acquisition date or the initiation of actual construction, alteration, or renovation.

As a practical matter, the State licensing agency should be contacted early in the planning or design stage of a project. This notification shall:

(A) State that a satisfactory site(s) for the location and operation of a blind vending facility is (are) included in the plans for the building.

(B) Include a copy of a single line drawing indicating the proposed location of such site(s).

(C) Advise the State licensing agency that, subject to the approval of the DoD Component, it shall be offered the opportunity to select the location and type of vending facility to be operated by a blind vendor prior to completion of the final space layout of the building.

(ii) Advise that the State licensing agency must respond within 30 days to the DoD Component, acknowledging receipt of the correspondence from the DoD Component and indicating whether it is interested in establishing a vending facility and, if interested, signifying its agreement or alternate selection of a location and its selection of type of vending facility. A copy of the written notice to the State licensing agency and the State licensing agency's response, if any, shall be provided to the Secretary of Education.

(iii) If the State licensing agency's response to the DoD Component indicates it does not desire to establish and operate a vending facility and sets forth any specific basis other than the insufficiency of patrons to support a vending facility, or if the State licensing agency does not respond within 30 days, then a site meeting the anticipated needs of the DoD Component shall be incorporated. Each such site shall have a minimum of 250 square feet for sale of items and for storage of articles necessary for the operation of a vending facility.

(iv) If the State licensing agency indicates that the number of persons using the property is or will be insufficient to support a vending facility, then a satisfactory site to be operated under the auspices of the State licensing agency shall not be incorporated. The On-Site Official shall, through the Head of the DoD component, notify the Secretary of Education of the State licensing agency's response.

(2) The requirement to provide a satisfactory site shall not apply:

(i) When fewer than 100 Federal employees (as defined in § 260.3 of this part) are located in the building during normal working hours; or

(ii) When the building contains less than 15,000 square feet to be used for Federal Government purposes, and the Federal Government space is used to provide services to the general public.

(iii) The provisions of paragraphs (d)(iv)(2)(i) and (d)(iv)(2)(ii) of this section do not preclude arrangements under which blind vending facilities may be established in buildings of a size or with an employee population less than that specified. For example, if a building is to be constructed that will contain only 30 Federal employees, upon agreement of the on-site official and the State licensing agency, the DoD Component may decide to provide a satisfactory site for a blind vending facility.

(3) When a DoD Component is leasing all or part of a privately owned building in which the lessor or any of its tenants have an existing restaurant or other food facility in a part of the building not covered by the lease, and operation of a vending facility would be in substantial direct competition with such restaurant or other food operation, the requirement to provide a satisfactory site does not apply.

(e) Vending machine income generated by the Department of Defense shall be shared with State licensing agencies as prescribed in paragraph (e)(1) of this section. The on-site official is responsible for collecting and accounting for such vending machine income (as defined in § 260.3 of this part) and for ensuring compliance with the requirements of this paragraph.

(1) The vending machine income-sharing requirements are as follows:

(i) One hundred percent of the vending machine income from vending machines in direct competition with blind-operated vending facilities shall be provided to the State licensing agency.

(ii) Fifty percent of the vending machine income from vending machines not in direct competition with blind-operated vending facilities shall be provided to the State licensing agency.

(iii) Notwithstanding paragraph (e)(1)(ii) of this section, thirty percent of the vending machine income from vending machines not in direct competition with blind-operated vending facilities and located where at least fifty percent of the total hours worked on the premises occurs during other than normal working hours (as defined in § 260.3 of this part) shall be provided to the State licensing agency.

(2) The determination of whether a vending machine is in direct competition with the blind-operated vending facility is the responsibility of the on-site official subject to the concurrence of the State licensing agency.

(3) These vending machine income-sharing requirements do not apply to:

(i) Income from vending machines operated by or for the military exchanges or ships' store systems; or

(ii) Income from vending machines, not in direct competition with a blind-operated vending facility, at any individual location, installation, or facility where the total of the vending machine income from all such machines at such location, installation, or facility does not exceed $3,000 annually.

(4) The payment to State licensing agencies under these income-sharing requirements must be made quarterly on a fiscal year basis.

(f) Pursuant to 34 CFR 395.37, whenever any State licensing agency for the blind determines that any DoD activity is failing to comply with the provisions of 20 U.S.C. 107 *et seq.* and all informal attempts to resolve the issues have been unsuccessful, the State licensing agency may file a complaint with the Secretary of Education.

§ 260.7 Information requirements.

Within 90 days after the end of each fiscal year, the DoD Components shall forward to the PDUSD (P&R) the total number of applications for vending facility locations received from State licensing agencies, the number accepted, the number denied, the number still pending, the total amount of vending machine income collected (as defined in § 260.3 of this part, excluding income exempt from the income sharing requirements by § 260.6(e)(3) of this part), and the amount of such vending machine income disbursed to State licensing agencies in each State. These reporting requirements have been assigned Report Control Symbol DD–P&R(A)2210, according to DoD 8910.1–M.[3]

Dated: January 8, 2009.

