ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[OAR 2003-0079, FRL-7918-6]

RIN 2060-AJ99

Implementation of the 8-Hour Ozone National Ambient Air Quality Standard – Phase 1: Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action on two issues raised in a petition for reconsideration of EPA's rule to implement the 8-hour ozone national ambient air quality standard (NAAQS or standard). In addition, EPA is taking final action to clarify two aspects of that implementation rule. On April 30, 2004, EPA issued a final rule addressing key elements of the program to implement the 8-hour ozone NAAQS (Phase 1 Rule). Subsequently, on June 29, 2004, and September 24, 2004, three different parties each filed a petition for reconsideration of certain specified aspects of the final rule. By letter dated September 23, 2004, EPA granted reconsideration of three issues raised in the petition for reconsideration filed by Earthjustice on behalf of several environmental organizations. On February 3, 2005, we proposed action on two of the issues and today we are taking final action on these two issues: (1) the

applicability of the section 185 fee provisions once the 1-hour NAAQS is revoked, and (2) the timing for determining what is an "applicable requirement" for purposes of anti-backsliding once the 1-hour NAAQS is revoked. On April 4, 2005, we issued a separate proposed rule on new source review (NSR) anti-backsliding, the third issue on which we granted reconsideration, and we plan to issue a final rule by June 30, 2005.

In the February 3, 2005 proposal, we also proposed to revise the Phase 1 Rule in two respects. Today we are taking final action on these two issues. First, we have determined that contingency measures for failure to make reasonable further progress (RFP) or attain by the applicable attainment date for the 1-hour ozone standard are no longer required as part of the State implementation plan (SIP) for as part of the SIP for an area after revocation of that standard. Second, we are adding the requirement to submit attainment demonstrations to the definition of "applicable requirements" in §51.900.

DATES: This final action will be effective on **[insert 30 days from date of publication in the <u>Federal Register</u>]**.

ADDRESSES: 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 (CBI) or other information whose disclosure is restricted by statute. Certain other materials, 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, EPA West (Air Docket), Attention E-Docket No. OAR-2003-0079, Environmental Protection Agency, 1301 Constitution Avenue, N.W., Room B102, Washington, D.C. 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 fax number is (202) 566-1749.

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SUPPLEMENTARY INFORMATION:

I. General Information

This action does not directly regulate emissions sources. Instead it addresses how States should continue to plan to meet the ozone standard as we transition from the 1-hour to the 8-hour ozone NAAQS.

Outline

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Environmental Justice in Minority Populations and Low-Income Populations
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II. Background

On June 2, 2003 (68 FR 32802) we proposed a rule to govern the transition from the 1-hour to the 8-hour NAAQS and implementation of the 8-hour ozone NAAQS. On April 30, 2004 (69 FR 23951), we issued a final rule (Phase 1 Rule), which covered some, but not all, of the program elements in the proposed rule. The Phase 1 Rule covered the following key implementation issues: 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 in achieving ozone reductions as areas transition to implementation of the 8-hour ozone NAAQS; attainment dates for the 8-hour ozone NAAQS; and the timing of emissions reductions needed for attainment of the 8-hour ozone NAAQS. The EPA plans to issue a final rule this summer addressing the remaining issues from the June 2003 proposal (Phase 2 Rule).

Following publication of the Phase 1 Rule, the Administrator received three petitions, pursuant to section 307(d)(7)(B) of the Clean Air Act (CAA) requesting

reconsideration of a number of aspects of the final rule.[1] On September 23, 2004, we granted reconsideration of three issues raised in the Earthjustice Petition. On February 3, 2005 (70 FR 5593), we issued a proposed rule seeking comment on two of the three issues raised in the Petition and proposed two other revisions to the Phase 1 Rule. The purpose of today's action is to take final action on the four issues which were addressed in the February 3, 2005 proposal. First, we are determining that section 185 fees are no longer required in SIPs for a failure to attain the 1-hour NAAQS once the 1-hour NAAQS is revoked. Second, we are determining that the timing for the determination of what is an "applicable requirement" once the 1-hour NAAQS is revoked is June 15, 2004. Third, we are finding that contingency measures are no longer required in SIPs for a failure to make RFP toward the 1-hour standard or attain that standard by the applicable attainment date for the 1-hour standard. Fourth, we are adding the requirement to

[1]The petitions for reconsideration of the Phase 1 Rule were filed by: 1) Earthjustice on behalf of the American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy; 2) the National Petrochemical and Refiners Association and the National Association of Manufacturers; and 3) the American Petroleum Institute, American Chemistry Council, American Iron and Steel Institute, National Association of Manufacturers and the U.S. Chamber of Commerce.

submit an "attainment demonstration" to the list of applicable requirements. On April 4, 2005 (63 FR 17018), we proposed action on a third issue on which we granted reconsideration concerning the continued applicability of the 1-hour NSR program. We intend to take final action on that issue no later than June 30, 2005.

On January 10, 2005, we granted reconsideration of one other issue raised by Earthjustice in their Petition – the overwhelming transport classification for certain areas subject only to subpart 1 of Part D of the CAA. We plan to issue a proposal on this issue this summer. At the same time, we denied reconsideration of the remaining two issues they raised in their Petition concerning the applicability of reformulated gasoline when the 1-hour NAAQS is revoked and whether EPA had removed authority for future redesignations to nonattainment for the 8-hour ozone NAAQS.

We are continuing to review the issues raised in the National Petrochemical and Refiners Association, et al., and American Petroleum Institute, et al., Petitions. Copies of the Petitions for Reconsideration and actions EPA has taken regarding the Petitions may be found at: www.epa.gov/ttn/naaqs/ozone/o3imp8hr and in Air Docket, ID No. OAR-2003-0079. For more detailed background information, the reader should refer to the Phase 1 Rule

(April 30, 2004; 69 FR 23956) and the reconsideration proposal (February 3, 2005; 70 FR 5593).

III. Today's Action

A. Reconsideration of the Portion of the Phase 1 Rule Addressing the Continued Applicability of the Section 185 Fee Provision for Areas that Fail to Attain the 1-Hour NAAQS

1. Background. In the Phase 1 Rule we stated that upon revocation of the 1-hour NAAQS: 1) EPA will no longer make findings of failure to attain the 1-hour NAAQS; 2) EPA will no longer reclassify areas to a higher classification for the 1-hour NAAQS based on a finding of failure to attain; and 3) States are no longer obligated to impose fees under sections 181(b)(4) and 185 of the CAA ("Fee Provisions") in severe or extreme ozone nonattainment areas that fail to attain the 1-hour standard by the area's 1-hour attainment date (69 FR 23984). In the reconsideration proposal (70 FR 5596), we stated that we continued to believe that there is no basis for determining whether an area has met the 1-hour NAAQS once the 1-hour NAAQS has been revoked. Consequently, we stated that since there will no longer be an applicable classification or attainment date, there cannot be a failure to meet such a date, i.e., the Fee Provisions could not be triggered for 1-hour nonattainment areas.

2. Summary of Final Rule. For the reasons stated in the

proposal and in the response to comments, we are adopting the approach we included in the proposal which is that once the 1-hour standard is revoked for an area, the fee provisions in SIPs will not be triggered for a failure of an area to attain the 1-hour NAAQS by its 1-hour attainment date and States will not be required to adopt fee provisions for the 1-hour standard.

