programs may not be needed for both types of areas. We note that the areas that will be classified under subpart 2 are the type of area that Congress considered at the time that it developed subpart 2 and it is more likely that subpart 2 will provide benefits for these areas. We also note that in the proposed rule, we proposed several ways to make the obligations under subpart 1 similar to those under subpart 2 for areas with a similar ozone problem. Thus, there are other means to address any inequities; EPA will

[13] Revised: Background Information Document, Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-hour Ozone National Ambient Air Quality Standard in Relation to Re-Opened Comment Period- Illustrative Analysis Based on 2000- 2002 Data. U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards. Draft. October 2003. Available at: *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/.*

[14] These areas included: (a) The transitional areas under section 185A (areas that were designated as an ozone nonattainment area as of the date of enactment of the CAA Amendments of 1990 but that did not violate the 1-hour ozone NAAQS between January 1, 1987, and December 31, 1989); (b) nonattainment areas that had incomplete (or no) recent attaining data and therefore could not be designated attainment; and (c) areas that were violating the 1-hour ozone NAAQS by virtue of their expected number of exceedances, but whose design values were lower than the threshold for which an area can be classified under Table 1 of subpart 2 (submarginal areas). *See* 57 FR 13498 at 13524 col. 3 *et seq.* (April 16, 1992).

[15] See also: Background Information Document, Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-hour Ozone National Ambient Air Quality Standard. Illustrative Analysis Based on 1998- 2000 Data. U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards, Draft, April 2003. Available at: *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/.*

[16] For instance, the range of 1-hour ozone design values of the hypothetical subpart 1 areas is from 0.101 ppm to 0.120 ppm, with an average of 0.111 ppm. The range of 1-hour design values of subpart 2 areas is from 0.122 ppm to 0.175 ppm with an average of 0.133 ppm. See docket document OAR-2003- 0079- 0573 (REVISED: Background Information Document, Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-hour Ozone NAAQS in Relation to Re-Opened Comment Period) for the data used for these statistics.

consider equity and other factors in deciding control requirements for subpart 1 areas in Phase 2.

Most of the gap areas would be classified as marginal if classified under subpart 2 by 8-hour design value.[17] Because control requirements for marginal areas are similar to those for subpart 1 areas, and because most of these areas are projected to attain within 3 years, the distinction in regulatory category may make no practical difference for many of these areas. However, placing these areas under subpart 1 provides States and EPA with greater discretion to handle implementation difficulties that might arise in some of these areas. For example, a gap area might be unable to attain within the maximum attainment date for marginal areas (3 years after designation) because of pollution transport from an upwind nonattainment area with a later attainment deadline. In that event, subpart 2 would call for the area to be reclassified as moderate and for the area to implement additional local controls specified for moderate areas. For areas under subpart 1, however, we could provide additional time for the area to attain while the upwind sources implemented required controls if this were determined to be a more effective or more appropriate solution. Although regional modeling projections indicate that the NO_X SIP Call will bring most gap areas into attainment by 2007, some States have voiced concern that interstate or intrastate pollution transport may make timely attainment difficult for some 8-hour areas with near-term attainment deadlines (*e.g.*, 2007). Subpart 1 would provide States and EPA with more flexibility on the remedy in any such cases, while still requiring that subpart 1 areas adopt all reasonably available control measures to attain as expeditiously as practicable.[18] Some may perceive the placement of gap areas in subpart 1 (based on their 1-hour design values) as inequitable compared to placing other areas that have similar 8-hour design values in subpart 2 (based on their 1-hour design values). We do not believe, however, that it makes sense to limit our authority by placing gap areas in subpart 2 even though they may have 8-hour design values similar to areas that will be classified under subpart 2.

An advantage of Alternatives A and B was that they avoided or reduced equity concerns raised by some commenters with Option 2. Regardless, we believe that equity considerations should not override other considerations in determining how to best help areas attain the 8-hour NAAQS. Congress mandated that areas with 1-hour ozone levels above the level 0.121 ppm be classified under subpart 2. However, Congress did not specifically address the areas that fall into the "gap." Where Congress has left to EPA's discretion how to classify areas, we believe that factors we have considered above[19] outweigh any desire for "equity."

Additionally, we note that since 1990 we have learned that NO_X control is more important for many areas than was recognized at the time of the 1990 CAA Amendments. Some mandatory measures in subpart 2, such as the 15 percent VOC reduction required for certain areas, focus on VOC reductions. In some areas it will be more effective and less costly to reduce ozone through a strategy that places more emphasis on NO_X than VOC, and a 15 percent VOC reduction may not be part of an optimal strategy. Subpart 1 would allow such areas greater flexibility on choice of controls.

In summary, Option 2 meets the policy goals EPA specified in the proposal- most importantly, providing flexibility, and encouraging expeditious attainment of the NAAQS- and is consistent with the Supreme Court's ruling. Commenters were divided on the merits of different classification approaches and no single option appealed to a large majority of stakeholders. On balance, EPA determined that Option 2 was preferable to the other options identified. Thus, EPA is adopting Option 2.

3. Comments and Responses

This preamble briefly summarizes major comments on each portion of the Phase 1 rule and generally provides a brief response to those comments. The response to comment (RTC) document presents a more complete description of comments received and a more complete response to those comments.

Comment: The commenters were split on whether they preferred Option 1, under which all areas are classified under subpart 2 of the CAA, or Option 2, under which 8-hour nonattainment areas with 1-hour ozone design values of 0.121 ppm or greater at the time of designation are classified under subpart 2 and all other 8-hour nonattainment areas are classified under subpart 1. Those who supported Option 2, indicated it made better policy sense, was more flexible and more appropriate than Option 1, cost less, was better integrated with other regulations, provided more reasonable attainment dates, and was more consistent with the Supreme Court decision. A number of commenters supported Option 2, but recommended variations of that approach. These commenters raised one (or both) of two concerns with the approach recommended by EPA: (1) Since most of the areas fall into the lower classifications with short-term attainment dates, it does not provide sufficient time for many areas to attain; and (2) since some areas classified under subpart 1 will have a more severe 8-hour ozone problem than some areas classified under subpart 2, Option 2 is or may be perceived as inequitable. In addition, several commenters recommended options different than either of the options proposed by EPA.

Those who favored Option 1 argued that it was more consistent with the Supreme Court's decision and the CAA, that Subpart 2 was more likely to produce progress and faster attainment, was more consistent with Subpart 2 of the CAA, was more equitable and fair, and that Subpart 1 had other problems that made it less desirable.

Some commenters claimed both Options 1 and 2 were flawed, based on concerns about transport and concerns related to the Supreme Court decision. We received comments on the translation of Section 181's Table 1. These comments addressed the concerns such as: the proposed translation could result in attainment deadlines which are unrealistic and unachievable; it would be more logical and more consistent with the nature of the standard being implemented- the 8-hour standard- for EPA to translate the Table 1 thresholds into approximate 8-hour equivalents; and the starting threshold should be different from what EPA proposed. Some commenters

[17] Background Information Document, Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-hour Ozone National Ambient Air Quality Standard. Illustrative Analysis Based on 1998- 2000 Data. U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards, Draft, April 2003. Available at: *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/.*

[18] Concern about transport is supported by EPA's modeling for the Interstate Air Quality Rule (69 FR 4566, January 30, 2004); EPA has proposed to find that in the absence of further controls, 25 States would significantly contribute to downwind nonattainment in other States in 2010, even after the NO_X SIP Call has been in full effect. As a result, EPA has proposed to require the 25 States to reduce their emissions of NO_X to reduce interstate transport, with the reductions to be achieved by 2010 and 2015.

[19] These include trying to meet the following objectives as discussed above: (a) Providing flexibility in determining the most effective control; (b) achieving attainment at costs lower than those for strategies with prescribed measures; (c) providing flexibility in addressing nonattainment areas that are have difficulty attaining due to transport; and (d) ensuring expeditious but reasonable attainment dates.

offered other alternatives for the translation and/or the starting threshold.

There were several specific comments related to the draft regulatory text.

Our rationale for adopting Option 2 as the final classification approach is presented above. Below is a brief synopsis of the response to major comments.

Response to Comments Supporting Option 2: We generally agree with these comments and the final rule incorporates Option 2.

Response to Comments that Supported Option 2, But Recommending Variations That Would Provide More Time for Attainment: Based on our projections of future air quality based on regional modeling and experience with ozone control in the past, we believe that States may find during the attainment planning process that a limited number of areas may need more time to attain the 8-hour NAAQS than their classification would permit. However, the statute provides a remedy for this situation. A State can receive more time to attain by voluntarily submitting a request to EPA for a higher classification- including the classification they had under the 1-hour NAAQS. The CAA (Section 181(b)(3)) directs EPA to grant a State's request, and to publish notice of the request and EPA's approval. Although the area would have to meet the additional requirements for the higher classification, the same would be true if the area had been initially classified higher, under a classification system that placed more areas in higher classifications. The EPA recognizes that voluntary reclassification is a legitimate option under the CAA, and may be an attractive option if the State is unable to develop a plan that demonstrates an area will attain within the time period for its assigned classification. As noted in the October 21, 2003 notice reopening the comment period, we considered other classification approaches, including those suggested by commenters and EPA's Alternatives A and B, which would provide more areas with later attainment dates by placing more areas in higher classifications. However, EPA found that alternatives that provided more time to the areas with the worst ozone problems also provided higher classifications, accompanied by additional statutorily-mandated requirements, for areas that EPA believes may attain by the 2007 ozone season based on projected emissions reductions from existing programs. Under these approaches, these areas would be subject to controls that may not be necessary for attainment. The EPA believes it is more appropriate to use the statutory mechanism for a voluntary bump up for areas classified "too low" than to mandate controls for areas based on a classification that is "too high."

Response to Comments that Noted that Option 2 May Be Perceived as Inequitable: A number of other commenters dismissed the characterization of Option 2 as being inequitable. The EPA's response to the equity issue is discussed above.

Response to Comments that Recommended Options Different than the Options Proposed by EPA: Certain commenters suggested that areas still not meeting the 1-hour NAAQS should continue to implement the 1-hour NAAQS under subpart 2, but once the NAAQS is attained (or all mandated controls were implemented) the area would implement the 8-hour NAAQS under subpart 1. All areas attaining the 1-hour NAAQS would begin implementing the 8-hour NAAQS under subpart 1.

As explained more fully in the response to comments (RTC) document, EPA does not believe this approach is consistent with the CAA or the Supreme Court's decision on implementation of a revised ozone NAAQS. The issue before the Court was whether the classification provisions of subpart 2 apply for purposes of implementing the revised 8-hour ozone NAAQS. The Court unequivocally stated that those provisions do apply for purposes of implementing the 8-hour ozone NAAQS. 531 U.S. 482- 84. We believe that any option that does not provide a role for the subpart 2 classification structure in implementing the 8-hour NAAQS is not consistent with the Court's interpretation of the CAA.

Commenters suggested several other options, some of which were described in our notice reopening the public comment period. Under one of these options, we would reduce the range for the subpart 2 classifications, which would have classified more subpart 2 areas in higher classifications, thereby extending the maximum period for attainment. We have addressed the problems associated with that kind of classification structure above. Under another of these options, the classification structure would have relied solely on 8-hour ozone design values. This approach was a variant of Option 2 in which all areas with 8-hour design value of less than a value that is equivalent to the 1-hour value of 0.121 ppm would be covered by subpart 1. This variant of Option 2 has the effect of moving source areas from Subpart 1 to Subpart 2 and at the same time placing more Subpart 2 areas in lower classification categories. The Subpart 2 areas placed in these lower classification categories would be subject to fewer mandatory requirements. However, EPA believes that this approach would increase the number of areas for which the initial classification would not provide sufficient time to attain.

The EPA's assessment of these and other options is included in the RTC document.

Response to Comments that Favored Option 1 and Argued that it was More Consistent with the Court Decision and the CAA: We believe Option 2 is a reasonable method for addressing the gaps that the Supreme Court recognized in the CAA. Option 2 provides more flexibility than Option 1 to States and Tribes to design strategies to meet the 8-hour ozone NAAQS in the most effective and least costly way considering local circumstances, while requiring and providing incentives for expeditious attainment of the health-based NAAQS. Since Option 1 would require all 8-hour nonattainment areas to be covered under subpart 2 with its set of prescriptive control measures, it would generally cost more but would not require attainment any more expeditiously than Option 2. Both subpart 1 and 2 require attainment dates "as expeditious as practicable" regardless of the maximum attainment dates specified in the CAA.

We believe that Option 2 is consistent both with the CAA and the Supreme Court's decision in *Whitman* as described above and in the June 2, 2003 proposed rule (68 FR 32813). In short, EPA relies on the Supreme Court's recognition that there is a gap in the statute with respect to areas "whose ozone levels are greater than the new standard (and thus not attaining) but less than the approximation of the old standard codified by Table 1." Thus, for areas with a 1-hour design value above the level codified in Table 1, EPA interprets the Supreme Court as determining that the CAA mandates that they be classified under subpart 2. For all other areas, the Court indicates there is a gap and EPA must determine a reasonable approach. For the policy reasons specified above, in the RTC and in the preamble to the proposed rule (68 FR 32814- 15), EPA believes it is reasonable to address these "gap" areas under subpart 1.

Response to Comments Asserting that EPA does not have Authority to Modify Table 1 to Reflect 8-Hour Ozone Values: We disagree with those commenters who claim EPA does not have authority to modify Table 1 in section 181(a) to

reflect 8-hour design values. We acknowledge that EPA is applying the statute other than in the way it is written. We believe we have authority to do so because to apply it as written would produce absurd results. In enacting the classification structure in subpart 2, Congress linked the severity of an area's air quality problem with the time needed to attain and the stringency of the controls that an area would be required to adopt. Thus, areas with a more significant air quality problem were granted more time to attain the NAAQS, but were also subject to more stringent controls. If we applied Table 1, as written, for purposes of the 8-hour NAAQS, the classification scheme would not be related to the severity of the area's 8-hour ozone problem.

If 1-hour values were used to classify 8-hour nonattainment areas based solely on Table 1 as presented in section 181 of the CAA, there would be 2 serious areas, 9 moderate areas, and 26 marginal areas.[20] Unlike other areas, marginal areas (as explained elsewhere) are not subject to the requirement for attainment plans to ensure that they identify and adopt the controls necessary for attainment by their attainment date. Based on EPA's modeling projections of future ozone levels and past experience working with states on ozone SIPs, EPA believes it is clear that most of the areas that would be marginal if classified by 1-hour design value would fail to attain the 8-hour standard without additional local controls by the spring 2007 attainment date for marginal areas. These include major cities with elevated 8-hour ozone levels such as Chicago and Dallas-Fort Worth. In fact, over a quarter of these areas that would be marginal if classified by 1-hour design values were not projected to attain the 8-hour NAAQS without additional local controls even by 2010. The projection that many of these areas would not attain by 2010 without additional controls is further evidence they would not attain in 2007 without further controls. Thus, for many areas, classifying by 1-hour design value would not reflect the severity of their 8-hour ozone problem or the time needed to attain.

An additional problem is that the practical effect of placing many areas that cannot attain by 2007 into the marginal classification would be to delay development of plans for improving air quality to meet the 8-hour standard. This would be inconsistent with Congress's intent, reflected in the requirements of the Act, that areas attain air quality standards as expeditiously as practicable. Rather, Congress intended classifications to approximate the attainment needs of areas. In this circumstance, it is appropriate for EPA to make, by way of regulation, a limited modification to Table 1 to reflect Congressional intent.

We recognize that even under the approach adopted by EPA, some of the same anomalies will be created. For example, some areas may need more time to attain than provided by the area's initial classification. However, these anomalies are more limited because the classifications more appropriately recognize an area's 8-hour ozone problem. As noted above in our discussion on the basis for selecting Option 2, we believe the statutory mechanisms such as voluntary bump ups can address these inequities in the limited situations in which they arise. In comparison, if 1-hour values were used to classify 8-hour nonattainment areas based solely on Table 1 as presented in section 181 of the CAA, there would only be 2 serious areas, 9 moderate areas, and 26 marginal areas. This is a much different distribution than using Option 2, in which there would be more areas in the higher classifications (1 severe-17, 4 serious, 21 moderate) and far fewer (11) marginal areas. And, under the adopted approach, the distribution under subpart 2 is based on the area's 8-hour design value not its 1-hour design value.[21]

Response to Comments Favoring Option 1 Arguing that Subpart 2 was more Likely to Produce Progress and Faster Attainment: Other commenters raised concerns that because subpart 1 is less prescriptive than subpart 2 and potentially allows later attainment dates for the less polluted areas, areas will not in fact attain the 8-hour NAAQS as quickly under subpart 1 as they would be required to do under subpart 2. As evidence, these commenters point to the past failure of areas to attain the ozone NAAQS prior to the enactment of subpart 2 in 1990. We disagree.

Subpart 1 and subpart 2 both require areas to attain the 8-hour ozone NAAQS as expeditiously as practicable. Thus, the intention of the CAA is that regardless of whether an area is covered under subpart 1 or subpart 2, it must achieve clean air on the same schedule- *i.e.*, as expeditiously as practicable. In addition, CAA section 172(c)(1) requires that a SIP for a nonattainment area "* * * shall provide for implementation of all reasonably available control measures ["RACM"] as expeditiously as practicable * * * and shall provide for attainment of the [NAAQS]." In reviewing SIPs for approvability under subpart 1, we will evaluate whether the emission control measures in the SIP and the timing of implementation comports with the RACM and attainment provisions to ensure all RACM are adopted and implemented as expeditiously as practicable and that the attainment date is as expeditious as practicable. Subpart 1 sets an initial outside attainment date of 5 years following designation for the 8-hour NAAQS.

Subpart 2 sets the earliest outside attainment date as 3 years following designation[22] for marginal areas. Under subpart 2, marginal areas are not required to submit attainment demonstrations and, for all practical purposes, are not required to adopt additional local controls for existing sources.[23] Thus, in general, Congress anticipated that these areas would come into attainment within 3 years without significant additional local controls. We believe that most areas covered under subpart 1 with air quality problems similar to marginal areas will in fact come into attainment with the 8-hour

[20] Based on data from: Revised: Background Information Document, Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-hour Ozone National Ambient Air Quality Standard in Relation to Re-Opened Comment Period- Illustrative Analysis Based on 2000- 2002 Data. U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards. Draft. October 2003. Available at: *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/.*

[21] Based on data from: Revised: Background Information Document, Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-hour Ozone National Ambient Air Quality Standard in Relation to Re-Opened Comment Period- Illustrative Analysis Based on 2000- 2002 Data. U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards. Draft. October 2003. Available at: *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/.*

[22] As provided below, in the section regarding attainment dates for the 8-hour ozone NAAQS, subpart 2 actually specifies that the attainment period runs from the date of the 1990 CAA Amendments rather than the date of designation. However, as we explain in the attainment date section, for purposes of 8-hour NAAQS, we believe Congress intended those dates to run from the date of designation.

[23] The only control obligations mandated for marginal areas are that they fix flaws in their RACT rules and their I/M programs that existed at the time of the 1990 CAA Amendments. Areas designated nonattainment for the 1-hour NAAQS, which were the areas with the pre-90 RACT and I/M obligations, have already made these corrections. It is unlikely that any areas designated nonattainment for the 8-hour NAAQS will not have already made these corrections if they have such programs in place.

NAAQS on a similar timeframe as areas classified as marginal (*i.e.*, 3 years following designation).[24] In fact, we believe the prospects for near-term attainment based on existing programs are more favorable now than they were in 1990 because national and regional control programs already in place will achieve substantial reductions in NO_X and VOC emissions prior to May 2007. These include the regional NO_X SIP Call, which mandates interstate transport controls for certain States by May 31, 2004 (63 FR 53756, October 27, 1998); progressively more stringent emissions standards for new cars and light-duty trucks issued since 1990, most recently the Tier 2 motor vehicle emission standards, and associated sulfur-in-gasoline requirements (65 FR 6698, February 10, 2000); and the heavy duty diesel rule (66 FR 5002, January 18, 2001).

For areas covered under subpart 1 with an air quality problem similar to subpart 2 moderate areas, the presumptive maximum attainment date will be 1 year earlier- *i.e.*, 5 years following designation rather than 6 years. To receive a later attainment date, section 172(a)(2)(A) requires such areas to demonstrate more time is needed based on the severity of nonattainment and the availability and feasibility of pollution control measures. As to the first factor- severity of nonattainment- EPA believes that it would be difficult to justify providing a period longer than 6 years since similar areas classified under subpart 2 would not have a longer time to attain. Thus, such an area would need to demonstrate that the availability and feasibility of control measures (including those mandated under subpart 2) would justify an extension longer than 6 years. A similar analysis would apply if an area with an even more significant air quality problem were covered under subpart 1. For this reason, we do not believe that public health concerns support classifying all areas with similar air quality under subpart 2.

4. Under the Final Classification Approach, How Will EPA Classify Subpart 1 Areas? (Section VI.A.4. of Proposal; 68 FR 32813; Section 51.904 of Draft and Final Rules)

a. *Background.* Section 172(a)(1) provides that EPA has the discretion to classify areas subject to subpart 1. We proposed two options with respect to classifications for areas subject only to subpart 1 (68 FR 32813). First, we proposed to create no classifications. Second, we proposed to create one classification- an interstate overwhelming transport classification for areas that submit a modeled attainment demonstration showing the area's nonattainment problem is due to overwhelming transport and that meet the definition of a rural transport area under section 182(h) of the CAA. As we noted in the June 2, 2003 proposal, the area would receive an attainment date that is consistent with section 172(a)(2)(A), but that takes into consideration the following:

- The attainment date of upwind nonattainment areas that contribute to the downwind area's problem; and
- The implementation schedule for upwind area controls, regardless of their geographic scope (*e.g.*, national, regional, statewide, local).

This option would partially address Tribal concerns about designations where a Tribal area designated nonattainment does not contribute significantly to its own problem. This is one of the key issues for the Tribes who seek to have economic growth from new sources within their jurisdiction but that have difficulty obtaining emission reduction offsets from sources located either inside or outside Tribal areas.

b. *Summary of final rule.* We are adopting the second option but modified as a result of comments. We are creating an overwhelming transport classification that will be available to subpart 1 areas that demonstrate they are affected by overwhelming transport of ozone and its precursors and demonstrate they meet the definition of a rural transport area in section 182(h). However, areas would not have to demonstrate that transport was due solely to sources from outside the State (interstate transport) as was implied by the June 2, 2003 proposal. All other areas that do not qualify for the overwhelming transport classification would not be classified. In addition, an area may consider the effects of international transport of ozone and precursors in determining if the area is affected by overwhelming transport.

An overwhelming transport classification will accomplish several purposes. One purpose is to communicate to the public the need for an attainment date to account for the control timetable for upwind areas whose emissions are overwhelmingly contributing to the area's nonattainment problem. An area will be classified as an "Overwhelming Transport Area" upon full approval of an attainment demonstration SIP that demonstrates, using EPA-approved modeling, that the nonattainment problem in the area is due to "overwhelming transport," as set forth in guidance. The area must also meet that part of the definition of a rural transport area in section 182(h) that requires that an area not be in or adjacent to a Consolidated Metropolitan Statistical Area (CMSA).

In approving an attainment date for the area, EPA will consider: (1) The attainment date of the upwind nonattainment area or areas that contribute to the downwind area's problem; and (2) the implementation schedule for upwind area controls, regardless of their geographic scope (*e.g.*, national, regional, statewide, local).

In the June 2003 proposal, we proposed that such areas would be subject to requirements similar to those that apply to areas classified as marginal under subpart 2. We are considering the comments we received on the issue of applicable requirements for these subpart 1 areas and will address this issue after we issue guidance on assessment of overwhelming transport.

In addition, the proposed rule also indicated that we could consider more flexibility for conformity for such areas. In our proposed transportation conformity rule published on November 5, 2003 (68 FR 62690), we did not propose any specific conformity flexibility for areas affected by ozone transport. However, many of the proposed options, including the types of emissions tests used in conformity, would be available to areas affected by transport, as well as other types of 8-hour ozone areas. In addition, the existing transportation conformity rule already provides flexibility in such things as transportation modeling requirements for smaller areas with less severe local air quality problems. Also, EPA intends to propose in a few months more flexible NSR provisions that would apply in such areas.

We believe the overwhelming transport classification for areas covered under subpart 1 is consistent with the CAA and is reasonable. We believe that the classification should be restricted to rural areas because these areas will generally not have significant sources of emissions to control and therefore are not likely to contribute much to their own nonattainment problem. There are exceptions, of course, such as rural areas with large sources such as power plants, but such areas would also need to meet the other criteria for the classification, such as not contributing significantly to nonattainment in other areas.

In determining an attainment date for areas classified as "transport," we would apply the criteria in section 172(a)(2)(A). The second criterion in section 172(a)(2)(A)- the availability

[24] *See* 68 FR 32814.

and feasibility of control measures- will allow EPA to consider the effects of transported pollution in setting an appropriate attainment date for these areas of no later than 10 years following designation.

We recognize that there may be areas affected by transport that don't meet the definition of rural transport. However, in determining attainment dates for areas under section 172(a)(2)(A), we can consider the availability and feasibility of control measures; thus, areas that do not meet the definition of a rural transport area should be able to adopt an attainment date that reflects the time period for reductions in upwind areas that are contributing to nonattainment.

The EPA decided not to exercise its discretion to create additional classifications for subpart 1 areas. We do not believe another classification is necessary for expeditious attainment of the 8-hour NAAQS for these other subpart 1 areas.