Patricia L. Toppings,

OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. E9–460 Filed 1–15–09; 8:45 am]

BILLING CODE 5001–06–P

[3] Available from *http://www.dtic.mil/whs/directives/corres/pdf/891001m.pdf.*

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 51

[EPA–HQ–OAR–2007–0956, FRL–8762–5]

RIN 2060–AO96

Proposed Rule To Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Revision on Subpart 1 Area Reclassification and Anti-Backsliding Provisions Under Former 1-Hour Ozone Standard; Proposed Deletion of Obsolete 1-Hour Ozone Standard Provision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to revise the rule for implementing the 1997 8-hour ozone national ambient air quality standard (NAAQS) for several of the limited portions of the rule vacated by the U.S. Circuit Court of Appeals for the District of Columbia. The proposal addresses the classification system for the subset of initial 8-hour ozone nonattainment areas that the implementation rule originally covered under Clean Air Act (CAA or Act) title I, part D, subpart 1. The proposal also addresses how 1-hour ozone contingency measures that apply for failure to attain or make reasonable progress toward attainment of the 1-hour standard should apply under the anti-backsliding provisions of the implementation rule. In addition, the proposal removes language relating to the vacated provisions of the rule that provided exemptions from the requirements of nonattainment new source review (NSR) and CAA section 185 penalty fees under the 1-hour standard. The EPA plans to issue a separate proposed rule providing additional guidance as to how these two requirements (185 fees and NSR) now apply.

In addition, this proposal includes the deletion of an obsolete provision in the 1-hour ozone standard itself.

DATES: *Comments.* Comments must be received on or before February 17, 2009.

Public Hearing. If anyone contacts us requesting a public hearing by January 26, 2009, we will hold a public hearing approximately 30 days after publication in the **Federal Register**. Additional information about the hearing would be published in a subsequent **Federal Register** notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0956, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2007–0956, Environmental Protection Agency, 1301 Constitution Ave., NW., Washington, DC 20460. *Mail Code:* 2822T. Please include two copies if possible.
- *Hand Delivery:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2007–0956, Environmental Protection Agency in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation will be 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday, Air and Radiation Docket and Information Center.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0956. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov*, or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in *www.regulations.gov*. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

Public Hearing: If a hearing is held, it will be held at the U.S. Environmental Protection Agency, 109 TW Alexander Drive, Research Triangle Park, North Carolina 27709, Building C.

FOR FURTHER INFORMATION CONTACT: For further general information or information on the issue of reclassification of subpart 1 areas, contact Mr. John Silvasi, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539–01), Research Triangle Park, NC 27711, phone number (919) 541–5666, fax number (919) 541–0824 or by e-mail at *silvasi.john@epa.gov*. For information on the 1-hour contingency measures issue discussed in this notice, contact Ms. Denise Gerth, Office of Air Quality Planning and Standards, (C504–03), U.S. EPA, Research Triangle Park, North Carolina 27711, phone number (919) 541–5550 or by e-mail at *gerth.denise@epa.gov*, fax number (919) 541–0824. To request a public hearing, contact Mrs. Pamela Long, Office of Air Quality Planning and Standards, (C504–03), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–0641 or by e-mail at *long.pam@epa.gov*, fax number (919) 541–5509.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected directly by the subject rule for this action include state, local, and Tribal governments. Entities potentially

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

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed to be CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where Can I Get a Copy of This Document and Other Related Information?

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

D. What Information Should I Know About the Public Hearing?

EPA will hold a hearing only if a party notifies EPA by January 26, 2009, expressing its interest in presenting oral testimony on issues addressed in this notice. Any person may request a hearing by calling Mrs. Pamela Long at (919) 541–0641 before 5 p.m. by January 26, 2009. Persons interested in presenting oral testimony should contact Mrs. Pamela Long at (919) 541–0641. Any person who plans to attend the hearing should also contact Mrs. Pamela S. Long at (919) 541–0641 or visit the EPA's Web site at *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/* and to learn if a hearing will be held.

If a public hearing is held on this notice, it will be held at the EPA, Building C, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709. Because the hearing will be held at a U.S. Government facility, everyone planning to attend should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please check our Web site at *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/* for information and updates concerning the public hearing.

If held, the public hearing will begin at 10 a.m. and end 1 hour after the last registered speaker has spoken. The hearing will be limited to the subject matter of this document. Oral testimony will be limited to 5 minutes. The EPA encourages commenters to provide written versions of their oral testimony either electronically (on computer disk or CD–ROM) or in paper copy. The list of speakers will be posted on EPA's Web site at *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/*. Verbatim transcripts and written statements will be included in the rulemaking docket.

A public hearing would provide interested parties the opportunity to present data, views, or arguments concerning issues addressed in this notice. The EPA may ask clarifying questions during the oral presentations, but would not respond to the presentations or comments at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at a public hearing.

E. How Is This Document Organized?

The Information Presented in This Document is Organized as Follows

I. General Information
A. Does This Action Apply to Me?
B. What Should I Consider as I Prepare My Comments for EPA?
C. Where Can I Get a Copy of This Document and Other Related Information?
D. What Information Should I Know About the Public Hearing?
E. How Is This Document Organized?
II. What Is the Background for This Proposal?
A. Litigation on EPA's 8-Hour Ozone NAAQS Implementation Rule (40 CFR Part 51, Sections 51.900 Through 51.918 (Collectively Subpart X))
B. Obsolete Provision in 1-Hour Ozone Standard (40 CFR Part 50)
III. This Action
A. Reclassification of Subpart 1 8-Hour Ozone Nonattainment Areas
1. Current Rule
2. Effect of Court Ruling
3. Proposed Rule
4. Consequences of Proposed Rule
B. Anti-Backsliding Under 1-Hour Ozone Standard—In General (Also Discussing NSR and Section 185 Penalty Fees)
C. Contingency Measures
1. Phase 1 Rule
2. Effect of Court Ruling
3. Proposed Rule
D. Deletion of Obsolete 1-Hour Ozone Standard Provision
IV. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132—Federalism
F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Determination Under Section 307(d)
Appendix A to Preamble. Application of the Proposed Classification Scheme

II. What Is the Background for This Proposal?

A. Litigation on EPA's 8-Hour Ozone NAAQS Implementation Rule (40 CFR Part 51, Sections 51.900 Through 51.918 (Collectively Subpart X))

On April 30, 2004 (69 FR 23951), EPA published Phase 1 of a final rule that addressed the following key elements for implementing the 1997 8-hour ozone NAAQS: Classifications for the 1997 8-hour NAAQS; revocation of the 1-hour NAAQS (i.e., when the 1-hour NAAQS will no longer apply); anti-backsliding principles for 1-hour ozone

requirements to ensure continued progress toward attainment of the 1997 8-hour ozone NAAQS; attainment dates; and the timing of emissions reductions needed for attainment.

