Response to Comments on Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements

February 13, 2015

Table of Contents

1.0 Introduction

The Environmental Protection Agency (EPA) proposed a rule on June 6, 2013 (78 FR 34178), to facilitate implementing the 2008 ozone national ambient air quality standards (NAAQS) (the "2008 ozone NAAQS") that were promulgated on March 12, 2008. This proposed rule addressed a range of state implementation plan (SIP) requirements for the 2008 ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology (RACT), reasonably available control measures (RACM), new source review (NSR) requirements in nonattainment areas, emission inventories and the timing of SIP submissions and of compliance with emission control measures in the SIP. Other issues also addressed in the proposed rule were the revocation of the 1997 ozone NAAQS and anti-backsliding requirements that would apply when the 1997 ozone NAAQS is revoked.

As noted in the proposal, the EPA will work closely with air agencies to provide assistance and flexibility in implementing the 2008 ozone NAAQS consistent with the implementation approaches that are adopted in the final implementation rule.

Included in this document are summaries of the comments received on the proposed rule and the EPA's responses. Comments are arranged consistent with the relevant sections of the proposed rule.

Table 1. Explanation of Acronyms and Frequently Used Abbreviations

Acronym	Long Name
ACT	Alternative Control Techniques
CAA	CAA
CFR	Code of Federal Regulations
CSAPR	Cross State Air Pollution Rule
CTG	Control Techniques Guideline
EGU	Electric Generating Units
EPA	United States Environmental Protection Agency
FR	Federal Register
HEDD	High Electric Demand Days
MACT	Maximum Achievable Control Technology
MATS	Mercury and Air Toxics Standards
NAAQS	National Ambient Air Quality Standards
NNSR	Nonattainment New Source Review
NO_x	Nitrogen Oxides
NSPS	New Source Performance Standards
NSR	New Source Review

PPB	Parts per Billion
PSD	Prevention of Significant Deterioration
RACM	Reasonably Available Control Measures
RACT	Reasonably Available Control Technology
RFP	Reasonable Further Progress
SIP	State Implementation Plan
TPY	Tons per Year

Table 2. List of Commenters and Associated Docket Numbers

Docket Number	Commenter Name
EPA-HQ-OAR-2010-0885-0119	J. Anderson
EPA-HQ-OAR-2010-0885-0122	Tauna M. Szymanski and Lucinda Minton Langworthy, Hunton & Williams LLP on behalf of the Utility Air Regulatory Group (UARG)
EPA-HQ-OAR-2010-0885-0127	Kipp A. Coddington, Environmental & Energy Counsel, American Automotive Leasing Association (AALA)
EPA-HQ-OAR-2010-0885-0128	Thomas Karol, Federal Affairs Counsel, National Association of Mutual Insurance Companies (NAMIC)
EPA-HQ-OAR-2010-0885-0129	Mathew Page, Vice President, Smith Aldridge, Inc.
EPA-HQ-OAR-2010-0885-0130	Michael G. Dowd, Director, Air Division, Virginia Department of Environmental Quality (DEQ)
EPA-HQ-OAR-2010-0885-0131	Kimberly A. Scarborough, Environmental Policy Manager - Air, PSEG Services Corporation
EPA-HQ-OAR-2010-0885-0132	Zak Covar, Executive Director, Texas Commission on Environmental Quality (TCEQ)
EPA-HQ-OAR-2010-0885-0136	Larry Greene, Executive Director/Air Pollution Control Officer, Sacramento Metropolitan Air Quality Management District (SMAQMD)
EPA-HQ-OAR-2010-0885-0137	Ronald W. Gore, Chief, Air Division, Alabama Department of Environmental Management (ADEM)
EPA-HQ-OAR-2010-0885-0138	Anonymous public comment
EPA-HQ-OAR-2010-0885-0139	Brad Poiriez, President, California Air Pollution Control Officers Association (CAPCOA)
EPA-HQ-OAR-2010-0885-0140	Pharr Andrews and Andrew Hoekzema, Co-Chair, Clean Air Coalition Advisory Committee (CACAC)
EPA-HQ-OAR-2010-0885-0141	John A. Paul, Administrator, Regional Air Pollution Control agency (RAPCA)
EPA-HQ-OAR-2010-0885-0142	Michael Bradley, Director, The Clean Energy Group
EPA-HQ-OAR-2010-0885-0143	E. Christopher Abruzzo, Acting Secretary, Pennsylvania Department of Environmental Protection (DEP)
EPA-HQ-OAR-2010-0885-0144	Jane Kozinski, Assistant Commissioner, Environmental Management, State of New Jersey
EPA-HQ-OAR-2010-0885-0145	Lorraine Krupa Gershman, Director, American Chemistry Council (ACC)
EPA-HQ-OAR-2010-0885-0146	Arthur N. Marin, Executive Director, Northeast States for Coordinated Air Use Management (NESCAUM)
EPA-HQ-OAR-2010-0885-0147	Seth Barna, Director, Chemical Products and Technology, American Chemistry Council (ACC)
EPA-HQ-OAR-2010-0885-0148	Michael Villegas, Air Pollution Control Officer, Ventura County Air Pollution Control District
EPA-HQ-OAR-2010-0885-0149	Hasan Ikhrata, Executive Director, Southern California Association of Governments (SCAG)

