

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 51

[EPA-HQ-OAR-2008-0419, FRL-8943-3]

RIN 2060-AP96

**Implementation of the 1997 8-Hour Ozone National Ambient Air Quality Standard:
Addressing a Portion of the Phase 2 Ozone Implementation Rule Concerning Reasonable
Further Progress Emissions Reductions Credits Outside Ozone Nonattainment Areas**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to revise a portion of its Phase 2 implementation rule for the 8-hour ozone National Ambient Air Quality Standard (NAAQS or standard) for which the Agency had sought a voluntary remand from the U.S. Circuit Court of Appeals for the District of Columbia Circuit. The Court granted EPA's request by remanding and vacating that portion of the rule. Specifically, this rule addresses an interpretation that allowed certain credits toward reasonable further progress (RFP) for the 8-hour standard from emissions reductions outside the nonattainment area.

DATES: This rule is effective on **[INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2008-0419. All documents in the docket are listed in www.regulations.gov. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (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.

FOR FURTHER INFORMATION CONTACT: For further information on the this final rule contact: Ms. Denise Gerth, Office of Air Quality Planning and Standards, (C539-01), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5550 or by e-mail at gerth.denise@epa.gov, fax number (919) 541-0824; or Mr. John Silvasi, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539-01), Research Triangle Park, NC 27711, telephone number (919) 541-5666, fax number (919) 541-0824 or by e-mail at silvasi.john@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected directly by this action include state, local, and tribal governments. Entities potentially affected indirectly by this rule 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. Where Can I Get a Copy of This Document and Other Related Information?

A copy of this document and other related information is available from the docket EPA-HQ-OAR-2008-0419.

C. How is This Notice Organized?

The information presented in this notice is organized as follows:

I. General Information

- A. Does This Action Apply to Me?
- B. Where Can I Get a Copy of This Document and Other Related Information?
- C. How Is This Notice Organized?

II. What is the Background For This Rule?

- A. Proposed Regulatory Interpretation of the Phase 2 Rule to Address RFP Emission Credits Outside Ozone Nonattainment Areas

III. This Action.

- A. Background
- B. Final Rule
- C. Comments and Responses

IV. Statutory and Executive Order Reviews

- A. Executive Order 12866: Regulatory Planning and Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act (RFA)
- 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 Risks and Safety Risks
- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- K. Congressional Review Act
- L. Determination Under Section 307(d)

II. What is the Background for This Rule?

A. Proposed Regulatory Interpretation of the Phase 2 Rule to Address RFP Emission Credits Outside Ozone Nonattainment Areas

On July 21, 2008 (73 FR 42294), EPA published a proposed rule to revise its regulatory interpretation of the Phase 2 implementation rule for the 8-hour ozone NAAQS to address the U.S. Circuit Court of Appeals for the District of Columbia Circuit's vacatur and remand of that portion of the interpretation of the Phase 2 implementation rule for which EPA had asked for a

voluntary remand. The proposal addressed a provision that allowed credit toward RFP for the 8-hour NAAQS from emission reductions outside the nonattainment area. Readers should refer to the proposed rule for additional background on this action, including the final Phase 2 ozone implementation rule and the Court's vacatur and remand of the provision allowing credit for emissions reductions outside a nonattainment area for the purposes of RFP for the 8-hour NAAQS.

III. This Action.

A. Background

In the Phase 2 Rule to implement the 8-hour ozone NAAQS, EPA set forth an interpretation that stated that credits could be taken for emissions reductions from a source outside the nonattainment area provided that emissions from these sources were included in the baseline for calculating the percent reduction needed. 70 FR 71612. However, emissions from other sources outside the nonattainment area did not have to be included in the baseline if they did not provide RFP credit for the nonattainment area. The regulatory interpretation stated that certain additional conditions must be met for such reductions to qualify for credit, including that credit could be taken for VOCs and NO_x emissions reductions within a 100 kilometers (km) and 200 km respectively, and there must be a demonstration that the emissions from outside the nonattainment area had an impact on air quality levels within the nonattainment area.

The Natural Resources Defense Council (NRDC) filed a petition for review of the Phase 2 Rule including the implementation of the statutory provisions regarding RFP. After briefing had concluded in this case, EPA published its final rule implementing the NAAQS for fine particulate matter (the "PM_{2.5} Implementation Rule") 72 FR 20586 (April 25, 2007). Because the PM_{2.5} Implementation Rule significantly modified the interpretation regarding credits for

emissions outside the nonattainment area, EPA requested a voluntary remand from the Court on July 17, 2007, to consider whether to revise the Phase 2 implementation rule to be consistent with the provisions in the PM_{2.5} rule. In response, the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded that portion of the Phase 2 Rule which provided credit under the 8-hour ozone RFP requirement for VOCs and NO_x emission reductions from outside a nonattainment area. EPA proposed to revise its regulatory interpretation of the RFP provisions in the Phase 2 Rule to be consistent with its regulatory interpretation of the RFP provisions in the PM_{2.5} Implementation Rule. 73 FR 42294 (July 21, 2008).

EPA received seven comments on this proposed rule. A few commenters supported the proposal while others opposed the action we proposed. The commenters addressed the following topics: requested clarification on how the rule affects general conformity and whether the transportation conformity determinations are only required within the nonattainment areas; stated that nonattainment areas should be expanded to include areas that contribute to nonattainment as required under section 107(d) of the Clean Air Act (CAA) rather than allowing areas to take credit outside of their nonattainment for RFP reductions; requested assurance that the rules do not allow substitution of NO_x to meet the 15 percent VOC reduction requirement; stated that the rule lacks mechanisms for addressing overwhelming transport in State Implementation Plan (SIP) requirements; stated that the proposed rule flouts the language and purpose of the CAA and is arbitrary and that EPA fails to offer a lawful or rational justification for the proposal, etc. Detailed responses to these comments are in section C under Comments and Responses.