Following publication of the April 30, 2004 final Phase 1 Rule, the Administrator received three petitions, pursuant to section 307(b)(7)(B) of the CAA requesting reconsideration of a number of aspects of the final rule.[1] In final rulemaking on one of these petitions, EPA further clarified the implementation rule in two respects: (a) Section 185 penalty fees under the 1-hour standard would no longer be applicable after revocation of the 1-hour standard, and (b) the effective date of designations under the 1997 8-hour standard (i.e., for almost all areas, June 15, 2004) is the date for determining which 1-hour control measures continue to apply in an area once the 1-hour standard is revoked.[2] Additionally, EPA clarified that the requirement to have 1-hour contingency measures for failure to make progress or failure to attain would no longer apply once the 1-hour standard was revoked. On April 4, 2005 (70 FR 17018), we published a proposed rule to take comment on the issue of whether we should interpret the Act to require areas to retain major NSR requirements that apply to certain 1-hour ozone nonattainment areas in implementing the 1997 8-hour standard. We took final action on the NSR issues on June 30, 2005 (70 FR 39413; July 8, 2005), to interpret the CAA to not require NSR under the 1-hour standard once the 1-hour standard was revoked.

Several parties challenged EPA's Phase 1 Rule and the two reconsideration rules, and on December 22, 2006, the Court upheld certain challenges and rejected others, but purported to vacate the Phase 1 Implementation Rule in its entirety. *South Coast Air Quality Management District, et al.*, v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006) *reh'g denied 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review).*

The EPA requested rehearing and clarification of the ruling and on June 8, 2007, the Court clarified that it was vacating the rule only to the extent that it had upheld petitioners' challenges. Thus, the following provisions of the Phase 1 rule were vacated:

- The provisions that placed 8-hour ozone nonattainment areas under subpart 1, part D, title I of the CAA instead of subpart 2.
- The provisions that waived obligations under the revoked 1-hour standard for NSR, section 185 penalty fees, and contingency measures for failure to attain or to make reasonable progress toward attainment of the 1-hour standard.[3]

B. Obsolete Provision in 1-Hour Ozone Standard (40 CFR Part 50)

When EPA promulgated the 8-hour ozone standard on July 18, 1997 (62 FR 38856), EPA initially revised 40 CFR 50.9 to revoke the 1-hour ozone standard once EPA determined that an area had air quality meeting the 1-hour standard. Subsequently, because the pending litigation over the 8-hour NAAQS created uncertainty regarding the 8-hour NAAQS and our implementation strategy, we revised 40 CFR 50.9 to place two limitations on our authority to apply the revocation rule: (1) The 8-hour NAAQS must no longer be subject to legal challenge, and (2) it must be fully enforceable.[4] (65 FR 45182, July 20, 2000). These limitations were codified as § 50.9(c). In the final Phase 1 Rule, we again revised § 50.9, this time to revise § 50.9(b) to provide for revocation of the 1-hour standard one year after designation of areas under the 1997 8-hour ozone standard. However, we neglected to remove paragraph (c) which was no longer necessary as the 8-hour standard was no longer subject to legal challenge and the standard had been upheld and was enforceable. *American Trucking Assoc.* v. *EPA* 283 F.3d 355 (DC Cir. 2002) (resolving all remaining legal challenges to the 8-hour ozone standard and upholding EPA's rule establishing that standard.)

III. This Action

A. Reclassification of Subpart 1 8-Hour Ozone Nonattainment Areas

1. Current Rule

In the Phase 1 implementation rule, EPA established which planning requirements of part D of title I of the Act would apply to areas for purposes of implementing the 8-hour ozone standard. 40 CFR 51.902. (''Which classification and nonattainment area planning provisions of the CAA shall apply to areas designated nonattainment for the 8-hour NAAQS?'') Paragraph (a) provided that areas with a 1-hour ozone design value equal to or greater than 0.121 parts per million (ppm) at the time of 8-hour NAAQS nonattainment designation (April 2004) would be classified in accordance with CAA title I, part D, section 181 of the CAA as interpreted in 40 CFR 51.903(a) for purposes of the 8-hour NAAQS, and would be subject to the requirements of CAA title I, part D, subpart 2 that apply for the area's classification. 40 CFR 51.903(a) set forth a translation into 8-hour design values of the CAA section 181 classification table, which is written in terms of 1-hour ozone design values. The preamble to the Phase 1 Rule provides the rationale and procedure for that translation. (*See* 69 FR 23958 *et seq.*) Section 181 in subpart 2 provides for specific classifications of each area by the magnitude of the ozone problem, providing shorter time periods for attainment for lower classifications and longer time periods for higher classifications. Higher classified areas also face additional specified control requirements than lower classified areas. A summary listing of the subpart 2 requirements by classification compared to subpart 1 requirements appeared in the proposed 8-hour ozone implementation rule. (*See* 68 FR 32864, Appendix A; June 2, 2003.)