The final rule (section 51.904(a)) provides for a subpart 1 area to be classified as an overwhelming transport area if it meets the criteria as specified for rural transport areas under section 182(h) of the CAA and overwhelming transport guidance that we will issue in the future. Although EPA's June 2, 2003 notice referenced an EPA guidance document as the criteria for determining the contribution of sources in one or more other areas are an overwhelming cause of an area being designated nonattainment, we believe that guidance needs to be updated. Thus, we are retracting our previous guidance and will issue revised guidance. We plan to address control requirements applicable to these areas in Phase 2.

c. Comments and Responses

Comment: Most of the commenters who commented on classifications for subpart 1 areas objected to the requirement that to receive an overwhelming transport area classification an area must demonstrate that it is a rural transport area. Many of these commenters pointed out that there are a number of areas that do not meet that definition and that do not generate a significant portion of emissions that contribute to the area's nonattainment problem. Some also stated that the CAA does not mandate this as a criterion and thus the test was unduly restrictive. These commenters asked that the availability of the overwhelming transport classification be based only on whether an area is a victim of overwhelming transport.

Response: The CAA does not mandate that an area be considered rural in order to receive an overwhelming transport classification under subpart 1. However, we believe that areas that are not rural, even if they are affected to a significant degree by transport, in general contribute at least some degree to their own and likely to other areas' nonattainment problems. The final rule, therefore, is as proposed- the overwhelming transport classification is only available to areas that meet the criteria for rural transport areas under section 182(h) of the CAA.

Comment: One commenter suggested EPA provide increased flexibility for areas that would be classified as nonattainment, primarily for reasons related to transport. A special category for transport areas, should be created for areas that are in attainment of the 1-hour standard but, if not for the impact of transport, would not be in violation of the new 8-hour standard. The regulatory requirements for transport area should be minimal and required compliance dates should extend out at least as long as the upwind states.

Response: We note that 8-hour ozone nonattainment areas covered under subpart 1 generally will be close to attaining the 1-hour standard. We believe the criteria used to determine overwhelming transport will invariably result in a situation where an area subject to overwhelming transport would be in attainment of the standard but for transport. Subpart 1 provides a maximum of 10 years from the effective date of nonattainment designation for attainment. We note, however, that if such an area believes that it would need an attainment date longer than 10 years, it could request to be reclassified under subpart 2 to a classification with a longer attainment date. The area would, of course, have to meet the requirements of its subpart 2 classification (either its requested classification or the rural transport classification if it so qualifies).

5. Will EPA Adjust Classifications? (Section VI.A.9. of Proposal; 68 FR 32816; Section 51.903(b) and (c) of Final Rule)

a. *Background.* Under sections 181(a)(4) and 181(b)(3), an ozone nonattainment area may be reclassified to the next higher or lower classification. Section 181(a)(4) of the CAA states:

> If an area would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

Section 181(b)(3) requires the Administrator to grant the request of any State to reclassify a nonattainment area in the State to a higher classification.

b. *Summary of final rule.* We are adopting the approach we included in the proposal. For areas subject to subpart 2, section 181(a)(4) of the CAA provides that classifications may be adjusted upward or downward for an area if the area's design value is within 5 percent of another classification. If, for example, an area is subject to a subpart 2 classification and there is evidence that the area will not benefit significantly from local controls mandated by subpart 2 for the area's classification and can attain within the time period specified for the next lower classification, the area may obtain some relief based on the 5 percent rule in the CAA if applicable. In addition, section 181(b)(3) requires the Administrator to grant the request of any State to reclassify a nonattainment area in the State to a higher classification.

Section 51.903 was revised from the initial draft regulatory text language to add the reclassification provisions in section 181(a)(4) and 181(b)(3).

c. Comments and Responses

Comment: Several commenters supported the use of provisions in section 181(a)(4) to allow adjustment of a classification. Comments indicated that this approach could result in cost savings in cases where the increased controls of the higher classification would not be needed for attainment. One commenter noted that the Administrator should consider several factors in making the adjustment under section 181(a)(4), including the number of exceedances of the NAAQS and complexity of the problem. The commenter requested that EPA explain how the Administrator would make this decision and the process that will be used. Another commenter recommended that the actual test of compliance with the provisions of section 181(a)(4) should include allowance for meteorological fluctuation in order to avoid States having to meet an average design value well below the NAAQS before deemed in compliance.

Response: The EPA's guidance on the 5 percent bump down provision in section 181(a)(4) is contained in the November 6, 1991 **Federal Register** (56 FR 56698) which established the initial

designations and classifications. In a separate **Federal Register** notice, EPA will invite States to submit bump down requests. The EPA will describe the criteria (including any changes from the 1991 criteria) for approval of 5 percent bump downs in that notice and will provide at least a 30-day period for States to submit their requests. Section 181(a)(4) authorizes the Administrator to adjust a classification within 90 days after the initial classification. The EPA continues to believe, as provided in the June 2, 2003 proposal, that section 181(a)(4) does not provide a basis for an area to move from subpart 2 to subpart 1.

6. Proposed Incentive Feature (Section VI.A.6. of Proposal; See 68 FR 32815; 51.903(b) of Draft Rule)

a. *Background.* In the proposed rule (68 FR 32815), we sought comment on a classification feature that would allow areas classified under subpart 2 to qualify for a lower classification upon a demonstration the area would attain the 8-hour NAAQS by the earlier attainment date of a lower classification. For example, an area that would be classified "moderate" based on its 8-hour design value would qualify for a "marginal" classification by demonstrating it would attain the 8-hour NAAQS within 3 years of designation.

b. *Summary of final rule.* We are not including the proposed incentive feature in the final rule. We received numerous adverse comments on the idea, raising both legal and policy issues. Because we agree as a policy matter that we should not adopt the incentive feature, we do not reach the legal issue of whether the statute grants such authority. Our basis for this decision is provided more fully in the RTC document, portions of which are excerpted below. In short, we believe that only a few areas would have benefitted from this proposal considering the flexibility already available under classification Option 2, and we believe that the difficulties in developing and implementing such an approach outweigh any benefits. In particular, commenters on the June 2, 2003 proposal were concerned that we did not identify the type of modeling that areas could rely on to take advantage of this option. While we had not identified in the June 2, 2003 proposal the type of modeling that could be used, we had referenced our current modeling guidance in the draft regulatory text which was published on August 6, 2003. Additionally, we believe it would be very difficult for an area to have completed the necessary modeling and for us to approve such a SIP submission much in advance of the attainment date for a marginal area. Further, if the area did not meet that attainment date, it would need to begin the modeling process over again almost immediately. We now believe that it makes more sense for the area to prepare the modeling required for its higher classification and, if the area attains the NAAQS earlier than the attainment date for its classification, our Clean Data Policy[25] will provide relief from RFP requirements.

c. Comments and Responses

Comment: About half the commenters that addressed this issue opposed the incentive feature. These comments originated mainly from environmental organizations and some State and local air pollution control agencies and organizations. Many of these commenters questioned the legal basis for such a feature and also believed modeling is too inaccurate or unreliable to be used for classification purposes. They believed that monitoring data should be the sole basis for classifications. The other comments received on this issue supported the incentive feature. These comments originated mainly from industrial representatives and organizations, as well as several State and local air agencies and transportation agencies and organizations.

Response: Our analysis indicates that the incentive feature would not have helped very many areas. Of 21 hypothetical nonattainment areas classified as moderate (based on 2000-2002 air quality data), our modeling projects that only 3 would have qualified without first adopting further controls. No serious or higher classified area would have qualified without further controls. Very few areas would even receive a classification higher than moderate. In addition, even if we adopted this approach, we do not believe there would have been enough time for areas seeking a marginal classification to submit a plan with local controls that demonstrate attainment by a Spring attainment date in 2007 and implement the controls by the Spring of 2006. In addition, we would have to develop guidance for the demonstration. Furthermore, although many commenters supported having the feature, many other commenters objected to the feature on a number of grounds. Because of the difficulties involved in administering such a program, the unfavorable timing, and the anticipated low number of areas that could benefit from the feature, we are not incorporating the feature in the final rule.

A number of commenters who opposed the feature contended that the approach was not supported by the CAA. Since we are not adopting the feature in the final rule on policy grounds, we do not address the legal issues here.

B. How Will EPA Treat Attainment Dates for the 8-Hour Ozone NAAQS? (Section VI.B. of Proposal; See 68 FR 32816; 51.903 and 51.904 Draft and Final Rules)

1. Background

Under Subpart 2 of the CAA, maximum attainment dates are fixed as a function of a nonattainment area's classification under Table 1. The CAA provides that an area's attainment date must be "as expeditious as practicable but no later than" the date provided in Table 1 for that area's classification. The statutory dates are specified as a set number of years from the date of enactment of the CAA Amendments of 1990. Since a strict application of Table 1 would produce absurd results for most areas (*i.e.*, areas classified as marginal would have a November 15, 1993 attainment date, moderate areas would have a November 15, 1996 attainment date, etc.), we are promulgating a targeted revision of Table 1 to reflect attainment dates consistent with Congressional intent.

While the attainment dates in Table 1 are expressly linked to the date of enactment of the CAA Amendments of 1990, this is also the date on which most areas were designated and classified as a matter of law. In addition, as explained in the preamble to the proposed rule (68 FR 32817), other provisions of the CAA specify that the date for attainment shall run from the date of designation and/or classification as a matter of law for an area. Consistent with this, we proposed that the starting point for the set timeframes for attainment would be the date an area is designated and classified for purposes of the 8-hour NAAQS.[26] Thus, for example, an area classified as marginal for the 8-hour NAAQS would have up

[25] Memorandum of May 10, 1995, "RFP, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," from John S. Seitz, Director, Office of Air Quality Planning and Standards. Available at: *http://www.epa.gov/ttn/oarpg/t1/memoranda/clean15.pdf.*

[26] As explained in our proposed rule, areas will be classified as a matter of law at the same time they are designated; thus, we simply refer to "designation" rather than designation and classification.

to 3 years from designation to meet that NAAQS and a moderate area would have up to 6 years from designation to attain.

For areas covered under subpart 1, attainment dates are set under section 172(a)(2)(A), which provides that the SIP must demonstrate attainment as expeditiously as practicable but no later than 5 years after designation, with up to 10 years after designation permitted if the severity of the area's air pollution and the availability and feasibility of pollution control measures indicate more time is needed. In the draft regulatory text, we provided that EPA would establish the attainment date for an area at the time we approve the area's attainment demonstration.

2. Summary of Final Rule

We are adopting the time periods for attainment that we proposed for areas under both subpart 1 and subpart 2 of the CAA. For areas subject to subpart 2 of the CAA, the maximum period for attainment will run from the effective date of designations and classifications for the 8-hour NAAQS and will be the same periods as provided in Table 1 of section 181(a):

- Marginal- 3 years,
- Moderate- 6 years,
- Serious- 9 years,
- Severe- 15 or 17 years, and
- Extreme- 20 years.

We are adopting this approach because applying the table, as written, would produce absurd results. For the reasons above and discussed in the preamble to the proposed rule, we believe it is consistent with Congressional intent to begin the time periods for attainment specified in Table 1 in section 181(a) at the time of designation and classification.

Consistent with section 172(a)(2)(A), for areas subject to subpart 1 of the CAA, the period for attainment will be no later than 5 years after the effective date of the designation. However, EPA may grant an area an attainment date no later than 10 years after designation, if warranted based on the factors provided in section 172(a)(2)(A). The EPA will establish an attainment date for each subpart 1 area at the time we approve an attainment demonstration for the area.

3. Comments and Response

Comment: Several commenters reiterated the CAA's requirement that areas attain the NAAQS as "expeditiously as practicable." They felt that the attainment deadlines in the proposed rule would impede the progress that areas have made and would subject the general public to years of unhealthy air quality. One commenter suggested that EPA create enforceable short-term compliance dates to assure citizens of downwind States that upwind States are meeting their longer-term compliance deadlines. Other commenters felt that the attainment dates under both subpart 1 and 2 that were proposed did not provide enough time for areas to attain for a number of reasons, such as: areas would not be able to take credit for emissions reductions from Federal measures, the slow turnover of mobile source fleets would not achieve the needed mobile source reductions in the timeframes proposed, EPA's Clear Skies modeling shows that a number of areas in the mid-Atlantic and northeast will not come into attainment before the middle of the next decade, it would not be feasible to have stationary and mobile source controls in place 3 years before the attainment dates for purposes of monitoring, etc. However, a number of commenters agreed with EPA's proposal to establish attainment dates that correspond to the timeframes established under subpart 2 of the CAA from the date of 8-hour nonattainment designations. In addition, one commenter stated that the proposal did not clearly address how attainment dates for subpart 1 areas would be set. Finally, several commenters recommended that EPA change the attainment dates to November or December of the attainment year rather than in April so areas can use the ozone season air quality data from the attainment year to demonstrate attainment.

Response: As stated in our June 2, 2003 proposal, under subpart 2 of the CAA, maximum attainment dates are fixed as a function of a nonattainment area's classification under Table 1. The CAA provides that an area's attainment date must be "as expeditious as practicable but no later than" the date prescribed in Table 1 for that area's classification. The dates were specified as the number of years from the date of enactment of the CAA Amendments, which was November 15, 1990, which was also the date of designation and classification by operation of law for most subpart 2 areas. We believe that applying the attainment dates as expressly provided under Table 1 would produce absurd results, since a strict application of Table 1 would result in an attainment date of November 15, 1993 for marginal areas and an attainment date of November 15, 1996 for moderate areas. Although we believe a strict application of the statute would produce absurd results, we do not believe that allows broad authority to re-write the statute. Rather, we look to the legislative history and other provisions of the CAA to discern Congressional intent. Consequently, for the reasons provided above and in the preamble to the proposed rule, we have determined that attainment dates will run from the effective date of designations and classifications for the 8-hour ozone NAAQS. Since we are designating and classifying areas for the 8-hour ozone NAAQS with an effective date of June 15, 2004, the corresponding attainment periods would run from June 15, 2004.

We do not believe we have authority to change the attainment dates to November or December of the attainment year as several commenters requested. We believe that Congress would have intended for areas designated nonattainment and classified under subpart 2 for the 8-hour NAAQS to have attainment periods consistent with those in Table 1 (*e.g.*, 3 years for marginal areas, 6 years for moderate areas, etc.) This would result in the 8-hour marginal attainment date being 3 years from the effective date of designations for the 8-hour NAAQS (*i.e.*, June 15, 2007), the moderate attainment being 6 years from the effective date of designations for the 8-hour NAAQS (*i.e.*, June 15, 2010), etc.

Additionally, EPA does not have the authority to shorten attainment dates or lengthen attainment dates to allow areas to take credit for emissions reductions from future Federal or regional measures as several commenters suggested. The statute provides for all areas to attain as expeditiously as practicable. As part of its attainment demonstration, a State must demonstrate that there are no reasonably available controls that can expedite attainment. Therefore, States must address why they cannot attain earlier than the maximum attainment date. As to longer attainment dates, States may request a voluntary bump up if they believe an area cannot attain by its maximum statutory attainment date through the adoption of RACM.

For areas classified under subpart 1, attainment dates will be set under section 172(a)(2)(A), which provides that the SIP must demonstrate attainment as expeditiously as practicable but no later than 5 years after designation or 10 years after designation if the severity of the area's air pollution and the availability and feasibility of pollution control measures indicate more time is needed. Under subpart 1, we will establish an attainment date for an area at the time we approve an attainment demonstration for the area. The State

must support that the attainment date is expeditiously as practicable and must justify any attainment date later than 5 years using the factors in section 172(a)(2)(A). The attainment date will be the date in the approved SIP. Thus, if an area submits an approvable attainment demonstration showing that they can attain the 8-hour NAAQS in, *e.g.*, 4 years, the area's attainment date will be 4 years from the effective date of designations for the 8-hour NAAQS.

4. How Will EPA Address the Provision Regarding 1-Year Extensions? (Section VI.B.2 of Proposed Rule; 68 FR 32817; Sections 51.907 of Draft and Final Rules)

a. *Background.* In limited circumstances, both subpart 1 and subpart 2 of the CAA provide for two brief attainment date extensions for areas that do not attain by their attainment date. Section 172(a)(2)(C) of subpart 1 (which applies for all NAAQS) provides for EPA to extend the attainment date for an area by 1 year if the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan and no more than a minimal number of exceedances of the NAAQS has occurred in the area in the attainment year. Up to two 1-year extensions may be issued for a single nonattainment area.

Section 181(a)(5) of subpart 2 contains a similar provision for the ozone NAAQS, but instead of providing for an extension where there has been a "minimal" number of exceedances, it allows an extension only if there is no more than one exceedance of the NAAQS in the year preceding the extension year. The language in section 181(a)(5) reflects the form of the 1-hour ozone NAAQS, which is exceedance-based and does not reflect the 8-hour ozone NAAQS, which is concentration-based.[27] We proposed that since section 181(a)(5) does not reflect the form of the 8-hour NAAQS and application would produce an absurd result, it was reasonable to interpret this provision in a manner consistent with Congressional intent, but reflecting the form of the 8-hour NAAQS. In addition, we proposed to apply the test in section 172(a)(2)(C), which applies to areas subject to subpart 1, in the same manner as we apply the test under section 181(a)(5) for areas subject to subpart 2. Specifically, we proposed that an area would be eligible for the first 1-year extension under section 172(a)(2)(C) and under 181(a)(5) if, for the attainment year, the area's 4th highest daily 8-hour average is 0.084 ppm or less. The area will be eligible for the second extension if the area's 4th highest daily 8-hour value, averaged over both the original attainment year and the first extension year, is 0.084 ppm or less.

b. *Summary of final rule.* We are adopting the interpretation that we proposed on June 2, 2003. Under both sections 172(a)(2)(C) and 181(a)(5), an area will be eligible for the first of the 1-year extensions under the 8-hour NAAQS if, for the attainment year, the area's 4th highest daily 8-hour average is 0.084 ppm or less. The area will be eligible for the second extension if the area's 4th highest daily 8-hour value, averaged over both the original attainment year and the first extension year, is 0.084 ppm or less.

We believe that it would be absurd to apply section 181(a)(5) as written for purposes of the 8-hour ozone NAAQS. This section was written with the form of the 1-hour NAAQS in mind. For purposes of the 1-hour NAAQS, an area is violating the NAAQS if it has more than three exceedances of the NAAQS at a monitor over a 3-year period. Thus, if an area is averaging more than one exceedance per year at a monitor, it is violating the NAAQS. For the 1-hour NAAQS, it makes sense to consider whether there has been more than one exceedance in the attainment year for purposes of granting an extension because two or more exceedances indicate a significant likelihood the area will not be able to attain the NAAQS with a 1-year extension of the attainment date since four exceedances over a 3-year period mean the area is violating the NAAQS.

For the 8-hour NAAQS, violations are determined based on the concentration as determined by averaging the 4th highest reading at a monitor over a 3-year period. Thus, for each monitor (with complete data), the fourth highest readings for each of 3 consecutive years are averaged to determine whether an area is violating the NAAQS. If the average of those readings is at or above 0.085, then the area is violating the 8-hour ozone NAAQS. Unlike the 1-hour NAAQS, an area could have several exceedances of the 8-hour NAAQS in the attainment year and still be on track to attain the NAAQS the following year since attainment is based on an average of the fourth highest reading. For this reason, and as we proposed, we believe it makes sense to allow for the two 1-year attainment date extensions under section 181(a)(5), based on the 4th highest reading at a monitor rather than based on the number of exceedances. We are interpreting the phrase "minimal number of exceedances" in section 172(a)(2)(C) to apply in the same manner.

c. Comments and Response

Comment: The commenters generally supported EPA's proposed interpretation for granting up to two 1-year attainment date extensions. One commenter requested clarification that the 4th highest daily average 8-hour ozone concentration would be used to grant the first extension and the 4th highest daily average 8-hour ozone concentration of the attainment year and first extension year would be used to determine eligibility for the second 1-year attainment date extension. The commenter further expressed support for this approach since it is consistent with how EPA determines whether an area is violating the 8-hour NAAQS.

Response: No commenters opposed this aspect of EPA's proposal. However, we are re-stating that the 4th highest daily average 8-hour ozone concentration would be used to grant the first 1-year extension and the 4th highest daily average 8-hour ozone concentration of the attainment year and first extension year would be used to determine eligibility for the second 1-year attainment date extension.

C. How Will EPA Implement the Transition From the 1-Hour to the 8-Hour NAAQS in a Way To Ensure Continued Momentum in States' Efforts Toward Cleaner Air? (Section VI.C. of the Proposal; See 68 FR 32818; 51.905 of Draft Rule)

There are two key issues that EPA considered together regarding the transition from the 1-hour NAAQS to the 8-hour NAAQS: (1) When will the 1-hour NAAQS no longer apply (*i.e.*, be "revoked"); and (2) what protections are in place to ensure that, once the 1-hour NAAQS is revoked, air quality will not degrade and that progress toward

[27] The 1-hour NAAQS, an exceedance-based NAAQS, is basically allowed to be exceeded an average of only once a year over a 3-year period. (This is a generalization of how attainment is determined; the actual method considers other factors such as completeness of the data.) See 40 CFR, appendix H. In contrast, the level of the 8-hour NAAQS (0.08 ppm, 8-hour average) can be "exceeded" more than once a year on average because the form (concentration-based) of that NAAQS is determined by averaging the 4th high reading for each year over a 3-year period. Section 50.10(b) provides that the 8-hour NAAQS is met at an ambient air quality monitor when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm. 40 CFR part 50, appendix I. Example 1 in appendix I provides an example of an ambient monitoring site attaining the 8-hour ozone NAAQS. The example shows that over a 3-year period, there were 10 exceedances of the level of the 8-hour ozone NAAQS, or an average of 3.33 exceedances per year.

attainment will continue as areas transition from implementing the 1-hour NAAQS to implementing the 8-hour NAAQS. As in the proposed rule, the second key issue has three components: (1) What requirements that applied based on an area's classification for the 1-hour NAAQS must continue to apply to that area; (2) for how long; and (3) in what geographic area. Below, we set forth our final transition approach in four parts: (1) When will the 1-hour NAAQS no longer apply (*i.e.*, when will it be revoked); (2) what 1-hour obligations should continue to apply once the 1-hour NAAQS is revoked; (3) how long should those requirements continue to apply; and (4) what is the geographic area subject to the requirement?

1. When Will EPA Revoke the 1-Hour NAAQS? (Section VI.C.2. of Proposal; See 68 FR 32819; Section 50.9.b. of Proposed and Final Rules)

a. *Background.* In the proposed rule (68 FR 32819), EPA provided an in-depth discussion of the background of the transition rule (40 CFR 50.9(b)) and policy as established in July 1997 and as subsequently revised in response to the ongoing litigation over the 8-hour ozone NAAQS and court decisions (68 FR 32818- 19). In short, at the time the 8-hour NAAQS was promulgated in 1997, EPA anticipated that areas would implement the 8-hour ozone NAAQS under subpart 1. Areas that were not meeting the 1-hour NAAQS were obligated to continue to meet that NAAQS and would remain subject to most of the requirements that applied due to the area's 1-hour classification, including obligations under subpart 2 (62 FR 38873). Although EPA concluded in the NAAQS rulemaking that the 1-hour NAAQS was not necessary to protect public health and that the 8-hour NAAQS would replace the 1-hour NAAQS (62 FR 38863), we determined to delay revocation of the 1-hour NAAQS for areas not yet meeting that NAAQS in order to facilitate continued implementation of the 1-hour obligations (62 FR 38873). Thus, we promulgated a rule providing for the phase-out of the 1-hour ozone NAAQS on an area-by-area basis based upon a determination by EPA for each area that it had met the 1-hour NAAQS (40 CFR 50.9(b), as promulgated at 62 FR 38894) ("revocation rule").

Subsequently, because the pending litigation over the 8-hour NAAQS created uncertainty regarding the 8-hour NAAQS and our implementation strategy, we placed two limitations on our authority to apply the revocation rule: (1) the 8-hour NAAQS must no longer be subject to legal challenge, and (2) it must be fully enforceable.[28] (65 FR 45182, July 20, 2000).

Ultimately, the Supreme Court struck down the implementation strategy provided for in the preamble to the final NAAQS rule. Although the Court agreed with EPA's conclusion that the statute was ambiguous as to how a revised, more stringent ozone NAAQS should be implemented, the Court found unreasonable the implementation strategy EPA anticipated at the time the 8-hour NAAQS was promulgated. Because EPA believes the time at which the 1-hour NAAQS should no longer apply is inextricably linked to the overall implementation strategy, EPA determined that it should reconsider 40 CFR 50.9(b) in the context of this rulemaking. (68 FR 32818- 19).

Consistent with the decision of the Supreme Court, our proposed June 2003 implementation rule anticipated that some, if not all, 8-hour ozone nonattainment areas would implement that NAAQS under subpart 2 of the CAA. There was no longer the clear cut dichotomy that we anticipated in 1997- *i.e.*, that 8-hour implementation would occur under subpart 1 and 1-hour implementation would continue to occur under subpart 2. Thus, the approach from 1997- where we retained the 1-hour NAAQS for areas that had not met it in order to make clear that such areas retained subpart 2 obligations- merited reconsideration. In addition, we indicated that the area-by-area approach to revocation of the NAAQS was needlessly burdensome and that it made more sense to promulgate one rule establishing the date of revocation of the 1-hour NAAQS for all areas.

With respect to the time at which the 1-hour NAAQS should no longer apply to areas, we sought comment on two options. Under Option 1, we would revoke the 1-hour NAAQS in full 1 year after the effective date of designations for the 8-hour NAAQS. The key consideration for when the NAAQS would be revoked was the time at which areas designated nonattainment for the 8-hour NAAQS would be subject to conformity requirements for the 8-hour ozone NAAQS and our concern that areas not be subject to conformity for both the 8-hour and the 1-hour NAAQS at the same time. We believed that since our proposed anti-backsliding provisions would ensure that progress toward clean air continued and would obligate areas to continue to meet the control obligations associated with the area's 1-hour classification, there was no need to retain the NAAQS and the associated designations and classifications.