B. Final Rule

Following its stated objective in the request for a voluntary remand, EPA re-evaluated its interpretation of the RFP provision and is taking final action to revise the earlier interpretation as

proposed on July 21, 2008 (73 FR 42294) which is consistent with the provisions in the PM_{2.5} Implementation Rule (72 FR 20636). Consequently if the state justifies consideration of precursor emissions for an area outside the nonattainment area, EPA will expect state RFP assessments to reflect emissions changes from all sources in this area. The state must include all sources, not just some selected sources, for the area providing emission reductions in the calculation of either (a) the RFP baseline from which to calculate the percent reduction needed for RFP or (b) the reductions obtained that would be credited toward the RFP requirement and the analysis of whether the reductions from areas outside the nonattainment area would contribute to decreases in ozone levels in the nonattainment area. Also, the justification for considering emissions outside the nonattainment area will include justification of the state's selection of the area used in the RFP plan for each pollutant. As is the case with the PM_{2.5} rule, if a state justifies consideration of precursor emissions for an area outside the nonattainment area, EPA expects state RFP assessments to reflect emissions changes from all sources in the area. The state cannot include only selected sources providing emission reductions in the analysis. The inventories for 2002, 2009, 2012 (where applicable) and the attainment year would all reflect the same source domain, i.e., the same set of sources except for the addition of any known new sources or removal of known, permanently shut down sources.

In cases where the state justifies consideration of emissions of one or both of the ozone precursors (i.e., VOC and NO_x) from outside the nonattainment area, states must provide separate information regarding on-road mobile source emissions within the nonattainment area for transportation conformity purposes.¹ However, this final rule does not change existing statutory requirements that transportation conformity determinations are only required within the

¹ Transportation conformity is required under CAA section 176(c) to ensure that federally supported transportation plans, programs, and highway and transit projects are consistent with the purpose of the SIP.

nonattainment area boundary. The CAA section 176(c)(5) and EPA's transportation conformity regulations (40 CFR 93.102(b)) only require conformity determinations in nonattainment and maintenance areas, and these requirements rely on SIP on-road motor vehicle emission budgets that address on-road emissions within the boundary of the designated nonattainment area. For this reason and consistent with the PM_{2.5} Implementation Rule (72 FR 20636), if the state addresses emissions outside the nonattainment area for an ozone precursor, the on-road mobile source component of the RFP inventory will not satisfy the requirements for establishing a SIP budget for transportation conformity purposes. In such a case, the state must supplement the RFP inventory with an inventory of on-road mobile source emissions to be used to establish a motor vehicle emissions budget for transportation conformity purposes. This inventory must: 1) address on-road motor vehicle emissions that occur only within the designated nonattainment area, 2) provide for the same milestone year or years as the RFP demonstration, and 3) satisfy other applicable requirements of the transportation conformity regulations (40 CFR part 93). As long as the state provides this separate emissions budget and conformity is determined to that budget, EPA believes that this approach will optimally address both the RFP and the transportation conformity provisions of the CAA.

In addition, we interpret this final rule to restrict the use of emission reductions for RFP credit to areas within the state, except in the case of multi-state nonattainment areas, and only then would allow RFP reductions from outside the state to be credited from outside the nonattainment area if the states involved develop and submit a coordinated RFP plan. EPA expects states with multi-state nonattainment areas to consult with other involved states, to formulate a list of the measures that they will adopt and the measures that the other state(s) will adopt, and then to adopt their list of measures under the assumption that the other state(s) will

adopt their listed measures. Each state would be responsible for adopting and thereby providing for enforcement of its list of measures, and then that state and ultimately EPA (at such time as the plan is approved) would be responsible for assuring compliance with the SIP requirements which is an approach consistent with the approach for RFP in the PM_{2.5} Implementation rule. (72 FR 20640).

C. Comments and Responses

Comments Supporting EPA's Approach

1. Comment: One commenter noted that, in the Phase 2 Ozone Implementation Rule (70 FR 71648, November 29, 2005), EPA stated that modeling analyses relating to the NO_x SIP call demonstrate that significant contribution to nonattainment results not only from source emissions within a nonattainment area but also from source emissions over a much broader area. The commenter agrees that allowing states to take credit for reductions from sources outside of their nonattainment areas may help reduce ozone levels in the nonattainment area and believes that reductions from outside the nonattainment area are sometimes necessary to attain the standard.

EPA Response: The EPA agrees with commenter. The preamble to the final Phase 2 rule explains that the rationale for allowing emission reduction credits from outside the nonattainment area for RFP purposes is based on modeling analyses that showed that emissions from outside the nonattainment area could affect the nonattainment area and that emission reductions from upwind of a nonattainment area will help the nonattainment area achieve progress toward attainment. 70 FR 71648; 61 FR 65758 (December 13, 1996), and Memorandum of December 29, 1997 from Richard D. Wilson to Regional Administrators, Regions I-X entitled: "Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM₁₀ NAAQS" (the 1997 Policy) located at URL: <http://www.epa.gov/ttn/oarpg/t1/memoranda/iig.pdf>.