Paragraph (b) of § 51.902 provided that 1997 8-hour ozone nonattainment areas with a 1-hour design value less than 0.121 ppm at the time of 8-hour NAAQS nonattainment designation would be covered under section 172(a)(1) of the CAA and would be subject to the requirements of CAA title I, part D, subpart 1 and not those of subpart 2.

The EPA designated areas for the 1997 8-hour standard on April 30, 2004 (69 FR 23858), and in accordance with section 181(a), the areas subject to subpart 2 under the Phase 1 Rule were classified by operation of law at that time. Of the 126 areas designated nonattainment, 84 were classified as under subpart 1, and the remaining 42 as under subpart 2.[5]

[1] Three 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.

[2] 70 FR 30592 (May 26, 2005).

[3] The Court's June clarification confirmed that the December 2006 decision was not intended to establish a requirement that areas continue to demonstrate conformity for the 1-hour ozone standard for anti-backsliding purposes.

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

[5] 13 of the 84 subpart 1 areas and one subpart 2 area were designated as ''Early Action Compact Areas'' with a deferred effective date for their nonattainment designation.

2. Effect of Court Ruling

In its decisions on the Phase 1 rule, the Court vacated the provisions that subjected any 8-hour ozone nonattainment areas to coverage under subpart 1. As the basis for its decision, the Court first agreed that Congress mandated that certain areas be subject to subpart 2, but ruled that our use of 0.121 ppm 1-hour design value as a dividing line was incorrect, holding that the Supreme Court had required use of 0.09 ppm on the 8-hour scale as the level for determining which areas Congress mandated would be subject to subpart 2.[6] Furthermore, although recognizing that Congress did not mandate that areas with an 8-hour design value be subject to subpart 2, the Court rejected as unreasonable our rationale for placing certain areas in subpart 1 instead of subpart 2. The Court vacated the Phase 1 rule to the extent it placed certain areas solely under the implementation provisions of subpart 1. Thus, a rule revision is necessary to address which provisions of the Act—only subpart 1 or subpart 2 [7]—should apply to those areas that were placed solely under subpart 1 in the Phase 1 Rule.

3. Proposed Rule

We are proposing that all areas designated nonattainment for the 1997 8-hour ozone standard will be classified under and subject to the nonattainment planning requirements of subpart 2. We would modify the regulatory text to remove current § 51.902(b) (which was vacated by the Court), which placed certain areas only under subpart 1. We considered the possibility of proposing to place areas with design values below 0.09 ppm 8-hour design value under subpart 1, but are not proposing this option in the interest of not further delaying implementation of the 8-hour ozone NAAQS that was established over 10 years ago.[8] However, we solicit comment on this part of this proposal.

Because these are the initial classifications for these areas for the 1997 ozone standard, the EPA further proposes to use the 8-hour ozone design values (from 2001–2003 air quality data) that were used to designate these areas nonattainment initially as the basis for classification and that the classification table in 40 CFR 51.903 (established by the Phase 1 Rule) be used for the classification. CAA section 181(a) provides that ''at the time'' areas are designated for a NAAQS, they will be classified ''by operation of law'' based on the ''design value'' of the areas and in accordance with table 1 of that section. Thus, this language specifies that the area will be classified based on the design value that existed for the area ''at the time'' of designation. Areas were designated nonattainment in 2004, based on design values derived from data from 2001–2003. We are soliciting comment on the approach of classifying these areas based on the same data that was used for designation.

Also, since the classification under this proposal would be the initial one under the 1997 8-hour standard for these areas after court vacatur of the method EPA used to treat these areas under subpart 1 only, EPA proposes that the provision of CAA section 181(a)(4) would apply to these areas, which would allow the Administrator in his discretion to adjust the classification—within 90 days after the initial classification—to a higher or lower classification ''* * * if the design value were 5 percent greater or 5 percent less than the level on which such classification was based.'' The EPA proposes to address requests for such classification adjustments for the newly-classified areas that were originally covered under subpart 1 in a manner similar to the way described for the original round of subpart 2 classifications.[9] This process is described at 69 FR 23863 *et seq.* (April 30, 2004).

Of the original 84 subpart 1 areas designated in the April 30, 2004 rulemaking, 13 areas successfully completed participation in the Early Action Compacts (EAC) program. As a result, these areas received deferred designations and classifications for as long as they continued to meet program requirements. These requirements were designed to ensure early reductions of ozone and progress toward attainment of the 1997 NAAQS. At the completion of the program, these areas were designated attainment for the 8-hour ozone NAAQS effective April 15, 2008.[10]

Despite the proposal to implement the 1997 8-hour standard by classifying nonattainment areas under title I, part D, subpart 2 at this time, EPA reserves the right to propose to cover future ozone nonattainment areas under title I, part D, subpart 1, in accordance with the constraints outlined in the Court's rulings. The EPA may in the future examine the appropriate role for subpart 1 in classifying nonattainment areas and in flexible, efficient, enforceable implementation of an ozone NAAQS.

Note that CAA section 182(h) (''Rural Transport Areas'') would be available for any nonattainment area that qualifies as a rural transport area under that section. A Rural Transport Area would have to only meet requirements of a marginal area.