EPA-HQ-OAR-2010-0885-0150	Barry R. Wallerstein, Executive Officer, South Coast Air Quality Management District (SCAQMD)
EPA-HQ-OAR-2010-0885-0151	Leslie Ritts, Counsel, National Environmental Development Association's Clean Air Project (NEDA/CAP)
EPA-HQ-OAR-2010-0885-0152	Scott Nally, Director, Ohio Environmental Protection agency
EPA-HQ-OAR-2010-0885-0153	Keith Bentley, Chief, Air Protection Branch, Environmental Protection Division, Georgia Department of Natural Resources
EPA-HQ-OAR-2010-0885-0154	Todd Parfitt, Director, State of Wyoming Department of Environmental Quality
EPA-HQ-OAR-2010-0885-0155	George S. (Tad) Aburn and Lynn A. Liddington, Co-Chairs, Criteria Pollutants Committee, National Association of Clean Air Agencies (NACAA)
EPA-HQ-OAR-2010-0885-0156	Carlos Swonke, P.G., Director, Environmental Affairs Division, Texas Department of Transportation (TxDOT)
EPA-HQ-OAR-2010-0885-0157	George S. (Tad) Aburn, Director, Maryland Department of the Environment (MDE)
EPA-HQ-OAR-2010-0885-0158	Pamela F. Faggert, Vice President and Chief Environmental Officer, Dominion Resources Services, Inc.
EPA-HQ-OAR-2010-0885-0159	Tokesha M. Collins, Ken Miller LLP, Counsel for the Louisiana Chemical Association (LCA)
EPA-HQ-OAR-2010-0885-0160	Richard W. Corey, Executive Director, California Air Resources Board (CARB)
EPA-HQ-OAR-2010-0885-0161	Thure Cannon, President, Texas Pipeline Association (TPA)
EPA-HQ-OAR-2010-0885-0162	Lisa M. Jaeger, Counsel, Bracewell & Giuliani LLP, on behalf of the Council of Industrial Boiler Owners (CIBO)
EPA-HQ-OAR-2010-0885-0163	Joseph J. Martens, New York State Department of Environmental Conservation (NYSDEC)
EPA-HQ-OAR-2010-0885-0164	Michael Morris, Director of Transportation, North Central Texas Council of Governments (NCTCOG)
EPA-HQ-OAR-2010-0885-0165	Robert J. Morehouse and Shannon S. Broome, Points of Contact on behalf of The Air Permitting Forum
EPA-HQ-OAR-2010-0885-0166	Lucinda Minton Langworthy and Tauna M. Szymanski, Hunton & Williams LLP on behalf of the Utility Air Regulatory Group (UARG)
EPA-HQ-OAR-2010-0885-0167	J. Wick Havens, Interim Executive Director, Ozone Transport Commission (OTC)
EPA-HQ-OAR-2010-0885-0168	Ali Mirzakhalili, P.E., Director, State of Delaware Department of Natural Resources & Environmental Control, Division of Air Quality