Under Option 2, we proposed to retain the NAAQS itself (and the associated designations and classifications) for limited purposes (viz., those identified and discussed in section VI.C.3. of the proposed rule, which are the same obligations that would continue to apply under Option 1). For all remaining purposes, we would revoke the 1-hour NAAQS and the associated designations and classifications 1 year after the effective date of designations for the 8-hour NAAQS. This approach would not create a different substantive result than Option 1; under both Options, areas would remain subject to the same obligations that applied based on their 1-hour classification. Rather, Option 2 was based on a somewhat different legal rationale than Option 1.

b. *Summary of final rule.* We are adopting Option 1. We will revoke the 1-hour NAAQS in full, including the associated designations and classifications, 1 year following the effective date of the designations for the 8-hour NAAQS. However, we are adopting strong anti-backsliding provisions which preserve control obligations mandated by subpart 2 for an area's classification for the 1-hour NAAQS. In light of the anti-backsliding provisions, the deciding factor supporting the schedule for revocation is the conformity obligation for areas. We believe it is unnecessary to require areas to meet conformity for both the 1-hour and 8-hour NAAQS at the same time; equally important, however, is the need to ensure that there is no time when conformity stops applying for areas that are subject to it under the 1-hour NAAQS and designated nonattainment for the 8-hour NAAQS. Thus, we are adopting a regulation that provides for revocation of the 1-hour NAAQS 1 year following the effective date of the designation of the area for the 8-hour NAAQS since that is the time an area designated as nonattainment for the 8-hour NAAQS will be subject to conformity requirements for the 8-hour NAAQS.

Our final anti-backsliding provisions will ensure that mandatory subpart 2 control measures that applied due to an area's classification under the 1-hour NAAQS will continue to apply after the 1-hour NAAQS is revoked in full.

Many commenters believed, and we agree, that Option 1 is a clearer approach than Option 2. Since both

[28] In addition, in June 2003, we stayed our authority to apply the revocation rule pending our reconsideration in this rulemaking of the basis for revocation. (68 FR 38160, June 26, 2003).

options would lead to the same substantive result, we are adopting the clearer approach. Many commenters recommended alternatives other than those proposed by EPA. Our basis for rejecting these approaches is provided below and in the RTC document.

c. Comments and responses.

Comment: Most of the comments we received addressed the issue of when we should revoke the 1-hour NAAQS. About half of the commenters favored revocation of the 1-hour NAAQS in full 1 year after the effective date of the 8-hour designations (proposed Option 1). Only a handful of commenters favored partial revocation of the 1-hour NAAQS (proposed Option 2). Almost a third of the commenters who addressed this issue opposed revocation of the 1-hour NAAQS. Many of the commenters in this group insisted that EPA should retain the 1-hour NAAQS because it is necessary to protect public health and some noted that it may be more protective of public health than the 8-hour NAAQS in several areas such as the South Coast and Houston. A number of these commenters also suggested that revocation would be contrary to the CAA and Congressional intent. Several commenters recommended alternative means or timing for the revocation of the 1-hour NAAQS, including a recommendation to revoke the 1-hour NAAQS immediately upon designations for the 8-hour NAAQS.

Response to Major Comments: Several commenters opposed revocation at all because they believe the 1-hour NAAQS is necessary to protect public health. The issue of whether the 1-hour NAAQS is necessary to protect public health is a standard-setting issue that was resolved in 1997. At that time, EPA determined that it was not necessary to retain the 1-hour NAAQS as a NAAQS in order to protect public health. In setting the 8-hour NAAQS in 1997, we concluded that replacing the current 1-hour NAAQS with an 8-hour NAAQS is appropriate to provide adequate and more uniform protection of public health from both short-term (1 to 3 hours) and prolonged (6 to 8 hours) exposures to ozone in the ambient air (62 FR 38863). The sole issue here is how and when the transition from implementation of the 1-hour NAAQS to implementation of the 8-hour NAAQS should occur.

We believe the strong anti-backsliding provisions in section 51.905 will ensure that not only will controls already adopted under the 1-hour NAAQS continue to be implemented until an area attains the 8-hour ozone NAAQS, but also that there will be no or minimal delay in obtaining additional emissions reductions comparable to those that would have been required had the 1-hour NAAQS remained in place. Although attainment of the 1-hour NAAQS would no longer be a goal, the provisions of section 51.905 would retain the ROP obligations that would have been required under the 1-hour NAAQS. Furthermore, the provisions of section 51.905 also would retain an area's obligation to either expeditiously complete the 1-hour attainment demonstration or obtain emissions reductions toward meeting the 8-hour NAAQS that substitute for those that would have been required had an area completed its attainment demonstration on a schedule more expeditious than that required solely for the 8-hour NAAQS. Thus, retaining the 1-hour NAAQS itself would become largely superfluous from the standpoint of obtaining timely emissions reductions.

We disagree with comments that recommended that EPA revoke the 1-hour NAAQS immediately upon a nonattainment designation for the 8-hour NAAQS. We believe that such timing would create a gap when conformity would not apply in the year following designation under the 8-hour NAAQS (since conformity does not apply for the 8-hour NAAQS until 1-year after designation).

Comment: A major concern raised by commenters was that if the NAAQS were revoked, areas would no longer have to meet the SIP budgets established for the 1-hour NAAQS for conformity purposes. These commenters were concerned that 8-hour ozone nonattainment areas that were nonattainment or maintenance for the 1-hour NAAQS would be able to determine conformity using another less protective test, such as the "build/no-build" test. One commenter said that if conformity is weakened, billions of dollars will be spent on transportation without accountability for public health impacts. To avoid these results, commenters suggested that conformity requirements for the 1-hour NAAQS continue to apply until some other point, such as when budgets for the 8-hour NAAQS are available, when areas have an approved maintenance plan for the 8-hour NAAQS, or the end of areas' 1-hour maintenance planning periods (assuming these periods would remain as they are, and would not be affected by revocation of the 1-hour NAAQS).

Response: The EPA proposed conformity regulations for the new 8-hour ozone NAAQS and new fine particulate matter NAAQS on November 5, 2003 (68 FR 62690). We proposed that new 8-hour ozone nonattainment areas that have 1-hour ozone SIPs would meet one of several tests, and the menu of options we offered differed depending on how the 8-hour area boundary relates to the 1-hour area boundary. We will consider the issues raised by commenters and provide a full response in the context of that rulemaking.

However, at this point EPA can respond to the suggestions to revoke the 1-hour NAAQS at a later point such as when 8-hour budgets are available, or the end of the 1-hour maintenance planning period. Under these scenarios, there would be a period of years where conformity would have to be determined for both NAAQS at the same time: a result that EPA believes could lead to confusion and additional burden for transportation and air quality planners. The EPA believes it is sufficient that conformity be determined for one ozone NAAQS at a time. Since the 8-hour NAAQS is the health-based standard and it is more stringent than the 1-hour NAAQS, we believe conforming to the 8-hour NAAQS will be sufficient.

Comment: One commenter recommended that we provide an option that allows States to submit an 8-hour conformity budget early and suspend the 1-hour conformity requirements at the time the 8-hour budget is determined to be adequate. A second commenter suggested something similar, that EPA require States to expedite budgets for the 8-hour standard in areas where the 8-hour boundary is larger.

Response: The EPA did not propose to revoke the 1-hour NAAQS earlier than 1 year after designations, in part because we did not believe that areas would be able to submit an 8-hour SIP earlier than 1-year following designation. Furthermore, EPA's proposal was intended to align the revocation of the 1-hour NAAQS with the application of conformity requirements for the 8-hour NAAQS 1 year after the effective date of 8-hour nonattainment designations. The EPA continues to believe it is unlikely that areas will have adequate budgets that address the 8-hour NAAQS before EPA revokes the 1-hour NAAQS. Such budgets cannot stand alone but have to be associated with adopted control measures and demonstrations of either attainment or RFP, and we believe developing these SIPs will take States some time. Once the SIPs are submitted, EPA must find them adequate, a process which EPA intends to complete within 90 days of receiving a SIP. It is unlikely that States will be able to complete the work to submit 8-hour ozone SIPs 1 year from the effective date of 8-hour ozone area designations, and less likely that States will have submitted them

sufficiently in time for EPA to find them adequate before the 1-hour NAAQS is revoked.

Given these facts and the fact that EPA did not propose an option for revoking the standard earlier than 1 year after 8-hour designations are effective, EPA does not intend to provide for early revocation of the 1-hour NAAQS, nor will EPA require 8-hour areas to expedite development of their 8-hour SIP for this purpose. All areas must submit SIPs as soon as practicable, and EPA wants States to develop quality SIPs to support attainment demonstrations and conformity determinations. Prior to the revocation of the 1-hour NAAQS, new transportation plan and transportation improvement plan must conform to the applicable SIP budgets for the 1-hour NAAQS.

Comment: Some commenters rebutted EPA's assertion that revoking the 1-hour NAAQS is necessary so that agencies can focus on planning for the 8-hour NAAQS. These commenters stated that neither the revocation of the 1-hour NAAQS (or the budgets) is justified on this basis with respect to transportation and emissions modeling, because under either NAAQS, similar work in establishing base year inventories, and future forecasts of travel and emissions must be done. Once the resources are in place to make future forecasts, commenters thought that the level of effort in both time and money to produce analyses to different regional boundaries is relatively small, and ample resources are available to pay for the additional analyses needed to determine conformity to both NAAQS.

The EPA also received comments of the opposite opinion. A number of commenters supported EPA's proposal that conformity apply for one NAAQS at a time. One commenter stated that determining conformity for two separate ozone NAAQS would result in undue administrative burden, create confusion about requirements in the public process and make synchronization of the air quality and transportation planning processes more difficult. A couple of commenters argued that having to determine conformity for both ozone NAAQS would drain limited resources in transportation and environmental agencies. One of these commenters contended that demonstrating conformity for two ozone NAAQS could in fact delay progress, due to the high administrative burdens.

Response: While these comments focus solely on the resources necessary to determine conformity for both NAAQS, EPA believes a discussion of resources should include all aspects of attainment planning. Under EPA's proposal, with revocation of the 1-hour NAAQS, conformity will no longer apply for that NAAQS as a matter of law. Therefore, in order for conformity to apply for both NAAQS as one commenter requests, both NAAQS have to be implemented at the same time, *i.e.*, the 1-hour NAAQS would have to be implemented in addition to the 8-hour NAAQS. This would mean continuation of the requirements to demonstrate attainment and maintenance of the 1-hour as well as the 8-hour NAAQS. The EPA believes that it would be a substantial increase in burden for States to plan for attainment of both NAAQS, which includes conformity but also includes creating inventories for each source sector, determining feasible control measures, writing rules to implement control measures, permitting stationary sources, establishing ROP plans, running iterations of air shed modeling, and demonstrating attainment.

In 1997, EPA determined that the 1-hour NAAQS is not necessary to protect public health. Where they are not required by anti-backsliding provisions, EPA does not believe that the additional burden States would undertake in planning to achieve both the 1-hour and the 8-hour NAAQS is necessary to protect public health.

2. What Requirements That Applied in an Area for the 1-Hour NAAQS Continue To Apply After Revocation of the 1-Hour NAAQS for That Area? (Section VI.C.3. of Proposal; 68 FR 32820; Section 51.905(a) of the Draft and Final Rules)

a. *Background.* In this section of the June 2, 2003 proposed rule (68 FR 32820), we considered what obligations from subpart 2 that applied to an area based on its classification for the 1-hour ozone NAAQS should continue to apply to such area after it has been designated for the 8-hour NAAQS and the 1-hour NAAQS has been revoked. We proposed that the continuity of particular obligations may vary depending on the attainment status of an area for the 8-hour NAAQS. The proposed rule addressed two categories of areas: (1) areas that are designated nonattainment for the 8-hour NAAQS and that were designated nonattainment for the 1-hour NAAQS on or after November 15, 1990; and (2) areas that are designated attainment for the 8-hour NAAQS and that were designated nonattainment for the 1-hour NAAQS on or after November 15, 1990. Furthermore, we divided the types of obligations into four categories for purpose of our analysis: (1) Mandatory control measures (*e.g.*, NO_X RACT, I/M, and fuel programs); (2) discretionary control measures (*e.g.*, control measures or other obligations the State selected and adopted into the SIP for purposes of attainment, ROP or any other goal to benefit air quality, but which are not specifically mandated by subpart 2); (3) growth management (NSR); and (4) planning activities (attainment and maintenance demonstrations and RFP plans). We addressed conformity separately because it is a subpart 1 requirement. In addition, we addressed the NO_X SIP Call separately since this obligation applies statewide and without respect to the designation status of areas within the State.

In the draft regulatory text released in August 2003, for areas designated nonattainment for the 8-hour NAAQS, we broke into two groups the areas designated nonattainment for the 1-hour NAAQS on or after November 15, 1990: (1) Areas that remain designated nonattainment for the 1-hour NAAQS at the time of revocation of the 1-hour NAAQS; and (2) areas that were designated nonattainment for the 1-hour NAAQS but that have been redesignated to attainment for the 1-hour NAAQS (*i.e.*, "maintenance areas") at the time of revocation of the 1-hour NAAQS.[29] In response to comments on the proposed rule and draft regulatory text, the final regulation creates the same sub-categorization for areas designated attainment for the 8-hour NAAQS. In the final rule and in the preamble discussion below, we also break into the same two groups the areas designated attainment for the 8-hour NAAQS. Thus, in the preamble and rule we consider the obligations that continue to apply for four categories of areas: (1) Areas that remain designated nonattainment for the 1-hour NAAQS at the time of designation as nonattainment for the 8-hour NAAQS; (2) areas that are maintenance areas for the 1-hour NAAQS at the time of designation as nonattainment for the 8-hour NAAQS; (3) areas that remain designated nonattainment for the 1-hour NAAQS at the time of designation as attainment for the 8-hour NAAQS; and (4) areas that are maintenance areas for the 1-hour NAAQS at the time of designation as attainment for the 8-hour NAAQS. Both the preamble and the rule may use the following terms to discuss

[29] The draft regulatory text did not accurately reflect the preamble discussion which distinguished maintenance areas at the time of designation for the 8-hour NAAQS from those that remained designated nonattainment at the time of 8-hour designation. For the final rule, we use the time of 8-hour designations rather than the time the 1-hour NAAQS is revoked.

these four categories: (1) 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment (2) 8-hour NAAQS nonattainment/1-hour NAAQS maintenance; (3) 8-hour NAAQS attainment/1-hour NAAQS nonattainment (4) 8-hour NAAQS attainment/1-hour NAAQS maintenance. Under each of these sections in the preamble, we address how the final rule treats the four types of obligations identified in the proposed rule: (1) Mandatory control measures; (2) discretionary control measures; (3) growth; and (4) planning obligations.

b. *Summary of final rule.* The approach we are adopting in the final rule is summarized below under the individual sections discussing each category of area and type of control obligation.

c. *Section 51.905(a)(1): 8-hour NAAQS nonattainment/1-Hour NAAQS nonattainment.*

(i) *Mandatory control measures.* (Section VI.C.3.a.i. of proposed rule; see 68 FR 32820; sections 51.900(f) and 51.905(a)(1) of the draft and final rules.)

(A) *Background.* For areas designated nonattainment for the 1-hour NAAQS at the time they are designated nonattainment for the 8-hour NAAQS, we proposed that, to the extent the area has met a mandatory SIP obligation under the CAA that is included as part of the approved SIP, the State may not modify or remove that measure except to the extent that it may have modified or removed that measure for purposes of the 1-hour NAAQS (68 FR 32820). For example, if an area was classified as serious for the 1-hour ozone NAAQS and required to have an enhanced I/M program as part of its SIP, the State cannot remove the enhanced I/M program for that area even though it may be classified as marginal or moderate for the 8-hour ozone NAAQS. However, under the proposal, the State may modify the enhanced I/M program consistent with EPA's enhanced I/M regulations, just as it may have done for purposes of the 1-hour NAAQS. (We address below when the obligation to retain such control measures as active control programs no longer applies, the geographic area in which the obligation applies, and the demonstration a State must make at that point to modify the SIP.)

For control measures that the State has not yet adopted, we proposed that the State remains obligated to adopt and submit such control measures. And, once adopted into the approved SIP, the State may not modify or remove such measures except to the same extent that it could have modified or removed them for purposes of the 1-hour NAAQS.

Our draft regulatory text referred to these obligations as "applicable requirements" and we identified the subpart 2 mandatory control measures in the definitions section under "applicable requirements."

(B) *Summary of final rule.* We are adopting the approach we proposed. (See sections 51.905(a)(1)(i)and 51.900(f) of the final rule.) All areas designated nonattainment for the 8-hour ozone NAAQS and designated nonattainment for the 1-hour ozone NAAQS at the time of designation for the 8-hour NAAQS remain subject to control measures that applied by virtue of the area's classification for the 1-hour NAAQS.

As we stated in the preamble to the proposed rule (68 FR 32819), there are a number of provisions in the CAA that we believe are evidence of Congress' intent that these obligations continue to apply despite EPA's determination that the 1-hour NAAQS is no longer necessary to protect public health. For example, at the time of the 1990 Amendments to the CAA, Congress designated and classified existing ozone nonattainment areas (and classified all other ozone nonattainment areas) as a matter of law. Congress also provided that areas could not remove from the SIP controls mandated by subpart 2 even after the area attains the NAAQS and is redesignated to attainment. At most, the State could move such controls to the contingency plan provisions of the SIP. *See* CAA section 175A(d). Also significant is that in 1990, Congress enacted a provision specifying States' obligations with respect to control measures for a NAAQS after EPA revised that NAAQS to be less stringent. In section 172(e), Congress specified that if EPA revises a NAAQS and makes it less stringent, EPA must promulgate regulations applicable to areas that have not yet attained the original NAAQS to require controls that are no less stringent than the controls that applied to areas designated nonattainment prior to such relaxation. We believe that, if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent. Finally, we noted that the Supreme Court cautioned against making subpart 2 "abruptly obsolete." For areas designated nonattainment in 1990, Congress intended the mandatory requirements of subpart 2 to apply (as implemented controls or contingency measures) for a significant period of time. We believe if we allowed areas to remove those mandated controls from their SIPs it would render those provisions prematurely obsolete, contrary to Congressional intent. We adopt in full the analysis provided at 68 FR 32819, 1st and 2nd columns.

The final rule also reflects, with several exceptions, the table in appendix B of the June proposal which identified the applicable requirements. The definition of "applicable requirements" in section 51.900(f) of the draft regulatory text erroneously excluded some of the requirements included in appendix B. The requirements that weren't included in the proposed regulatory text definition of applicable requirement but are included in the definition in the final rule are:

- Enhanced (ambient) monitoring under section 182(c)(1) of the CAA.
- Transportation controls under section 182(c)(5) of the CAA.
- Vehicle miles traveled provisions of section 182(d)(1) of the CAA.
- NO_X requirements under section 182(f) of the CAA.

One exception in which the final rule does not reflect appendix B of the proposal concerns the requirement for reformulated gasoline (RFG). Appendix B erroneously included RFG as an applicable requirement under subpart 2. As discussed below under "Comments and responses," it is not an applicable requirement under subpart 2 and is not included as such in section 51.900(f) of the final rule. In addition, Appendix B listed NSR (major source applicability and offsets) as "applicable requirements" under subpart 2. Although these would be applicable requirements under subpart 2 for the 8-hour standard, they would not be applicable requirements under subpart 2 for the 1-hour standard after the 1-hour standard is revoked.[30]

(C) *Comments and responses*

Comment: Concerning the June 2, 2003 proposal, several commenters believed that not all control requirements required by an area's 1-hour classification would necessarily help achieve the 8-hour NAAQS and therefore opposed the proposed anti-backsliding provisions. Other commenters supported the proposal.

Concerning the draft regulatory text, commenters generally reiterated their comments from the June 2, 2003 notice

[30] In addition, Appendix E of the June 2, 2003 proposal treats 1-hour NSR as an applicable requirement after the 1-hour standard is revoked. Under the final rule, 1-hour NSR would not be a required implementation plan element after the 1-hour standard is revoked. Instead, NSR under the 8-hour NAAQS will apply.

in commenting on the draft regulatory text.

Response: As we noted above and in the preamble to the proposed rule, we examined the CAA as a whole to discern Congressional intent since Congress did not specifically address anti-backsliding where EPA promulgated a more stringent NAAQS. After considering the "as a matter of law" designation and classification for the 1-hour NAAQS, section 172(e), and the CAA's redesignation provisions, we believe that Congress intended these areas to continue to implement requirements that applied in the area for the 1-hour NAAQS.

Comments: The EPA's June 2 proposal listed RFG in appendix B as an "applicable requirement" for severe and above ozone nonattainment areas; it was also listed as an "applicable requirement" in the draft regulatory text under section 51.900(f). The EPA received a number of comments addressing RFG requirements. Some commenters argued that the program was of no environmental benefit in certain locations, and should not be required. One commenter suggested that where it is estimated that the costs per ton of VOC removal would be around $36 million per daily ton removed or around $100,000 per annual ton removed, with no measurable benefit to ozone levels, that requiring use of RFG would be an "absurd result" justifying a waiver of the RFG requirement. One commenter argued that the rules providing for ozone nonattainment areas to opt-in to the RFG program should be liberalized, to allow additional areas to avail themselves of the benefits of RFG. Other commenters argued against such liberalization, on the basis that the fuels industry is already burdened with implementation of far-reaching fuels regulations and does not need the additional difficulties that would be associated with the proliferation of RFG opt-ins.

Response: The EPA has decided that it is not appropriate to list RFG as an "applicable requirement" in the final rule in section 51.900(f). The RFG program is not adopted as a State program in SIPs, as are the other "applicable requirements" listed in today's final rule. Rather, RFG is required under a Federal program. It is prescribed in some instances by statute, and in other instances States are allowed to opt-in and opt-out of the program in accordance with Federal statutory prescriptions and EPA rules. The EPA recognizes that the scope and applicability of the RFG program during and after implementation of the new 8-hour ozone standard raises various issues that need further clarification. However, such clarification is more appropriately provided in a separate undertaking. Since Federal RFG does not appear on the final rule's list of "applicable requirements" in subpart 2, there is no need to respond in this rulemaking to the comments regarding implementation of the RFG program. Therefore, while not an "applicable requirement" under today's rules, the RFG requirement is nonetheless applicable under the CAA for certain areas, and EPA will determine in the future whether this requirement would change for these areas when they attain the ozone NAAQS.

Comment: One commenter noted that the language in the draft regulatory text is based upon the date of revocation of the 1-hour ozone NAAQS, which is at least one year later than that specified in the proposed rule. The date of revocation is also highly uncertain compared to the date of designation, which is driven by the Consent Decree. The Draft Regulatory Text therefore conflicts with the proposed rule language. The commenter prefers use of the date of designation for these and other applicable requirements.

Response: The regulatory text has been revised to key the requirement from the effective date of designation for the 8-hour NAAQS.

Comment: One commenter believed there was a conflict between the June 2, 2003 notice and the draft regulatory text concerning the timing of the 1-hour NSR obligation. The draft section 51.905(a)(1) provision would apply for areas designated nonattainment for the 1-hour NAAQS at the time of revocation of the 1-hour NAAQS, but the June 2, 2003 notice provision would apply to areas designated nonattainment for the 1-hour NAAQS at the time of designation of the 8-hour NAAQS. The commenter recommended that the rule be based on the date of designation for the 8-hour NAAQS.

Response: We agree there was a conflict in the draft regulatory text on this matter. However, as discussed below, the final differs from the proposal in that after the 1-hour NAAQS is revoked, NSR under the 1-hour NAAQS will no longer be a required implementation plan element in areas that are 8-Hour NAAQS nonattainment/1-Hour NAAQS nonattainment. Instead, NSR under the 8-hour NAAQS will apply.

(ii) *Discretionary control measures.* This discussion of discretionary measures includes how we plan to treat enforceable commitments approved into the SIP. (section VI.C.3.a.ii. of proposed rule, see 68 FR 32821, and section VI.C.3.a.v. of proposed rule; see 68 FR 32822; section 51.905(d) of draft and final rules; there is no parallel provision in the final rule.)

(A) *Background.* Many approved SIPs contain control measures that are not specified under subpart 2 for the area, but that the State chose to adopt as part of the demonstration of attainment or part of the ROP requirement for the 1-hour NAAQS. For these kinds of measures, we proposed that States retain the discretion they now have to modify these requirements in their SIPs. For purposes of the 1-hour NAAQS, States may currently revise or remove those requirements so long as they make a demonstration consistent with section 110(l) that such removal or modification would not interfere with attainment of or progress toward the 1-hour ozone NAAQS (or any other applicable requirement of the CAA).[31] Once the 1-hour standard is revoked, for purposes of the 8-hour NAAQS, the same discretion to modify a SIP would apply except the State would need to make the demonstration required by section 110(l) with respect to the 8-hour NAAQS, not the 1-hour NAAQS. *See* 68 FR 32821 for an example of how this would work.

We also proposed that States remain obligated to meet enforceable commitments approved into a SIP to the same extent as if they were adopted measures (68 FR 32822). This includes enforceable commitments to perform a mid-course review. The only way a State may modify or remove such a commitment is through a SIP revision making the required demonstration under section 110(l).

(B) *Summary of final rule.* We are adopting the approach we set forth in our proposed rule. A State may revise or remove discretionary control measures (including enforceable commitments) contained in its SIP for the 1-hour NAAQS so long as the State demonstrates consistent with section 110(l) that such removal or modification will not interfere with attainment of or progress toward the 8-hour ozone NAAQS (or any other applicable requirement of the CAA). Under the rule, States remain obligated to meet any SIP-approved commitment to perform a mid-course review. These SIP commitments generally do not bind the

[31] For purposes of the preamble to this rulemaking, whenever we state that a State must make the demonstration required under section 110(l) to modify its SIP, we also mean that the State must make the required demonstration under section 193 to the extent the affected area is designated nonattainment and the SIP requirement the State is modifying was a control requirement in effect or required to be in effect prior to November 15, 1990.