4. Consequences of Proposed Rule

Areas originally covered under subpart 1 that have already been redesignated to attainment will not be affected by this rule, including the 13 EAC areas noted above.[11] Appendix A provides a listing of the former subpart 1 areas that are still designated nonattainment and that would be classified under subpart 2 under this proposed rule and provides the subpart 2 classification for the area based on the air quality data initially used to designate the area in the 2004 designation rule. All of these areas would be classified as either marginal or moderate.[12] The classification table of 40 CFR 51.903 provides an outside attainment date based on a number of years after the effective date of the

[6] ''* * * the gap identified in Whitman affords EPA discretion only to the extent that an area is nonattaining but its air quality is not as dangerous as the level addressed by the 1990 Amendments, which now translates to 0.09 ppm on the 8 hour scale. Thus, the gap extends only to the extent that the standard was strengthened and not to the extent that the measurement technique merely changed * * * We therefore hold that the 2004 Rule violates the Act insofar as it subjects areas with 8-hour ozone in excess of 0.09 ppm to Subpart 1. We further hold that EPA's interpretation of the Act in a manner to maximize its own discretion is unreasonable because the clear intent of Congress in enacting the 1990 Amendments was to the contrary.''

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

[8] As the court made clear in its decision on rehearing, the CAA does not mandate coverage under subpart 2 of all areas designated nonattainment for an ozone NAAQS. As EPA moves forward to develop an implementation strategy for the new 2007 ozone NAAQS, we will consider whether subpart 1 alone might apply in some areas for purposes of implementing that NAAQS.

[9] Note, however, that if a State requests a reclassification from moderate to marginal and the attainment date for marginal areas has passed and the area is violating the standard, EPA would not grant the request for the reclassification.

[10] One area (Denver, CO) that was originally part of the EAC program did not successfully complete all milestones and was subsequently designated nonattainment under subpart 1. Thus, this area would be treated the same as all areas classified under subpart 1 under the original provisions of the Phase 1 Rule.

[11] *See,* e.g., 73 FR 11558 (col. 2) (March 4, 2008), together with e.g., 73 FR 1166 (col 3) (January 8, 2008).

[12] Note that Essex Co (the top of Whiteface Mtn), NY, and Door County, WI would be eligible for consideration under CAA section 182(h) as a Rural Transport Area. This is based on the 1999 definition of Metropolitan Statistical Areas; neither of the above two areas is in or adjacent to an MSA as defined by the Office of Management and Budget (OMB) in 1999 (June 30, 1999; 64 FR 35548).

nonattainment designation (3 years for marginal and 6 years for moderate). For all areas other than Denver, the effective date of designation for the 8-hour standard was June 15, 2004. Thus, marginal nonattainment areas would have a maximum statutory attainment date of June 15, 2007 and moderate areas a maximum date of June 15, 2010. Since the marginal area attainment date has passed, EPA proposes that any area that would be classified under the proposal as marginal, and that did not attain by June 15, 2007, or that does not meet the criteria for an attainment date extension under CAA section 181(a)(5)(B) and 40 CFR 51.907, would be reclassified immediately as moderate under this rule.

Areas classified marginal or moderate would be required to meet the marginal or moderate area requirements of CAA section 182(a) and/or (b). Moderate area requirements include the requirements for the marginal classification. Briefly, these requirements are depicted in Table 1:

TABLE 1

Element	Subpart 2 [a]	
	Classification	Requirement
Attainment Dates	Marginal	3 years from CAA Amendments enactment.
For all areas, attainment should occur as expeditiously as practicable, but no later than specified timeframe.		
	Moderate	6 years from CAA Amendments enactment.
Reasonable Further Progress (RFP)	Marginal	None.
	Moderate	15% VOC reduction from baseline within 6 years of enactment.
Attainment demonstration submission	Marginal	None.
	Moderate	Due 3 years after CAA Amendments enactment.
NSR and Reasonable Achievable Technology (RACT) major source applicability.	Marginal	100 tons per year (TPY).
	Moderate	100 TPY.
NSR offsets	Marginal	1.1 to 1.
	Moderate	1.15 to 1.
Bump-up to higher classification	All except severe & extreme.	Required to bump up to higher classification if area doesn't meet attainment date.
NO_X control for RACT	Moderate & above; all areas in Ozone Transport Commission.	Requirements under this subpart for major stationary VOC sources (NSR & RACT) also apply to all major NO_X sources, unless EPA approves NO_X waiver.
Emission inventory	All	Comprehensive emissions inventory within 2 years of enactment; update every 3 years (until area attains). Provision for submission to state of annual emissions statements from VOC and NO_X stationary sources.
RACT	Marginal & above	Pre-1990 RACT fix-up.
	Moderate & above	RACT for all Control Techniques Guidelines sources and all other major sources.
Inspection and Maintenance (I/M)	Marginal	Pre-1990 corrections to previously required I&M programs.
	Moderate	Basic I/M.
Consequences of failure to attain	Marginal, moderate	Bump-up for failure to attain.
Contingency measures	All	Required for failure to meet the Rate of Progress milestones or attain.

[a] Note that subpart 1 requirements also apply to subpart 2 areas to the extent that the CAA does not provide an exemption (*e.g.*, 182(a) (last paragraph, which exempts marginal areas from the requirement to submit an attainment demonstration)) or such requirements are not superseded by more specific obligations under subpart 2 (*e.g.*, where subpart 2 specifies specific increments of progress for moderate and above areas in place of the more general requirement for "reasonable further progress" under subpart 1). Subpart 1 requirements that are also applicable to subpart 2 areas (but that are not addressed in subpart 2) include reasonably available control measures (RACM) requirement and transportation and general conformity requirements.

With respect to transportation conformity requirements, current transportation plan and transportation improvement program conformity determinations for the 1997 8-hour ozone standard will remain valid, and are not impacted by this action. Areas that would be reclassified under subpart 2 are already satisfying the applicable CAA section 176(c) conformity requirements for the 1997 8-hour ozone standard. In addition, no new conformity deadline would be triggered in the subject areas after their classification under subpart 2. Nonattainment areas that are classified as marginal or moderate under Subpart 2 would continue to make future conformity determinations according to the applicable requirements of 40 CFR 93.109(d) and (e). EPA notes that any new moderate areas that continue to be required to use the interim emissions tests will be required to meet additional test requirements that do not apply to marginal areas (40 CFR 93.119(b)(1)).