3. Comments and Responses

Comment: Several commenters questioned EPA's authority to waive the section 185 fee requirements. Some commenters claimed that such action is contrary to the anti-backsliding provisions of section 172(e) of the CAA which provides that if EPA relaxes a NAAQS, it must provide for controls which are not less stringent than the controls required before such relaxation. One commenter noted that EPA interprets this provision to apply with equal force when a NAAQS is strengthened. Several commenters stated that the proposed waiver is also inconsistent with other rationales offered by EPA for anti-backsliding, i.e., that ozone nonattainment areas are designated and classified by operation of law; that allowing relaxation of controls mandated by subpart 2 would render those controls "prematurely obsolete" in contravention of the Supreme Court's decision regarding the implementation of the 8-hour NAAQS; and that section 175A(d)

of the CAA provides that areas redesignated to attainment can, at most, move mandated measures to be contingency measures, and that this rationale precludes relaxation of the fee provisions after revocation. Another commenter stated that the CAA does not explicitly delegate to EPA the authority to remove provisions enacted by Congress nor does it impliedly authorize it to remove them; consequently the section 185 fee provisions should remain in effect. The commenter stated that EPA's proposal would render "textually explicit" provisions of part D "utterly inoperative," which was prohibited under American Trucking. Another commenter contended the language of the CAA is explicit and does not give EPA discretion to choose to enforce or not enforce a program and EPA thus has no authority to promulgate a rule stating that section 185 is not applicable.

Response: As an initial matter, section 172(e) addresses the situation where EPA has promulgated a less stringent NAAQS and does not directly apply here, where EPA has promulgated a more stringent NAAQS. However, since the statute is silent about what requirements must remain when EPA promulgates a more stringent NAAQS, EPA looked to section 172(e) (as well as other provisions of the CAA) to discern what Congress might have intended in this situation. After reviewing section 172(e) and other provisions of the

statute, EPA concluded that Congress would have intended that control obligations that applied for purposes of the 1-hour NAAQS should remain in place. As EPA explains in response to a similar comment regarding the date for determining "applicable requirements," the commenters misconstrue what section 172(e) requires. Section 172(e) requires EPA to provide for controls not less stringent than those that applied "before such relaxation [of the NAAQS]." Thus, it does not mandate that controls be as stringent as those that could not be required to be imposed until a date after the previous NAAQS no longer exists.

Similarly, our anti-backsliding rule establishes a "cut-off" date for determining which control obligations will continue to apply. We looked at three options for when this "cut-off" date should be – the date of signature of designation rule, i.e., April 15, 2004; the effective date of 8-hour designations, i.e., for most areas June 15, 2004; and the date the 1-hour standard is revoked, i.e., for most areas June 15, 2005. In this final rule, we adopt the effective date of designation for the 8-hour standard as the relevant cut-off date. The requirement to impose section 185 fees cannot exist any earlier than 2006 because the earliest 1-hour attainment date for a severe or extreme ozone nonattainment is November 15, 2005. Thus, we do not

believe that even applying 172(e) directly (which is not the case here) would result in the fee obligation remaining in place after revision of the NAAQS because the requirement to implement the fees does not exist as of the effective date of designation for the 8-hour NAAQS. Additionally, upon revocation of the 1-hour NAAQS, a State may remove from their SIP the provisions for complying with the section 185 fee provision as it applies to the 1-hour NAAQS.

We disagree that this approach is inconsistent with other provisions in the statute that we looked to for purposes of establishing our anti-backsliding approach. We recognized that Congress did not directly speak to the issue of what occurs if a more stringent NAAQS is promulgated, but looked to a variety of statutory provisions to discern Congressional intent. While we did look at the fact that Congress designated and classified areas as a matter of law in 1990, we have not taken the position that such action "codified" the 1-hour standard and left it in place indefinitely. Rather, we believe that under this provision Congress intended the areas classified in 1990 to implement the required controls until such areas attained the ozone standard necessary to protect public health. The 8-hour standard has replaced the 1-hour standard as the ozone standard necessary to protect public health. We believe

that Congress intended these areas to continue to implement mandated control measures but not that they provide for programs keyed to a finding of failure to attain the old standard after that standard no longer applies.

As to the U.S. Supreme Court decision, we first note that in making the quoted statement, the Supreme Court was addressing EPA's determination that no areas would be classified under subpart 2 for purposes of the 8-hour NAAQS and thus that the subpart 2 control requirements would not apply at all for purposes of implementing the 8-hour NAAQS. While the classification scheme we established in our Phase 1 rule for the 8-hour NAAQS is the primary method for addressing the concern that no areas would be subject to subpart 2 for purposes of implementing the 8-hour NAAQS, we agree that the statement carries some weight for purposes of anti-backsliding, particularly where the classification scheme for the 8-hour standard results in many areas being placed in lower classifications than their classifications for purposes of the 1-hour standard. As we stated in the preamble to the Phase 1 Rule, we believe that Congress intended areas with significant pollution problems to retain Congressionally-mandated pollution programs until such time as they attain the ozone NAAQS necessary to protect public health, which is now the 8-hour standard.

Our Phase 1 Rule does not render the subpart 2 provisions "prematurely obsolete" or "utterly inoperative." Rather, they continue to have meaning in two ways. First, the applicable subpart 2 control requirements that were required to be imposed for purposes of the 1-hour standard at the time an area was designated nonattainment for the 8-hour standard continue to apply until the area attains the 8-hour NAAQS. Second, many areas will be classified under subpart 2 for purposes of the 8-hour standard and will be subject to the subpart 2 requirements for purposes of implementing the 8-hour standard. We do not read the Supreme Court decision (or any of the provisions of the CAA that we examined) to mean that Congress intended areas designated nonattainment for the 1-hour standard to remain fully subject to that pre-existing NAAQS, including future requirements whose implementation is dependent on a future determination that the area had not met a revoked standard, even after they begin programs to comply with the revised NAAQS, which is the NAAQS now determined to be necessary to protect public health. Similarly, we don't think that section 175A(d) indicates any Congressional intent to retain the section 185 fee obligation for a failure to attain the 1-hour NAAQS after that standard has been revoked. Because this provision is linked to whether an area attains by its

severe or extreme area attainment date, it would have no meaning for an area redesignated to attainment and thus would not need to be retained as a contingency measure for purposes of a 1-hour ozone maintenance plan under section 175A(d). Because this obligation would not need to be retained as part of a section 175A(d) maintenance plan, we don't believe this provision indicates Congressional intent that the fee obligation be retained once the 1-hour standard is revoked.

Comment: One commenter questioned EPA's statement that because section 185 fees "operate in lieu of reclassification" they should no longer apply since reclassifications will no longer be required. The commenter contended this statement is incorrect because the CAA does not require SIPs to contain provisions for imposition of the section 185 fees in lieu of reclassification for severe and extreme ozone nonattainment areas.

Response: While we disagree with the commenter regarding whether the fees are imposed "in lieu" of reclassification, we need not resolve that issue here. For the same reasons we concluded that areas are not subject to reclassification for the 1-hour standard once it is revoked, we believe that areas should no longer be subject to the section 185 fees provision for failure to meet that standard once it is

revoked. Like reclassification, the section 185 fees are triggered by a failure to attain the standard. Once the 1-hour standard no longer applies (i.e., is no longer the health-based NAAQS), areas are not obligated to meet it and neither the States nor EPA are obligated to conclude whether the area has met it by the attainment date that also no longer applies. Therefore, findings of nonattainment of the 1-hour standard will no longer be made and the 185 fee program would no longer be required.

Comment: One commenter disagreed with EPA's assertion that the fee provisions are linked to whether or not an area has met the 1-hour NAAQS which EPA has determined is no longer needed to protect public health. The commenter stated that regardless of whether the 1-hour NAAQS is still needed to protect public health, the CAA requires that controls required for the 1-hour NAAQS must not be relaxed.

Response: As discussed above, we do not believe the timing provision of section 172(e) would mandate retention of the section 185 fee obligation where EPA has promulgated a less stringent NAAQS.