States to take any specific action in response to the results of the mid-course review. The EPA anticipates that rather than using these reviews to ensure areas meet the 1-hour NAAQS (which will have been revoked), States and EPA can use these reviews to ensure progress is being made consistent with needs for the 8-hour NAAQS.

Note, however, that since general provisions for modifying or removing control measures in a SIP are already provided in the statute (sections 110(l) and 193), we do not believe there is a need to have a duplicative provision in this final rule. Therefore, even though the draft regulatory text contained such a provision (section 51.905(d)), the final rule does not contain that provision.

(C) Comments and Responses

Comment: Several commenters supported the proposal regarding discretionary control measures. Other commenters believed that States should not be held to commitments to submit the mid-course review required under their 1-hour SIP. Some commenters objected to the provision in draft regulatory text for allowing "relaxations" of the SIP under sections 110(l) and 193 of the CAA.

Response: Sections 110(l) and 193 allow States to modify the discretionary controls in their SIPs if the provisions of those sections are met. While we believe it is important to prevent backsliding consistent with the statutory provisions, we do not believe it is appropriate to further restrain the discretion Congress granted to States in determining the appropriate mix of controls in the SIP. We believe that a State may revise discretionary controls approved in its SIP as long as it meets the criteria specified in sections 110(l) and 193. We believe the tests provided in sections 110(l) and 193 will prevent the adverse effects envisioned by the commenter.

(iii) *Measures to address growth.* (section VI.C.3.a.iii of proposed rule; see 68 FR 32821; sections 51.900(f) and 51.905(a)(1) of the draft and final rule.)

(A) *Background.* In general, the SIP provisions in the CAA include one provision to address growth-nonattainment NSR. We discuss conformity for all areas in a later section.

For areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment, we proposed in the June 2, 2003 notice that the major source applicability cut-offs and offset ratios for nonattainment NSR that applied for an area's 1-hour classification continue to apply.

(B) *Summary of final rule.* The final rule treats 1-hour NSR as a requirement that will no longer apply once the 1-hour NAAQS is revoked. We provide a more thorough discussion of the approach in our final rule and the rationale in the section below discussing 1-hour NAAQS obligations that no longer apply as of revocation of the 1-hour NAAQS.

(C) *Comments and responses.* Comments and responses are included in the section below discussing 1-hour NAAQS obligations that no longer apply as of revocation of the 1-hour NAAQS.

(iv) *Planning SIPs.*

(A) *Outstanding ROP obligation.* (section VI.C.3.a.iv of proposal; 68 FR 32822; section 51.905(a)(1) of the draft and final rules).

(1) *Background.* In the June 2, 2003 proposal, we proposed that States remain obligated to address separately 1-hour ROP requirements that do not overlap with RFP obligations for the 8-hour NAAQS.[32] Where outstanding ROP and RFP obligations overlap, the area need not submit a separate ROP plan for the 1-hour NAAQS but must show that the 8-hour ROP plan is no less stringent than the 1-hour ROP requirement. For ROP provisions already adopted into the SIP, we proposed that the State may remove or revise control measures needed to meet the ROP milestone if such control measures were discretionary (*i.e.*, not mandated by subpart 2 for the area's 1-hour classification), as discussed above, and the State makes a demonstration under section 110(l) including a demonstration that the revision will not interfere with meeting the 1-hour ROP and 8-hour RFP goals.

(2) *Summary of final rule.* We are adopting the approach set forth in our proposed rule for areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment. States remain obligated to meet the CAA-mandated ROP emission reduction targets that applied for the 1-hour NAAQS, but discretionary measures adopted to meet those targets may be modified, if the State makes the necessary showing under section 110(l).

In addition, we are providing further clarification regarding how this obligation applies. Areas that have an outstanding obligation for an approved 1-hour ROP SIP for one or more of the ROP periods (*e.g.*, 1999- 2002, 2002-2005, 2005- 2007) must still develop and submit to EPA (if they have not already done so) all outstanding 1-hour ROP plans. Where a 1-hour ROP obligation overlaps with an 8-hour RFP requirement, the State's 8-hour RFP measures can be used to satisfy the 1-hour ROP obligation.

The State may choose to show that both the 8-hour and 1-hour ROP obligations are met through a single 8-hour plan submittal. To prevent backsliding, the State must ensure that the 8-hour RFP emission plan is at least as stringent as the 1-hour ROP emission target, for the year in which 1-hour ROP must be met. The State may do this by first establishing an RFP emission target for the entire 8-hour ozone nonattainment area, for the 1-hour ROP target year. If the 8-hour RFP emission target for the 8-hour area for the same period is more stringent than the 1-hour ROP emission target for the 1-hour area (assuming the 8-hour area includes the entire 1-hour area), the State is not obligated to submit a separate 1-hour ROP plan, but can rely solely on the 8-hour RFP plan and emission target to demonstrate that the 1-hour target will be met. However, the State must ensure that the emission target will be met for the same period as for 1-hour ROP (*e.g.*, 2003- 2005). The State may rely on any control measure to meet both ROP for the 1-hour NAAQS and RFP for the 8-hour NAAQS. Appendix A below provides an example of how this might work.

In the June 2, 2003 proposal (68 FR 32835), we proposed that the Agency's Clean Data Policy[33] would remain effective under the 8-hour ozone NAAQS, and we therefore intend to apply this policy in implementing this final rule for areas that achieve the 8-hour NAAQS. Thus, if an area attains the 8-hour ozone NAAQS, under the Agency's "Clean Data Policy," EPA may waive the 1-hour RFP obligation for the area based on a determination that the area has attained the 8-hour NAAQS. Under that policy, the State will not be subject to the 1-hour RFP requirement for so long as the area remains in attainment with the 8-hour NAAQS. (The EPA will address the applicability of the Clean Data Policy for 8-hour ozone nonattainment areas in Phase 2 of the implementation rule.)

We believe that there is ambiguity in the statute regarding whether areas should remain subject to the requirement to submit planning SIPs, such as the 1-hour ROP plans. Unlike control obligations, we do not believe there is as strong an argument that Congress intended areas to continue to

[32] In this rulemaking, we use "ROP" to refer to the rate of progress requirement for the 1-hour NAAQS and "RFP" to refer to both the rate of progress requirement under subpart 2 and the reasonable further progress requirement under subpart 1 for the 8-hour ozone NAAQS.

[33] Op cit.

submit planning SIPs for a NAAQS that EPA has determined is no longer necessary to protect public health. Section 172(e), which applies when EPA relaxes a NAAQS, only requires EPA to ensure that control measures are no less stringent than they were for the more stringent NAAQS that has been replaced. It does not indicate a Congressional intent that areas remain obligated to plan for and meet a NAAQS as it existed before it was revised. However, both attainment demonstrations and ROP plans result in the adoption of control obligations. And, if EPA determined that these planning requirements did not apply at all, areas currently designated nonattainment for the 1-hour NAAQS that have not met these obligations might be subject to less stringent controls than would have otherwise applied. Thus, in considering how to treat this obligation, we balanced the need to ensure the same level of control with the difficulties associated with meeting this obligation.

For purposes of ROP, the exercise of calculating the reductions necessary to meet ROP is relatively simple. Moreover, as provided above, even if the State must calculate ROP separately for the 1-hour and 8-hour NAAQS, it may still rely on one or more of the same control measures to meet both those obligations. Additionally, we believe that most of the areas with an outstanding 1-hour ROP obligation will be able to demonstrate that the 8-hour RFP targets for the same time period will be more stringent and thus will not be required to prepare a separate 1-hour ROP plan. Finally, we note that States have already submitted and, EPA has already approved 1-hour ROP plans for most 1-hour nonattainment areas. Thus, the anti-backsliding provisions regarding the continued obligation to adopt and submit 1-hour ROP plans will affect only a handful of areas. For these reasons, we are adopting a regulation that requires areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment to continue to adopt and achieve the level of ROP reductions mandated by Congress under the CAA for that NAAQS.

(3) Comments and responses

Comments on June 2, 2003 Proposal: Few commenters submitted comments on the portion of the proposed rule discussing the anti-backsliding requirements applicable to 1-hour ROP. Several commenters generally opposed any continued planning obligations under the 1-hour NAAQS, but did not raise specific concerns with respect to ROP. Similarly, a number of other commenters opposed revocation of the 1-hour NAAQS and urged retention of all 1-hour planning and control obligations; but again, these commenters did not raise concerns specific to the proposed anti-backsliding approach for ROP.

One commenter, addressing section 51.905(a)(1)(iii) of the draft regulatory text, argued that States should have the ability to modify ROP measures if it can be demonstrated that they are not needed for purposes of meeting requirements under the 8-hour NAAQS or if measures are no longer appropriate due to updated technical information regarding emissions inventory and control strategy effectiveness. Another commenter objected to retaining the 1-hour ROP requirement, primarily because areas recently reclassified to a higher classification would have a continuing obligation for ROP even if they were not required to develop an RFP plan under the 8-hour NAAQS. Another commenter believed the 1-hour ROP requirement should only be required where it is demonstrated to be needed for attainment of the 8-hour NAAQS.

Response: As provided above, we believe Congress intended areas to continue to have control measures no less stringent than those that applied for the 1-hour NAAQS. Because the ROP obligation results in control obligations, we believe areas should remain obligated to adopt outstanding ROP obligations to ensure that the ROP milestones are met. If a State believes adopted controls are not the best fit for the 8-hour NAAQS, the State retains full discretion to revise those controls so long as the revision doesn't interfere with the ROP milestones.

Without this provision, an area with an unmet obligation to submit and implement a ROP plan under the 1-hour NAAQS could experience backsliding by being released from the obligation to have controls in place that achieve a specified level of emissions reductions during the interim period prior to implementation of the SIP required for the 8-hour NAAQS. In other words, if the 1-hour NAAQS were not revoked, the area would have been required to continue to ensure emissions would be reduced by specified levels in specific timeframes. If the final rule contained no provision comparable to section 51.905(a)(1)(i), achievement of those emissions reductions would almost certainly be delayed. Because we are transitioning to a more stringent and protective air quality NAAQS. We see no reason why there should be provisions that would provide less protection to public health.

(B) *Unmet attainment demonstration obligations* (section VI.C.3.a.iv of proposal; see 68 FR 32822; section 51.905(a)(1)(ii) of the draft and final rules)

(1) *Background.* Most areas designated nonattainment for the 1-hour ozone NAAQS have fully approved attainment demonstrations for the 1-hour NAAQS. Because there are so few areas without approved attainment demonstrations, in the proposed rule we identified the two types of situations of which we were aware and solicited comment on how to handle those situations. First, there are a few areas that do not have a fully approved attainment demonstration because the area has not acted in accordance with the timelines provided under the CAA. The second situation is an area which has a future obligation to submit an attainment demonstration. In general, these are areas that, over the past several years, have been reclassified (*i.e.*, "bumped up") to a higher classification. In the preamble to the proposal, we discussed the policy reasons that would support retention of the obligation to submit an attainment demonstration and the policy reasons that would counsel against retention of that obligation (68 FR 32822). For both these groups of areas, we solicited comment on whether to retain the obligation to develop a 1-hour attainment demonstration. In addition, we solicited comment on two alternatives that would address many of the policy concerns we noted.

Alternative 1 would require that areas with a current or past due obligation to submit a new or revised attainment demonstration instead be required to submit a SIP revision that would obtain an advance increment of local emissions reductions toward attainment of the 8-hour ozone NAAQS within a specified, short-term timeframe; 5 percent and 10 percent were suggested possibilities for the increment. Under Alternative 2, areas with a current or past due obligation to submit a 1-hour attainment demonstration would be required to submit their 8-hour ozone attainment demonstration early in lieu of being required to submit a 1-hour attainment demonstration. The draft regulatory text was developed using the first alternative, and used a 10 percent increment.

(2) *Summary of final rule.* In the final rule, we are allowing the States to choose among three options that are tailored after the approaches addressed in the proposed rule. Thus, rather than establishing one mandatory approach, we are adopting a rule that will allow

States to choose any one of the following three options:

- *Option 1.* Submit a 1-hour attainment demonstration.
- *Option 2.* Submit, no later than 1 year after the effective date of the 8-hour designations, an early increment of progress plan toward the 8-hour NAAQS which provides:
- A 5 percent increment of reduction from the 2002 emissions baseline (NO_X and/or VOC). The control measures for achieving this increment must be in addition to measures (or enforceable commitments to measures) in the SIP as of the effective date of designation and in addition to national or regional measures. (The State can take credit for this increment of reduction toward its RFP requirement under the 8-hour NAAQS.)
- For achievement of the emissions reductions within 2 years after submittal (*i.e.*, 3 years after designation).
- *Option 3.* Submit an early 8-hour ozone attainment demonstration SIP 1 year after the effective date of designation for the 8-hour NAAQS that:
- Demonstrates attainment of the 8-hour NAAQS by the area's attainment date,
- Provides for 8-hour RFP consistent with the area's classification out to the area's attainment date, and
- Ensures that the first segment of RFP[34] between the end of 2002 and the end of 2008 is achieved early- by the end of 2007.

With respect to Option 2, the final rule specifies a 2002 baseline year for calculating the early increment of progress whereas the draft regulatory text did not provide a specific baseline year.

As noted above in the ROP section, we believe the statute is ambiguous regarding the need for States to address planning for a NAAQS no longer needed to protect public health. However, since these planning SIPs result in the adoption of control measures, which we believe Congress intended be no less stringent, we examined what approaches would ensure controls are adopted and implemented without unnecessarily obligating States to plan for a NAAQS not needed to protect public health.

Unlike planning for ROP, preparing an attainment demonstration involves complex modeling and analyses that can be resource intensive both in terms of workload and cost. We don't believe it is appropriate or necessary to mandate that States perform the attainment demonstration for a NAAQS that is not needed to protect public health. But we also do not believe it is appropriate to waive in total this obligation in light of the need to ensure there is no delay in achieving emissions reductions to protect public health. We are adopting an approach that provides States with options because it provides maximum flexibility to States that have outstanding attainment demonstration obligations while continuing to obtain in a timely fashion many or all of the emissions reductions that should occur under those obligations, effecting an orderly transition to planning under the 8-hour NAAQS. In addition, we do not believe it is equitable to relieve these areas of this obligation where other areas have already adopted controls to meet these obligations and will not be able to modify or remove such controls unless the State can demonstrate that such action is consistent with section 110(l).

Thus, in balancing Congressional intent to ensure no backsliding, equitable treatment of all areas, the need for areas to begin planning for the 8-hour NAAQS and the limited planning resources that States have available, we believe the best approach is to provide States with several alternatives, each of which will achieve emissions reductions on a timeframe similar to when they would have been achieved for the 1-hour NAAQS through a 1-hour attainment demonstration SIP. The State may choose the option that is least burdensome in light of activities already performed. For example, States with a 1-hour attainment demonstration that is past due or is due in the next several months may have already made significant progress in developing a 1-hour attainment demonstration SIP. Thus, these States may choose the first option. We are aware that one or more States have already begun the process of developing 8-hour attainment demonstrations for some 1-hour nonattainment areas. These States may choose to submit an early 8-hour attainment demonstration SIP. Other areas, which have not yet made significant progress on 1-hour or 8-hour attainment planning, may wish to reserve more time for the attainment demonstration process, which can involve complex modeling, and thus choose the third option- to achieve an early increment of progress.

For the second option available to States, we chose 5- rather than 10-percent as the amount of reduction. Under this option, States must achieve the 5 percent emission reduction from local controls (not currently required by the SIP) and within 3 years of designation for the 8-hour NAAQS. In light of the quick timeframe in which to achieve the reductions following designations and the limitation that such reductions cannot be from regional or national controls or from measures already in the SIP, we concluded that 10 percent was unduly burdensome. The States that choose this option will need to identify and adopt appropriate controls within a 1-year timeframe and require sources to implement the controls within a short time thereafter. These limitations will restrict the control choices available to States. In addition, because of the limited timeframe for adoption and submission of the controls to EPA, we do not believe it is reasonable to require the State to obtain a level of reduction that would force the States to concentrate its resources on the early ROP reduction rather than on an 8-hour attainment plan. However, because the State will not be able to rely on national or regional controls, we are confident that the 5 percent requirement will achieve the anti-backsliding goal.

Finally, as with the 1-hour ROP requirement, we note that EPA may waive the 1-hour attainment demonstration requirement for areas based on a determination that the area has attained the 8-hour NAAQS. The EPA's Clean Data Policy[35] provides that if EPA has determined that an area has attained the 1-hour NAAQS, it will not be obligated to submit a 1-hour attainment demonstration for so long as it maintains the 1-hour NAAQS. Thus, extending this policy to the 8-hour NAAQS, if EPA determines that an area has attained the 8-hour ozone NAAQS before the time the area is obligated to make a submission under this portion of EPA's 8-hour implementation regulations, EPA would waive this requirement for so long as the area remains in attainment with the 8-hour NAAQS. (The EPA will address the applicability of the Clean Data Policy for 8-hour ozone nonattainment areas in Phase 2 of the implementation rule.)

(3) *Comments and responses.*

Comment: Several commenters advocated retaining the planning obligations under the 1-hour NAAQS, expressing the belief that momentum will be lost in implementing controls if these obligations are not retained. In general, most of these commenters also

[34] The amount of which will depend on the ROP option in the final rule and the classification of the area.

[35] Memorandum of May 10, 1995, "RFP, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," from John S. Seitz, Director, Office of Air Quality Planning and Standards. Available at: *http://www.epa.gov/ttn/oarpg/t1/memoranda/clean15.pdf.*

opposed revocation of the 1-hour NAAQS and believed Congress intended the 1-hour NAAQS to be planned for and met. Some commenters opposed retaining the attainment demonstration requirements under the 1-hour NAAQS after the NAAQS is revoked on the basis that State resources are limited and should be focused on developing plans for implementing the 8-hour rather than the 1-hour NAAQS. A few commenters favored the alternative of requiring an early plan with an advance increment of emissions reductions toward progress of the 8-hour NAAQS in lieu of the attainment demonstration SIP revision. A few other commenters favored the alternative of requiring States to submit an early attainment demonstration SIP for the 8-hour NAAQS.

Only one commenter believed that 10 percent was the appropriate amount under Alternative 1 for an advance increment of progress; several others opposed 10 percent, claiming that it appeared to be punitive, that there was no technical support for that amount, and that it may be more than what was needed for attainment of the 8-hour NAAQS.

Some commenters recommended that exceptions be made for any area that made good faith efforts to develop and submit its plan, such as those with a submitted and approved plan that may have been challenged and overturned by a court.

Response: We have designed the final rule such that an area without an approved attainment demonstration or ROP plan would still be required to submit and implement a ROP plan and an attainment demonstration or substitute plan as required for the 1-hour NAAQS. We believe this approach will ensure there are no delays in achieving emissions reductions as we transition to the more stringent 8-hour ozone NAAQS.

We believe that areas that have not met their planning obligations under the 1-hour NAAQS- if relieved of that obligation after the 1-hour NAAQS is revoked- would provide emissions reductions on a more protracted time schedule than areas that had met their 1-hour NAAQS planning obligations. For example, an area that is classified severe-15 for the 1-hour NAAQS would have to obtain RFP reductions and any additional reductions needed for attainment by the end of 2005, whereas if that same area is moderate under the 8-hour NAAQS, it would not be required to obtain reductions under the RFP provisions until 2008 and additional reductions for attainment by some time in 2009. We believe that the provisions of the final rule- by offering three alternative means of meeting the 1-hour attainment demonstration obligation- allow sufficient flexibility for a State in these circumstances to choose the most appropriate means to achieve these reductions in the time intended by Congress.

d. *Section 51.905(a)(2): 8-hour NAAQS Nonattainment/1-hour NAAQS Maintenance*

In the June 2003 proposal, we discussed the requirements for areas designated as attainment for the 1-hour NAAQS with a maintenance plan at the time of designation for the 8-hour NAAQS in the same sections discussing the requirements for areas designated nonattainment for the 1-hour NAAQS at the time of 8-hour designations. However, in the draft regulatory provisions, we created a separate subparagraph addressing these areas. Below, we indicate briefly where the obligations for these areas, *i.e.*, maintenance areas at the time of designation, are the same as for areas designated nonattainment for the 1-hour NAAQS at the time of 8-hour designations. We discuss in more detail where the obligations differ.

(i) *Mandatory Control Measures.* (section VI.C.3.a.i. of proposed rule; see 68 FR 32821; sections 51.900(f) and 51.905(a)(2) of draft and final rules).

(A) *Background.* In the June 2003 proposal, we proposed that all areas designated nonattainment for the 8-hour NAAQS and that were nonattainment or maintenance for the 1-hour NAAQS at the time of 8-hour designations would be required to continue to implement mandatory measures adopted into the approved SIP. We did not distinguish between areas designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS and areas that are maintenance for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS. However, in the draft regulatory text, we created a separate provision for maintenance areas because these areas do not have an outstanding obligation to adopt mandatory control obligations for the 1-hour NAAQS.[36] Thus, the draft regulatory provision for maintenance areas did not address the future adoption of controls; it simply provided that these areas would be required to continue to implement the applicable requirements (as defined in the regulatory text) in the approved SIP.

We also provided in the June 2003 proposal and the draft regulatory text that if a maintenance area had previously shifted a mandatory control measure to the contingency provisions, the area would not be required to begin implementation of that measure based on the 8-hour nonattainment designation. However, the measure would need to remain as a contingency measure for the area and could not be removed from the SIP.

(B) *Final Rule.* We are adopting the approach we took in the proposal and the draft regulatory text. Areas that are maintenance for the 1-hour NAAQS at the time of 8-hour designations and are designated nonattainment for the 8-hour NAAQS, must continue to implement mandatory control requirements (*i.e.*, "applicable requirements") that have been approved into the SIP. However, since maintenance areas do not have any outstanding obligation to adopt mandatory control measures for the 1-hour NAAQS, the provision only addresses implementation, not adoption. In addition, this section recognizes that maintenance areas had the flexibility to move mandatory controls to the contingency measures portion of their maintenance plan. The area would not be required to implement these measures unless it is required to do so for the area's classification for the 8-hour NAAQS. However, the measures would need to remain as contingency measures and could not be removed from the SIP.

We are adopting the requirement that 1-hour maintenance areas are required to continue to implement mandatory controls for the same reasons we provided with respect to 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment areas above. With respect to mandatory measures that the State has moved to the contingency portion of the maintenance plan, we do not believe that Congress intended to require areas to begin implementing such measures again based on the promulgation of a revised NAAQS unless required based on the area's classification for the revised NAAQS. These areas have fully complied with the process that Congress established- attainment of the (then-existing) NAAQS and redesignation to attainment for that NAAQS based on a plan demonstrating that the area will maintain the NAAQS. While we believe these areas should not "backslide" from existing control levels, we do not believe that for purposes of the 8-hour NAAQS they should be required to begin implementing once more measures that the State has chosen to place in the contingency measures portion of the SIP.

(ii) *Discretionary Control Measures.* (Section VI.C.3.a.ii. of proposed rule,

[36] In order to redesignate these areas to attainment, EPA had to determine these areas had met all obligations under part D. *See* CAA section 107(d)(3)(E).

see 68 FR 32821, Section 51.905(a)(2) of draft regulatory text; there is no parallel provision in the final rule.)

(A) *Background.* The June 2, 2003 proposal did not discuss the requirements for these areas independent of all areas that were designated nonattainment for the 1-hour NAAQS on or after November 15, 1990. The draft regulatory text (section 51.905(a)(2)), however, did provide for this situation separately but did not directly address discretionary measures.

(B) *Summary of Final Rule.* As with discretionary control measures for 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment areas, 1-hour NAAQS maintenance/8-hour NAAQS nonattainment areas will retain the discretion to modify any discretionary control measures upon a demonstration under section 110(l). We are not promulgating regulatory text because, as described above, sections 110(l) and 193 of the CAA govern such SIP revisions.

(iii) *Measures to address growth.* (Section VI.C.3.a.iii of proposed rule; see 68 FR 32821; sections 51.900(f) and 51.905(a)(1) of the draft and final rules)

(A) *Background.* In the proposal, we recognized that 1-hour maintenance areas generally are subject to the prevention of significant deterioration (PSD) program and are no longer implementing the nonattainment NSR program for their previous 1-hour ozone designation and classification.[37] For areas where the NSR program no longer applies under the SIP, we proposed that the areas would not need to revert back to the NSR program they had for purposes of the 1-hour NAAQS. The proposal provided examples of how this would work (68 FR 32821).

(B) *Summary of final rule.* We are adopting the approach we proposed but our rationale relies on the final rule's provision that NSR under the 1-hour standard will no longer apply as of revocation of the 1-hour standard. If an area has been redesignated to attainment for the 1-hour NAAQS as of the effective date of the 8-hour nonattainment designation and is no longer required to implement a nonattainment NSR program, the area will not be required to revert back to the program it had for purposes of the 1-hour ozone NAAQS. As noted elsewhere, NSR offset ratios and source applicability provisions under the 1-hour standard are not being defined as "applicable requirements" after the 1-hour standard is revoked.

As provided in more detail below for 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment areas, we have determined that 1-hour NAAQS NSR should not continue to apply once the 1-hour NAAQS is revoked for those areas. It would not be reasonable to require these areas to begin those 1-hour programs again for the 1-year between designation for the 8-hour NAAQS and revocation of the 1-hour standard. Moreover, Congress did not intend the nonattainment NSR program to continue to apply to most areas once they are redesignated to attainment. Rather, such areas are subject to the PSD program. For an area that has met the clean air goals for the 1-hour NAAQS, we see no reason to require such area to revert back to its 1-hour NSR program. These areas will be required to implement the nonattainment NSR program that applies based on their classification for the 8-hour ozone NAAQS.