EPA-HQ-OAR-2010-0885-0169	Myra C. Reece, Chief, Bureau of Air Quality, South Carolina Department of Health and Environmental Control (SCDHEC)
EPA-HQ-OAR-2010-0885-0170	Peter Zalzal and Graham McCahan, Environmental Defense Fund (EDF)
EPA-HQ-OAR-2010-0885-0171	Zachary L. Craft, Baker Botts, LLP, on behalf of The 8-Hour Ozone SIP Coalition *(identical to comment 0173)*
EPA-HQ-OAR-2010-0885-0172	John S. Lyons, Director, Kentucky Division for Air Quality, Energy and Environment Cabinet, Kentucky Department of Environmental Protection
EPA-HQ-OAR-2010-0885-0173	Zachary L. Craft, Baker Botts LLP on behalf of BCCA Appeal Group (BCCA)
EPA-HQ-OAR-2010-0885-0174	Michael O. Lebeis, Senior Environmental Engineer, Environmental Management and Resources, DTE Energy
EPA-HQ-OAR-2010-0885-0175	Bart Sponseller, Director, Bureau of Air Management, Wisconsin Department of Natural Resources (WDNR)
EPA-HQ-OAR-2010-0885-0176	J. Dillard
EPA-HQ-OAR-2010-0885-0177	Connecticut Department of Energy and Environmental Protection (DEEP)
EPA-HQ-OAR-2010-0885-0178	Kyra L. Moore, Director, Missouri Department of Natural Resources (DNR)
EPA-HQ-OAR-2010-0885-0179	Sheila C. Holman, Director, North Carolina Division of Air Quality (NCDENR)
EPA-HQ-OAR-2010-0885-0180	Earthjustice et al.
EPA-HQ-OAR-2010-0885-0181	Mark Macarro, Tribal Chairman, Pechanga Indian Reservation

2.0 What are the SIP requirements for the 2008 ozone NAAQS?

A. What is the deadline for submitting nonattainment area SIP elements due under Clean Air Act (CAA or Act) section 182 for the 2008 ozone NAAQS?

1. Suggest consolidated SIP submittal at 36 months after designation

Comment: Commenters (0130, 0132, 0137, 0156 and 0175) supported the flexibility offered by a consolidated approach and stated the deadline for such a submittal should be 36 months following the effective date of designations. Commenters suggested, the timeline for the combined submittal be at the maximum statutory timeline for the attainment plan, in the case of Moderate nonattainment areas 36 months from designation.

Commenter (0130) stated that, RACT determinations are highly contentious, facility-specific control determinations involving negotiation of control requirements and which must be SIP revisions with public notice requirements. The Commenter (0130) stated that, the deadline of 24 months from designation is impossible to meet and 30 months would be difficult as well. The Commenter (0130) stated that, RFP plans are difficult to create and finalize in 36 months and attainment plans, with modelling demonstrations, are significant efforts that need every bit of 36 months for proper development.

Commenter (0132) stated that, the EPA does not provide a rationale for why 30 months provides for a *de minimis* delay, but 36 months does not. The Commenter (0132) stated that, submitting the attainment demonstration to the EPA in 30 months, instead of 36 months, would not advance attainment of the standard because the EPA's implementation deadlines for RACT, RACM and RFP control measures are independent of the SIP submittal date. Commenter (0132) stated that, the delayed release and finalization of the implementation rule and revised modeling guidance warrant a 36-month deadline given the length of time needed to have stakeholder meetings, proposal and adoption of the SIP and rule revisions.

Commenter (0156) supported the consolidated approach because it would streamline administrative processing, increase meaningful public involvement, and it should also reduce the number of conformity determinations required by SIP actions (e.g. within 24 months of a new budget or a SIP revision).

Commenter (0137) supported the EPA's proposal to align deadlines for the attainment SIP and any required new inspection and maintenance program (I/M) SIP so that both are due at the time the attainment SIP is due.

Response: Although we proposed a consolidated approach for the state's choice to consolidate SIP submittal requirements for their respective areas into a SIP due at 30 months after designation, we are not finalizing that approach given the uncertainty regarding the statutory basis for providing such flexibility. Rather, the EPA is finalizing the approach that the various SIP elements are due based on the timeframes provided in CAA section 182.

The final rule requires all areas to submit the various elements of the SIP in the period of time provided by the statute. The time period specified in section 182 for the emission inventories and RACT SIPs is 2 years, 3 years for 15 percent RFP plans and Moderate area attainment demonstrations, and 4 years for 3 percent per year RFP plans and attainment demonstrations from Serious and higher areas. The specified time period for states to submit each required element will run from the effective date of an area's nonattainment designation for the 2008 ozone NAAQS.