The Phase 1 Rule provided that states must submit the major SIP elements for the subpart 1 areas no later than June 15, 2007. For areas classified as moderate, EPA also provided a submission date of June 15, 2007 for most requirements, but required states to submit the reasonably available control technology requirement (RACT) SIP by September 15, 2006. The EPA proposes to require states to submit all required SIP elements for the areas' marginal or moderate classification one year after the effective date of a final rule classifying the areas. The EPA believes this is an appropriate and reasonable amount of time given the attainment dates that will apply to these areas and the fact that the areas should have made significant progress toward meeting these requirements based on the obligations that applied before the

subpart 1 classification provision of the Phase 1 rule was vacated. As subpart 1 areas, these areas should have been well along the path to developing SIPs at the time the Court issued its decision in December 2006. We believe states have already had ample opportunity to complete the technical work to support development of these major SIP elements prior to now. Also, EPA has encouraged states to continue planning for clean air in the prior subpart 1 areas.[13] Therefore, EPA believes one year from the date of final rule should be sufficient time for states to submit these SIPs. However, EPA solicits comment on this aspect of the proposal.

B. Anti-Backsliding Under 1-Hour Ozone Standard—In General (Also Discussing NSR and Section 185 Penalty Fees)

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

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

Section 51.905(e), as promulgated in 2004, indicated that certain 1-hour standard requirements are not part of the list of anti-backsliding requirements. These include 1-hour NSR, section 185 penalty fees, and 1-hour contingency measures for failure to attain or make reasonable progress toward attainment of the 1-hour NAAQS.[14] The Court vacated these exemption provisions, and accordingly EPA is proposing to delete these exemptions from the rule. Thus, this proposal would remove language relating to the vacated provisions of the rule that provided exemptions from the requirements of nonattainment NSR and CAA section 185 penalty fees under the 1-hour standard in addition to the provision for contingency measures. The EPA plans to issue a separate proposed rule providing further guidance on how the section 185 fee provisions and the 1-hour NSR requirements apply as a result of the Court's vacatur.[15]

In the following section, in response to the Court vacatur, EPA proposes the manner in which the 1-hour NAAQS contingency measure requirement applies as an anti-backsliding requirement.

C. Contingency Measures

1. Phase 1 Rule

The Phase 1 Rule did not address anti-backsliding provisions related to sections 172(c)(9) and 182(c)(9) of the CAA, which require nonattainment area SIPs to contain contingency measures that would be implemented if an areas fails to attain or fails to make RFP toward attainment of the 1-hour NAAQS. In the Reconsideration Rule published on May 26, 2005 (70 FR 30592), we determined that these 1-hour contingency measures would no longer be considered required SIP measures once the 1-hour standard was revoked. This meant that after the 1-hour standard was revoked, areas that had not submitted 1-hour attainment demonstrations or a specific 1-hour RFP SIP would no longer be required to submit contingency measures in conjunction with those SIPs. Also, the reconsideration rule stated that areas with approved section 172 and 182 contingency measures in the adopted SIP could submit a revision to remove them from their SIP when the 1-hour standard was revoked.

2. Effect of Court Ruling

The Court concluded that EPA improperly waived the CAA requirements for contingency measures that would apply based on the failure of an area to meet a 1-hour RFP milestone or 1-hour attainment date. The Court vacated the provision of the Phase 1 Rule that waived this requirement for areas once the 1-hour standard was revoked. Consequently, areas remain subject to the obligation to have contingency measures for failure to attain the 1-hour NAAQS or make RFP toward attainment of the 1-hour NAAQS and cannot remove section 172 or 182 contingency measures from their SIPs based on revocation of the 1-hour standard.

3. Proposed Rule

The EPA is proposing that states be required to retain contingency measures in their SIPs that would apply based on a failure to meet a 1-hour RFP milestone or upon a failure to attain the 1-hour standard by the area's attainment date. Consistent with the Court's vacatur of § 51.905(e)(2)(iii), which waived this requirement once the 1-hour standard was revoked, EPA proposes to remove this provision from the regulations. Furthermore, consistent with EPA's proposal to retain these 1-hour contingency measure requirements as anti-backsliding measures, we also propose to list contingency measures under sections 172(c)(9) and 182(c)(9) of the CAA as applicable requirements under § 51.900(f).

In situations where an area attains the 1-hour NAAQS by its applicable attainment date, the area is not subject to the requirement to implement contingency measures for failure to attain the standard by its attainment date. As a result, any area that meets or has met its attainment deadline, even if the area subsequently lapses into nonattainment, would not be required to implement the contingency measures for failure to attain the standard by its attainment date for purposes of anti-backsliding.

In situations where a 1-hour ozone nonattainment area is in attainment based on current air quality (*e.g.*, after the area's attainment date), EPA can

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

[14] Note that if the area is nonattainment for the 1997 8-hour standard, it is subject to nonattainment NSR, contingency measures and (if severe or extreme) the section 185 penalty fee provision for that 1997 NAAQS.