2. Comment: One commenter supports the proposal to revise the interpretation for crediting emissions reductions from outside a nonattainment area for RFP to be analogous with the provision in the PM_{2.5} Implementation Rule. Specifically, the commenter supports the portion of the proposal that allows RFP reductions from outside the state to be credited from outside the nonattainment area if states develop a coordinated RFP plan as part of their SIPs.

EPA Response: The EPA agrees with commenter. The EPA by this action makes the RFP provisions regarding credits from emission reductions outside the nonattainment area in the context of the ozone NAAQS consistent with the interpretation in the context of the PM_{2.5} NAAQS with respect to multi-state areas.

Clarification Requested on How this Rule Affects General Conformity

3. Comment: One commenter appreciates EPA's efforts in the proposal to clarify that a state may no longer include only selected sources from an area outside of a nonattainment area for emissions reduction credit in the SIP. The commenter also appreciates EPA's efforts to address how the proposed rule affects transportation conformity. The commenter requests that EPA provide clarity on how the proposed rule affects general conformity requirements and determinations in the final rule.

EPA Response: This regulatory interpretation does not affect the requirement for federal agencies to demonstrate conformity with SIPs. These requirements stem from section 176(c) of the CAA. Implementing regulations published by EPA (40 CFR 93.150 -160) provide for when and how federal agencies can make these determinations. EPA discussed transportation conformity in the proposal only to clarify that it applies only within nonattainment areas and to facilitate development of appropriate budgets for use in areas that take rate of progress (ROP) credit from outside the nonattainment area.

Nonattainment Areas should be Expanded to Include Contributing Sources

4. Comment: One commenter is opposed to the revision because it is contrary to the CAA.

Section 107(d)(1)(A)(i) of the CAA requires the designation as nonattainment for “any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for that pollutant.” The CAA requires that instead of allowing an area that is contributing to the nonattainment area to be used to demonstrate RFP goals, the designated nonattainment area must be expanded to include that area. A commenter also feels that the proposal illegally circumvents the statutory designation provisions by allowing states to selectively claim credit for reductions from outside areas without subjecting those areas to the full range of safeguards mandated by Congress for such areas.

EPA Response: As a threshold matter, EPA is not taking any action through this regulatory interpretation to establish procedures for designating or not designating areas. The designations process for each NAAQS generally provides guidance on how to determine nonattainment areas. Under CAA section 107 (d)(1)(A) an area is designated “nonattainment” if it does not meet the NAAQS or is a “nearby” area that contributes to ambient air quality in an area that is violating the NAAQS.²

As the Agency explained in the final preamble to the Phase 2 rule, the CAA does not specify a distance that is “nearby” or a specific level of emissions that is deemed to “contribute to” nonattainment (70 FR at 71648). EPA also did not establish a hard-and-fast set of rules to determine which areas are “nearby” or “contribute to” nonattainment. Instead, in guidance EPA listed a broad set of factors for states and EPA to consider in determining the boundaries of each nonattainment area. As for the comment that EPA is circumventing the statutory designations

² For example, Memorandum of March 28, 2002, from John S. Seitz, “Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards.”

provisions by not subjecting the outside areas to all the requirements for nonattainment areas, EPA believes that since these areas are not necessarily “nearby” for designations purposes, it is not appropriate to subject these areas to all of the requirements for nonattainment areas. In this rule EPA is allowing emissions reductions outside a nonattainment area that benefits the nonattainment area to be considered for credit in emission reductions for ROP purposes.

Whether an area is “nearby” for purposes of designations is an issue that would be considered on a case-by-case basis when the area is initially designated nonattainment.

Clarification Requested that Transportation Conformity Only Applies in the Nonattainment Area

5. Comment: One state transportation agency requested clarification in the final rule that transportation conformity only applies inside the nonattainment area.

EPA Response: EPA's final rule does not change existing statutory requirements that transportation conformity determinations are only required within the nonattainment area boundary. CAA section 176(c)(5) and section 93.102 of EPA’s transportation conformity regulations only require conformity determinations in nonattainment and maintenance areas. These requirements rely on SIP on-road motor vehicle emission budgets that address on-road emissions within the boundary of the designated nonattainment area. For this reason and consistent with EPA’s PM_{2.5} implementation rule (72 FR 20636), if the state addresses emissions outside the nonattainment area for an ozone precursor, the on-road mobile source component of the RFP inventory will not satisfy the requirements for establishing a SIP budget for transportation conformity purposes. In such a case, the state must supplement the RFP inventory with an inventory of on-road mobile source emissions to be used to establish a motor vehicle emissions budget for transportation conformity purposes, as described in this final rule. As long as the state provides this separate emissions budget and conformity is determined to be within

the geographic boundary of the nonattainment area, EPA believes that this approach will optimally address both the RFP and the transportation conformity provisions of the CAA.

Lack of Regulatory Text

6. Comment: One commenter believes that the proposed revision appears to provide an appropriate and reasonable degree of flexibility to states in meeting the RFP requirements. It is, however, difficult for the commenter to evaluate and comment on the proposal because EPA has not provided any proposed regulatory text that clearly states the precise provisions and limitations of the intended rule.