Comment: Several commenters disagreed with EPA's assertion that section 185 fees are no longer needed because States should focus their resources on the 8-hour NAAQS and it would be counterproductive to continue efforts linked to the

1-hour NAAQS.

Response: We believe that imposition of the section 185 fees would be counterproductive because instead of focusing limited resources on attainment of the 8-hour NAAQS as expeditiously as practicable, States would need to divert some of those resources to monitoring compliance with a standard that is no longer needed to protect public health. If fees were to be triggered, States would have to devote resources to the further development of plans focused on meeting the 1-hour standard based on a determination that an area had failed to achieve a non-existent NAAQS. We believe this is an unwise use of resources when the 1-hour standard no longer applies.

A determination of failure to attain in the future, accompanied by additional planning obligations focused on attaining a standard that no longer applies, would detract from efforts to plan for and implement the new health-based standard. Once controls are adopted for the 8-hour NAAQS, additional 1-hour planning would be redundant, at a minimum, and could result in efforts beyond those necessary to meet the applicable health-based standard.

Comment: Several commenters disagreed with EPA's assertion that the CAA requires a finding of failure to attain before the fee provisions are triggered. The commenters stated

that the fees are based on whether an area has attained, which can be determined by comparing monitored air quality data with the standard for the relevant time period. One commenter noted that for areas that will be submitting an outstanding 1-hour attainment demonstration, EPA can and must determine whether the demonstration shows attainment with the 1-hour NAAQS.

Response: Whether or not the fees provision is triggered by a finding of failure to attain or simply through an examination of monitoring data, is not a decisive factor for determining whether the fee obligation should be retained under the anti-backsliding provisions. As provided above, we do not believe there is any Congressional intent that this obligation remain in place.

While we retained the obligation to submit outstanding 1-hour attainment demonstrations, we did so primarily for the purpose of ensuring that as areas began the transition to implementation of the 8-hour NAAQS, the areas achieved the emissions reductions that Congress contemplated they would make on a specific near-term schedule. A determination that a specific mix of control measures demonstrates attainment at a future date is not the same as a reviewing monitoring data after the attainment date to determine whether an area in fact attained. The purpose of

retaining the outstanding 1-hour attainment demonstration obligation is to ensure that in the short-term, prior to submission of 8-hour SIPs, areas continue to make progress in cleaning their air.

Comment: Several commenters urged EPA to retain the section 185 fee provisions to provide incentives for businesses in the worst nonattainment areas to reduce emissions in order to attain or make RFP toward the NAAQS. One commenter disagreed with EPA's argument that it would be counterproductive to continue efforts linked to whether or not an area met the 1-hour NAAQS. Further, the commenter stated that the fee provisions provide an economic incentive for major sources to achieve 20 percent reductions in emissions in areas that are violating the NAAQS. Another commenter stated that the section 185 fees should be retained because they create a strong incentive for major sources to reduce emissions and ensure that local areas and States take actions to reduce emissions and improve air quality. The commenter stated the section 185 fees create tremendous benefits at the SIP development stage since major sources can and have become forceful advocates for emissions reductions from other sources based on an economic interest in avoiding this charge to pollute. One commenter disagreed with EPA's assertion that areas should focus their resources

on the 8-hour NAAQS rather than the 1-hour NAAQS because they believe that Congress' intent was to impose fees as incentives while still requiring emissions reductions regardless of whether the reductions are to achieve the 8-hour or 1-hour NAAQS. Some commenters noted that the fees would generate additional resources for planning and control efforts and would discourage emissions of ozone precursors. Finally, one commenter stated that the section 185 fees would provide substantial resources to States with difficult air pollution problems.

Response: As stated above, EPA does not believe that Congress directly spoke to which obligations must remain where EPA promulgates a more stringent standard. Furthermore, we do not believe that Congress intended the fee obligation to continue for a failure to meet a standard once that standard has been replaced. Because the section 185 fees that would apply for failure to attain the 1-hour NAAQS are linked to whether an area has attained the 1-hour standard, any efforts to eliminate fees imposed for a failure to attain the 1-hour standard would be focused on attainment of the 1-hour standard not the 8-hour standard, which is the standard necessary to protect public health. Thus, if we retained the fee provisions for purposes of failure to attain the 1-hour standard, States would divert

resources from planning for the 8-hour standard to planning efforts for the 1-hour standard based on a future determination that the area had not met a revoked standard.

The incentives for major sources to reduce emissions remain. The section 185 fee provisions remain in place for purposes of the 8-hour standard, and thus sources will have an incentive to reduce emissions to ensure areas meet the 8-hour standard. We note that it is speculative to assume that States would use fees generated under this provision for purposes of planning and control efforts beyond those already funded by the State. In any event, we see no Congressional intent to impose these fees for that purpose. That reason, absent a compelling reason related to attaining the 8-hour NAAQS, is not a sufficient basis to retain the requirement.

Comment: One commenter also stated that EPA did not provide support in the record for its decisions on how to implement the 8-hour standard, rendering its decision arbitrary and capricious. In particular, the commenter claimed EPA provided no support for its decision to eliminate the fee provisions nor showed that it would be counterproductive to retain the fee obligation for severe and extreme 1-hour nonattainment areas that fail to attain the 1-hour standard by their attainment date.

Response: This commenter, as well as others, contend that retention of the fee provisions for failure to attain the 1-hour standard would be beneficial because their existence would spur stationary sources to advocate tighter controls in order to avoid the repercussions of a failure to attain. It is logical to assume that these same fee provisions, if triggered, would spur stationary sources to pressure areas to focus on attainment of the 1-hour standard (to relieve the sources of the fee obligation). Planning activities for attaining a standard take a commitment of time and money. While reductions for purposes of the 8-hour standard may result in benefits for the pre-existing 1-hour standard (and vice versa), other activities, such as modeling for attainment, will not. Time and resources spent modeling and planning for attainment of the 1-hour standard will detract from planning efforts for the 8-hour standard.

B. Reconsideration of the Portion of the Phase 1 Rule Establishing the Time for Determining Which 1-Hour Obligations Remain Applicable Requirements

1. Background. The Phase 1 Rule provided that the "applicable requirements" would be those 1-hour control measures that applied in an area as of the date of signature

of the Phase 1 Rule (i.e., April 15, 2004).[2] In the June 2003 proposal (68 FR 32821), EPA had proposed that the applicable requirements would be those that applied as of the effective date of the 8-hour designations (i.e., for almost all areas, June 15, 2004). The draft regulatory text released for public comment in August 2003 defined the applicable requirements as those 1-hour requirements that applied as of the date of revocation of the 1-hour NAAQS (i.e., for almost all areas, June 15, 2005). (See e.g., 51.905(a) of Draft Regulatory Text.) In the reconsideration proposal, we proposed June 15, 2004 as the date for determining which 1-hour control measures continue to apply in an area once the 1-hour standard is revoked, which was consistent with our June 2, 2003 proposal.

2. Summary of Final Rule. We are adopting the approach that we proposed, which is that the effective date of the 8-hour designations (i.e., for almost all areas, June 15, 2004) is the date for determining which 1-hour control

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[2] The Phase 1 Rule provides in §51.900(f) that: "Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the areas'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..." (69 FR 23997). Phase 1 of the final rule to implement the 8-hour ozone NAAQS was signed by the Administrator on April 15, 2004.

measures continue to apply in an area once the 1-hour standard is revoked. An area's 1-hour designation and classification as of June 15, 2004 would dictate what 1-hour obligations remain "applicable requirements" under the anti-backsliding provisions of the Phase 1 Rule. We believe this date is consistent with the trigger date for other obligations for implementation of the 8-hour ozone NAAQS, such as the attainment date provisions of the Phase 1 Rule and the date for submission of planning SIPs as proposed in the June 2003 proposal.