(iv) *Planning SIPs.* (Section VI.C.3.a.iV. of proposed rule, see 68 FR 32822; no specific provision in draft regulatory text or final rule.)

(A) *Background.* In the June 2003 proposal, we did not discuss maintenance areas separate from 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment areas. However, the preamble discussion focused on areas with an outstanding obligation to submit a 1-hour ROP or attainment plan and the obligation to ensure that the ROP percentage reduction obligations in the approved SIP are achieved. Maintenance areas for the 1-hour NAAQS do not have an outstanding obligation to submit ROP or attainment plans for the 1-hour NAAQS. Thus, the draft regulatory text did not include language similar to that in 51.905(a)(ii) and (iii) for maintenance areas. The draft regulatory text did reflect ROP as an applicable requirement for maintenance areas, indicating that these areas must ensure that any SIP revision does not interfere with an approved ROP milestone.

(B) *Summary of final rule.* We are adopting the approach taken in the draft regulatory text. In redesignating an area to attainment, EPA must conclude that the area has met all requirements applicable under section 110 and part D. Thus, maintenance areas do not have continuing progress and attainment demonstration requirements, and the final rule does not establish requirements for maintenance areas related to outstanding attainment demonstration and ROP plans. The final rule does identify the ROP percent reduction requirement as an applicable requirement. However, we note that the ROP periods for areas redesignated to attainment for the 1-hour NAAQS have already passed and thus any revision to the SIP should not affect ROP reductions for the periods required for the 1-hour NAAQS.

(C) *Comments and responses.*

Comment: One commenter believed that 1-hour maintenance areas designated nonattainment under the 8-hour NAAQS should not have to submit updates to the 1-hour maintenance plan, since they will be developing 8-hour attainment plans that will subsume the requirements of the maintenance plan previously in effect.

Response: The rule provides that after the 1-hour ozone NAAQS is revoked, areas are relieved of responsibilities to submit updates to their 1-hour maintenance plans. The State may submit a revision to the SIP to remove the provisions that require the update to the maintenance plan.

Comment: One commenter noted that draft Section 51.905(a)(2) would limit shifting of an applicable requirement to the contingency measure portion of an area's maintenance plan. Under the proposal, a State may only make such a shift prior to the revocation of the 1-hour NAAQS; States may only make subsequent shifts by satisfying the requirements of section 110(l) of the CAA. The commenter believes that this criterion for shifting measures to the maintenance plan is more stringent and burdensome than the requirements in section 175A of the CAA for maintenance plans. In the alternative, the commenter recommends that in lieu of the showing required by Section 110(l), that States, instead, be allowed to substitute a control measure with equivalent emissions reductions for the measures they propose to remove from their plan.

Response: We agree with the commenter that section 51.905(a)(2) will limit the authority of an area that was maintenance for the 1-hour standard at the time of designation as nonattainment for the 8-hour standard. However, we disagree with the commenter regarding the statutory provisions that apply for purposes of SIP revisions. The commenter is incorrect that section 110(l) does not apply to revisions to maintenance plans. Prior to being designated nonattainment for the 8-hour NAAQS, such an area could move adopted measures to the contingency measures portion of the maintenance plan based on a demonstration under section 110(l) that such a revision would not interfere with attainment, maintenance or any other applicable requirement of the CAA. Our

[37] If an area located in the Ozone Transport Region was redesignated to attainment, section 184(b)(2) of the CAA required it to retain a nonattainment NSR program. In addition, it is possible that one or more areas still has a nonattainment NSR program in place because of the way the State wrote the SIP.

rule provides that upon designation as nonattainment for the 8-hour NAAQS, a 1-hour maintenance area will not be able to shift adopted mandatory controls (*i.e.*, those identified as "applicable requirements" in the regulation) to contingency measures as those obligations are now defined as "applicable requirements." Once the area is redesignated to attainment for the 8-hour NAAQS, such obligations will no longer be defined as "applicable requirements" and the State can move them to contingency measures based on a demonstration that to do so would not interfere with attainment or maintenance of the 8-hour NAAQS or any other applicable requirement of the CAA. For adopted control measures that are not identified as "applicable requirements" in the regulation, the State will continue to have the same authority it currently has for shifting adopted controls to contingency measures, based on a demonstration under section 110(l).

Comment: One commenter noted that in section 51.905(a)(2), the clause "* * * except to the extent required under its 8-hour obligations * * *" could be interpreted to imply that contingency measures in the 1-hour maintenance plan become 8-hour measures by default. The commenter suggested language to avoid an incorrect interpretation.

Response: The final rule reflects this recommended language change with some slight modifications.

e. *Section 51.905(a)(3): 8-Hour NAAQS Attainment/1-Hour NAAQS Nonattainment*

(i) *Mandatory control obligations.* (Section VI.C.3.b. of proposal, see 68 FR 32823; section 51.905(a)(3)(i) of the draft and final rule)

(A) *Background.* The proposal noted that the issue of what obligation remains with respect to mandatory control measures approved into the SIP or required under the CAA is based on the CAA's requirements for maintenance plans. We proposed that if EPA determined that these areas were required to develop maintenance plans pursuant to section 175A, then they would need to keep (or to adopt and then keep) those control measures in the SIP, though they could shift them to contingency measures.

For an area that was never redesignated to attainment for the 1-hour standard and never had a section 175A maintenance plan, we proposed that if the area wants to revise any part of its current 1-hour SIP, the area must first adopt and submit a maintenance plan consistent with section 110(a)(1) (discussed below). We proposed that these obligations would remain in place but in a later section of the preamble proposed options as to when this obligation would no longer apply.[38]

(B) *Summary of final rule.*

We are adopting an approach consistent with our proposed rule. As we discuss later in this preamble, we have determined that mandatory control obligations will no longer apply once an area attains the 8-hour NAAQS. Thus, because these areas are attaining the 8-hour NAAQS, the State may request that obligations under the applicable requirements of section 51.900(f) be shifted to contingency measures once the 1-hour NAAQS is revoked, consistent with sections 110(l) and 193 of the CAA. However, the State cannot remove the obligations from the SIP.

Because these areas are in attainment with the health-based NAAQS, we believe that Congress- as with areas redesignated from nonattainment to attainment- did not intend the areas to retain these controls as implemented measures if the area can demonstrate maintenance without the controls. As with areas redesignated to attainment, the rule provides that the State cannot remove the measures from the SIP, but rather may move them to the contingency measures portion of the SIP. We did not receive comments directly addressing mandatory control obligations for this category of areas outside the context of maintenance plans for these areas discussed below.

(ii) *Discretionary control obligations.* (Section VI.C.3.b.iii. of proposal; 68 FR 32823; section 51.905(d) of draft regulatory text; no parallel provision in final rule.)

Areas designated nonattainment for the 1-hour NAAQS that are designated attainment for the 8-hour ozone NAAQS will retain the ability to modify any discretionary controls upon a demonstration under section 110(l). However, such controls must remain in the SIP as contingency measures. We are not promulgating regulatory text because, as described above, sections 110(l) and 193 of the CAA govern such SIP revisions. As with mandatory measures, we look to the maintenance plan provision of section 175A to see what Congress' intent may have been for these areas. Because these areas were nonattainment for the 1-hour NAAQS, we believe Congress intended them to retain the measures in the SIP, but could shift them to contingency measures if the area demonstrates it will maintain the 8-hour NAAQS if the measure is no longer implemented. We did receive comments directly addressing discretionary control obligations for this category of areas outside the context of maintenance plans for these areas discussed below.

(iii) *Measures to address growth.* (Section VI.C.3.b.i. of proposal; 68 FR 32823; no provision in draft or final rule.)

(A) *Background.* The proposal explained that NSR applies only in nonattainment areas.[39] Since these areas would be designated attainment for the 8-hour NAAQS- the only ozone NAAQS that exists for the area once the 1-hour NAAQS is revoked- they would be subject to PSD, not NSR, once the 1-hour NAAQS is revoked.

(B) *Summary of final rule.* We are adopting the approach we set forth in our proposed rule for areas designated attainment for the 8-hour NAAQS and designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS. After the 1-hour NAAQS is revoked, the CAA requires such areas to comply with PSD, not NSR. (The States may need to modify their SIPs so that it provides for PSD rather than NSR in such areas.) We do not see a basis for mandating that such areas retain a nonattainment NSR program and do not believe that Congress intended such a result. As an initial matter, once the 1-hour NAAQS is revoked, these areas are meeting the only ozone NAAQS that is in place. Congress specified that PSD shall apply in areas not designated nonattainment (section 161 of the CAA). In addition, as provided in more detail below for 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment areas, we have determined that 1-hour NAAQS NSR should not continue to apply once the 1-hour NAAQS is revoked for those areas.

Note that for these areas, the NSR provisions may be removed from the SIP and need not be shifted to contingency measures.[40] We have never interpreted section 175A of the CAA to mandate that nonattainment NSR be retained as a contingency measure in the SIP after an area is redesignated from nonattainment to attainment because we do not interpret NSR to be a control

[38] These two options were: (1) When the area attains the 1-hour NAAQS, or (2) when the area attains the 8-hour NAAQS.

[39] If an area located in the Ozone Transport Region was redesignated to attainment, section 184(b)(2) of the CAA required it to retain a nonattainment NSR program. In addition, it is possible that one or more areas still has a nonattainment NSR program in place because of the way the State wrote the SIP.

[40] Memorandum from Mary Nichols to Regional Air Division Directors dated October 14, 1994, entitled "Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment."

measure. (*See, e.g.*, May 12, 2003; 68 FR 25436.)

(C) *Comments and responses.*

Comment: Some commenters believed that the 1-hour NAAQS should remain in effect, and therefore NSR would continue to apply until the area attains the 1-hour NAAQS and is redesignated to attainment for that NAAQS regardless of the area's status for the 8-hour NAAQS. Other commenters generally agreed with the proposal.

Response: We address the broader legal and policy issues regarding revocation of the 1-hour NAAQS in the revocation section of this rule.

(iv) *Planning SIPs.* (Section VI.C.3.b(ii) of proposed rule; see 68 FR 32823; section 51.905(a)(3)(ii) of draft and final rule.)

(A) *Background.* In the June 2, 2003 proposed rule, we proposed that any outstanding SIP planning requirements (ROP plans and attainment demonstrations) that applied for purposes of the 1-hour NAAQS would not continue to apply to areas designated attainment for the 8-hour NAAQS for as long as they continue to maintain the 8-hour NAAQS. If such an area violates the 8-hour NAAQS prior to having an approved maintenance plan meeting the requirements of section 110(a)(1) the obligation to have a 1-hour attainment demonstration and ROP plan would once again apply in the same manner that they apply for 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment areas.

The draft regulatory text (section 51.905(a)(3)) contained specific provisions addressing the obligation for an area designated attainment for the 8-hour NAAQS that subsequently violates the 8-hour NAAQS prior to having an approved maintenance plan under section 110(a)(1). If the area was required to and does not have an approved attainment demonstration or ROP plan for the 1-hour NAAQS, the State would be required to submit a plan providing for a 10 percent emission reduction as a substitute for the attainment demonstration and to adopt and submit any outstanding ROP emission reductions.

(B) *Summary of final rule.* We are adopting our proposal with some modification. As an initial matter, section 51.905(a)(3) now only addresses 8-hour NAAQS attainment/1-hour NAAQS nonattainment areas. We have created a new section 51.905(a)(4) that addresses 8-hour NAAQS attainment/1-hour NAAQS maintenance areas. The section addressing that second category of areas is discussed below. An area that is 8-hour NAAQS attainment/1-hour NAAQS nonattainment will not be required to develop and submit outstanding attainment demonstration and ROP plans for the 1-hour NAAQS for so long as the area continues to maintain the 8-hour NAAQS. However, if the area violates the 8-hour NAAQS prior to having an approved 8-hour maintenance plan under section 110(a)(1), the area will be required to submit a SIP revision to address outstanding ROP and attainment demonstration plans as follows.[41]

(1) *ROP Plans.* For an outstanding 1-hour ROP plan, the State must submit a SIP providing for any outstanding ROP and the 3-year periods for achieving those reductions will begin January 1 of the year following the 3-year period on which EPA bases its determination. For example, if an area was required to and does not have an approved SIP providing for a 9% reduction in emissions from 1996- 1999, the obligation to have such a SIP is deferred unless the area violates the 8-hour NAAQS prior to having an approved maintenance plan for the 8-hour NAAQS. If EPA determines in August 2007 that the area violated the 8-hour NAAQS based on ambient air quality data from 2004- 2006 and at that time the area does not have an approved maintenance plan for the 8-hour NAAQS, the area will be required to submit a SIP providing for a 9 percent reduction in emissions for the 3-year period of January 2007- December 2009. The State may rely on national and regional controls for purposes of meeting this increment of reduction and the 9 percent should be calculated using the 1990 baseline. (The 1-hour ROP requirement is calculated from a 1990 baseline, not a 2002 baseline, as is the 8-hour RFP requirement.) We have clarified the language in the final regulation to make clear that the requirement to submit the plan for additional emission reductions applies only to the extent that an area had not met its prior planning obligations. For example, if an area was classified as serious for the 1-hour NAAQS and had an approved 15 percent ROP plan and an approved 9 percent ROP plan for 1996- 1999, then the area does not have any outstanding ROP obligation that must be met under this provision. However, if the same area only had an approved 15 percent ROP plan, but not an approved 9 percent ROP plan for 1996- 1999, then the area has an outstanding 9 percent ROP plan for the 1996- 1999 period. If the State had submitted the ROP plan to EPA, but EPA had not yet acted on the submission, the State may notify EPA that it wishes to rely on the previously submitted SIP or it may elect to submit a new or revised SIP.

We believe this approach makes sense as it ensures that the level of emission reduction that the area was required to achieve, but was not yet enforceable under the SIP, will be achieved expeditiously after a violation of the 8-hour NAAQS occurs.

(2) *Attainment Demonstration.* For an outstanding 1-hour attainment demonstration, the final rule requires the State to either: (1) submit an 8-hour maintenance plan that addresses the violation and demonstrates maintenance through EPA-approved modeling; or (2) submit a plan to achieve a 3 percent increment of progress within 3 years after EPA determines the area has violated the NAAQS. The 3 percent increment of progress must be in addition to measures (or enforceable commitments to measures) in the SIP at the time of the effective date of designation and in addition to national or regional measures.

This approach differs from both the June 2003 proposal and the draft regulatory text in that we do not establish precisely the same requirement for these areas that we establish for areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment. For areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment, section 51.905(a)(1)(ii) provides three options for the State. The first option available is that States may choose to submit their 1-hour SIP. We do not believe this option makes good policy sense for an area designated attainment for the 8-hour NAAQS to spend resources to develop a plan to achieve the 1-hour NAAQS (which is likely to have been revoked by that time), when the area will already be in the process of developing the section 110(a)(1) maintenance plan for the area discussed elsewhere in this preamble.

The second and third options under section 51.905(a)(1)(ii) available to areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment are analogous but not identical to the two options we provide for areas designated attainment for the 8-hour NAAQS. Both types of areas are provided with the option of achieving a specified increment of progress. For areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment, we established an increment of 5 percent and for those designated attainment for the 8-hour NAAQS, we established a 3 percent increment. In general, we believe that those areas initially designated attainment for the 8-hour NAAQS will

[41] We discuss the obligation for these areas to adopt a section 110(a)(1) maintenance plan below.

have a less significant 8-hour problem-these areas tend to record values within a few parts per billion of the NAAQS. Thus, since the increment of progress is limited to controls not already adopted into the SIP or required by federal or regional controls, the 5 percent reduction requirement would likely be excessive for purposes of addressing that small deviation from the NAAQS.

The third option available to areas that are 8-hour NAAQS nonattainment/1-hour NAAQS nonattainment is to submit an early 8-hour attainment demonstration. Since areas designated attainment for the 8-hour NAAQS are not required to develop attainment demonstrations, it did not make sense to carry this option over. Rather, we determined it made more sense to allow the area to address the violation in the context of the obligation that it does have, *i.e.*, to develop a maintenance plan for the 8-hour NAAQS. Thus, for these areas, we created the option of performing a more rigorous maintenance demonstration- a demonstration based on EPA-approved modeling.

(C) *Comments and responses.*

Comment: Some commenters on draft regulatory text objected to continuing the obligation for areas to submit ROP plans and/or attainment demonstrations for the 1-hour NAAQS after the 1-hour NAAQS is revoked. Some of the comments reflected the fact that the regulatory text may have been unclear regarding what the requirement entailed and which areas were affected.

Response: We have designed the final rule such that an area with an unmet planning obligation would still be required to submit and implement a rate of progress plan and an attainment demonstration (or substitute plan) under the 1-hour NAAQS if the area violates the 8-hour NAAQS before it has an approved maintenance plan. These are areas that have historically had an ozone problem and, in general, have 8-hour design values within a few parts per billion of the 8-hour NAAQS. Once these areas have an approved 110(a)(1) maintenance plan with contingency measures, that plan will address future violations of the 8-hour NAAQS and the 1-hour obligations will no longer apply. However, until that plan is in place, we believe that Congress would have intended these requirements to still have significance if the area violates the health-based NAAQS.

The final regulatory text was modified to clarify that the provision applies to areas that do not have approved ROP plans and/or attainment demonstrations under the 1-hour NAAQS and that violate the 8-hour NAAQS before having an approved 8-hour maintenance plan under section 110(a)(1). The regulatory text also clarifies the obligation that will apply.

(v) *Maintenance Plans for the 8-hour NAAQS.* (Section VI.C.3.b(iii) of proposed rule; see 68 FR 32823; Section 51.905(a)(3)(iii)of draft and final rules).

(A) *Background.*

In the June 2003 proposal, we proposed that areas designated attainment for the 8-hour NAAQS and designated nonattainment for the 1-hour NAAQS on or after November 15, 1990, must adopt and submit a maintenance plan consistent with section 110(a)(1) within 3 years of designation as attainment for the 8-hour NAAQS. The maintenance plan should provide for continued maintenance of the 8-hour NAAQS for 10 years following designation for the 8-hour NAAQS and must include contingency measures. Areas with approved 1-hour maintenance plans under section 175A would be able to modify those maintenance plans consistent with their obligation to have a maintenance plan for the 8-hour NAAQS under section 110(a)(1). Such areas could remove from their maintenance SIPs (a) the obligation to submit a maintenance plan for the 1-hour NAAQS 8 years after approval of their initial 1-hour maintenance plan; and (b) the requirement to implement contingency measures upon a violation of the 1-hour ozone NAAQS.

The draft regulatory text reflected the description in the June 2003 proposal.

(B) *Summary of final rule.*

We are adopting the approach we proposed. However, as noted above, we have now created separate subsections in the rule addressing areas that were designated nonattainment for the 1-hour NAAQS at the time of designation for the 1-hour NAAQS and areas that were maintenance areas for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS. Section 51.905(a)(3)(iii) applies only to areas designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS. Section 51.905(a)(4)(ii) establishes the same requirement for areas that are maintenance for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS. These two provisions provide that 1-hour NAAQS nonattainment/8-hour NAAQS attainment (section 51.905(a)(3)(iii)) and 8-hour NAAQS attainment/1-hour NAAQS maintenance (section 51.905(a)(4)(ii)) areas must adopt and submit a maintenance plan consistent with section 110(a)(1) within 3 years of designation as attainment for the 8-hour NAAQS. The maintenance plan should provide for continued maintenance of the 8-hour NAAQS for 10 years following designation for the 8-hour NAAQS and should include contingency measures. We provide additional detail below regarding maintenance areas for the 1-hour NAAQS.

Section 110(a)(1) requires all areas to demonstrate that they will attain and maintain the relevant NAAQS. Most of the areas addressed by this provision of the regulation have historically had problems meeting and/or remaining in attainment of the ozone NAAQS. We think it is important for States to ensure that these areas will continue to have clean air so that the health of citizens will be protected.

(C) *Comments and responses.*

Comment: A number of commenters who addressed this issue in comments on the June 2, 2003 proposal did not support the section 110(a)(1) maintenance plan requirement. Some commenters believed the 1-hour NAAQS should remain in effect and with it any existing 1-hour SIP requirements, including section 175A maintenance plan requirements (which would require conformity determinations). One commenter objected to the proposed requirement, alleging the requirement was unnecessary and not required. Two commenters agreed with the requirement.

In commenting on the draft regulatory text one commenter supported this provision. One commenter recommended that we provide more specific guidance on preparation of section 110(a)(1) maintenance plans and also not require modeling for them. Two commenters objected to maintenance plans under section 110(a)(1) because they would not require conformity (as would maintenance plans under section 175A) for areas that currently have maintenance plans under the 1-hour NAAQS. The commenters believed the maintenance planning should be done under section 175A. Another commenter believed that section 110(a)(1) of the CAA requires neither contingency measures nor a 10-year plan; the commenter suggested that the section 110(a)(1) maintenance plan merely be a continuation of the provisions of the existing maintenance plan.

Response: Because the 1-hour NAAQS would be revoked, the requirements of section 175A would not apply to these areas (areas initially designated attainment for the 8-hour NAAQS but that were designated nonattainment for the 1-hour NAAQS at the time of enactment of the 1990 CAA Amendments.) Section 175A applies to

redesignations, not to initial designations. After the 1-hour NAAQS is revoked, we believe that an area that was previously designated nonattainment for the 1-hour NAAQS or was designated attainment with a maintenance plan and that initially is designated attainment for the 8-hour ozone NAAQS, should be required to demonstrate maintenance only for the 8-hour NAAQS at that point. The area was not "redesignated" attainment for the 8-hour NAAQS, and therefore the section 175A maintenance plan requirement does not apply. We believe that the section 110(a)(1) maintenance provisions- as required in section 51.905- will provide adequate assurance of maintenance of the 8-hour NAAQS. The EPA always retains the authority to require a State that fails to maintain the NAAQS to revise its SIP to provide additional maintenance measures or to redesignate the area nonattainment and require an attainment demonstration.

We do not agree with commenters that opposed a provision requiring a maintenance plan under section 110(a)(1) for these areas. We believe that the CAA requires that SIPs continue to provide for maintenance of the applicable NAAQS under section 110(a)(1). Because these areas have historically experienced ozone problems and generally are close to violating the 8-hour NAAQS, we believe it is prudent to require a demonstration of how they will maintain the 8-hour NAAQS. We think this requirement will benefit citizens by providing better assurance that the air will remain clean and will benefit industry by minimizing the likelihood the area will violate the standard and be redesignated to nonattainment.

f. *Section 51.905(a)(4): 8-Hour NAAQS Attainment/1-Hour NAAQS Maintenance.*

As noted above, in the preamble to the proposed rule, EPA addressed in the same section 1-hour nonattainment areas and 1-hour maintenance areas that are designated nonattainment for the 8-hour NAAQS. Comments on the proposed regulatory text noted that section 51.905(a)(3) only addressed 8-hour attainment areas that were designated nonattainment for the 1-hour ozone NAAQS and not areas that were maintenance for that NAAQS. Thus, the draft rule did not address all aspects of the proposal since it did not include provisions for areas that are maintenance for the 1-hour NAAQS at the time of designations.

We considered revising paragraph 51.905(a)(3) to include 1-hour maintenance areas. However, that subsection included certain requirements not relevant for 1-hour maintenance areas, such as requirements concerning outstanding attainment demonstration and ROP plans. Thus, in the final rule, we created section 51.905(a)(4) to apply to areas designated attainment for the 8-hour NAAQS and that were maintenance areas for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS.

(i) *Obligations in an approved SIP.* (51.905(a)(4)(i)).

This subsection is identical in structure to section 51.905(a)(3)(i). Our reasons are explained in our discussion of section 51.905(a)(3)(i), above.

(ii) *Maintenance plan.* (51.905(a)(4)(ii). As provided above in the discussion of section 51.905(a)(3)(iii), we are adopting in our final rule our proposed interpretation regarding maintenance plans for areas designated nonattainment for the 1-hour NAAQS on or after November 15, 1990 (*i.e.*, areas that remain designated nonattainment for the 1-hour NAAQS as well as maintenance areas for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS). Specifically, these areas must adopt a maintenance plan under section 110(a)(1) within 3 years of designation for the 8-hour NAAQS. The provision for maintenance areas is the same as for areas designated nonattainment for the 1-hour NAAQS. However, for maintenance areas, section 51.905(e), discussed below, cross-references this provision and addresses the relationship between the existing 1-hour maintenance plan and the 8-hour maintenance plan.

Our reasons for adopting this provision are discussed above. Although these areas already have maintenance plans, those plans only address maintenance of the 1-hour NAAQS. It is important for these areas to ensure that they have a plan addressing maintenance of the 8-hour NAAQS. These areas may evaluate their existing plan and demonstrate how it will ensure maintenance of the 8-hour NAAQS, or may modify their existing plan, or may adopt a new plan, as appropriate.

Comment: One commenter argued that it makes little sense to require the State to continue to expend the effort and resources to update and extend these maintenance plans. The commenter questioned why a newly designated marginal area under the 8-hour NAAQS should be exempt from implementation plan requirements, while an area previously nonattainment for the 1-hour NAAQS, but now in attainment for both NAAQS, should be required to continue with 8 additional years of maintenance plan requirements.

Response: The final rule (section 51.905(a)(4)) clarifies that these areas (areas that are initially designated attainment for the 8-hour NAAQS but were attainment areas under the 1-hour NAAQS with approved maintenance plans) are relieved of the requirement to update their maintenance plan under section 175(A), but must submit a maintenance plan under section 110(a)(1) that provides for maintenance for 10 years. It should be noted that marginal areas under the 8-hour NAAQS are not "exempt" from implementation plan requirements; they are still subject to nonattainment new source review and conformity requirements, for instance. Furthermore, if a marginal area does not attain the NAAQS by its attainment date, the CAA requires that the area be bumped up in classification, which would require the area to submit a revised SIP with an attainment demonstration and control measures required under subpart 2 for the area's new classification. In addition, once the area attains the 8-hour NAAQS, it will be subject to the more stringent maintenance plan provision in section 175A, which requires the areas to demonstrate maintenance for 20 years.