EPA Response: In this action we are modifying a regulatory interpretation that the Agency adopted in the Phase 2 rule (70 FR at 71647-48). Since publication of that rule, EPA modified its approach to RFP credits from outside the nonattainment area in its PM_{2.5} Implementation Rule (72 FR 20636). This action provides a regulatory interpretation that is consistent with the approach adopted in the PM_{2.5} Implementation Rule. Neither rule included regulatory text on the specific issue of RFP credits from outside the nonattainment area and EPA believes that it is unnecessary to include regulatory text in this action

Substitution of NO_x to Meet 15 Percent VOC Requirement

7. Comment: The commenter assumes that EPA does not intend to apply, and will not apply, the policy reflected in the proposal in a way that would allow crediting of NO_x emission reductions outside the nonattainment area to meet the 15 percent VOC emission reduction requirement in section 182(b)(1) of the CAA. Further the commenter stated that allowing states to use NO_x emission reductions – wherever they may occur – to satisfy section 182(b)(1) would contradict the explicit statutory provision that the 15 percent ROP reduction requirement must be met by VOC emission reductions only. See 70 FR 71,612, 71,636/1 (November 29, 2005).

The commenter also noted that this principle is also reflected in the December 1997 guidance memorandum that addressed taking credit outside nonattainment areas for purposes of RFP.

EPA Response: The commenter is correct that EPA does not intend to apply the policy interpretation in the proposed rule to allow substitution of NO_x emission reductions outside the ozone nonattainment area to meet the 15 percent VOC requirement in section 182(b)(1). This is consistent with the “Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM₁₀ NAAQS” that EPA issued on December 29, 1997 and the Phase 2 Ozone Implementation Rule that EPA issued on November 29, 2005.

Lack of Mechanism for Addressing Overwhelming Transport

8. Comment: One commenter feels that EPA's proposed rule lacks reasonable, equitable mechanisms for addressing overwhelming transport in SIP requirements. This rule, as proposed, would disallow RFP credit in the Michigan SIP for out-of-state reductions even though the local areas' contribution to high ozone concentrations measured at monitors in counties abutting Lake Michigan are negligible. The contributors, large urban areas across the lake, are in other states, and West Michigan nonattainment areas are not part of multistate nonattainment areas. The proposed rule does nothing to ameliorate the regulatory burdens of ozone transport into West Michigan. Additionally, the commenter stated that the CAA lacks adequate provisions to address ozone transport and include a presumption that local emissions reductions are necessary to reduce ozone levels. The commenter recommends that amendments to the CAA be pursued.

EPA Response: The regulatory interpretation was not intended to address the kind of situation posed by the commenter. The revised interpretation only applies to ROP plans and does not

attempt to resolve issues of regional transport. Amendments to the CAA to address regional transport are only within Congress' purview.

CAA Does Not Give EPA Authority to Take Credit for Emissions Reductions Outside the Nonattainment Area nor Change the Emissions Baseline

9. Comment: One commenter believes that the proposed rule is unlawful and arbitrary. The commenter stated that CAA sections 182(b)(1) and 182(c)(2)(B) require SIPs for ozone nonattainment areas to provide for an initial 15 percent rate of progress cut in ozone-forming emissions and subsequent three percent per year emission cuts until attainment. The CAA requires these cuts to be made from emissions “in” each nonattainment area. §182(b)(1). The commenter believes that allowing areas to claim credit toward these ROP requirements from emission cuts outside the nonattainment area would not require that outside reductions provide the same ozone reduction benefit to the nonattainment area as would equivalent emission reductions inside the nonattainment area. The commenter feels that the EPA is without authority to allow states to claim ROP credit for emission reductions occurring outside of the nonattainment area because section 182(b)(1)(A) requires each plan to provide for cuts in VOC emissions “of at least 15 percent *from baseline emissions*” (emphasis added). The statute goes on to define “baseline emissions” as “the total amount of actual VOC or NO_x emissions from all anthropogenic sources *in the area*,” with certain exclusions not relevant here. §182(b)(1)(B)(emphasis added). Thus, Congress explicitly mandated that the required 15 percent emissions cut be achieved from a baseline comprising emissions from sources “in the [nonattainment] area.” Congress did not authorize EPA to grant rate of progress credit for emission reductions outside the nonattainment area or to redefine “baseline emissions” to include emissions from sources outside of the nonattainment area, even where those outside reductions

are alleged to or do in fact “contribute” to ozone concentrations in the nonattainment area. The commenter feels that EPA cannot allow states to credit emission cuts from outside of the nonattainment area toward meeting post-15 percent progress requirements. Nor can EPA alter the baseline for the post-15 percent cuts, a baseline that is identical to the one set in the statute for the 15 percent plans, and that is explicitly limited to emissions from within the nonattainment area.

EPA Response: The EPA notes first that the regulatory interpretation set forth here does not apply to the section 182(b)(1) requirement to provide 15 percent reductions within the first six years from a baseline year, but only to the section 182(c)(2)(B) requirement for an average of three percent per year for subsequent three year periods up to the attainment date. The interpretation is based on the December 29, 1997 memorandum from Richard D. Wilson, “Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM₁₀ NAAQS.” Page 7 of the attachment to that memorandum says: “The EPA believes that the start date of the expanded locality-based substitution credit for ROP is changed from post-1999 ROP requirements to post-1996 requirements. EPA does not believe that it may allow credit for substitutions to complete or revise the 15 percent ROP requirement for VOC emission reductions in nonattainment areas through 1996. Although the start date for application of ROP substitution reductions from outside the nonattainment area would apply to post-1996 ROP requirements, consistent with past Agency policy, states would be able to bank excess earlier reduction credits (NO_x or VOC) to apply to post-1996 and later requirements.”