The final introductory regulatory text for §51.900(f) has been revised from the proposal to use the defined term "designation for the 8-hour NAAQS" (see §51.900(h)) to refer to the effective date of designation for an area.

3. Comments and Responses

Comment: One commenter stated that the proposed revocation of the 1-hour NAAQS violates the CAA and will be invalidated on remand. The commenter further stated that the entire "applicable requirements" rubric stands with no legal basis.

Response: We are not reconsidering in this action our revocation of the 1-hour standard or the applicable requirements "rubric." Therefore, we do not respond to comments on these issues.

Comment: One commenter noted that any cutoff date for anti-

backsliding protection violates section 172(e) of the CAA that provides that EPA's rules must provide for controls which are not less stringent than the controls applicable to such areas designated nonattainment before relaxing (or strengthening) a NAAQS. The commenter stated that section 172(e) requires that any area designated nonattainment for the 1-hour NAAQS before relaxation (or here, revocation) of that standard must be subject to controls at least as stringent as those that would apply to the area under the 1-hour NAAQS. Thus, the commenter stated that such areas must continue to adopt and implement the level of controls mandated by the CAA for 1-hour nonattainment areas as they would in the absence of revocation. The commenter stated that this means that areas are subject to additional requirements in the case of a bump up to a higher classification, whether the bump up occurred before or after the revocation. The commenter stated that the proposal is also inconsistent with other rationales offered by EPA for anti-backsliding, i.e., that ozone nonattainment areas are designated and classified by operation of law, and that allowing relaxation of controls mandated by subpart 2 would render those controls "prematurely obsolete" in contravention of the Supreme Court's decision in Whitman v. American Trucking Assoc., 531 U.S. 427 (2001).

Response: Initially, section 172(e) does not apply by its own terms where, as here, EPA has adopted a new, more stringent NAAQS. Congress did not directly address how areas should transition to a more stringent NAAQS. However, as we stated in the preamble to the Phase 1 Rule, we looked to section 172(e) of the CAA, as well as other statutory provisions and the Supreme Court decision in Whitman v. American Trucking Assoc., 531 U.S. 427 (2001) to determine how we thought Congress intended such a transition should occur. We concluded that, where we have adopted a more stringent NAAQS, Congress would not have intended areas to be able to loosen applicable control requirements as they transition to implementation of that more stringent NAAQS. This conclusion was the basis for our anti-backsliding approach.

We note that contrary to the statements of the commenter, section 172(e) does provide a cut-off date. It provides that control requirements should not be less stringent than the controls that applied "before such relaxation." This timing provision places a limit on which controls should be considered. This phrase could possibly be interpreted in several ways – e.g., the time the relaxed standard is promulgated, the time areas must begin to implement the revised standard, or the time the more

stringent standard no longer applies. However, we do not believe that it means that all requirements that could ever be triggered for such a standard remain permanently in place. That position is tantamount to saying that by this provision Congress intended to retain the standard itself. We do not be believe that Congress would have done so in such an oblique manner. In this case, we took comment in the June 2, 2003 proposal and the draft regulatory text that we made available on August 6, 2003 on several options for what the timing for determining applicable requirements should be. We have concluded that the control obligations that should remain in place are those that applied as of the effective date of the 8-hour designation for an area. Furthermore, for the same reasons we stated in response to comments on the section 185 fee issues, we do not believe our interpretation is inconsistent with our analysis of the other statutory provisions that we looked to for guidance on what Congress may have intended.

Comment: A few commenters stated that the date for determining "applicable requirements" should be June 15, 2005. One commenter stated that June 15, 2005 would contain the most recent control measures and reduce the extent of backsliding that will occur due to revocation of the 1-hour standard. The commenter further stated that the measures

that should apply for purposes of anti-backsliding should include all measures that were submitted to EPA for review as of June 15, 2005. Another commenter who voiced support for June 15, 2005 as the most appropriate date for determining applicable requirements noted that choosing an earlier date would provide a "benefit" to those communities that have gamed the SIP process to the detriment of those communities who took their responsibilities earnestly. Further, the commenter stated that the earlier date provides a potential future incentive for States to delay the SIP process as long as possible with hopes for future loopholes that would make such actions unnecessary.

Response: We disagree with the commenter that adopting June 15, 2005 as the date for determining "applicable requirements" would ensure that the most recent control measures would apply. In fact, we believe that there will be no substantive difference between the selection of June 15, 2004 and June 15, 2005 because no areas have been reclassified in that 1-year period. Under our anti-backsliding rule, States remain obligated to adopt and implement any control obligations that applied for the area's 1-hour classification as of the effective date of designations for the 8-hour NAAQS. Thus, each area's control requirements are dependent on the area's 1-hour

classification as of the date for determining the area's applicable requirements. Areas must retain control obligations applicable on that date whether or not the area had satisfied the obligation by that date. It appears that the commenter misinterprets the Phase 1 Rule to allow areas that have not yet adopted control obligations to be relieved of the obligation to adopt such controls, which is not the case (69 FR 23972).

We note that an area's applicable requirements are also related to the area's 1-hour designation as of the date for determining applicable requirements. And, while EPA has proposed to redesignate several areas (Atlanta, Cincinnati, Phoenix) from nonattainment to attainment for purposes of the 1-hour standard, there is only one substantive difference between the "applicable requirements" that would apply to an area designated nonattainment for the 1-hour standard and 1-hour attainment areas subject to a section 175A maintenance plan. That difference is that a maintenance area that has moved an "applicable requirement" to its contingency plan prior to the date for determining the "applicable requirements" may leave that obligation in its contingency plan and need not begin to implement the program if the program is not required based on the area's

8-hour classification.[3] For such an area, the selection of June 15, 2005 would provide additional time for areas to move measures that are currently being implemented to the area's contingency plan. Thus, if any argument could be made, it would be that the selection of June 15, 2005 would provide 1-hour ozone nonattainment areas that achieve the 1-hour standard more time to be eligible for redesignation to attainment. This could result in less stringent controls being implemented because areas redesignated to attainment are able to stop implementation of one or more control measures and move those measures to the contingency plan.

Comment: A number of commenters disagreed with making June 15, 2004, rather than April 15, 2004, the date for determining which "applicable requirements" apply to an area. One commenter stated that April 15, 2004 represents the point in time when States were on notice that they needed to shift their efforts and adopt measures to attain the 8-hour not the 1-hour NAAQS. The commenter further stated that the responsibility and timelines for implementing 8-hour nonattainment measures were triggered for purposes of the new standard on April 15, 2004, in accordance with settlement agreements with environmental

[3]See memorandum dated May 12, 2004, entitled "1-Hour Ozone Maintenance Plans Containing Basic I/M Programs" from Tom Helms and Leila H. Cook.

groups in the American Lung Association litigation over the issue (American Lung Association v. EPA (D.D.C. No. 1:02CV02239).

Response: States have been aware since July 1997, when the 8-hour NAAQS was promulgated, that they needed to begin to consider programs to meet that standard. While April 15, 2004 is the date that the final Phase 1 and designation rules were signed, we do not believe that the date of signature is more meaningful than the effective date of the rulemaking action. For the reasons provided in the reconsideration proposal, we believe that the effective date of designation is more consistent with other obligations under the Phase 1 Rule and is, therefore, more consistent and appropriate. We note that the settlement referenced by the commenter only established an obligation for EPA to sign no later than April 15, 2004, a final rule designating areas for the 8-hour standard. That settlement did not address the timelines and responsibilities for implementing the 8-hour ozone NAAQS.