2. Support consolidated SIP submittal due 30 months after designation

Comment: Commenters (0139, 0143, 0144, 0146, 0150, 0152, 0154, 0155, 0157, 0158, 0160, 0166, 0169, 0172, 0177 and 0179) generally supported the EPA's flexible approach.

Commenters (0143, 0146, 0150, 0154, 0155, 0157, 0166 and 0177) supported this flexibility if the EPA is able to establish a firm legal basis before finalizing the proposed rule and requested that the EPA carefully explain the policy and legal basis for these options in the final rule, to avoid the uncertainty of litigation.

Commenter (0152) generally supported the EPA's attempts to incorporate more flexible approaches but believed the proposal falls short of the flexibility needed to implement the CAA effectively—for example, the alignment of the attainment demonstration SIP with the emission inventory and RACT SIPs due earlier.

Commenter (0177) stated, the 30-month option provides a more realistic timeframe for completion of inventories and adoption of any new RACT regulations and added that, if this flexibility is included in the final rule, the EPA should make it clear that any associated RACT, RACM or other control measures must be implemented according to mandated CAA deadlines to ensure expeditious attainment.

Commenter (0179) indicated a preference for the second option because it allows states to undertake a less burdensome planning process, including having one period for public review and opportunity for public hearing for all the SIP elements involved. Commenter (0179) added that, states should be given sufficient time to adopt rules in the event the EPA issues updates to Control Techniques Guidelines (CTG) or Alternative CTG.

Commenters (0158 and 0166) supported giving states the *option* to follow the statutory deadlines or to submit a consolidated SIP within 30 months, but stated the EPA should make clear in the final rule that it is not *requiring* states to submit consolidated SIPs within 30 months since such a

requirement would be contrary to the Act, which provides for later deadlines for certain SIP elements.

Commenter (0166) supported the EPA's proposal allowing the use of existing, already-prepared inventories and previously established schedules.

Response: The EPA appreciates the support of the Commenters. However, we are not including the consolidated approach in the final rule. We proposed the consolidated approach to provide flexibility to states in order to balance such flexibility with what the CAA specifically requires. Several Commenters questioned the legal basis for providing such flexibility in the consolidated approach (*See* section below for details). The EPA agrees and is not providing the consolidated approach in the final rule. The final rule requires all areas to submit the various elements of the SIP within the period of time provided by the statute.

3. Do not support consolidated SIP submittal

Comment: Keep the SIP submission schedule consistent with the CAA

Commenters (0151, 0159, 0163 and 0168) stated their preference is to adhere to the period of time provided by the statute. Commenter (0151) expressed concerns regarding the use of modeling efforts under the Cross State Air Pollution Rule (CSAPR) and stated that it may make better sense for local authorities to stick to the established SIP submittal schedule and examine closely the emission inventory baseline before deciding which actions must be taken in the overall SIP strategy for attainment and then providing time to model those results. Commenter (0151) suggested accepting the fact that states could be late on their first 2008 SIP inventory submissions and keeping to the normal SIP submission schedule.

Commenters (0151 and 0163) questioned the viability of the "state's choice" alternative because the required SIP elements create a significant workload that may be difficult for states to complete within 30 months.

Commenter (0151) noted that, one of the dates that must be met sooner rather than later is not even discussed in the proposal— for states to adopt/make nonattainment NSR (NNSR) applicable in expanded nonattainment areas or adopt NNSR requirements within 18 months, as required by the D.C. Circuit in *NRDC v. EPA (Phase 2 Ozone Plan).*

Commenter (0168) concluded that, this alternative should not be adopted because it is providing flexibility that is inconsistent with the CAA, inconsistent with prior rules and is not needed given the EPA's classification scheme. Commenter (0168) stated that, the proposal would impact only areas classified as Moderate and higher, and given that most areas are classified as Marginal, it would have little utility. Further, the Commenter noted that, those states with areas currently classified as Moderate and above already have significant experience preparing emission inventories and have been through at least one round of RACT SIPs.