Secondly, EPA disagrees with the assertion in the comment that the proposed rule is unlawful and arbitrary and that EPA is without authority to allow RFP credit for emission reductions from outside the nonattainment area. The CAA does not expressly prohibit credits for

emission reductions outside the area. In fact, the Fifth Circuit, which examined the same language at issue here, found the language "ambiguous" reasoning:

On the one hand, the meaning of "in the area" could be limited to emissions within the nonattainment area. On the other hand, the CAA does not expressly state that emissions outside the nonattainment area are prohibited, rather the Act only states that emissions from sources "in the area" must be included. We therefore find the CAA ambiguous on this point.

Louisiana Env'tl. Action Network ("LEAN") v. EPA, 382 F.3d 575, 585 (5th Cir. 2004).³ If Congress intended to disallow credits from outside the nonattainment area, it could have expressly disallowed it as it did for RFP credit for four other specific categories of emission reductions, 42 U.S.C. § 7511a(b)(1)(D)(i)-(iv), while otherwise allowing credit for any reductions that "have actually occurred after November 15, 1990," *id.* § 7511a(b)(1)(C). See also the discussion in response to comments 15 and 16.

Rule is Unclear as to the Precise Requirements for Crediting Outside Reductions

10. Comment: One commenter stated that the proposal is actually unclear as to the precise requirements for crediting these outside reductions. The Federal Register notice describes EPA's approach for crediting outside reductions in the PM_{2.5} Implementation Rule, and states that EPA is proposing to revise its earlier interpretation with respect to ozone plans "to be consistent with the analogous provisions in the PM_{2.5} Implementation Rule." The proposal does not explain whether "consistent with" means "identical to" or whether it allows some differences from the PM_{2.5} approach. For purposes of these comments, the commenter will assume EPA is proposing an identical approach to the one adopted for PM_{2.5}.

EPA Response: The commenter is correct in the assumption that EPA's proposed approach follows the same approach for ozone as followed for PM_{2.5}.

³ Although the Fifth Circuit found application of the 1997 policy as applied to the facts in that case unsupported, it did so for reasons that are inapposite here. First, the court was reviewing EPA's determination that continuing reductions outside an area could be used as contingency measures. The court found EPA had not demonstrated that the policy had "any rational connection with the relevant issue of what contingency measures to apply when an attainment deadline passes." *Id.* at 586.

Second, the court found that in the specific case under review there was no data to support the presumption that the "outside" reductions selected in that case "can affect emissions reductions in the . . . area." *Id.* In contrast, in its regulatory interpretation, EPA is explicitly requiring that such data be demonstrated in all cases prior to accepting credits from outside a nonattainment area. 70 FR at 71,647/3.

Rule Does not Set Meaningful Restrictions on Boundary Drawing for the Outside Area

11. Comment: One commenter alleged that the proposal sets no meaningful restrictions on boundary drawing for the “outside” area, thereby allowing states to gerrymander them in a way that includes sources expected to cut emissions while excluding sources that are likely to increase their emissions. Although the proposal appears to limit the “outside” to a doughnut around the nonattainment area of up to 200 km, it allows the states to choose the slice or hole in that surrounding doughnut to include for purposes of the RFP calculation. Assuming EPA is proposing the same approach used in the PM_{2.5} rule, the state need only show that emissions from the area selected substantially impact ambient concentrations in the nonattainment area. There is no stated requirement that all areas substantially impacting the nonattainment area be included. The proposal does not prevent states from defining whatever area they choose – theoretically even the block on which the selected source sits – for inclusion in the RFP inventory.

EPA Response: Under this approach, as a prerequisite to including emission reductions from outside the nonattainment area in the RFP assessment, a state must justify the outside area. The justification must include a demonstration that these outside emissions have a substantial impact on nonattainment concentrations. Because the demonstration of such impacts likely involve differing factors and characteristics, EPA believes a one-size fits all “boundary drawing” approach is not an appropriate approach in this instance. EPA will evaluate each RFP assessment on a case-by-case basis to determine whether a state using RFP credits from outside the nonattainment area has included the appropriate and pertinent area for calculating the emission reductions. In addition, if a state wants to adopt this approach, the RFP assessment

must include emissions for all sources within the pertinent area in order to ensure that the RFP plan reflects the actual net emissions changes that occur within that area.

12. Comment: One commenter alleged that the proposed 200 km radius for the “outside” area is also wholly arbitrary. EPA offers no rational basis, and none exists, for choosing that particular distance and applying it to each and every nonattainment area in the nation. There is no evidence, for example, that NO_x emission reductions 200 km outside a nonattainment area invariably provide the same ROP benefit as the same reductions inside the nonattainment area. EPA appears to have picked the 200 km figure out of thin air. The arbitrariness of EPA’s approach here is confirmed by contrasting it with agency’s approach in drawing nonattainment area boundaries. In the latter situation, EPA has taken the position that determining whether nearby sources contribute to nonattainment is too complex to be dictated by hard and fast rules, and instead requires a multi-factor analysis tailored to each area. See EPA’s Final Brief in Catawba County v. EPA, No. 05-1064 (D.C. Cir) filed June 11, 2008.