Comment: One commenter stated that although the date change from April 15, 2004 to June 15, 2004 represents only a couple of months, the implications are significant for two areas that were placed in a more stringent classification during that time frame. The commenter stated that subpart

2's planning and implementation burdens fall disproportionately on stationary sources whether or not stationary sources are the primary contributor to nonattainment, without moving either of the two areas impacted by the date change (i.e., Beaumont/Port Arthur and the San Joaquin Valley) any closer to attaining either the 1-hour or 8-hour NAAQS. The commenter further stated that Beaumont/Port Arthur's nonattainment issues stem from ozone transport from the Houston/Galveston nonattainment area, and that mobile sources comprise as much as 60 percent of the emissions inventory in the San Joaquin Valley.

Response: We agree that shifting the date from April 15, 2004 to June 15, 2004 has implications for both the Beaumont/Port Arthur and the San Joaquin Valley nonattainment areas which were classified between those two dates. For the Beaumont/Port Arthur area, the reclassification has resulted in a number of new requirements. Only the new reasonably available control technology (RACT) requirements, which must now apply to smaller sources with a potential to emit 50 tons/year or more down from 100 tons/year, directly impact industrial sources. Other new requirements, such as the clean fuel fleets requirement, instead impact emissions from mobile sources. Thus, we do not believe the requirements that were

triggered by reclassification disproportionately apply to stationary sources.

We note, however, that approximately 59 percent of the Beaumont/Port Arthur area's NO_x emissions and 55 percent of the area's VOC emissions come from local stationary sources.[4] Consequently, any attainment plan for the Beaumont/Port Arthur area would have to include stationary source controls.

While we agree that the Beaumont/Port Arthur area is sometimes affected by emissions transported from Houston, at other times the Beaumont/Port Arthur area ozone problem is primarily the result of locally-generated emissions. In Texas' latest proposed revision to the SIP for the Beaumont/Port Arthur area, Texas estimated that more than half of the 1-hour exceedence days were influenced significantly by local emissions.[5] This is not surprising since Beaumont/Port Arthur is home to a large number of petrochemical manufacturers. Thus, we do not agree that the additional local control obligations that would apply based on a serious vs. moderate classification would not result in reductions that will improve air quality in the

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[4]Texas SIP revision that was submitted on November 16, 2004, see pages 2-5.

[5]Texas SIP revision that was submitted on November 16, 2004, see pages 4-5.

Beaumont/Port Arthur area.

In the San Joaquin Valley, shifting the date means that "applicable requirements" for the San Joaquin Valley ozone nonattainment area are the "extreme" 1-hour ozone nonattainment requirements as opposed to the requirements that applied based on a "severe" 1-hour classification. Although EPA generally agrees with the comment that mobile sources contribute approximately 60 percent towards the ozone problem in the Valley,[6] we do not agree that requiring San Joaquin to adopt and implement the 1-hour extreme control requirements places a new disproportionate burden on stationary sources located in the Valley. While the contribution of emissions from stationary sources to the overall emissions in the San Joaquin Valley is less than that for mobile sources,[7] stationary sources remain a critical part of the overall air pollution control strategy needed by the State and the San Joaquin Valley Unified Air Pollution Control District to achieve attainment.

Section 182(e)(4) of the CAA allows SIPs for areas classified extreme to adopt traffic controls during heavy

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[6]Calculated from typical summertime day mobile source NO_x and VOC emissions inventory for 2000 as a percent of the total 2000 NO_x and VOC emissions. Extreme Ozone Attainment Demonstration Plan, San Joaquin Valley Air Basin (October 2004), Section 3. Available at http://www.valleyair.org/.

[7]Id. at p. 3-11, Table 3-1.

traffic hours to reduce the use of high polluting vehicles or heavy-duty vehicles, notwithstanding any other provisions of the CAA. Furthermore, on-road mobile source emission standards continue to improve through EPA and State regulations, and will result in emissions reductions over time as newer vehicles replace older vehicles. Additionally, new fuel and emission standard requirements for nonroad diesel engines were finalized by EPA last year and will achieve substantial reductions through time from the non-road diesel engine sector. Reducing VOC emissions from the large number of area sources is also an important part of the overall ozone control strategy for the San Joaquin Valley.[8]

Comment: One commenter stated that EPA should apply anti-backsliding measures only where they will assist an area in attaining or maintaining the 8-hour NAAQS.

Response: The EPA established its general anti-backsliding approach in the Phase 1 Rule and is not reconsidering here and therefore not responding to comments on the general issues raised by the commenter.

Comment: One commenter stated that since San Joaquin's attainment date under the 8-hour NAAQS is now 2013, there is no longer any reason to require imposition of the control

[8]Id. at p. 3-9, Table 3-1.

measures required for the extreme classification contained in the approved bump up SIP for the 1-hour NAAQS by 2010. The commenter stated that retaining these requirements will unnecessarily restrict business operations in the area without providing commensurate environmental benefit. Several commenters asserted that retaining the April 15, 2004 date would be consistent with the unique circumstances in the San Joaquin Valley. They claimed that San Joaquin's 2005 emissions inventories for NO_x and reactive organic gases are mainly comprised of mobile source emissions and that these emissions were a key reason the area was unable to demonstrate attainment of the 1-hour ozone NAAQS by the 2005 deadline. The commenters believe that continued implementation of the 1-hour severe area requirements in addition to various mobile source emission control measures which San Joaquin has adopted will satisfy EPA's objective that they make expeditious progress toward attainment of the 8-hour NAAQS.

Response: At the State's request, EPA recently reclassified the San Joaquin area to extreme. The EPA disagrees with the commenter that because San Joaquin now has a later attainment date (2013 for the 8-hour standard compared with a 1-hour extreme area attainment date of 2010), there is no longer a need to require the extreme area requirements. We

do not view the longer attainment period for the 8-hour standard as a basis for delaying emission reductions that were required for purposes of the 1-hour standard. The State's request for a voluntary bump up to extreme was based on the area's inability to demonstrate attainment of the 1-hour standard by 2007. Ozone is a persistent problem in the San Joaquin Valley where, over the past 30 years, monitors in the San Joaquin Valley have measured exceedences of the 8-hour standard level between approximately 90 and 140 days per year.[9] This serious and persistent ozone problem in the area supports continuing to require the area to implement the more stringent obligations that apply under the area's extreme classification for the 1-hour standard. In another response to comment, we provide more detail regarding the extreme areas requirements and the "circumstances" of the San Joaquin area, specifically responding to the commenters' allegations relating to mobile source emissions. As stated in our proposed reconsideration notice, EPA believes that implementing the additional 1-hour requirements of the higher (extreme) classification serves to ensure continued progress toward reducing ambient ozone levels and meeting

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[9]See California Air Resources Board's 8-Hour Ozone Trends Summary for the San Joaquin Valley Air Basin at: http://www.arb.ca.gov/adam/cgi-bin/db2www/polltrendsb.d2w/Branch.

the 8-hour ozone standard.

Comment: One commenter disagreed with EPA's statement that June 15, 2004 is more consistent with the other aspects of the Phase 1 Rule that are keyed to the effective date of the designations rule rather than the signature date. The commenter stated that nothing about EPA's use of the phrase "time of designation" suggests that it was intended to mean the effective date of designations. The commenter agreed with EPA’s statement that it is important for areas to know "early in the process" which 1-hour requirements will remain in place for implementation of the 8-hour NAAQS, and claimed that changing the cutoff date now will impede the San Joaquin Valley Air Pollution Control District's progress toward developing an attainment plan. Another commenter stated that EPA's use of the date of signing of designations is consistent with dates used elsewhere in the Phase 1 Rule and should be retained.