Commenter (0180) stated, the EPA may not extend the deadlines because the proposed extensions would unlawfully rewrite the statute and be arbitrary. Commenter (0180) stated, the

EPA's policy arguments cannot override Congress's intent and cited *NRDC v. EPA*, 489 F.3d 1364, 1373-74 (D.C. Cir. 2007). Commenter (0180) disagreed that, the 6-month delay is "*de minimis*" and argued that when Congress establishes an explicit submittal deadline, the EPA lacks authority to override it and cited *Sierra Club v. EPA*, 705 F.3d 458, 467-69 (D.C. Cir. 2013) and *Pub. Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989). Commenter (0180), citing *SCAQMD*, 472 F.3d at 886-88, 894-95, stated, Congress amended the Act to limit the EPA's discretion and to expedite attainment of the NAAQS, thus the delay is thus contrary to Congress's intent. Commenter (0180) stated that, because the proposal breaks the law to achieve an end that could be lawfully achieved and is irrational and arbitrary. Commenter (0180) also stated that, the text of § 51.1115 should reflect the preamble statement which indicated the preferred alternative would only be available for Moderate and higher areas.

Response: After considering comments questioning the legal supportability of the consolidated approach, the EPA has concluded that we do not have a sufficient statutory basis to provide this flexibility. Therefore, the final rule includes only the option of submitting SIP elements on their statutory deadlines, as this approach is the one that is most clearly supported by the CAA. Additionally, we note that there is no need to modify § 51.1115 as suggested by the Commenter because we are not finalizing the consolidated approach.

Comment: Use the actual date of designation

Commenter (0180) contended that to be consistent with the Clean Air Act (CAA), the trigger date for the submission obligations must be when the designations are made, not some later "effective date" the EPA arbitrarily assigns. Commenter (0180) claims the proposed extensions would unlawfully rewrite the statute and be arbitrary if the trigger dates are based on the "effective date" of designations as the trigger for the nonattainment SIP submission obligations instead of the signature date by the EPA administrator for the 2008 ozone nonattainment designation action. Commenter (0180) argued that, the submission obligations originally ran from date of enactment of the 1990 Clean Air Act Amendments – November 15, 1990.

Response: We disagree with the Commenter that the CAA mandates the SIP submittal due dates in subpart 2 must run from the date the designations are signed instead of from the effective date of designations and classifications. As an initial matter, the SIP deadlines in subpart 2 for the 1-hour ozone standards, as set forth in section 182, are established as a specified period of time (months or years) from November 15, 1990, the date of enactment of the CAA Amendments of 1990, and also generally the date it became effective. The EPA notes that the SIP deadlines for areas initially designated nonattainment for new/revised 8-hour standards are not directly addressed by the CAA. Instead, EPA logically refers to section 181(b)(1), which addresses new nonattainment designations for the 1-hour standards, to derive reasonable deadlines for SIP obligations associated with designations and classifications under the new/revised 8-hour standards. Section 181(b)(1) indicates that "…any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between November 15, 1990, and the date the area is classified. We believe that provision can be reasonably interpreted to mean the effective date of the designation and classification, and we have historically interpreted it as such for ozone-related SIP obligations and attainment deadlines, and also similarly for other pollutants. See, 40 Code of Federal Regulation (CFR)

51.902, Table 1 (specifying that the attainment periods in the Table for the 1997 8-hour ozone NAAQS are "years after the effective date of nonattainment designation")

After the comments were submitted, the D.C. Circuit has confirmed that the better reading of the CAA is that the clock for determining when attainment is due begins when an area's designation becomes effective, not at some later time. *NRDC v. EPA*, D.C. Cir. No. 12-1321 (Dec. 23, 2014). To provide clarity to states after the D.C. Circuit court decision, the EPA is modifying 40 CFR 51.1103 consistent with that decision to establish attainment dates that run from the effective date of designation, i.e., July 20, 2012.[1] This is the same approach the EPA used in past ozone implementation rules and the approach the court indicated was consistent with Congressional intent.[2] The maximum attainment dates for nonattainment areas in each classification under the 2008 NAAQS based on the July 20, 2012 effective date are as follows: Marginal - 3 years from effective date of designation; Moderate - 6 years from effective date of designation; Serious - 9 years from effective date of designation; Severe - 15 years (or 17 years) from effective date of designation; and Extreme - 20 years from effective date of designation.