3. For How Long Do These Obligations Continue To Apply? (Section VI.C.4 of Proposed rule; See 68 FR 32824; Section 51.905(b) of Draft and Final Rules)

a. *Background.* In the June 2, 2003 proposed rule, we proposed two options for when the State would no longer be required to continue implementing SIP-approved control obligations required for an area's 1-hour classification. At that time, these requirements could be relegated to the contingency measures portion of the SIP if the State demonstrated that implementation of the controls was not necessary to attain or maintain the 8-hour NAAQS (consistent with section 110(l)). For simplification, we refer to this as the time control obligations may be shifted to the contingency measures. We clarified that the term "control obligations" was intended to refer to the obligations which we determined would continue to apply under the preceding sections of the proposal, including the NO_X transport rules. Under Option 1, control obligations could be shifted to contingency measures when the area achieves the level of the 1-hour ozone NAAQS (even if the area has not yet attained the 8-hour NAAQS). Under Option 2, control obligations could be shifted to contingency measures once the area attains and is redesignated to attainment for the 8-hour NAAQS (regardless of when, if ever, the area

attains the 1-hour NAAQS). The draft regulatory text was developed using Option 1 (when the area achieves the level of the 1-hour ozone NAAQS).

b. *Summary of final rule.* We are adopting Option 2- control obligations an area is required to retain in the approved SIP for an area's 1-hour classification must continue to be implemented under the SIP until the area attains and is redesignated to attainment for the 8-hour NAAQS. At that time, the State may relegate such controls to the contingency measure portion of the SIP if the State demonstrates in accordance with section 110(l) that doing so will not interfere with maintenance of the 8-hour NAAQS or any other applicable requirement of the CAA. If at the time the area is redesignated to attainment for the 8-hour NAAQS the State has an outstanding obligation to adopt a control requirement under the 1-hour NAAQS, it remains obligated to do so, but may adopt it as a contingency measure. As discussed above, under EPA's Clean Data Policy, certain obligations such as the requirement to submit ROP plans and attainment demonstrations may be suspended based on a determination that the area has attained the 8-hour NAAQS and will no longer apply if the area is redesignated to attainment. However, if an area experiences a violation of the 8-hour NAAQS prior to being redesignated to attainment the requirements would once again apply.

We are adopting this option because, as noted in the June 2, 2003 proposal, the 8-hour NAAQS is the NAAQS that we have determined will protect public health and the environment. Only once an area demonstrates it has met and can maintain the health protective NAAQS do we believe it will be appropriate to shift these obligations to the contingency measures portion of the SIP. This scheme is consistent with what Congress intended. The CAA contemplates under subpart 2 that States must implement certain mandated requirements. Under the maintenance plan provision of the CAA (section 175A), such requirements may be shifted to the contingency measure portion of the SIP upon or after redesignation to attainment. Since the relevant NAAQS is now the 8-hour NAAQS, we believe it is appropriate to require these mandated controls to remain as part of the implemented SIP until an area attains the 8-hour NAAQS and is redesignated to attainment. On or after that date, a State may move such obligation to the contingency measures portion of the SIP consistent with sections 175A and 110(l). Moreover, we believe it is appropriate to use attainment of the 8-hour NAAQS rather than attainment of the 1-hour NAAQS because, as provided elsewhere in this rulemaking, EPA will no longer be making determinations of whether an area has attained the 1-hour NAAQS and areas will not be required to demonstrate attainment or maintenance of the 1-hour NAAQS. Some areas may never attain the 1-hour NAAQS, as there will be no obligation to do so once it is revoked.

The final rule covers the continued applicability of the NO_X transport rules under section 51.905(f), rather than as an "applicable requirement" for purposes of section 110(l) because the NO_X rules apply regardless of an area's attainment or nonattainment status for the 8-hour (or the 1-hour) NAAQS.

c. *Comments and responses*

Comment: Of the few commenters who addressed this issue in response to the June 2, 2003 proposal, several favored Option 1, and several favored Option 2. Of those who commented on the draft regulatory text, one commenter opposed the provision, and one comment was unclear as to the commenter's concerns. One other commenter supported the provision. Several commenters had clarifying questions.

Response: Our rationale for the choice of Option 2 is presented above. A more detailed response to these and other comments appears in the RTC document.

4. Which Portions of an Area Designated for the 8-Hour NAAQS Remain Subject to the 1-Hour NAAQS Obligations? (Section VI.C.2 and 3 of Proposal; *See* 68 FR 32820- 32821; 51.905(c) of the Draft and Final Rules)

a. *Background.* In the June 2, 2003 notice, we proposed that the obligation to retain or to adopt and retain a mandatory control obligation applies only to the part of the 8-hour ozone nonattainment area that was designated nonattainment for the 1-hour ozone NAAQS. The proposal also provided an example of how this would work.

The draft regulatory text provided additional specificity concerning geographic applicability of the anti-backsliding provisions. The draft text provided that with two exceptions only the portion of the designated area for the 8-hour NAAQS that was required to adopt the applicable requirements in 51.900(f) for purposes of the 1-hour NAAQS is subject to the obligations identified in paragraph (a) of this section with several exceptions. The first exception is an area that is designated nonattainment for the 8-hour NAAQS but that was nonattainment for the 1-hour NAAQS with an unmet obligation to submit an attainment demonstration; for these areas, the draft regulatory text provided that the entire area designated nonattainment for the 8-hour ozone NAAQS would be subject to the 10 percent advance increment of reduction. The second exception is an area that is attainment for the 8-hour NAAQS but that was nonattainment under the 1-hour NAAQS with an unmet obligation to submit an attainment demonstration; for these areas, the 110(l) maintenance plan would have to demonstrate maintenance for the entire 8-hour ozone attainment area.

b. *Summary of final rule.* The final rule incorporates most aspects of the approach as that contained in the proposal and in the draft regulatory text. The final rule provides that only the portion of the designated area for the 8-hour NAAQS that was designated nonattainment for the 1-hour NAAQS is required to comply with the obligations in subparagraph 51.905(a), except if the State elects to provide an early increment of progress or an early 8-hour attainment demonstration in lieu of an outstanding 1-hour attainment demonstration (for an 8-hour NAAQS nonattainment area/1-hour NAAQS nonattainment area under 51.905(a)(1)(ii)(B) and (C)), the increment of progress or early 8-hour attainment plan must apply for purposes of the entire 8-hour nonattainment area.

The final rule does not follow the approach in the proposal for the maintenance plan requirement for 8-hour attainment areas. The maintenance plans required under section 51.905(a)(3)(iii) and (4)(ii) must demonstrate maintenance only for the area designated nonattainment for the 1-hour NAAQS at the time of designation of the 8-hour NAAQS. We received comment that recommended this obligation apply only to the area that was originally designated nonattainment for the 1-hour NAAQS. After considering this comment and our discussion in the preamble to the proposed rule, we agree with the commenter. In many States, attainment areas are identified county by county rather than identifying a group of counties as an attainment area. Thus, a State may have one or more groups of counties listed as a nonattainment area and then the remaining counties in the State are each identified individually as "attainment." See *e.g.*, 40 CFR 81.311 (Georgia); 81.329 (Nevada). Because the area that historically had a problem attaining the ozone NAAQS is the area

that was previously designated nonattainment for the 1-hour NAAQS, we believe it makes the most sense to require the maintenance plan for the area previously designated nonattainment for the 1-hour NAAQS. We will set forth in 40 CFR Part 81, Subpart E, an identification of the boundaries of areas and the area designations and classifications for the 1-hour NAAQS at the time of the 8-hour designations.

c. *Comments and responses.*

Comments on June 2, 2003 Proposal: With regard to limiting the applicability of 1-hour obligations to that portion of the 8-hour nonattainment area that was also part of the 1-hour nonattainment area, one commenter supports this policy, especially for the enhanced I/M program. The commenter believes that the environmental benefit of requiring an extension of the enhanced I/M program to areas recently added to the CMSA and designated nonattainment for the 8-hour NAAQS to be minimal, costly, and disruptive of the continued implementation of the enhanced I/M program in the current 1-hour nonattainment area.

One commenter objected to requiring the substitute planning requirement (10 percent advance increment of emission reductions) that applies to areas with an outstanding attainment demonstration for the entire 8-hour ozone nonattainment area. Instead, the commenter recommended it should only apply to the 1-hour nonattainment area.

Response: The final rule provides for retaining applicable emission control requirements for an area's 1-hour classification in only the original 1-hour nonattainment area.

As noted in the final rulemaking notice, we are now allowing the State to meet its unmet 1-hour attainment demonstration obligation by submitting the outstanding attainment demonstration or by taking one of two early actions for 8-hour planning: achieve a 5 percent advance increment of emission reductions or submit an early 8-hour attainment demonstration. The advance increment of emission reductions is applied throughout the entire 8-hour nonattainment area because, although it is being submitted in lieu of the 1-hour requirement, it is intended to address the 8-hour nonattainment problem. Similarly, the 8-hour attainment demonstration is intended to address attainment for the full 8-hour area. Because these alternatives to the 1-hour attainment demonstration are intended to address attainment and progress toward the 8-hour NAAQS, the State would need to apply these requirements, if selected, to the entire 8-hour nonattainment area. We developed these alternatives in response to concerns that areas focus on the 8-hour NAAQS rather than on the 1-hour NAAQS and that continued planning obligations for the 1-hour NAAQS would burden State resources. States still have the flexibility to choose to develop the 1-hour attainment demonstrations for the 1-hour area if they would like to restrict the unmet planning obligation to the old area.

5. What Obligations That Applied for the 1-Hour NAAQS Will No Longer Apply After Revocation of the 1-Hour NAAQS for an Area? (Section VI.C.3.d. of Proposal; *See* 68 FR 32824; Section 51.905(e) of Proposed and Final Rules)

a. *Background.* In the June 2, 2003 proposed rule (68 FR 328224), we proposed that once the 1-hour NAAQS is revoked, EPA would no longer make findings of failure to attain that NAAQS and, therefore, we would not reclassify areas based upon a finding that the area failed to attain the 1-hour NAAQS. We indicated areas should focus their resources on attainment of the 8-hour NAAQS and stated that we believed it would be counterproductive to establish new obligations for States with respect to the 1-hour NAAQS after they have begun planning for the 8-hour NAAQS. In addition, we noted that the attainment dates for areas classified as marginal, moderate and serious had passed and that the CAA does not provide for reclassification of severe areas. We also noted other mechanisms that are available to make sure that States continue to make progress toward attaining the 8-hour NAAQS.

In addition, we indicated that conformity requirements would no longer apply for the 1-hour NAAQS once the NAAQS is revoked. The June 2, 2003 proposal explains that, under section 176(c) of the CAA, conformity applies to areas designated nonattainment or subject to the requirement to develop a maintenance plan pursuant to section 175A. Once the 1-hour NAAQS is revoked, areas would no longer be designated nonattainment for the 1-hour NAAQS or subject to the obligation to develop a maintenance plan under section 175A for the 1-hour NAAQS and thus would no longer be subject to the obligation to demonstrate conformity (either transportation conformity or general conformity) for that NAAQS.

The draft regulatory text incorporated these concepts and also provided that, at the time of revocation of the 1-hour NAAQS, any provisions of applicable SIPs that require conformity determinations in such areas for the 1-hour NAAQS will no longer be enforceable as a matter of law pursuant to section 176(c)(5) of the CAA.

Additionally, the draft regulatory text reflected the discussion in the preamble to the proposed rule regarding what portions of a 1-hour maintenance plan could be revised or removed once the 1-hour NAAQS was revoked (68 FR 32823). The draft regulatory text provided that areas with approved 1-hour maintenance plans could modify those plans to remove the obligation to submit a maintenance plan for the 1-hour NAAQS eight years after approval of the initial 1-hour maintenance plan and to remove the obligation to implement contingency measures upon a violation of the 1-hour NAAQS. The draft regulatory text provided, however, that these requirements would remain enforceable until EPA approved a SIP removing or revising them and also provided that EPA would not approve such revisions until EPA approves an 8-hour attainment demonstration for an area designated nonattainment for the 8-hour NAAQS or an 8-hour maintenance plan for an area designated attainment for the 8-hour NAAQS. Finally, EPA noted that such a SIP revision must also be consistent with sections 110(l) and 193 of the CAA.

b. *Summary of final rule.*

We are adopting the approach we set forth in our proposed rule and providing clarification regarding the penalty obligations under sections 181(b)(4) and 185 of the CAA that apply in severe areas that do not attain the 1-hour NAAQS by the applicable attainment date. The final rule provides that as of the effective date of revocation of the 1-hour NAAQS:

- We will no longer make findings of failure to attain the 1-hour NAAQS and, therefore, (a) we will not reclassify areas to a higher classification for the 1-hour NAAQS based on such a finding, and (b) areas that were classified as severe for the 1-hour NAAQS are not obligated to impose fees as provided under sections 181(b)(4) and 185 of the CAA.
- Areas will not be obligated to continue to demonstrate conformity for the 1-hour NAAQS as of the effective date of the revocation of the 1-hour NAAQS.
- An area with an approved 1-hour maintenance plan under section 175A of the CAA may modify its maintenance plan to: (1) Remove the planning obligation to develop the second 10-year maintenance plan for the 1-hour NAAQS; and, (2) replace the existing 1-hour contingency measure trigger with an 8-hour value. However, before the EPA can consider approving such a

revision, certain conditions must be met. If the area is designated nonattainment for the 8-hour ozone NAAQS, it must first have an approved 8-hour attainment demonstration in place. If the area has been designated as attainment for the 8-hour ozone NAAQS, it must first have an approved section 110(a)(1) maintenance plan in place for the 8-hour NAAQS.

- NSR under the 1-hour NAAQS will no longer apply in areas that are 8-Hour NAAQS nonattainment/1-Hour NAAQS nonattainment.

Each of these provisions is discussed further below.

(i) *Findings of Failure to Attain the 1-hour NAAQS.* We continue to believe, as stated in the preamble to the proposed rule, that areas should focus their resources on attainment of the 8-hour NAAQS and that it would be counterproductive to establish new obligations for States with respect to the 1-hour NAAQS after they have begun planning for the 8-hour NAAQS. Moreover, we do not believe there is a basis to determine whether an area has met the 1-hour NAAQS once that NAAQS no longer applies; once the 1-hour NAAQS is revoked, there will not be an applicable attainment date with which to make a determination as to whether an area has met its attainment date or not. Since the obligations to reclassify areas and impose fees are based on a determination that an area has failed to meet the NAAQS by the appropriate attainment date, those obligations also would no longer apply for the 1-hour NAAQS once the 1-hour NAAQS has been revoked.

While we did not specifically state in our proposal that severe areas would no longer be obligated to impose fees under sections 181(b)(4) and 185 based on a failure to attain the 1-hour NAAQS after the effective date of the revocation of the 1-hour NAAQS, it is a logical extension of our proposal as that obligation is triggered by a finding of failure to attain. In addition, this is consistent with Appendix B of the June 2, 2003 proposal, which did not identify the section 185 fee provision as an applicable requirement.

(ii) *Conformity under the 1-hour NAAQS.* Regarding conformity, we are adopting the approach we set forth in our proposed rule (68 FR 32823). The final rule provides that, upon revocation of the 1-hour NAAQS for an area, conformity determinations will no longer be required for the 1-hour NAAQS. At that time, any provisions of applicable SIPs that require conformity determinations for the 1-hour NAAQS in such areas will no longer be enforceable pursuant to section 176(c)(5) of the CAA.

Under section 176(c) of the CAA, conformity applies to areas designated nonattainment or subject to the requirement to develop a maintenance plan pursuant to section 175A for a specific NAAQS. Once the 1-hour NAAQS is revoked, areas designated attainment for the 8-hour NAAQS would no longer be subject to the obligation to demonstrate conformity for the 1-hour NAAQS and would have no conformity obligation for the 8-hour NAAQS. Likewise, even areas designated nonattainment for the 8-hour NAAQS would no longer have an obligation to demonstrate conformity under the 1-hour NAAQS. The reason for this is that these areas would no longer be designated nonattainment for the 1-hour NAAQS and would no longer be required to develop a maintenance plan under section 175A for purposes of the 1-hour NAAQS.

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

(iv) *New Source Review under the 1-hour NAAQS.* As noted above concerning anti-backsliding provisions related to growth measures, our June 2, 2003 proposal indicated that 1-hour NSR requirements would continue to apply in a nonattainment area if that area's classification under the 1-hour ozone standard (at the time of designation for the 8-hour standard) is higher than its classification under the 8-hour standard (68 FR 32821). We indicated at proposal that Congress intended each area that was classified for the 1-hour ozone NAAQS under subpart 2 to adopt the specified control obligations in subpart 2 for the area's 1-hour classification. Accordingly, we proposed that the 1-hour NSR obligations continue to apply after revocation.

We have now determined that it is inappropriate to mandate that a State continue to apply 1-hour nonattainment NSR requirements to such areas. Therefore, today's final rule specifies that, at the time that the 1-hour NAAQS is revoked, a state is no longer required to retain a nonattainment NSR program in its SIP based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard. Instead, State implementation plans will be required to include an NSR program based on the area's designation and classification under the 8-hour standard.

Accordingly, a State may request approval of a SIP revision to remove its 1-hour nonattainment NSR program from its SIP. We will approve such changes to a State's SIP because we have determined based on section 110(l) of the Act that such changes will not interfere with any State's ability to reach attainment of the 8-hour standard and will be consistent with reasonable further progress.

For example, upon approval of a SIP revision for a nonattainment area that we classify as marginal for the 8-hour standard, the major source threshold would be 100 tpy and the offset ratio would be at least 1.1:1. Any lower major stationary source threshold and higher offset ratio that applied by virtue of the area's previous 1-hour classification would no longer apply. For areas that must comply with nonattainment NSR requirements solely based on the area's location within the Ozone Transport Region under Section 184 of the Act, there will be no change in the major stationary source threshold or offset ratio as these requirements remain the same for the 8-hour standard.

Although the proposal identified nonattainment NSR as a measure to address growth and not a control obligation, we proposed to treat NSR in the same manner as control obligations. We stated that such requirements should continue to apply based on Congressional intent to prohibit States from altering or removing provisions from SIPs if the SIP revision would jeopardize the air quality protection provided in the approved plan. 68 FR at 32819. We further concluded that Congress intended the specified control obligations in subpart 2 to continue to apply after revocation by virtue of the 1-hour classifications.

Upon further reflection, and consideration of public comments, we have revised our approach concerning NSR in areas that were non-attainment for the 1-hour NAAQS and continue to be nonattainment under the 8-hour NAAQS. While some commenters believed that NSR requirements that are part of SIPs submitted to meet 1-hour NAAQS requirements should be retained, several preferred that the 1-hour NSR program be replaced by an NSR program under the 8-hour standard when the 1-hour standard is revoked. Other commenters supported removing the 1-hour NSR requirements based on a showing that removing the requirements would not interfere with attainment or maintenance of the 8-hour standard. We agree with these commenters that there is no need to retain 1-hour NSR programs upon a finding under section 110(l) that 8-hour NSR will not interfere with the State's ability to reach attainment of the 8-hour standard. Moreover, we note major NSR only applies to new sources and to existing sources that have a physical change or change in the method of operation. Therefore, emission limitations and other requirements in NSR permits issued under 1-hour NSR programs will continue to be in force when the 1-hour NAAQS is revoked.

Also, our revised approach is more consistent with our longstanding treatment of NSR as a growth measure. We have historically treated control measures differently from measures to control growth. We provided no rationale in our proposal for treating control measures and growth measures in the same manner for purposes of the 8-hour standard, in contrast with our historical approach.

Unlike control requirements such as RACT and I/M, the NSR program is a growth measure and is not specifically designed to produce emissions reductions. Instead, its purpose is to allow new source growth to occur without interfering with an area's ability to attain. The statute and regulatory history identify nonattainment NSR as a growth measure. Thus, we have previously concluded that NSR is not a "control" measure in the context of Section 175A maintenance plans. See 68 FR 25418, 25436 (May 12, 2003). Specifically, we explained that the requirement that contingency provisions include "control" measures does not include nonattainment NSR. We reasoned that the LAER and offset requirements included in existing NSR permits would remain in effect for those sources. Thus, the LAER and offset measures that were relied upon to attain the NAAQS would remain in effect after the nonattainment NSR program was replaced. We also noted that another preconstruction review program (in that context, PSD) would be triggered to limit growth consistent with attainment in the future. Those considerations apply with equal force here, as discussed in more detail below.

The role of the NSR permitting program as a growth measure, rather than a control measure, is evident in the structure of the Act, which delineates nonattainment NSR and control measures as separate SIP requirements. In the general requirements for nonattainment plan provisions, NSR permits are listed in CAA 172(c)(5), while control measures are listed in CAA 172(c)(6). Similarly, in defining implementation plan requirements, CAA 110(a)(2)(C) sets forth the requirement for permit programs and CAA 110(a)(2)(A) the control measures. As we explained in our 1994 policy memo,[42] if the term "measures," as used in sections 110(a)(2)(A) and 110(a)(2)(C), had been intended to include PSD and part D NSR, there would have been no point to requiring that SIPs include both measures and preconstruction review. Section 172(e), which applies when EPA relaxes a NAAQS, only requires EPA to ensure that "controls" are no less stringent than they were for the more stringent NAAQS that has been replaced. It contains no specific requirements concerning growth measures.

Moreover, the statute is clear regarding the roles of the NSR program and control measures in nonattainment areas. CAA 172(a)(2) requires attainment as expeditiously as practicable considering control measures and CAA 172(c)(1) and (c)(6) require implementation of all control measures as expeditiously as practical to provide for attainment of the NAAQS by the area's attainment date. Conversely, CAA 173(a)(1)(A) requires only that growth due to proposed sources, when considered together with the other plan provisions required under section 172, be sufficient to ensure RFP. Thus, unlike the control measures required by section 172(c)(1) and (c)(6), NSR is not a measure in and of itself to assure attainment of the NAAQS. Rather, NSR should be considered in conjunction with a State's control measures to assure, consistent with the requirements in Section 172(c)(4), that the emissions from new sources will be consistent with RFP and not interfere with attainment of the applicable NAAQS.

In light of these different statutory goals, we believe the appropriate review of NSR SIP revisions under the 8-hour standard is whether: (1) The SIP revision is consistent with reasonable further progress; and whether (2) the SIP revision will not interfere with the ability to attain.

With regard to the specific requirements of 110(l), we do not believe that States need to make any case-specific demonstration that replacing the 1-hour NSR program with an NSR program based on the area's 8-hour classification satisfies the Section 110(l) requirements. As one commenter noted, NSR is a prospective permitting program that only applies to future emissions from new and modified sources. Any source that is subject to the 1-hour NSR requirements is required to continue to comply with those requirements. In this respect, there will be no degradation of air quality by virtue of this SIP change. Moreover, unlike control measures, States do not rely on the NSR program to generate emissions reductions to move an area further toward attainment. The essential question is whether the NSR program changes will hinder future air quality improvements based on future growth projections. Such a question inherently involves a look at the present day air quality, which is best reflected by the current 8-hour classifications. As long as the State plans to manage growth within the emissions inventory and include growth in their attainment plans, new source growth will be consistent with RFP and not interfere with the State's ability to attain. Therefore, we believe that the 8-hour NSR program requirements, based on an area's present air quality needs, will assure that progress continues toward attainment despite future economic growth.

c. *Comments and responses.*

(i) *Comments on June 2, 2003 proposal:*

Comment: Several commenters addressed this issue. Most agreed with the proposal, but recommended that we clarify that the section 185 penalty fees would not be imposed after the 1-hour NAAQS is revoked. A few of the commenters disagreed on the basis that EPA should not revoke the 1-hour NAAQS and that all requirements that apply for purposes of the 1-hour NAAQS remain applicable.

Regarding conformity, the majority of commenters that addressed this issue objected to EPA's proposal. Most of these commenters believed the 1-hour NAAQS and any 1-hour SIP budgets

[42] Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment, October 14, 1994, from Mary D. Nichols.

should remain in effect, such that for an area that was designated nonattainment under the 1-hour NAAQS, or was redesignated to attainment and had an approved maintenance plan under the 1-hour NAAQS, conformity requirements would still apply. Given the variety of comments we received about how conformity will be implemented, in this section we provide a response following each type of comment.

Several commenters indicated that revoking the 1-hour NAAQS for conformity is backsliding, and offered several arguments for why the 1-hour budgets should be retained in 1-hour nonattainment and maintenance areas.

Some commenters indicated that once approved, the motor vehicle emissions budget is part of the applicable implementation plan, and EPA may not render them nugatory for conformity purposes. Commenters also asserted that EPA may not unilaterally revise a state's SIP or suspend it, and in order to require states to revoke the budgets in their SIPs, EPA would have to find the budgets inadequate. Further, commenters argued that EPA may not lawfully allow states to discontinue implementation of the budgets in their current SIPs, and if states were to decide on their own that budgets no longer apply for conformity purposes, commenters said that EPA would be obligated to impose sanctions pursuant to section 179(a)(3). Commenters asserted that states may not revise their SIPs to remove budgets without complying with section 110(l), which states that EPA cannot approve revisions "if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act."