Response: The phrase “designation for the 8-hour NAAQS” is defined in §51.900(h) of the Phase 1 Rule to mean “the effective date of the 8-hour designation for an area.” We are aware of only one purpose for which the date of signature of the designation rule is used in the Phase 1 Rule. Section 51.902 indicates that an area’s 1-hour design value as of the date of signature of the designation rule

will govern whether the area is subject to the classification provisions of subpart 2 of part D of title I of the CAA, or whether it is subject only to the obligations under subpart 1. Since an area's classification occurs "by operation of law" at the time of designation and because such classification is included in the tables promulgated in the designation rule, we could not use a date later than the date of signature of the designation rule as the date for determining whether an area would be classified under subpart 2. The "effective date of designation" is used (i.e., the phrase "designation for the 8-hour standard") for purposes of determining an area's attainment date. In addition, our proposed rule concerning planning obligations for the 8-hour standard (the regulatory text which was released for comment at the same as the regulatory text for the Phase 1 Rule), linked SIP submission obligations to the effective date of designation for the 8-hour NAAQS.

C. Contingency Measures in SIPs for the 1-Hour Ozone Standard

1. Background. Sections 172(c)(9) and 182(c)(9) of the CAA require that nonattainment area SIPs contain contingency measures that would be implemented if an area fails to attain the NAAQS or fails to make RFP toward attainment. In the reconsideration proposal, EPA recognized that it had not

addressed the continued application of 1-hour section 172(c)(9) contingency measures in the Phase 1 Rule. We proposed that once the 1-hour standard is revoked contingency measures for the 1-hour standard will no longer be required (e.g., if the State had not yet submitted them) and contingency measures for the 1-hour standard that had been approved in the SIP may be removed.

2. Summary of Final Rule. We are adopting the approach that we proposed, which is that contingency measures under sections 172(c)(9) and 182(c)(9), which are triggered upon a failure to attain the 1-hour standard or to meet reasonable progress milestones for the 1-hour standard, will no longer be required as part of the SIP once the 1-hour NAAQS is revoked. This means that after revocation of the 1-hour standard, an area that has not yet submitted a 1-hour attainment demonstration or a specific 1-hour RFP SIP would no longer be required to submit contingency measures in conjunction with those SIPs. Also, areas with approved section 172 and 182 contingency measures could remove them from their SIP.

3. Comments and Responses

Comment: Several commenters claimed that dropping the requirement for contingency measures for failure to attain or make progress toward attainment of the 1-hour ozone NAAQS

is unlawful, arbitrary and capricious and violates the anti-backsliding provisions of section 172(e) by relaxing explicit control requirements for pre-existing 1-hour nonattainment areas. Additionally, several commenters claimed the proposal illegally abrogates subpart 2's contingency measure requirements imposed on such areas "as a matter of law" and renders those requirements "prematurely obsolete" in opposition to the Supreme Court ruling in Whitman v. American Trucking Assoc., 531 U.S. 427 (2001)

Response: As noted in response to other comments, section 172(e) does not explicitly apply where EPA has promulgated a more stringent NAAQS. Furthermore, section 172(e) contemplates that there is a cut-off regarding which control obligations should continue after revision of a NAAQS. Where contingency measures have not yet been triggered, we believe it is consistent with Congressional intent to allow areas to remove those measures (or to modify the trigger for such measures to reflect the 8-hour standard). Furthermore, since EPA will no longer make findings of failure to attain or make progress with respect to the 1-hour NAAQS, the obligation to trigger future contingency measures for such 1-hour failures would never occur. With respect to the "as a matter of law" argument and the commenters' reliance on the Supreme Court's ruling in Whitman, we refer to our

response to comments on this similar issue regarding the section 185 fees.

Comment: Several commenters claimed the proposal violates section 110(l) by interfering with applicable requirements for attainment and RFP and without a showing that such measures are not needed for timely attainment and progress toward attainment.

Response: As we have clarified in the regulatory text, States will need to submit SIP revisions to remove the contingency measures from their SIPs or to revise a trigger that is linked to a violation of the 1-hour NAAQS. In doing so, the State would need to demonstrate that the modification would not interfere with attainment, reasonable progress or any other applicable requirement for purposes of the 8-hour NAAQS. However, since any future contingency measures will never be triggered, EPA does not believe such SIP revisions would interfere with any applicable requirements.

Comment: One commenter contended that because the proposal allows the dropping of 1-hour contingency measures, this may imply that contingency measures that have been implemented could be dropped.

Response: If a State has already implemented a contingency measure, and such measure was considered a "discretionary

control measure" after implementation under the Phase 1 Rule (i.e., is not an "applicable requirement"), the State could modify its SIP to remove such measure (as it could for any "discretionary control measure"), but would need to make a demonstration under 110(l) that the modification would not interfere with attainment, reasonable progress or any other applicable requirement for purposes of the 8-hour NAAQS. EPA intends to issue guidance for States to follow to ensure that SIP revisions are consistent with section 110(l).

Comment: Several commenters argued that the proposal is inconsistent with EPA's decision to retain requirements for the 1-hour attainment and rate of progress (ROP) plans and the rationale for that decision ("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"). One commenter contended that contingency measures are an integral part of the attainment demonstration and the ROP plan and, therefore, if the States must meet the attainment demonstration and ROP plan obligations, they must also satisfy contingency measure requirements.

Response: As we stated in the preamble to the final Phase 1 Rule, we felt that Congress intended that areas continue to implement mandatory control measures but that Congress'

intent with regard to planning SIPs was not as clear (69 FR 23874-75). As a policy matter, we concluded that it made sense to require areas to continue to meet 1-hour ROP obligations because we believed the obligation did not create a significant burden on areas and it made sense that areas that had not met this obligation were not relieved from achieving ROP reductions and thus were treated the same as areas that had fulfilled their statutory obligation. We reached a slightly different result for purposes of outstanding 1-hour attainment demonstrations – providing States with flexibility to adopt alternatives – but relied on the same rationale for retaining the obligation. Additionally, we noted that one of the primary focuses of the anti-backsliding provisions is to keep areas on track for making reductions as they develop SIPs to meet the 8-hour standard. For all of these reasons, we don't believe that areas are obligated to retain the contingency measure obligation. The adoption and implementation of the 1-hour ROP and attainment demonstrations (or an alternative under 51.905(a)(1)(ii)) will ensure that progress is made while areas transition. Once plans are adopted and approved for purposes of the 8-hour standard, including 8-hour contingency measures, those plans by definition will be what is necessary to protect public health and the environment

and 1-hour contingency measures that kick in at some future date for the 1-hour standard will not be necessary to achieve that goal (however, contingency measures are required for purposes of the 8-hour standard). Furthermore, this approach is consistent with our goal of shifting our focus to the 8-hour standard and not continuing efforts to monitor compliance with the pre-existing 1-hour standard.

Comment: One commenter argued that under section 172(e), EPA must enforce controls no less stringent than the 1-hour ozone standard for areas that have never achieved the standard, including section 182(c)(9) contingency measures. The commenter contends that EPA's implementation of the 8-hour standard constitutes a relaxation of the standard because (a) certain areas had higher classifications under the 1-hour standard than they have under the 8-hour standard; and (b) EPA policy allows relaxation of offset ratios, major source definitions and removal of contingency fees. Thus, they contend that EPA must promulgate a set of control measures "no less restrictive than under the old standard."