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

propose to make a finding of attainment.[16] This finding would be pursuant to the interpretation set forth in the May 10, 1995 memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, entitled ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone Ambient Air Quality Standard'' (Clean Data Policy). Under this policy, if EPA determines through rulemaking that the area is meeting the 1-hour ozone standard, the requirements for the state to submit an attainment demonstration and related components such as reasonably available control measures (RACM), RFP demonstration, contingency measures for failure to attain or make reasonable further progress and the section 185 fees program are suspended as long as the area continues to attain the 1-hour ozone NAAQS. If the area subsequently violates the ozone NAAQS, EPA would initiate notice-and-comment rulemaking to withdraw the determination of attainment, which would result in reinstatement of the requirement for the state to submit such plans.

The Tenth, Seventh and Ninth Circuits have upheld EPA rulemakings applying the Clean Data Policy. *See Sierra Club* v. *EPA,* 99 F. 3d 1551 (10th Cir. 1996); *Sierra Club* v. *EPA.* 375 F.3d 537 (7th Cir. 2004) and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Cir. June 28, 2005) memorandum opinion.[17] See also the discussion and rulemakings cited in EPA's Phase 2, 8-Hour Ozone Implementation Rulemaking, 70 FR 71644–71646 (November 29, 2005), which codified the policy for the 8-hour NAAQS.

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

Under 40 CFR 51.905(b), states remain subject to the obligations under § 51.905(a)(1)(i) and (a)(2) until the area attains the 8-hour NAAQS for purposes of anti-backsliding. After the area attains the 8-hour NAAQS, states may request that these obligations be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA; however, the state cannot remove the obligations from the SIP.

D. Deletion of Obsolete 1-Hour Ozone Standard Provision

For the reasons stated above in the background section concerning the obsolete nature of 40 CFR 50.9(c), we are proposing to delete that paragraph. This will have no effect on the status of the 1-hour ozone standard,[18] or on the anti-backsliding provisions which set forth how areas must meet 1-hour requirements that applied to the area at the time the area was designated for the 8-hour standard.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

B. Paperwork Reduction Act

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

C. Regulatory Flexibility Act

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

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

After considering the economic impact of these proposed revisions to the regulations on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposal will not impose any requirements on small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

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

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

[16] This applies even if the area did not attain by its attainment date; however, the CAA requires EPA in these cases to make a finding of failure to attain by the attainment date and either reclassify the area or apply other requirements (such as section 185) as specified for the area's classification.

[17] The Clean Data Policy, as it is embodied in 40 CFR. 51.918, is being challenged in the context of the 8-hour ozone standard in the Phase 2 Rule ozone litigation pending in the DC Circuit, *NRDC* v. *EPA,* No. 06–1045 (DC Cir.).

[18] The 1-hour standard was revoked for most areas on June 15, 2005, the date one-year after the effective date of designation. For the 13 EAC areas designated attainment with an effective date of April 15, 2008, the 1-hour standard will be revoked April 15, 2009, and for the Denver EAC area, which was designated nonattainment effective November 20, 2007, the 1-hour standard will be revoked November 20, 2008.

and local officials in the development of regulatory policies that have Federalism implications.'' Policies that have ''Federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

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

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

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

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

EPA specifically solicits additional comment on the proposed revisions to the regulations from Tribal officials.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because these proposed rule revisions address whether a SIP will adequately attain and maintain the NAAQS and meet the obligations of the CAA. The NAAQS are promulgated to protect the health and welfare of sensitive population, including children. However, EPA solicits comments on whether the proposed action would result in an adverse environmental effect that would have a disproportionate effect on children.

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

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

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

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

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed revisions to the regulations would, if promulgated revise procedures for states to follow in developing SIPs to attain the NAAQS, which are designed to protect all segments of the general populations. As such, they do not adversely affect the health or safety of minority or low income populations and are designed to protect and enhance the health and safety of these and other populations.

K. Determination Under Section 307(d)

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

Appendix A to Preamble. Application of the Proposed Classification Scheme

This appendix lists the proposed new subpart 2 classifications for the areas that were originally covered under subpart 1 in the phase 1 rule (April 30, 2004) and that are currently still designated nonattainment. The geographic boundaries of these nonattainment areas are provided in 40 CFR Part 81, Subpart C.

Current nonattainment areas not classified under phase 1 rule, as vacated by the court [a]	2001–2003 8-hour ozone design value ppm	Proposed subpart 2 classification	2004–2006 8-hour ozone design value ppm	2005–2007 8-hour ozone design value ppm
Albany-Schenectady-Troy, NY [e]	0.087	Marginal	0.078	0.079
Allegan Co, MI	0.097	Moderate	0.088	0.093
Amador and Calaveras Cos (Central Mtn), CA [c]	0.091	Moderate	0.093	0.090
Buffalo-Niagara Falls, NY	0.099	Moderate	0.083	0.086
Chico, CA [e]	0.089	Marginal	0.084	0.084
Cincinnati-Hamilton, OH-KY-IN	0.096	Moderate	0.086	0.088
Clearfield & Indiana Cos, PA [e]	0.09	Marginal	0.077	0.080
Columbus, OH	0.095	Moderate	0.084	0.087
Denver-Boulder-Greeley-Ft. Collins-Love, CO [b]	0.087	Marginal	0.081	0.085
Door Co, WI [d]	0.094	Moderate	0.086	0.090
Essex Co (Whiteface Mtn), NY [d]	0.091	Marginal	NAV	NAV
Greene Co, PA [e]	0.089	Marginal	0.079	0.080
Haywood and Swain Cos (Great Smoky NP), NC [e]	0.085	Marginal	0.076	0.078
Jamestown, NY	0.094	Moderate	0.086	0.086
Kern Co (Eastern Kern), CA	0.098	Moderate	0.086	0.085
Knoxville, TN	0.092	Moderate	0.084	0.088
Las Vegas, NV [e]	0.086	Marginal	0.083	0.086
Manitowoc Co, WI [e]	0.09	Marginal	0.082	0.086
Mariposa and Tuolumne Cos (Southern Mtn),CA [c]	0.091	Moderate	0.086	0.085
Nevada Co. (Western Part), CA	0.098	Moderate	0.096	0.095
Phoenix-Mesa, AZ [e]	0.087	Marginal	0.083	0.083
Pittsburgh-Beaver Valley, PA	0.094	Moderate	0.083	0.087
Rochester, NY [e]	0.088	Marginal	0.072	0.080
San Diego, CA	0.093	Moderate	0.088	0.089
Sutter Co (Sutter Buttes), CA [e]	0.088	Marginal	0.082	0.081