EPA Response: The commenter’s assertions are incorrect. EPA has not picked the distances “out of thin air.” As described below, EPA has had this policy, adopted after discussions and input from the scientific community, in place for over ten years. The December 1997 policy was developed “as a result of the modeling results relating to the NO_x SIP Call, [which] demonstrate that significant contribution to nonattainment resulted not only from source emissions within a nonattainment area but also from source emissions over a much broader area.” 1997 Policy at 5-6. In addition, under the Federal Advisory Committee Act (FACA), we formed a Subcommittee for Development of Ozone, Particulate Matter and Regional Haze Implementation Programs that provided recommendations and ideas to assist us in developing implementation approaches for these programs. We have incorporated ideas from the FACA process for a number of SIP

elements, particularly those related to transport of ozone, the process for demonstrating attainment of the ozone standard, and requirements for ensuring reasonable further progress. The distance of 100 km for VOC and 200 km for NO_x resulted from discussions of the FACA Subcommittee and generally represent transport of one to two days.⁴ Further information on the FACA process and its reports is found at the following web site: <http://www.epa.gov/ttn/faca/>. This regulatory interpretation incorporates the same distance limitations, which must be supported in an individual area by data “that are shown to be beneficial toward reducing ozone in the nonattainment area.”⁵ In addition, the proposed regulatory interpretation does not change the distances for crediting emissions from outside the nonattainment area for NO_x and VOCs. EPA proposed and finalized those distances in the rulemaking for the Phase 2 rule. The proposed regulatory interpretation only modifies those instances where the ozone RFP interpretations were not consistent with the PM_{2.5} Implementation Rule such as whether emissions from all sources should be included in the RFP assessments for the pertinent area outside the nonattainment area. Thus, the comments on the distances themselves are outside the scope of this rulemaking.

Lack of Justification for Proposal

13. Comment: The commenter states that the proposed rule is unlawful and arbitrary in that EPA has failed to offer a lawful or rational justification for the proposal. The commenter states that the notice of proposed rulemaking offers no justification for allowing credit for outside reductions, other than a desire to provide “flexibility.” In the past, EPA has stated other rationales for allowing ROP credit for outside reductions, but as the agency does not state any intent to rely on them here, they cannot support this iteration of the proposal. If EPA wants to

⁴ See Footnote 43 at 68 FR 32833 (June 2, 2003)

⁵ 70 FR 71647, col 3. (November 29, 2005).

provide other rationales for the proposal, it must first provide public notice and an opportunity to comment.

EPA Response: EPA disagrees with the commenter's assertion that it has provided no justification for its proposal to modify its regulatory interpretation of the RFP provisions. First, in the preamble to the Phase 2 rule, EPA explained its rationale for permitting credits for reductions outside the nonattainment area (70 FR 71647-48). The proposed modification of that regulatory interpretation does not change the distances or the precursors for which such credits may be taken provided other conditions such as reductions are not attributed to measures otherwise mandated by the CAA are met. Second, the preamble to the proposed regulatory interpretation explains that EPA is modifying its approach to allowing credits for emission reductions from outside the nonattainment area to make it consistent with the approach that the Agency adopted in the PM_{2.5} Implementation Rule. In the PM_{2.5} Implementation Rule, EPA received comments that indicated that RFP inventories for areas outside the nonattainment area could include selected sources expecting substantial emissions reductions while excluding other sources in the area expecting emission increases. In response to those comments, EPA modified its approach and required that if a state justifies consideration of emissions for an area outside the nonattainment area, the RFP assessments will be expected to reflect emission changes from all sources in this area and would no longer allow states to include only selected sources that provide emission reductions. Because the rationale for the change there is equally applicable for ozone, EPA proposed the same regulatory interpretation for RFP assessments for ozone.

14. Comment: The commenter noted that EPA has also tried to justify overriding the statutory language by citing section 182(c)(2)(C) which provides for substitution of NO_x emission cuts for VOC emission cuts to meet the percentage reduction requirements in serious and above areas,

where the state shows that equivalent ozone reductions will be achieved. EPA erroneously claimed that this provision somehow shows intent to allow even broader exceptions, such as the one here, as long as some ozone reductions are achieved within the nonattainment area. In reality, section 182(c)(2)(C) contains no language at all authorizing states to claim emission reduction credit for emission cuts outside of the nonattainment area, nor does it redefine “baseline emissions” to include emissions from outside the nonattainment area. The provision merely defines the limited circumstances in which an area can substitute NO_x emission cuts for VOC emission cuts to meet percentage reduction requirements. It does not allow the required reductions to be achieved outside the nonattainment area. Moreover, a key requirement of section 182(c)(2)(C) is that any substitution of NO_x reductions for VOC reductions will “result in a reduction in ozone concentrations at least equivalent” to that which would result from the required VOC percentage reduction (emphasis added). EPA’s proposed rule merely requires that emissions from the “outside” area “contribute to” ozone concentrations in the nonattainment area – it does not require the ozone benefits from cutting those outside emissions to be at least equivalent to those achievable by reductions inside the nonattainment area (70 FR 71647).

EPA Response: The Phase 2 rule clarified the 1997 policy to respond to concerns identified in the Office of Inspector General Report [OAR-2003-0079-0849 AT 80 (“OIG Report”)]. The regulatory interpretation for RFP did not allow crediting of outside emissions based solely on distance from the nonattainment area boundary. Instead, the regulatory interpretation stated that the distances are only a general presumption that would need area-specific data showing that reductions from sources in attainment areas benefit the particular nonattainment area. 70 FR 71647-49. Under this approach, as a prerequisite to including emission reductions from outside the nonattainment area in the RFP assessment, a state must justify the inclusion of sources

outside the area. The justification must include a demonstration that these outside emissions have a substantial impact on nonattainment concentrations and that reductions in these emissions would have a beneficial impact on the nonattainment area.