Response: The commenter raises an issue that is not being reconsidered in this rulemaking. At the time of promulgation of the 8-hour NAAQS and consistently since that time, EPA has taken the position that the 8-hour NAAQS is a

more stringent standard. Thus, although not at issue in this rulemaking, we note that the fundamental premise of the comment is inaccurate. The stringency of a standard is determined by looking at the standard itself, which has three components: (1) the averaging time (i.e., 8 hours); (2) level (.08 ppm); and (3) form (the 3-year average of the fourth-high annual reading at a specific monitor). Once a standard is established, areas are required to meet that standard and a determination of whether the standard has been met is based on air quality monitoring data. How a standard is implemented, does not alter the standard in any way although it could have implications for whether areas meet their mandated attainment dates. The EPA's current rulemaking efforts (based on the June 2003 proposal) address how the standard is implemented, and in no way alter the requirement that an area monitor attainment of the standard (as expeditiously as practicable but no later than specific mandated dates) in accordance with the requirements established in the NAAQS rulemaking and thus do not affect the stringency of the standard.

Comment: One commenter recommended that all requirements relating to the 1-hour standard should be retained, including those relating to contingency measures. They point out that section 172(c)(9) requires such measures.

Response: For the reasons provided above, we have concluded that contingency measures related to attainment of the 1-hour NAAQS or achievement of ROP milestones for the 1-hour NAAQS need not be retained. Elsewhere in this rule, we address our decision to no longer require SIPs to contain provisions for the imposition of fees under section 185 for purposes of a failure to attain the 1-hour NAAQS. This rulemaking did not re-open the issue of whether other 1-hour requirements should be retained.

Comment: One commenter urged that the 1-hour standard should not be revoked. They noted that the 1-hour standard is in some cases more protective of public health than the 8-hour standard.

Response: As we noted in the final Phase 1 Rule, we determined in the 1997 NAAQS rulemaking that we did not need to retain the 1-hour standard to protect public health and that the only issue before us in the Phase 1 Rule was the timing for determining when the 1-hour standard should no longer apply (69 FR 23969). Neither issue is being reconsidered in this rulemaking; thus, we will not address this comment here.

Comment: One commenter suggested that we include in proposed §51.905(e)(2)(iii) – after the reference to section 172(c)(9) of the CAA – a reference also to section

182(c)(9), as we did in the preamble to the proposed rule.

Response: We agree with the commenter and have included that reference in the final regulatory text.

Comment: One commenter noted that an inconsistency exists between §51.905(e)(1) and proposed §51.905(e)(2)(iii). Section 51.905(e)(1) requires that the 1-hour contingency measures approved into a SIP remain in force after the 1-hour standard is revoked until the State removes them from the SIP; the commenter believes that the 1-hour contingency measures won't be triggered since the 1-hour standard is revoked. The commenter recommended either to revise §51.905(e)(1) to conform it with proposed §51.905(e)(2)(iii) by removing the former provision's preconditions to removal of 1-hour contingency measures; or to clarify the apparent inconsistency between §51.905(e)(1) and proposed §51.905(e)(2)(iii).

Response: We agree that the language is inconsistent and that the proposed §51.905(e)(2)(iii) was poorly drafted. States are required to implement provisions in the approved SIP until such time as the SIP is revised. We are revising §51.905(e)(2)(iii) to provide that a State is not required to include in its SIP contingency measures that are triggered upon a failure to attain the 1-hour ozone standard. We note that since EPA will no longer be making

determinations of whether areas attain the 1-hour standard, contingency measures that have such a trigger would never be triggered, even if they remained in the SIP. Therefore, we have revised §51.905(e)(2)(iii) to be consistent with §51.905(e)(ii). Areas must submit SIP revisions to remove contingency measures from their SIPs under this provision.

Comment: One commenter noted that §51.905(a)(2), addressing 8-hour nonattainment/1-hour maintenance areas, provides that the State may not remove certain 1-hour contingency measures from the maintenance SIP and that this is inconsistent with our proposal that States no longer need contingency measures that are triggered by a finding of failure to attain the 1-hour standard.

Response: We do not believe this language is inconsistent. Section 51.905(a)(2) addresses contingency measures that were part of a 1-hour maintenance plan and here we are addressing contingency measures related to a finding of failure to attain the 1-hour standard or make reasonable further progress toward attainment of the 1-hour standard. As §51.905(a)(2) recognizes, an area that was maintenance for the 1-hour standard may have moved certain "applicable requirements" to the contingency measures portion of the SIP. This section makes clear that the state is no longer obligated to retain the 1-hour trigger for such measures,

but that these requirements must remain a part of the SIP because they are "applicable requirements." Because contingency measures related to failure to attain and failure to make RFP are typically beyond the reductions achieved through applicable requirements, such measures could be removed from the SIP. We note, however, that to the extent a contingency measure is also an "applicable requirement," it cannot be removed from the SIP and we have added a sentence to §51.905(e)(2)(iii) to clarify that point.

Comment: Sections 51.905(a)(3)(i) and 51.905(a)(4)(i) (addressing 8-hour attainment areas) both provide that the State may not remove obligations from the SIP but may relegate them to contingency measures. Also, §51.905(b) requires that the §51.900(f) applicable requirements may be shifted to contingency measures after the 8-hour NAAQS is attained but may not be removed from the SIP. This should be clarified to say that these contingency measures are triggered upon a violation of the 8-hour standard.

Response: The commenter is raising issues outside the context of this proposed rulemaking. We believe that while the regulatory text could perhaps be more explicit, when read in the context of the entire Phase 1 Rule, it is clear that the contingency measures will be linked to the 8-hour

standard. We note, however, that areas have flexibility to identify appropriate triggers. Thus, while they may choose a violation of the 8-hour NAAQS as a trigger, a different trigger, such as a certain number of exceedences of the 8-hour NAAQS, may also be appropriate as the trigger and areas are free to choose such triggers.

Comment: One commenter suggested that §51.905(e)(2)(iii) should be revised to read (with new language in italics): "*Upon revocation of the 1-hour NAAQS for an area,* the State is no longer required to implement contingency measures under section 172(c)(9) *or section 182(c)(9)* of the CAA based on a failure to attain the 1-hour NAAQS or to make reasonable further progress toward attainment of the 1-hour NAAQS."

Response: As provided above, we agree with some of the recommendations made by the commenter and disagree with others. We are revising the language to include the reference to section 182(c)(9). We are also modifying the language to make clear that areas are no longer required to include in their SIP, contingency measures that are triggered by a failure to attain the 1-hour standard or a failure to make RFP and to indicate that control measures that are also applicable requirements may not be removed. These modifications make clear that we are not suggesting

that States are not required to implement approved SIPs, but rather that they may revise their SIPs to remove discretionary contingency measures linked to these triggers, if they so choose.

D. Adding Attainment Demonstration to the List of "Applicable Requirements" in §51.900(f)

1. Background. In the Phase 1 Rule, we provided three options for areas that had not met their obligation to have a fully approved 1-hour ozone attainment demonstration SIP. Such areas could submit: 1) a 1-hour attainment demonstration, 2) an early 8-hour attainment demonstration, or 3) a RFP plan providing a 5 percent increment of progress towards the 8-hour NAAQS. While our intent was that an attainment demonstration was an "applicable requirement" for purposes of anti-backsliding in §51.905, we neglected to specifically include the term "attainment demonstration" when we defined "applicable requirements" in §51.900(f). Our intent in this rule is to clarify that an attainment demonstration is an "applicable requirement."

2. Summary of Final Rule. We are adopting the approach we proposed, which is to add the term "attainment demonstration" to §51.900(f). The term "attainment demonstration" will be included in §51.900(f) as "(13) Attainment demonstration or an alternative as provided under

§51.905(a)(ii)."