[a] A number of areas that were placed in Subpart 1 under the vacated portion of the Phase 1 Rule have since attained the 8-hour ozone standard and have been redesignated to attainment. Because these areas are now designated attainment for the ozone standard, they are not nonattainment areas subject to classification and thus are not included in this table.

[b] Denver originally participated in the Early Action Compact (EAC) program and was listed in the April 30, 2004 designation action as a nonattainment area under subpart 1; its nonattainment designation was deferred until November 20, 2007, at which time based on a violation of the 1997 8-hour ozone NAAQS, Denver's nonattainment designation became effective. Denver has planning requirements as a former EAC area.

[c] Area would have been marginal but did not have attaining design values by the marginal area attainment date (June 15, 2007) (based on 2004-2006 design values).

[d] Essex Co (the top of Whiteface Mtn), NY, and Door County, WI, would be eligible for consideration under CAA section 182(h) as Rural Transport Areas. This is based on the 1999 definition of Metropolitan Statistical Areas; neither of the above two areas is in or adjacent to an MSA as defined by the Office of Management and Budget (OMB) in 1999 (June 30, 1999; 64 FR 35548). Essex Co does not have a design value for the 2005-2007 period (indicated by NAV (not available)).

[e] These areas had attaining design values as of the marginal area attainment date (June 15, 2007) (based on 2004–2006 design values).

List of Subjects

40 CFR Part 50

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

40 CFR Part 51

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

Authority: 42 U.S.C. 7409; 42 U.S.C. 7410; 42 U.S.C. 7511–7511f; 42 U.S.C. 7601(a)(1).

Dated: January 9, 2009.

Stephen L. Johnson,

Administrator.

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

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

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

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

§ 50.9 [Amended]

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

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

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

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

Subpart X—[Amended]

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

§ 51.900 Definitions.

* * * * *

(f) * * *

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

* * * * *

5. Section 51.902 is revised to read as follows:

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

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

(b) [Reserved]

6. Section 51.905 is amended as follows:

a. By adding a sentence to the end of paragraph (b).

b. By removing and reserving paragraphs (e)(2)(ii) and (e)(2)(iii).

c. By removing paragraph (e)(4).

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

* * * * *

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

* * * * *

[FR Doc. E9–806 Filed 1–15–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2008–0497, FRL–8763–4]

Approval and Promulgation of Implementation Plans; New Jersey Reasonable Further Progress Plans, Reasonably Available Control Technology, Reasonably Available Control Measures and Conformity Budgets

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing action on portions of two State Implementation Plan revisions submitted by New Jersey that are intended to meet several Clean Air Act (Act) requirements for attaining the 0.08 part per million (ppm) 8-hour ozone national ambient air quality standards. EPA is proposing approval of: The 2008 reasonable further progress plan and associated 2008 ozone projection year emission inventories, contingency measures for the 2008 reasonable further progress plan, 2008 conformity budgets used for planning purposes, and the reasonably available control measure analysis. In addition, EPA is proposing a conditional approval of New Jersey's efforts to meet the reasonably available control technology requirement. The intended effect of this action is to approve those programs that meet Act requirements and to further achieve emission reductions that will be critical to attainment of the national ambient air quality standard for ozone in New Jersey's two nonattainment areas.

DATES: Comments must be received on or before February 17, 2009.

ADDRESSES: Submit your comments, identified by Docket Number EPA–R02–OAR–2008–0497, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: Werner.Raymond@epa.gov.*
- *Fax:* 212–637–3901
- *Mail:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866.
- *Hand Delivery:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal holidays.

Instructions: Direct your comments to Docket No. EPA–R02–OAR–2008–0497. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. EPA requests, if at all possible, that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Raymond Forde (*forde.raymond@epa.gov*) concerning emission inventories and reasonable further progress and Paul Truchan (*truchan.paul@epa.gov*) concerning other portions of the SIP revision, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4249.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What Action Is EPA Proposing?
II. Background Information
A. What Are the Act Requirements for a Moderate 8-Hr Ozone Nonattainment Area?
1. History and Time Frame for the State's Attainment Demonstration SIP
2. Moderate Area Requirements
III. What Was Included in New Jersey's SIP Submittals?
IV. EPA's Review and Technical Information
A. Emission Inventories
1. What Are the Act Requirements?
2. What Emission Inventories Were Included in the SIP?
3. What Is EPA's Evaluation?
B. Reasonable Further Progress Plans
1. What are the Act Requirements?
2. What Reasonable Further Progress Plans Were Included in the SIP?
3. What Is EPA's Evaluation?
C. Contingency Measures
1. What Are the Act Requirements?
2. What Contingency Measures Were Included in the SIP?
3. What Is EPA's Evaluation?
D. RACT for Stationary Sources
1. What Are the Act Requirements?
2. How Did New Jersey Perform Its RACT Analysis?
3. What Were the Results of New Jersey's Analysis of RACT for Stationary Sources?
4. What Is EPA's Evaluation?