Response: The CAA specifically states that conformity applies only in "a nonattainment area* * *" and "an area that was designated as a nonattainment area but that was later redesignated by the Administrator as an attainment area and that is required to develop a maintenance plan under section 7505a of this title* * *" (42 U.S.C. 7506(5)). Therefore, CAA section 176(c)(5) restricts conformity to nonattainment areas and areas that are required to submit maintenance plans under section 175A; in these areas, the Federal government's sovereign immunity is waived so that states can require conformity to be determined by the U.S. Department of Transportation. However, after revocation of the 1-hour NAAQS, the areas previously nonattainment for the 1-hour NAAQS are no longer nonattainment for that NAAQS. Similarly, after revocation of the 1-hour NAAQS, the areas previously required to submit section 175A maintenance plans under the statute for the 1-hour NAAQS will no longer be required to do so. Therefore, after revocation the statute will no longer waive sovereign immunity to allow States to require the U.S. Department of Transportation to perform conformity determinations.

States are not taking any action to remove the budgets for the 1-hour ozone NAAQS in their SIPs, nor are they required to do so. In fact, EPA has proposed that 8-hour nonattainment areas would be able to use the 1-hour budgets for conformity for the 8-hour NAAQS, if they exist in an area (November 5, 2003, proposed rule, 68 FR 62690). Thus, although the 1-hour budgets would remain in the SIP, areas previously designated nonattainment or maintenance for the 1-hour NAAQS would no longer be required or even authorized to show conformity under CAA section 176(c)(5) for that NAAQS. Similarly, EPA would have no grounds for imposing sanctions where conformity is not conducted in these areas because there would be no SIP planning or implementation failure, since any SIP provisions requiring conformity would become unenforceable under section 176(c)(5) after revocation. EPA also disagrees that States cannot revise their SIPs to remove budgets without a demonstration that 110(l) is met, because states will not be revising their SIPs to remove budgets.

As we acknowledged in our June 2, 2003, proposal, EPA's conclusion that conformity cannot apply in 1-hour maintenance areas once the 1-hour NAAQS is revoked differs from the approach we planned to take in 1997. In 1997, we interpreted revoking the 1-hour ozone NAAQS to mean that conformity would not apply for the 1-hour ozone NAAQS in areas that were nonattainment for the 1-hour ozone NAAQS, but that conformity would continue to apply for the 1-hour ozone NAAQS in areas with a maintenance plan. However, the 1997 interpretation would lead to an unfair and counter-intuitive result: areas that had attained the NAAQS and had made the effort to establish a maintenance plan would have to continue a required program, but areas that had not attained would not. We reconsidered this result and found it to be unfair and inappropriate. Further, upon reanalyzing CAA section 176(c)(5), we concluded that this interpretation did not fit with the text of the statute.

Although section 110(l) would normally require areas to demonstrate that removing prior SIP requirements would not interfere with any applicable requirements of the CAA, where the CAA itself now forbids application of a prior requirement such a demonstration would be unnecessary. Further, it would interfere with the statutory limitation on the applicability of conformity to require conformity determinations in areas that are no longer required by the CAA to submit section 175A maintenance plans.

Comment: Commenters remarked that revoking the 1-hour ozone NAAQS is of particular concern in areas that are currently nonattainment or maintenance for the 1-hour ozone NAAQS that will be designated attainment for the 8-hour ozone NAAQS, because once the NAAQS is revoked, these areas will no longer be subject to conformity. A couple of commenters made the point that revoking the 1-hour NAAQS would have economic implications for their area because without transportation conformity, the emissions from the transportation sector could grow without restraint and therefore, emissions from the industrial sector would have to be limited further. Commenters were also concerned that their region would lose the ability to forecast whether a violation could occur.

Response: We promulgated the 8-hour ozone NAAQS in response to the latest data and science regarding ozone; we believe the 8-hour ozone NAAQS is more protective of public health. In 1997, EPA made the decision to replace the 1-hour ozone NAAQS with the 8-hour ozone NAAQS, because EPA concluded that the 1-hour NAAQS is not needed to protect health and welfare.

It is our conclusion that areas that are in attainment for the 8-hour NAAQS would not be subject to conformity because the statute explicitly limits the applicability of conformity to designated nonattainment and maintenance areas. These areas still have an incentive to monitor the growth of emissions from the transportation sector; if these areas violate the 8-hour NAAQS, EPA could redesignate them as nonattainment for the 8-hour NAAQS and conformity would then apply.

The EPA notes that although States could not implement conformity for attainment areas as a matter of federal law, they could still work with their MPOs to estimate regional emissions that would be generated by the planned transportation system to see whether a violation could occur and to address motor vehicle emissions growth. These type of State activities may be done

under State law, when possible, or on a voluntary basis.

Comment: One commenter supports, in part, our proposal to allow amendment of maintenance plans, but takes issue with the fact that States would face a continuing obligation to implement contingency measures after revocation of the 1-hour NAAQS and the criteria for approval of such amendments. After the 1-hour NAAQS is revoked, a State's obligation to implement contingency measures should automatically be lifted. The Illinois EPA recommends that amendments to the maintenance plans for these areas be approved after the 1-hour NAAQS has been revoked.

Response: Once we revoke the 1-hour NAAQS, the requirement for submission or subsequent revision of a section 175A maintenance plan under the 1-hour NAAQS no longer apply. The State still has an obligation to ensure that air quality remains clean and to invoke contingency measures in accordance with the terms of the approved SIP. The final rule provides that, upon revocation of the 1-hour NAAQS, an area with an approved 1-hour maintenance plan under section 175A of the CAA may modify the maintenance plan to remove the obligation to submit a maintenance plan for the 1-hour NAAQS 8 years after approval of the initial 1-hour maintenance plan and to remove the obligation to implement contingency measures upon a violation of the 1-hour NAAQS. The final rule provides that EPA would not approve a SIP revision requesting these modifications until the State submits and EPA approves an attainment demonstration for the 8-hour NAAQS for an area initially designated nonattainment for the 8-hour ozone NAAQS or a maintenance SIP for the 8-hour NAAQS for an area initially designated attainment for the 8-hour NAAQS. Any revision to such SIP must meet the requirements of section 110(l) and 193 of the CAA. For areas that are not required to submit attainment demonstrations (*e.g.*, marginal areas), the SIP revisions that affect prior maintenance plans under the 1-hour NAAQS may be made when other portions of the 8-hour SIP are due (*e.g.*, the NSR provisions). The EPA disagrees with the comments that certain obligations in the maintenance plan should no longer apply upon revocation of the 1-hour NAAQS. The EPA believes that in order to ensure that these revisions will not interfere with attainment or maintenance of the 8-hour NAAQS, these areas should first have an approved 8-hour attainment or maintenance SIP in place.

Comment: A commenter recommended that, in general, the rule should make it clear that any SIP revisions must comply with Sections 110(l) and 193.

Response: The proposed rule- as well as the final rule- provides that EPA will not approve revisions to the maintenance plan until EPA approves the area's 8-hour SIP for either attainment or maintenance, which will ensure non-interference with the 8-hour NAAQS. However, the final rule also includes a requirement that the changes must be in accordance with sections 110(l) and 193. Several commenters supported the proposed rule. Other commenters believed the 1-hour NAAQS should not be revoked at all, and therefore there would not be a need for the anti-backsliding provision regarding NSR.

Response: We address the issue of the revocation of the 1-hour NAAQS elsewhere in this notice and do not repeat it here.

(ii) *Comments on draft regulatory text* (sect. 51.905(e) of the draft):

Comment: One commenter believes that proposed 40 CFR 51.905(e)(1) contains an apparent misstatement that EPA should correct. That provision states that upon revocation of the 1-hour NAAQS, an area with an approved maintenance plan for that NAAQS may modify that plan to remove the obligation under CAA § 175A(b) to submit a "second round" maintenance plan eight years after redesignation to attainment and to remove the obligation to implement contingency measures upon a 1-hour NAAQS violation. The provision goes on to say that EPA will not approve a SIP revision making these modifications until the state submits and EPA approves: (1) An 8-hour attainment demonstration, if the area is designated nonattainment for the 8-hour NAAQS; or (2) an 8-hour maintenance SIP under proposed 40 CFR 51.905(a)(3)(iii), if the area is designated attainment for the 8-hour NAAQS. Option (2) does not make sense, however. Proposed 40 CFR 51.905(e) by its terms applies to areas with approved 1-hour maintenance plans. Thus, these areas by definition have been redesignated to attainment- *i.e.*, are no longer nonattainment- for the 1-hour NAAQS. Yet proposed 40 CFR 51.905(a)(3)(iii) applies only to areas that are "designated nonattainment for the 1-hour NAAQS at the time of revocation of the 1-hour NAAQS." Thus, contrary to the last clause of § 51.905(e)(l), areas that are maintenance for the 1-hour NAAQS and attainment for the 8-hour NAAQS cannot be subject to § 51.905(a)(3)(iii).

Response: The commenter has pointed out a flaw in the proposal. The final rule has been modified from the proposal to account for this situation. A separate parallel provision has been established in section 51.905(a)(4) requiring 1-hour maintenance plan areas to submit a maintenance plan under section 110(a)(1). As provided earlier, EPA has also changed the proposed regulatory text- consistent with the June proposal- to indicate that 51.905(a)(3) and (4) apply, respectively to areas that are nonattainment or maintenance of the 1-hour NAAQS at the time of designation for the 8-hour NAAQS. Section 51.905(e)(1) has been modified to provide that the State would not be able to modify an existing 1-hour maintenance plan until EPA approves the new 8-hour maintenance plan.

Comment: One commenter provided suggested language changes to section 51.905(e) that would retain the section 175A maintenance plan and the conformity requirement.

Response: As noted above, once EPA revokes the 1-hour NAAQS, and the area is an 8-hour attainment area, section 175A maintenance provisions do not apply and conformity for the 1-hour NAAQS no longer applies.

6. What Is the Continued Applicability of the NO_X SIP Call After Revocation of the 1-Hour NAAQS? (Section VI.C.3.c. of Proposal; See 68 FR 32824; Section 51.905(f) of the Proposed and Final Rules)

a. *Background.* In the June 2, 2003 proposal (68 FR 32824), we noted that it is important to ensure that the transition to the 8-hour NAAQS does not jeopardize the controls required to be in place under the NO_X SIP Call rule and the section 126 rule (*i.e.*, the rules for addressing the long-range transport of ozone and its precursor, NO_X). We jointly referred to these rules in the proposal as the NO_X transport rules. We indicated that we plan to lift the stay of the 8-hour basis for the NO_X transport rules.[43] Regardless of whether we lift

[43] When EPA promulgated the NO_X SIP Call, we required the same level of reductions for both the 1-hour and 8-hour ozone NAAQS (63 FR 57356, October 27, 1998). In response to the Court of Appeals remand of the 8-hour NAAQS, EPA stayed the 8-hour basis of the NO_X SIP Call (65 FR 2674, January 18, 2000). However, since the same level of reductions was required for both the 8-hour and 1-hour NAAQS, the stay had no practical effect on States' compliance with the rule. Because EPA also stayed the 8-hour portion of the Section 126 Rule, we did not move forward to make the section 126 findings under the 8-hour NAAQS which would trigger the 8-hour control requirements (65 FR 2674, January 18, 2000). We plan to complete rulemaking action on the 8-hour petitions at the time we lift the 8-hour stay. All of the States affected by the 1-hour

that stay, the controls required have substantial benefits for reductions of both 1-hour and 8-hour ozone levels. We indicated that we believe that relaxing such controls would be contrary to the principles we identified in the proposal for an effective transition. Thus, we proposed that States must continue to adhere to the emission budgets established by the NOX transport rules after the 1-hour NAAQS is revoked in whole or in part.

The draft regulatory text reflected the discussion in the June proposal.

b. *Summary of final rule.* We are adopting the approach we set forth in our proposed rule and draft regulatory text. States must continue to adhere to the emission budgets established by the NO_X transport rules after the 1-hour NAAQS is revoked. States retain the authority to revise control obligations they have established for specific sources or source categories under the NO_X SIP Call rule so long as the State demonstrates consistent with section 110(l) that such modification will not interfere with attainment of or progress toward meeting the 8-hour NAAQS or any other applicable requirement of the CAA. We continue to believe that the reductions required by the NO_X transport rules are necessary to address transported emissions for the 8-hour ozone NAAQS as well as the 1-hour ozone NAAQS.

c. *Comments and responses.*

(i) *Comments on the June 2, 2003 proposal:*

Only a handful of commenters addressed this issue, all of whom supported the proposal. Several of these commenters recommended that we lift the stay of the NO_X transport rules with respect to the 8-hour NAAQS.

D. What Is the Required Timeframe for Obtaining Emissions Reductions To Ensure Attainment by the Attainment Date (Section VI.E of the Proposed Rule (68 FR 32826); Section 51.908 of the Draft and Final Rules)

1. Background

In the June 2003 proposal, we proposed that emissions reductions needed for attainment must be implemented by an area's attainment date. We noted this meant that emissions reductions must be implemented by the beginning of the final ozone season prior to the attainment date. For example, for areas with an attainment date in May 2010, the emissions reductions need to be implemented by the beginning of the 2009 ozone season because a determination of attainment will be based on air quality monitoring data from 2007, 2008 and 2009. The proposal cautioned that States should be aware of the consequences of failing to implement the control measures necessary for attainment sufficiently far in advance of their attainment date. As noted above, areas covered under subpart 2 can receive up to two 1-year attainment date extensions if certain criteria are met. However, if an area does not meet the eligibility requirements for the 1-year extension, it would be subject to a reclassification to a higher classification (bump up). While areas covered under subpart 1 are able to obtain up to two 1-year attainment date extensions, there is no provision for a bump up in subpart 1. If an area covered under subpart 1 fails to attain, section 179 of the CAA provides that EPA publish a finding of failure to attain which starts a 1-year time frame for States to submit a SIP revision that provides for attainment within a specified time frame.

2. Summary of Final Rule

In section 51.908, we are adopting the approach we set forth in our proposed rule, namely that emissions reductions needed for attainment must be implemented by the beginning of the ozone season immediately preceding the area's attainment date. We believe that Congress contemplated that control measures would continue to be implemented up to the attainment year. For example, section 182(c)(2)(B) requires areas classified as serious or higher to achieve an average of 3 percent reduction in emissions per year over each 3-year period until the area's attainment date. If Congress intended areas to achieve all reductions needed for attainment 3 years prior to attainment, then the last 9 percent reductions required for serious and above areas would be reductions beyond those needed for attainment. We do not believe that Congress mandated these reductions in addition to the reductions needed to attain the NAAQS. In fact, this requirement is included in the statute as a part of the subparagraph addressing attainment and reasonable further progress, which indicates that Congress intended it to address progress toward attainment. This is further supported by the definition of reasonable further progress in section 171(1) as "annual incremental reductions in emissions * * * for the purpose of ensuring attainment * * *."

Other provisions in the CAA also support the concept that areas do not need to achieve 3 years in advance of the attainment date the full complement of reductions needed for attainment. For example, Congress only provided marginal areas with 3 years to attain the NAAQS and did require at least minimal additional controls be implemented in such areas. In addition, the fact that Congress provided for two 1-year extensions of the attainment date also indicated that Congress believed that some areas might not be fully implementing all measures needed for attainment 3 years in advance of the attainment date. Rather, Congress contemplated that areas would have air quality healthy enough to make it substantially likely the area would attain within the next 1 or 2 years.[44]

Finally, we note that the NAAQS itself does not contemplate that air quality must be at "attainment levels" for each of the 3 years on which attainment is based. Rather, attainment is determined based on an average of the 4th high reading at a monitor over a 3 year period. Thus, the 4th high reading for an area could be above the NAAQS for one or both of the years preceding the attainment year, but so long as the 4th high level for the other year(s) was low enough to produce an average at or below 0.084 ppm, the area would be attaining the NAAQS.

As noted in the June 2003 preamble, despite the fact that we believe an area need not have all controls implemented until the beginning of the final attainment season, the State needs to consider that attainment is based on a 3-year average. Thus, the State will need to ensure that implementation of controls is not unduly delayed. A State that plans to achieve reductions by the beginning of the ozone season prior to the attainment date may still experience meteorology conducive to very high ozone formation in that last ozone season that may result in the area having a 4th highest daily ozone concentration above the level of the 8-hour NAAQS, making it ineligible for the first of the 1-year extensions. Such an area- if classified under subpart 2-

and/or 8-hour Section 126 Rule are also covered by the NO_X SIP Call. The Section 126 Rule contains a provision under which the Section 126 findings and control requirements would be withdrawn if States have approved SIPs meeting the NO_X SIP Call. The EPA has already withdrawn the 1-hour Section 126 Rule in three States and the District of Columbia and proposed to withdraw the 1-hour rule in all other affected States except one. (We expect to propose action with respect to the rule in the remaining State shortly.)

[44] As discussed in the section regarding the two 1-year attainment date extensions, section 172(a)(2)(C), which applies to all pollutants, allows for a 1-year attainment date extension if the area has had "minimal exceedances" in the attainment year and section 181(a)(5), which applies to ozone nonattainment areas classified under subpart 2, allows for a 1-year extension if the area has had no more than 1 exceedance in the attainment year.

would then be reclassified (bumped up) to a higher classification and be subject to additional planning requirements and mandatory control measures. Thus, a State should be aware of the consequences of delaying too long to implement control measures needed for attainment. Additionally, in reviewing implementation timeframes in SIPs, EPA will consider whether those timeframes are as expeditious as practicable. A guidance memorandum from John Seitz of November 30, 1999[45] reiterates the need to implement measures as expeditiously as practicable:

> In order for EPA to determine whether an area has provided for implementation as expeditiously as practicable, the State must explain why the selected implementation schedule is the earliest schedule based on the specific circumstances of that area. Such claims cannot be general claims that more time is needed but rather should be specifically grounded in evidence of economic or technologic infeasibility. While it may be appropriate for some control measures to be implemented shortly after adoption, the EPA recognizes that other measures may need a longer period. The EPA will review the State's submission to ensure that sufficient information is provided for the EPA to determine whether the State has adopted all RACM necessary for attainment as expeditiously as practicable and provided for implementation of those measures as expeditiously as practicable. The EPA will make those determinations based on the information provided by the State and any other information available to the EPA at the time the Agency approves or disapproves the attainment demonstration.

3. Comments and Responses

Comment: Some commenters agreed with our proposal as written, *i.e.*, to require that emission reductions needed for attainment be implemented by the beginning of the ozone season prior to the attainment year.

However, several commenters disagreed with the timeframe that was included in our proposal because it precludes areas from realizing the benefit of Federal measures prior to developing additional local controls.

Another commenter stated that the attainment deadlines place an extraordinary burden on metropolitan areas to achieve the level of emissions reductions necessary to demonstrate attainment. The commenter felt that requiring emissions reductions to be implemented at the beginning of the ozone season prior to the attainment date is 1 year earlier than is required. The commenter stated that so long as there are no exceedances in the attainment year, *i.e.*, having controls in place by the beginning of the ozone season of the attainment year, the area has met the statutory requirement and could qualify for the first of two 1-year attainment date extensions allowed under the CAA. The commenter further stated that controls for moderate areas would need to be in place by about the same time the area's SIP must be submitted to EPA in order to provide 3 years of clean data for the demonstration of attainment.

Other commenters stated that all emissions reductions needed for attainment must be implemented in sufficient time to ensure attainment by the attainment date without relying on the CAA provisions for the 1-year extensions.

Response: Section 172(c)(2) of the CAA requires that emissions reductions needed for attainment be phased in such that RFP toward attainment is achieved. For areas classified as moderate under subpart 2, their attainment date would be as expeditiously as practicable but no later than 6 years after the date of classification. Their ROP requirement would be at least a 15 percent VOC emissions reduction from the base year to be achieved no later than 6 years after the base year. However, if the area needed more than 15 percent VOC reductions in order to demonstrate attainment, then any additional reductions would also have to be achieved by the beginning of the ozone season prior to the area's attainment date.

The CAA requires each area to demonstrate attainment as expeditiously as practicable but no later than the maximum timeframe specified in the CAA for the area. In addition, each area is required to adopt RACM. In determining whether measures are reasonably available, we consider cost, technical feasibility and whether implementation will advance the attainment date. An area cannot reject local control measures that are technically and economically feasible in favor of awaiting the implementation of national or regional controls, if to do so would delay attainment of the NAAQS. The consequences of failing to implement the control measures necessary for attainment sufficiently far in advance of the attainment date are discussed above and in the proposed rule.

Areas covered under subpart 1 are also able to obtain up to two 1-year extensions of the attainment date (see section 172(a)(2)(C)). There is no provision for bump-up in classification similar to that under subpart 2. However, if an area fails to attain, section 179 of the CAA provides that EPA publish a finding that the area failed to attain. The State then must submit within 1 year after that publication a revision to the SIP that provides for attainment within the time provided under section 179. Section 179 also provides that the SIP revision must also include any additional measures that EPA may prescribe.

Comment: Several commenters suggested that nonattainment areas should be afforded the opportunity to install controls in time to monitor for attainment before the attainment deadline. The commenters believes that for many industrialized and metropolitan areas classified under Subpart 2 as marginal, moderate or serious, it will not be feasible to have stationary and mobile source controls in place 3 years before the attainment deadlines for the purposes of attainment monitoring. Pragmatically, state SIPS will not be finalized until mid-2007, at which time industrial facilities can begin the 18- 24 month period for detailed engineering, permitting and procurement of NO_X control equipment. The installation of controls would occur over a 5-year average facility turnaround period. Furthermore, Tier II fuels and engines will just be entering the market as will cleaner diesel fuel and engines. It is virtually certain that many of these areas will not have the necessary emission reductions in place 3 years before the attainment deadline and will be required to rely on the case-by-case extensions to the designated attainment deadlines. The commenters believe that Congress did not intend for EPA to establish attainment deadlines that would in a large number of cases automatically require areas to use deadline extensions; such areas have probably been misclassified. All nonattainment areas should be afforded the opportunity to install controls in time to monitor for attainment by the attainment deadline, but not three years prior to the attainment year. This would also eliminate the need for case-by-case extensions.

Response: The final rule does not require emission reductions to be in place three ozone seasons prior to the attainment date. However, the after-the-fact determination of whether an area actually attains the NAAQS by its attainment date must be done by looking back at the previous 3 years of ambient air quality data. As noted elsewhere in this preamble, the CAA

[45] Memorandum, "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas." John S. Seitz, Director, Office of Air Quality Planning and Standards. November 30, 1999. Web site: *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

provides for up to two 1-year extensions of the attainment date.

Comment: Marginal areas may not be able to demonstrate compliance in 3 years and the final rule should provide for automatic extensions for such areas. Additional time to implement all of these reductions may be required in order for marginal areas to comply. By creating an automatic extension, EPA will avoid the inevitable cost of SIP nonattainment planning problems that communities will face if these measures are fully implemented.

Response: The general assumption for marginal areas is that they will be able to attain without significant additional emissions controls. As such, section 182(a) specifies very little in terms of mandatory obligations for marginal areas. If an area needs additional controls and time to implement such controls, it may need to be reclassified to a higher classification. The CAA does not allow EPA to extend attainment dates for a classification.

Comment: One commenter noted that EPA's proposal provides: "For each nonattainment area, the State must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season." CAA § 51.908(e). Attainment of the 8-hour NAAQS is based on analysis of 3 years of data. Part 51, App. I 2.3(a) ("The primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the 3-year average of the annual fourth highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm."). Thus, to meet the statutory requirement that SIPs provide for attainment, the rule must require SIPs to provide for implementation of all control measures needed for attainment no later than 3 years before the attainment date.

Response: We disagree with the comment. In section 51.908, we are adopting the approach we set forth in our proposed rule, namely that emissions reductions needed for attainment must be implemented by the beginning of the ozone season immediately preceding the area's attainment date. Our rationale is presented above.

Comment: In addition, a commenter stated that this timing was inconsistent with the draft modeling guidance which essentially requires areas with an attainment date of 2013 to have their controls in place by 2011 to perform an attainment demonstration. The 2011 date is inconsistent with the proposal which would require that the emissions reductions be in place in 2012. The commenter further stated that it seems inappropriate that the draft modeling guidance would be driving the schedule for implementation of control measures as opposed to the 8-hour implementation rule.

Response: Comments on the modeling requirements will be addressed in Phase 2 of this rulemaking. The approach on when emission reductions needed for attainment must be in place was not based on the modeling requirements, but on the rationale stated in the preamble to the final rule. The modeling guidance will be revised for consistency with the final rule.

E. Conformity Under the 8-Hour Ozone Standard

The June 2, 2003 proposal provided background discussion on issues related to transportation conformity and general conformity under the 8-hour ozone standard. See sections VI.M (68 FR 32841) and VI.N. (68 FR 32842). However, we did not propose any rules related to either. We did receive a number of comments on this topic, however. Responses to those comments are included in the response to comments document.

F. Comments on Other Issues

We received comments on other issues associated with elements of this final rulemaking. We address those comments here. Comments on any other issues not discussed in this preamble or the RTC accompanying this final rule will be addressed in the second phase of this final rulemaking.

1. Designation of Nonattainment and Attainment Areas

We received a number of comments on the designation process.

Response: As we noted in the June 2, 2003 proposal, we did not propose to establish attainment/nonattainment designations nor did we address the principles that will be considered in the designation process; we issued guidance on the principles that States should consider in making designation recommendations in March 2000.[46] The designation process is being conducted separately.

[46] EPA issued the memorandum "Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standard (NAAQS or Standard)" on March 28, 2000, from John S. Seitz, Director, Office of Air Quality Planning and Standards, to the Air Directors, Regions I- X, to provide guidance to State and local agencies and Tribes on designating areas and EPA's views on boundaries for nonattainment areas for the 8-hour NAAQS.

2. Early Action Compacts (EACs). (Section VIII.A.2. and 3 of the Proposal; See 68 FR 32859)

We received a number of comments that addressed EACs. The June 2, 2003 proposal included a description and background information concerning EACs, but the proposal made clear that we were not proposing any rulemaking on EACs in that notice.