As clarified in a response below, in evaluating RFP submittals, EPA would consider whether the reductions from outside the nonattainment area could reasonably be expected to yield comparable air quality benefits as would be obtained if the same quantity of reductions were to occur inside the nonattainment area.

15. Comment: The commenter offers as support for the previous comment based on the fact that EPA's Office of Inspector General (OIG) observed that EPA's policy allows credit "for all emission reductions achieved by outside sources within specified distances outside the nonattainment area boundaries without any demonstration of the actual impact of these specific emissions on the area's nonattainment . . ." OAR-2003-0079-0849 AT 80 ("OIG Report").

EPA Response: EPA believes that when Congress allowed the substitution of NO_x controls for VOC controls to meet the section 182(c)(2)(C) RFP requirement, its choice of specific words is telling because it referred to "reductions in ozone concentrations" in the applicable nonattainment area, rather than "reductions in emissions." 70 FR 71648. While the language in the CAA does not explicitly state that emission reductions from outside the nonattainment area may be credited for RFP assessments, EPA reasonably interpreted this language as an indication that Congress' intent was to lower "ozone concentrations" - not just "emissions" of ozone precursors - within the nonattainment area. As EPA explained, "(i)t is consistent with that intent that emissions reductions from outside the nonattainment area that will reduce ozone concentrations in the nonattainment area should be creditable (toward) RFP." 70 FR 71648.

As for the commenter's assertion that VOC and NO_x reductions should result in equivalent benefits within the area, the fact that EPA's policy always had limits for the distance outside the nonattainment area was intended to preclude emission reductions from having negligible ozone benefits within the nonattainment area. While it is implicit in EPA's proposed regulatory interpretation in its evaluation of the appropriateness of the credit reductions, the Agency is now clarifying in response to the commenter's statement that EPA, in evaluating RFP submittals, would consider whether the reductions from outside the nonattainment area could reasonably be expected to yield comparable air quality benefits as would be obtained if the same quantity of reductions were to occur inside the nonattainment area.

In setting forth a requirement for the ozone transport region in section 184 of the CAA, Congress realized that controlling ozone would require emission reductions from not just nonattainment areas, but all areas that were shown to contribute to ozone concentrations, including areas outside nonattainment areas. The work done under the Ozone Transport Assessment Group (OTAG) led to the NO_x SIP call, which resulted in State-wide NO_x emission budgets. The NO_x SIP call, with its significant NO_x emission reductions from attainment as well as nonattainment areas, was highly successful in reducing ozone concentrations, and indeed provided progress toward attainment for many of the nonattainment areas in the eastern portion of the US.⁶

A state's ozone attainment demonstration performed with photochemical grid modeling will invariably take account of emission reductions not only from within the nonattainment area, but also from outside the nonattainment area. Generally, a state will be unable to demonstrate

⁶ "Evaluating Ozone Control Programs in the Eastern United States: Focus on the NO_x Budget Trading Program, 2004" United States Environmental Protection Agency; Office of Air and Radiation; Office of Air Quality Planning and Standards; Office of Atmospheric Programs. 1200 Pennsylvania Ave, NW Washington, DC 20460. EPA454-K-05-001. August 2005. Found at: <http://www.epa.gov/airmarkt/progress/docs/ozonenbp.pdf> .

attainment for many areas unless there are emission reductions from attainment and nonattainment areas outside the area for which the state is performing the attainment demonstration. An extreme hypothetical example of this situation would be a nonattainment area that is mostly rural with few emissions of its own, but which is ineligible for rural transport area treatment and that is affected by significant transport from upwind areas. For its attainment demonstration, it must rely totally on emission reductions from upwind areas and may not be able to demonstrate RFP from emission reductions totally within the nonattainment area.

Additionally, air quality modeling to make a determination of equivalent ozone reductions would be very difficult. Ozone reductions from a particular strategy of emission reductions vary based on a number of factors such as wind, climate, type of emission source, location of sources, and height of emissions release above the ground. Therefore, the location and spatial extent of ozone reductions may be highly variable on a day-to-day basis. In many cases, emission reductions from farther away from a receptor location could be more beneficial in reducing ozone than emission reductions from a nearer location in the nonattainment area. The fact that the NO_x SIP call regional emission reductions have been shown to reduce ozone concentrations in almost all nonattainment areas is a testament to the fact that regional NO_x controls are beneficial in reducing ozone. The current policy of allowing reductions for RFP purposes only out to certain well-defined geographic distances would serve to prevent abuse.

Section 182(c)(2)(C) does require that NO_x reductions must be shown to reduce ozone concentrations “at least equivalent” to that which would result from VOC reductions. In response to the CAA’s requirement of section 182(c)(2)(C), EPA had in the early- and mid-1990’s issued guidance^{7,8} for implementation of this provision. The guidance is based on two

⁷ NO_x Substitution Guidance, December, 1993. Office of Air Quality Planning and Standards; U.S. Environmental Protection Agency; Research Triangle Park, North Carolina 27711

principles: First, an equivalency demonstration requires that cumulative RFP emission reductions must be consistent with the NO_x and VOC emission reductions determined in the ozone attainment modeling demonstration; in other words, a ton of NO_x cannot simply substitute for a ton of VOC since the air quality impact might be entirely different. Second, specified reductions in NO_x and VOC emissions should be accomplished in the interim period between the time of the beginning of the RFP period in question (at the time, that was the end of 1996) and the attainment date, consistent with the continuous RFP emission reduction requirement. Thus, substituting NO_x emission reductions for VOC emission reductions for RFP purposes has consistently been done in the context of the area's attainment demonstration in order to demonstrate equivalent ozone reductions regardless of whether the emission reductions that are credited for RFP purposes come wholly within the nonattainment area or where some come from outside the nonattainment area.⁹

Mandate from Subpart 1 for RFP

16. Comment: The commenter also feels that EPA has erroneously claimed support from Subpart 1's mandate for "reasonable further progress," defined as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." §171(1). The agency has asserted that this Subpart 1 provision somehow shows that Congress did not care about the

⁸ Memorandum from John Seitz, "Clarification of Policy for Nitrogen Oxides (NO_x) Substitution." August 8, 1994.