3. Comments and Responses

Comment: Two commenters opposed EPA's including the attainment demonstration in the list of applicable requirements. One commenter stated that adding attainment demonstration to the list of applicable requirements is redundant because the final rule already requires nonattainment areas to submit attainment demonstrations in §51.905(a)(1)(ii). The other commenter cross-referenced their comments on the issue of the date for determining which requirements remain applicable requirements once the 1-hour standard is revoked, but did not provide any further explanation.

Response: We agree with the one commenter that it is somewhat redundant to identify "attainment demonstration" in the list of applicable requirements. However, because our rule provides that the obligation to submit an attainment demonstration continues to apply (i.e., remains applicable), we think it is clearer (and removes any possible ambiguity) to include it with the other obligations that continue to apply. In addition, we believe that the change is needed to ensure that the definition of applicable requirement is consistent with the provisions of §51.905(a) that retain the obligation for the 1-hour attainment demonstration for

certain 1-hour ozone nonattainment areas. Regarding the other commenter's opposition based on the same reasons as they described with regard to the date for determining what requirements are applicable requirements, we did not find this argument clear enough for a response. However, to the extent that the commenter's arguments regarding the date for determining what requirements are applicable requirements are relevant to their opposition of listing the attainment demonstration as an applicable requirement, we incorporate our responses to those arguments for responding to this comment.

Comment: Two commenters opposed EPA's including the attainment demonstration in the list of applicable requirements. One commenter stated that adding attainment demonstration to the list of applicable requirements is redundant because the final rule already requires nonattainment areas to submit attainment demonstrations in §51.905(a)(1)(ii). In opposing the inclusion of the attainment demonstration in the list of applicable requirements, the other commenter referred to reasons they provided regarding the date for determining what requirements are applicable requirements.

Response: We agree with the one commenter that it is somewhat redundant to identify "attainment demonstration" in

the list of applicable requirements. However, because our rule provides that the obligation to submit an attainment demonstration continues to apply (i.e., remains applicable), we think it is clearer (and removes any possible ambiguity) to include it with the other obligations that continue to apply. In addition, we believe that the change is needed to ensure that the definition of applicable requirement is consistent with the provisions of §51.905(a) that retain the obligation for the 1-hour attainment demonstration for certain 1-hour ozone nonattainment areas. Regarding the other commenter's opposition based on the same reasons as they described with regard to the date for determining what requirements are applicable requirements, we did not find this argument clear enough for a response. However, to the extent that the commenter's arguments regarding the date for determining what requirements are applicable requirements are relevant to their opposition of listing the attainment demonstration as an applicable requirement, our responses to those arguments above also apply here.

Comment: One commenter indicated that, while the proposal to add attainment demonstration to the list of applicable requirements would be more consistent with the remainder of the anti-backsliding rule, the commenter recommended that the control strategy that is used to demonstrate attainment

of the 1-hour standard also be listed as an applicable requirement.

Response: EPA disagrees. A control strategy is part of the attainment demonstration that EPA would approve into a SIP and therefore does not need to be listed separately in addition to the attainment demonstration. Furthermore, the Phase 1 Rule also provided alternative means of satisfying the attainment demonstration requirement (i.e., an advance increment of progress of 5 percent emission reduction or an early 8-hour ozone attainment demonstration). Thus, EPA believes areas should have the option under the regulation of submitting these alternatives rather than a control strategy for the 1-hour NAAQS as an applicable requirement. Finally, if we did as the commenter suggested, the effect would be to convert many "discretionary" control measures to applicable requirements. We have never suggested (and do not believe it is required) that State discretion to substitute for non-mandatory control measures should be restricted.

IV. 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 final rule is not a "significant regulatory action." The reconsideration put forth today does not substantially change the Phase 1 Rule. With respect to one issue, we are retaining the position we adopted in the Phase 1 Rule. As to the second issue, we are modifying the date in this rule so that it is consistent

with our original proposal. Finally, we are promulgating regulatory text to make two clarifications to the final rule. We believe that these provisions do not substantially modify the intent of the final rule but rather merely clarify two issues.

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. 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 final 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 part 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 final

rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. The Phase 1 Rule interpreted the obligations required of 1-hour ozone nonattainment areas for purposes of anti-backsliding once the 1-hour NAAQS is revoked. This final reconsideration addresses two aspects of the Phase 1 Rule that the Agency was requested to reconsider and clarifies two other aspects of the Phase 1 Rule. Since as noted that final rule, the Phase 1 Rule does not impose requirements on small entities our further action on aspects of that rule also does not impose requirements on small entities.

D. <u>Unfunded Mandates Reform Act</u>

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 final 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. In promulgating the Phase 1 Rule, we concluded that it was not subject to the requirements of sections 202 and 205 of the UMRA. For those same reasons, our reconsideration and clarification of several aspects of that rule is not subject to the UMRA.

The EPA has determined that this final 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 final 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. This final reconsideration addresses two aspects of the Phase 1 Rule that the Agency was requested to reconsider and clarifies two other aspects of the Phase 1 Rule. For the same reasons stated in the Phase 1 Rule, Executive Order 13132 does not apply to this proposed rule.

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 final rule does not have "Tribal implications" as specified in Executive Order 13175.

The purpose of this final rule is taking comment on two issues from the Phase 1 Rule that EPA agreed to grant for reconsideration, in addition to two other issues from the Phase 1 Rule. These issues concern the implementation of

the 8-hour ozone standard in areas designated nonattainment for that standard. The CAA provides for States and Tribes to develop plans to regulate emissions of air pollutants within their jurisdictions. The Tribal Authority Rule (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 Tribes whether to develop these programs and which programs, or appropriate elements of a program, they will adopt.

For the same reasons stated in the Phase 1 Rule, this final 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 final 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 final rule does nothing to modify that relationship. Because this final rule does not have Tribal implications, Executive Order 13175 does not apply.

While the final rule would have Tribal implications upon a Tribe that is implementing such a plan, it would not

impose substantial direct costs upon it nor would it preempt Tribal law.

Although Executive Order 13175 does not apply to this final rule, EPA consulted with Tribal officials in developing this final rule. The EPA has supported a national "Tribal Designations and Implementation Work Group" which provides an open forum for all Tribes to voice concerns to EPA about the designation and implementation process for the 8-hour ozone standard.

G. 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.

This final rule addresses two aspects of the Phase 1

Rule that the Agency was requested to reconsider and clarifies two other aspects of the rule. The final rule is not subject to Executive Order 13045 because the Agency does not have reason to believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. 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 38854, 62 FR 38860 and 62 FR 38865).

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

This final 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 2002, *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 final 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 concluded that the Phase 1 Rule should not raise any environmental justice issues; for the same reasons, this final 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 final 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 **[insert 30 days after publication].**

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 District of Columbia Circuit by **[insert 60 days from the date of publication in the Federal Register].** 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)(U) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(U) 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 reconsideration rulemaking.

List of Subjects in 40 CFR Part 51

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

Dated: May 20, 2005

Stephen L. Johnson,
Administrator.

For the reasons stated in the preamble, Title 40, Chapter I of the Code of Federal Regulations, is amended as

follows:

PART 51 – AMENDED

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

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

Subpart X – Provisions for Implementation of 8-Hour Ozone National Ambient Air Quality Standard

2. Section 51.900 is amended by revising paragraph (f) introductory text and adding paragraph (f)(13) to read as follows:

§51.900 Definitions.

* * * * *

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

* * * * *

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

* * * * *

3. Section 51.905 is amended by revising paragraph (e)(2)(ii) and by adding paragraph (e)(2)(iii) as follows:

§51.905 How do areas transition from the 1-hour NAAQS to

the 8-hour NAAQS and what are the anti-backsliding provisions?

* * * * *

(e) * * *

(2) * * *

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

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

* * * * *