Response: The comments we received will be addressed in the rule that takes final action on the proposed rule to defer the effective date for EAC areas and therefore those comments are not addressed in this current rulemaking. We note that existing 1-hour maintenance areas will remain subject to all the requirements of that maintenance plan and transportation conformity, until the 1-hour standard is revoked 1 year following the effective date of the area's 8-hour designation. If EPA takes final action deferring the effective date of the 8-hour designation for an EAC area, revocation of the 1-hour standard will also be effectively deferred for such area. Therefore, for such an EAC area that is a 1-hour maintenance area, the 1-hour maintenance plan, and 1-hour conformity, will continue to apply until 1 year after the 8-hour designation takes effect.

3. Health and Environmental Concerns

We received a number of general comments related to health and environmental concerns. Some of these cited national health statistics or provided information concerning the levels of ozone in their communities or information concerning the adverse health symptoms of themselves or friends, relatives, or patients. These commenters generally cited this information as a way of encouraging EPA to ensure expeditious attainment of the 8-hour ozone NAAQS and in some cases to support leaving the 1-hour NAAQS and its implementation process in place.

Response: We have addressed these latter concerns above in discussion of the classification system, revocation of the 1-hour NAAQS and the anti-backsliding provisions that serve to ensure that the 8-hour NAAQS is attained as expeditiously as practicable with little or no delay in emission reductions as a result of revoking the 1-hour NAAQS.

4. Clarity and Understandability of Proposed Rule

A number of commenters expressed concern about the complexity of the proposed rule, and the lack of apparent

clarity and transparency. A number of these commenters complained that due to the large number of combinations of options that were possible from the proposal, it was difficult or impossible to determine exactly what the effect of the rule would be.

Response: One of our principles in drafting the proposal was to make the rule as understandable as possible. However, the Supreme Court's ruling on our previous implementation approach left it to EPA to develop an implementation scheme with only general guidance as to how to proceed. Because the consequences of implementation under a particular approach might be fairly large, we felt obligated to place as many practicable options in our proposal as possible to assess public reaction by providing an opportunity for comment. This approach obviously added complexity to the proposal. We tried to minimize the complexity by setting forth two example frameworks for how some options could work in conjunction with each other. We also attempted in the draft regulatory text to focus on one set of options to illustrate how one set of options would work together. We attempted to simplify where we could and to provide other materials in the docket and on our web site for this rulemaking (*e.g.*, the "roadmap" and the crosswalks between the June 2, 2003 proposal and the draft regulatory text) to enable the reader to more easily see relations between various sections of the proposal and to provide a synopsis of the options being proposed. Although the very nature of the proposal was complex, we believe that the public had sufficient opportunity to comment on the rule.

5. Regulatory Text

A number of commenters chastised us for not providing regulatory text with the proposal.

Response: As noted above, we did provide for public comment draft regulatory text, which reflected one set of proposed options. On August 6, 2002 (68 FR 46536), we published a notice of availability of the draft regulatory text for the proposed rule to implement the 8-hour ozone NAAQS. This notice started a 30-day public comment period on the draft regulatory text.

6. Requests for Extension of Comment Periods

We received a number of requests for extension of the comment periods on the three notices related to our proposal (the June 2, 2003 proposal,[47] the notice of availability of the draft regulatory text,[48] and the notice reopening the comment period on the classification approach.[49]) We did not grant any of these requests.[50] We provided a 60-day comment period on our full implementation proposal, which was published on June 2, 2003. We also provided a separate 30-day comment period on draft regulatory text (notice of availability was published on August 6, 2003). The October 21, 2003 notice was very narrow, supplementing just one aspect of the June 2, 2003 proposal. We believe that a 15-day comment period was sufficient to address this limited issue. That notice was based on several comments which were submitted during the public comment period. Those comments have been available to the public since early August.

We are committed by a consent decree to designate areas for the 8-hour ozone NAAQS by April 15, 2004. We believe it was essential to move forward to provide the public health protection that implementation of the 8-hour NAAQS will yield. We have recognized the strong interest from many stakeholders in our issuance of a final implementation rule prior to the April 2004 designation deadline. These interests, in conjunction with the reasons set forth above, support our denial of requests for an extension of the comment period. However, as is normally the case, we considered comments received after the close of the comment period to the extent we were able to do so without impeding the process for issuing the final rule.

[47] OAR- 2003- 0079- 0081, 0085 American Petroleum Institute (API) requests for extension to the August 1st, 2003 comment deadline.

[48] OAR- 2003- 0079- 0405 Request for Extension of Time for Filing Comments on Draft Regulatory Text for Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) submitted by Howard J. Feldman, Director, American Petroleum Institute.

[49] OAR- 2003- 0079- 0542, 0589, 0590 Request for Extension of time for 15-day comment period on approaches to implement the 8-hour ozone NAAQS, submitted by Gregory Dana, Vice President Environmental Affairs, Alliance of Automobile Manufacturers.

OAR- 2003- 0079- 0555 Request for extension of time for 15-day comment period on alternative approaches to implement the 8-hour ozone NAAQS submitted by Howard Feldman, Director Regulatory Analysis and Scientific Affairs, American Petroleum Institute (API).

OAR- 2003- 0079- 0572 Request for Extension of Public Comment Period submitted by Leslie S. Ritts, Counsel to The National Environmental Development Associations Clean Air Regulatory Project (NEDA/CARP).

[50] *See*, for instance, OAR- 2003- 0079- 0165 Letter from S. Page, Director, OAQPS to H.J. Feldman, Director, API, denying extension of comment period.

G. Other Considerations

Although Phase 2 of the final rule will address aspects of implementation of the 8-hour ozone NAAQS that are not addressed in this rulemaking, additional information is provided below regarding new source review for the 8-hour ozone NAAQS.

1. What Happens If a Source Is in the Process of PSD Permitting at the Time That the Area in Which It Is Located Is Designated as Nonattainment for the 8-Hour Ozone NAAQS?

An area's designation at the time the final permit is issued determines which major New Source Review (NSR) requirements apply to the construction activity.

Accordingly, if a source has received its PSD permit before the area is designated nonattainment, it may construct under the terms of that permit if it commences an ongoing program of construction within the required time period and completes the project within a reasonable time. However, if the area is designated nonattainment before the permit is issued (even if the reviewing authority deemed the PSD application complete), the PSD permit may not be issued. The source would be required to submit a new application to comply with the requirements of the applicable nonattainment major NSR program before receiving a final permit and beginning construction. 40 CFR 52.24(k) and 40 CFR part 51, appendix S. We have consistently applied this approach in past designation and redesignation situations.

This approach is consistent with CAA section 165, which states that PSD permitting requirements apply only in attainment and unclassifiable areas. The DC District Court of Appeals affirmed this plain reading of the statute in the *Alabama Power* decision (636 F.2d 323). In response to EPA's attempt to apply PSD permitting requirements in some nonattainment areas, the court stated, "After careful consideration of the statute and the legislative history, we must accept the contention of the industry petitioners that the phrase 'constructed in any area to which this part applies' limits the application of section 165 to major emitting facilities to be constructed in [attainment and unclassifiable areas]." The court went on to say, "The plain meaning of the inclusion in section 165 of the words 'any area to which this part applies' is that Congress intended location to be the key determinant of the applicability of the PSD review requirements."

This approach is also consistent with the regulatory text in the Federal PSD

regulations. These regulations limit the applicability of PSD requirements to "an area designated as attainment or unclassifiable." 40 CFR 51.166(a)(7)(i); 52.21(a)(2)(i).

H. EPA's Final Action

We are taking final action on key elements of the program to implement the 8-hour ozone NAAQS. This final rule addresses the following topics: Classifications for the 8-hour NAAQS; revocation of the 1-hour NAAQS (*i.e.*, when the 1-hour NAAQS will no longer apply); how anti-backsliding principles will ensure continued progress toward attainment of the 8-hour ozone NAAQS; attainment dates; and the timing of emission reductions needed for attainment. A summary of the rule appears in section IV of this preamble.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because it raises novel legal or policy issues arising out of legal mandates. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule merely interprets the requirement to develop State implementation plans to achieve a new or revised NAAQS. This requirement is prescribed in the CAA sections 110 and part D, subparts 1 and 2 of Title 1. The present final rule does not establish any new information collection burden apart from any that required by law. A SIP contains rules and other requirements designed to achieve the NAAQS by the deadlines established under the CAA, and also contains a demonstration that the State's requirements will in fact result in attainment. Such a document is not considered information collection. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

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

After considering the economic impacts of today's rule 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. Rather, this rule interprets the obligations established in the CAA for States to submit implementation plans in order to attain the 8-hour ozone NAAQS. We are issuing this rule so that States and Tribes will know how we plan to classify areas and transition from implementation of the 1-hour NAAQS to implementation of the 8-hour NAAQS.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104- 4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory

proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. The estimated administrative burden hour and costs associated with implementing the 8-hour, 0.08 ppm NAAQS were developed upon promulgation of the NAAQS and presented in Chapter 10 of U.S. EPA 1997, *Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards*, Innovative Strategies and Economics Group, Office of Air Quality Planning and Standards, Research Triangle Park, NC, July 16, 1997. The estimated costs presented there for States in 1990 dollars totaled $0.9 million. The corresponding estimate in 1997 dollars is $1.1 million. Should the more traditional classification option be adopted as the implementation framework, these costs may increase modestly, but would not reach $100 million. Thus, today's rule is not subject to the requirements of section 202 and 205 of the UMRA.

The CAA imposes the obligation for States to submit SIPs to implement the 8-hour ozone NAAQS; in this rule, EPA is merely fleshing out those requirements. However, even if this rule did establish a requirement for States to submit SIPs, it is questionable whether a requirement to submit a SIP revision would constitute a Federal mandate in any case. The obligation for a State to submit a SIP that arises out of section 110 and part D of the CAA is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of section 421(5)(9a)(I) of UMRA (2 U.S.C. 658(a)(I)). Even if it did, the duty could be viewed as falling within the exception for a condition of Federal assistance under section 421(5)(a)(i)(I) of UMRA (2 U.S.C. 658(5)(a)(i)(I)).

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

E. Executive Order 13132: Federalism

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

This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. As described in section D, above (on UMRA), EPA previously determined the costs to States to implement the 8-hour ozone NAAQS to be approximately $1 million. While this rule considers options not addressed at the time the NAAQS were promulgated, the costs for implementation under these options would may rise modestly. This rule fleshes out the statutory obligations of States in implementing the 8-hour ozone NAAQS. Finally, the CAA establishes the scheme whereby States take the lead in developing plans to meet the NAAQS. This rule would not modify the relationship of the States and EPA for purposes of developing programs to implement the NAAQS. Thus, Executive Order 13132 does not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA actively engaged the States in the development of this rule. EPA held regular calls with representatives of State and local air pollution control agencies. EPA also held three public meetings at which it described the approaches it was considering and provided an opportunity for States and various other governmental officials to comment on the options being considered. Finally, EPA held three public hearings after the proposed rule was published to obtain public comments.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This determination is stated below.

This rule concerns the implementation of the 8-hour ozone NAAQS in areas designated nonattainment for that NAAQS. The CAA provides for States and Tribes to develop plans to regulate emissions of air pollutants within their jurisdictions. The regulations flesh out the statutory obligations of States and Tribes that develop plans to implement the 8-hour ozone NAAQS. The TAR gives Tribes the opportunity to develop and implement CAA programs such as the 8-hour ozone NAAQS, but it leaves to the discretion of the Tribe whether to develop these programs and which programs, or appropriate elements of a program, they will adopt.

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

The EPA also notes that even if Tribes choose to develop plans to implement the 8-hour ozone NAAQS in the future, these regulations would not impose substantial direct compliance costs on such Tribes, nor would they preempt Tribal law. As provided above, EPA has determined that the total costs for implementing the 8-hour ozone NAAQS by State, local, and Tribal governments is approximately $1 million in all areas designated nonattainment for the NAAQS. The percentage of Indian country that will be designated nonattainment for the 8-hour ozone NAAQS is very small. For Tribes that choose to regulate sources under their jurisdiction, the costs would be attributed to inspecting regulated facilities and enforcing adopted regulations.

Although Executive Order 13175 does not apply to this rule, EPA did consult with Tribal officials in developing this rule and encouraged Tribal input at an

early stage. The EPA supports a national "Tribal Designations and Implementation Work Group" which provided an open forum for all Tribes to voice concerns to EPA about the designation and implementation process for the 8-hour ozone NAAQS. These discussions have given EPA valuable information about Tribal concerns regarding implementation of the 8-hour ozone NAAQS. The work group sent issue summaries and suggestions for addressing them to the newly formed National Tribal Air Association (NTAA), who in turn sent them to Tribal leaders. EPA encouraged Tribes to participate in the national public meetings held to take comment on early approaches to the rule. Several Tribes made public comments at the April 2002 public meeting in Tempe, Arizona.

Furthermore, EPA sent individualized letters to all federally recognized Tribes about the proposal and gave Tribal leaders the opportunity for consultation. EPA received comment from the NTAA raising several questions: (1) NTAA asked for clarification on the nature of EPA's support for Tribes without Treatment in the same manner as a State (TAS) status and asked if EPA would provide technical assistance in interpreting SIP documentation to a Tribe without TAS approval; (2) NTAA asked EPA to explain how it envisions its role in continuing consultation with Tribes throughout the execution of SIPs. These comments will be addressed in the technical support document. The NTAA's final comment cited concerns with the impact of NSR requirements on the Tribes. The EPA intends to address these NSR comments in the Tribal NSR Rule.

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

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

The rule is not subject to Executive Order 13045 because it implements a previously promulgated health based Federal standard (this rule implements the 8-hour ozone NAAQS). Nonetheless, we have evaluated the environmental health or safety effects of the 8-hour ozone NAAQS on children. The results of this evaluation are contained in 40 CFR part 50, National Ambient Air Quality Standards for Ozone, Final Rule (62 FR 38855- 38896; specifically, 62 FR 38855, 62 FR 38860 and 62 FR 38865).

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

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

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

I. National Technology Transfer Advancement Act

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

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

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

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

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

The EPA believes that this rule should not raise any environmental justice issues. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS. The level is designed to be protective with an adequate margin of safety. The rule provides a framework for improving environmental quality and reducing health risks for areas that may be designated nonattainment.

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 15, 2004.

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 29, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

M. Determination Under Section 307(d)

Pursuant to section 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." While the Administrator did not make this determination earlier, the Administrator believes that all of the procedural requirements, *e.g.*, docketing, hearing and comment periods, of section 307(d) have been complied with during the course of this rulemaking.

Appendix A to Preamble—Example for 8-Hr Ozone Preamble Portion Dealing with Anti-Backsliding and Outstanding 1-Hr ROP Obligation

Consider a 1-hour nonattainment area classified as Severe-15. For simplicity, only one precursor is assumed here, and this example does not account for issues of creditability established by the CAA. The 1-hour Severe-15 areas are required to reach attainment no later than 15 years after the 1990 base year, *i.e.*, in year 2005. The ROP requirement over this 15-year period would be accomplished by an initial 15 percent reduction in emissions in the first six years, followed by additional 3 percent per year reductions (9 percent averaged over three years) until attainment is reached but no later than the attainment date (with any additional reductions needed for attainment). Suppose an area started with a base year emissions inventory of 1000 tons/day (t/d); after an initial 15 percent reduction, the area's emissions in 1996 would be 850 t/d. Subsequent additive linear 9 percent reductions would net 24 percent, 33 percent, and 42 percent reductions, leaving emissions of 760 t/d in 1999, 670 t/d in 2002, and 580 t/d in 2005. (Since each subsequent 9 year incremental reduction toward attainment would have to account for adjustments in the base year inventory because of noncreditable reductions, actual reductions would vary somewhat from those shown here.)

Assume that the same area is classified Serious for the 8-hour NAAQS. Under one of our proposed options for such an area, the area would be required to submit an RFP plan in 2006 that shows (for the 6-year period from the end of 2002 to the end of 2008) an 18 percent reduction from a 2002 base year. The 1-hour NAAQS ROP schedule thus overlaps the 8-hour one, which begins in base year 2002 and continues to year 2013. As the same 1-hour Severe-15 area transitions to an 8-hour serious nonattainment area, overlap occurs during years 2002 through 2005. During this interval, the area will complete its last 9 percent incremental reduction in year 2005 for its 1-hour obligation while at the same time beginning to meet the 8-hour obligation of 18 percent by 2008. Therefore, between 2002- 2005, the area will need to get (670 t/d − 580 t/d =) 90 t/d reductions to meet its 1-hour obligation. The area would also be required to get between 2002- 2008 an 18 percent reduction from the 2002 base inventory of 670 t/d which equals a 121 t/d in reductions. However, since the 90 t/d is already obtained for the 2002- 2005 period, the area need only get an additional (121 t/d − 90 t/d =) 31 t/d reductions to meet the 8-hour obligation from 2005 out to 2008. Therefore, if this area had not actually submitted a 1-hour ROP plan that covered the 2002- 2005 period, and it submitted its 8-hour RFP plan that achieves the 121 t/d reduction, it would be deemed to have met its 1-hour ROP obligation, provided that the RFP plan insured that 90 t/d would be achieved by 2005.

Appendix B to Preamble—Glossary of Terms and Acronyms

bump-up Reclassify to higher classification
CAA Clean Air Act
CAAA 1990 Clean Air Act Amendments
CFR Code of Federal Regulations
CMSA Consolidated Metropolitan Statistical Area
EAC Early Action Compacts
EPA Environmental Protection Agency
I/M Inspection and Maintenance Area
LAER Lowest achievable emission rate
LNB Low NO_X Burner
MCR Mid-course review
MPO Metropolitan Planning Organization
NAAQS National Ambient Air Quality Standards
NO_X Nitrogen oxides
NSR New source review
NTAA National Tribal Air Association
NTTAA National Technology Transfer Advancement Act of 1995
OMB Office of Management and Budget
OTR Ozone Transport Region
PAMS Photochemical Assessment Monitoring Stations
ppm Parts per million
PSD Prevention of significant deterioration
RACM Reasonably available control measures
RACT Reasonably available control technology
RFG Reformulated gasoline
RFP Reasonable further progress
ROP Rate of progress
SBA Small Business Administration
SCR Selective Catalytic Reduction
SIPs State implementation plans
TAR Tribal Authority Rule
TAS Treatment in the same manner as a State
t/d Tons per day
TEA- 21 Transportation Equity Act for the Twenty-first Century
UMRA Unfunded Mandates Reform Act of 1995
VCS Voluntary consensus standards
VOC Volatile organic compound

List of Subjects

40 CFR Part 50

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

40 CFR Part 51

Air pollution control, Intergovernmental relations, Ozone, Particulate matter, Transportation, Volatile organic compounds.

40 CFR Part 81

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

Authority: 42 U.S.C. 7408; 42 U.S.C. 7410; 42 U.S.C. 7501- 7511f; 42 U.S.C. 7601(a)(1); 42 U.S.C. 7401.

Dated: April 15, 2004.

Michael O. Leavitt,

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.*

■ 2. Section 50.9 is amended by revising the second sentence of paragraph (b) to read as follows:

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

* * * * *

(b) * * * The 1-hour NAAQS set forth in paragraph (a) of this section will no longer apply to an area one year after the effective date of the designation of that area for the 8-hour ozone NAAQS pursuant to section 107 of the Clean Air Act. * * *

* * * * *

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.

■ 4. Part 51 is amended by adding a new subpart X to read as follows:

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

Sec.
51.900 Definitions.
51.901 Applicability of part 51.
51.902 Which classification and area planning provisions of the CAA shall apply to areas designated nonattainment for the 8-hour NAAQS?
51.903 How do the classification and attainment date provisions in section 181 of subpart 2 of the CAA apply to areas subject to § 51.902(a)?
51.904 How do the classification and attainment date provisions in section

172(a) of subpart 1 of the CAA apply to areas subject to § 51.902(b)?
51.905 How do areas transition from the 1-hour NAAQS to the 8-hour NAAQS and what are the anti-backsliding provisions?
51.906 [Reserved]
51.907 For an area that fails to attain the 8-hour NAAQS by its attainment date, how does EPA interpret sections 172(a)(2)(C)(ii) and 181(a)(5)(B) of the CAA?
51.908 What is the required timeframe for obtaining emission reductions to ensure attainment by the attainment date?
51.909- 51.916 [Reserved]

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

§ 51.900 Definitions.

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

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

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

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

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

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

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

(1) Reasonably available control technology (RACT).

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

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

(4) Rate of Progress (ROP) reductions.

(5) Stage II vapor recovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 51.901 Applicability of part 51.

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

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

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

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

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

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

TABLE 1.—CLASSIFICATION FOR 8-HOUR OZONE NAAQS FOR AREAS SUBJECT TO § 51.902(A)

Area class		8-hour design value (ppm ozone)	Maximum period for attainment dates in state plans (years after effective date of nonattainment designation for 8-hour NAAQS)
Marginal	from	0.085	3
	up to [1]	0.092	
Moderate	from	0.092	6
	up to [1]	0.107	
Serious	from	0.107	9
	up to [1]	0.120	
Severe-15	from	0.120	15
	up to [1]	0.127	
Severe-17	from	0.127	17
	up to [1]	0.187	
Extreme	equal to or above	0.187	20

[1] but not including.

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

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

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

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

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

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

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

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

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

(a) *What requirements that applied in an area for the 1-hour NAAQS continue to apply after revocation of the 1-hour NAAQS for that area?* (1) *8-Hour NAAQS Nonattainment/1-Hour NAAQS Nonattainment.* The following requirements apply to an area designated nonattainment for the 8-hour NAAQS and designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS for that area.

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

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

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

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

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

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

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

(3) *8-Hour NAAQS Attainment/1-Hour NAAQS Nonattainment—(i) Obligations in an approved SIP.* For an area that is 8-hour NAAQS attainment/ 1-hour NAAQS nonattainment, the State may request that obligations under the applicable requirements of § 51.900(f) be shifted to contingency measures, consistent with sections 110(l) and 193

of the CAA, after revocation of the 1-hour NAAQS; however, the State cannot remove the obligations from the SIP. For such areas, the State may request that the nonattainment NSR provisions be removed from the SIP on or after the date of revocation of the 1-hour NAAQS and need not be shifted to contingency measures subject to paragraph (e)(4) of this section.

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

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

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

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

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

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

(*ii*) Submit a SIP providing for a 3 percent increment of emissions reductions from the area's 2002 emissions baseline; these reductions must be in addition to measures (or enforceable commitments to measures) in the SIP at the time of the effective date of designation and in addition to national or regional measures.

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

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

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

(4) *8-Hour NAAQS Attainment/1-Hour NAAQS Maintenance*—(i) *Obligations in an approved SIP.* For an 8-hour NAAQS attainment/1-hour NAAQS maintenance area, the State may request that obligations under the applicable requirements of § 51.900(f) be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA, after revocation of the 1-hour NAAQS; however, the State cannot remove the obligations from the SIP.

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

(b) *Does attainment of the ozone NAAQS affect the obligations under paragraph (a) of this section?* A State remains subject to the obligations under paragraphs (a)(1)(i) and (a)(2) of this section until the area attains the 8-hour NAAQS. After the area attains the 8-hour NAAQS, the State may request such obligations be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA; however, the State cannot remove the obligations from the SIP.

(c) *Which portions of an area designated for the 8-hour NAAQS remain subject to the obligations identified in paragraph (a) of this section?* (1) Except as provided in paragraph (c)(2) of this section, only the portion of the designated area for the 8-hour NAAQS that was required to adopt the applicable requirements in § 51.900(f) for purposes of the 1-hour NAAQS is subject to the obligations identified in paragraph (a) of this section, including the requirement to submit a maintenance plan for purposes of paragraph (a)(3)(iii) of this section. 40 CFR Part 81, Subpart E identifies the boundaries of areas and the area designations and classifications for the 1-hour NAAQS at the time the 1-hour NAAQS no longer applied to each area.

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

(d) [Reserved]

(e) *What obligations that applied for the 1-hour NAAQS will no longer apply after revocation of the 1-hour NAAQS for an area?*—(1) *Maintenance plans.* Upon revocation of the 1-hour NAAQS, an area with an approved 1-hour maintenance plan under section 175A of the CAA may modify the maintenance plan: To remove the obligation to submit a maintenance plan for the 1-hour NAAQS 8 years after approval of the initial 1-hour maintenance plan; and to remove the obligation to implement contingency measures upon a violation of the 1-hour NAAQS. However, such requirements will remain enforceable as part of the approved SIP until such time as EPA approves a SIP revision removing such obligations. The EPA shall not approve a SIP revision requesting these modifications until the State submits and EPA approves an attainment demonstration for the 8-hour NAAQS for an area initially designated nonattainment for the 8-hour ozone NAAQS or a maintenance SIP for the 8-hour NAAQS for an area initially designated attainment for the 8-hour NAAQS. Any revision to such SIP must meet the requirements of section 110(l) and 193 of the CAA.

(2) *Findings of failure to attain the 1-hour NAAQS.* (i) Upon revocation of the 1-hour NAAQS for an area, EPA is no longer obligated-

(A) To determine pursuant to section 181(b)(2) or section 179(c) of the CAA

whether an area attained the 1-hour NAAQS by that area's attainment date for the 1-hour NAAQS; or

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

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

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

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

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

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

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

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

§ 51.906 [Reserved]

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

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

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

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

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

§ 51.908 What is the required timeframe for obtaining emission reductions to ensure attainment by the attainment date?

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

§§ 51.909–51.916 [Reserved]

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 5. The authority citation for Part 81 continues to read as follows:

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

■ 6. Part 81 is amended by adding and reserving a new subpart E to read as follows:

Subpart E—Identification of Area Designations and Classifications for the 1-Hour Ozone NAAQS as of June 15, 2004 [Reserved]

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