⁹ It should be noted that reductions toward the RFP requirement of the CAA that actually occur within one part of a nonattainment area do not necessarily produce the same ozone reductions as emissions reductions in another part of the nonattainment area. Depending on where the reductions occur, even if all the RFP emission reductions occur wholly within the nonattainment area, it is possible that there could actually be no reduction in ozone concentrations within that nonattainment area.

location of emission reductions as long as they contributed to progress toward attainment. 70 FR 71648, quoting CAA section 171(1). This argument simply ignores the express language of Subpart 2, which explicitly requires the achievement of specified percentage reductions “in” the nonattainment area. EPA cannot rely on a general statutory provision to override a more specific one, or rely on policy goals to override express statutory mandates.

EPA Response: The EPA believes that its interpretation advances the general statutory purpose underlying RFP. For both Subparts 1 and 2,¹⁰ Congress defined RFP to mean "such annual incremental reductions in emissions of the relevant pollutant as are required by this part or may reasonably be required by (EPA) for the purpose of ensuring attainment. . . by the applicable date." CAA section 171(1). Under both Sections 172 and 182, the stated purpose of 'reasonable further progress' is to ensure attainment by the applicable attainment date. Acknowledging this stated purpose, EPA reasoned that "specific, annual emissions reductions from geographic areas outside the nonattainment area boundaries that contribute to lower ambient ozone levels in the nonattainment area would fall within the scope of 'such annual incremental reductions' . . . as are required. . . for the purpose of ensuring attainment. . . ." 70 FR 71,648/2. Therefore, while it is true that the statute does not expressly authorize RFP credit for outside emission reductions, EPA believes its interpretation of the statute to allow such credit in the absence of an express prohibition is reasonable. The commenter is incorrect in stating that this construction relies on a general statutory provision to override a more specific one. Although the RFP requirements in Subpart 2 are more specific than those in Subpart 1, they do not expressly and unambiguously limit the crediting of reductions in the manner the commenter suggests. Because no provision

¹⁰ See 42 U.S.C. § 7501 (stating that the ensuing definitions apply "(f)or the purpose of this part").

speaks precisely to the relevant issue, EPA appropriately considered the RFP and creditability provisions (CAA section 182 (b)(1)(c)) as a whole to reach a reasonable reading of the statute.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a “significant regulatory action” under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations of the Phase 2 Rule published on November 29, 2005 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2060-0594. The Phase 2 Rule’s information collection request (ICR) covered the RFP interpretation that is the subject of this final rule. 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 this 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 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 this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not directly impose any requirements on small entities. Rather this final rule interprets the RFP requirements under the SIP for states to submit RFP plans in order to attain the ozone NAAQS.

D. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local, and 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 CAA imposes the obligation for states to submit SIPs, including RFP, to implement the Ozone NAAQS. In this final rule, EPA is merely providing an interpretation of those requirements. However, even if this interpretation did establish an independent requirement for states to submit SIPs, it is questionable whether such a requirement would

constitute a federal mandate in any case. The obligation for a state to submit a SIP that arises out of section 110 and section 172 (part D) of the CAA is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of section 21(5)(9a)(I) of UMRA (2 U.S.C.658(a)(I)). Even if it did, the duty could be viewed as falling within the exception for a condition of federal assistance under section 21(5)(a)(i)(I) of UMRA (2 U.S.C. 658(5)(a)(i)(I))

The EPA has determined that this rule contains merely an interpretation of regulatory requirements and 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 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 final action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule addresses the Court’s vacatur and remand of a

portion of the Phase 2 implementation rule for the 8-hour standard, namely an interpretation that allowed credit toward RFP for the 8-hour standard from emission reductions outside the nonattainment area. In addressing the vacatur and remand, this rule merely explains the requirements for RFP and does not impose any additional requirements. Thus, Executive Order 13132 does not apply to this rule.

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

F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

This final rule does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It does not have a substantial direct effect on one or more Indian tribes, since no tribe has to develop a SIP under this final rule. 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 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 to this action.

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

This final action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866 and because EPA does not have reason to believe the environmental health or safety risk addressed by the 8-hour ozone RFP Regulations present a disproportionate risk to children. This final action addresses whether a SIP will adequately and timely achieve reasonable further progress to 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 solicited comments on whether this 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 No. 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 action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (EO) 12898 (59 FR 7629, February 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 final 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. This final action will address the Court’s vacatur and remand of a portion of the Phase 2 implementation rule for the 8-hour standard, namely an interpretation that allowed credit toward RFP for the 8-hour standard from emission reductions outside the nonattainment area. This final action merely explains the requirements for RFP and does not impose any additional requirements.

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. 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 DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

L. Determination Under Section 307(d)

Under section 307(b)(1) of the Act, judicial review of today's final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by

[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

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: August 4, 2009.

Lisa P. Jackson,
Administrator.