4. Incorporate planning for the next ozone standard

Comment: Commenter (0151) suggested, the agency should re-propose this portion of the SIP Requirements Rule and "key" the 2008 NAAQS SIP to planning for the next ozone NAAQS. Commenter (0151) stated that, one alternative might be to actively anticipate that the EPA will

---

[1] We are finalizing this approach without additional notice-and-comment. As noted, we took comment in the original proposal on two approaches: the option we promulgated and which the court rejected, and the option we are promulgating here. Moreover, the court decision strongly indicates that the approach we are promulgating here is the only approach that is consistent with Congressional intent. In light of the need for certainty for the states and regulated parties, the fact that we previously solicited comment on the approach we are adopting here, and the limited discretion the court believes EPA has been provided under the Act, we believe additional comment is unnecessary and contrary to the public interest.

[2] We note that during the comment period on the May 2012 rule establishing the attainment dates, a few commenters claimed that the attainment period should run from the time the designations actions were signed by the Administrator rather than the effective date of designation. In the final May 2012 rule, we responded to this comment explaining why we believed the arguments the commenters raised were not supported by the statute. Regardless we note that whether the attainment date runs from the date of signature or the effective date of designation, the attainment year will be the same, as an attainment showing is based on the most recent three full years of ozone data available. Thus, for example, under either approach, the relevant years for demonstrating attainment for a Marginal area will be 2012-2014 and for a Moderate area, 2015-2017.

need to make a deficiency finding on the first half of states' SIP planning obligations and issue a generic SIP call (as it has done in the past for other NAAQS), which would provide at least 18 months and possibly additional time for preparation of the 2014 emission inventory, RACT and infrastructure SIP, allowing additional time for ozone planning to catch up with the new standard. Commenter (0151) stated that, this 2008 NAAQS SIP Requirement Rule is an important link to achieving the anticipated revised ozone NAAQS and should be viewed in that context. Commenter (0151) suggested that, in finalizing this rulemaking the EPA should endeavor to minimize duplicative state legacy ozone SIP planning requirements for both the 1997 and 2008 NAAQS.

Commenter (0151) stated that, it would be reasonable to conclude that Congress meant only to apply 182(b) as minimum requirements to the SIP planning cycle immediately following the 1990 CAA Amendments and thereafter, presumed that states would resume SIP planning under Title 1 Subpart 1, consistent with the Court's determination in *South Coast, supra,* that section 172(e) in Title 1 serves as the backstop against backsliding. Applying this legal theory, Commenter (0151) stated, allows the EPA to suspend multiple SIP-planning efforts for former ozone standards, concentrating on attainment of the most recent NAAQS, dispensing obsolete elements like RVP or all- volatile organic compounds (VOC) RFP and allowing states to tailor RFP planning without layering on multiple requirements that have no meaning except to penalize states and business.

Commenter (0169) stated, the shortened timeframe between finalizing the 2008 ozone NAAQS implementation rule and the expected proposal of a revised ozone NAAQS provides the EPA with an excellent opportunity to implement a co-proposal process. Commenter (0169) stated that, this is the perfect opportunity for the EPA to utilize many of the "lessons learned" from the Full/Life Cycle Analysis Project (FCAP/LCAP) which began during the 2012 $PM_{2.5}$ NAAQS proposal process.

Response: The EPA has not promulgated a revision to the 2008 NAAQS and designations for that standard would occur 2 (and up to 3) years following promulgation of any NAAQS revision. SIPs for any such revised standard would not be due until well after SIPs are required to be submitted for the 2008 ozone NAAQS. For this reason EPA believes it is premature, impractical, and not legally supported by the CAA to further delay planning obligations for the 2008 standard in order to consider obligations associated with a future, yet to be determined standard.

5. Marginal area RACT

Comment: Commenter (0180) stated that, because the EPA has (correctly) determined that implementation of the 2008 standard is governed by subpart 2, the rule must require states to submit, within 6 months of designation, the RACT provisions required for Marginal areas under 42 U.S.C. § 7511a(a)(2)(A). Commenter (0180) stated, the EPA's proposed RACT implementation deadline also does not assure consistency with the statute with respect to areas that are designated nonattainment for the 2008 standard in the future. Commenter (0180) stated that, to be consistent with the Act and prior EPA rules and policy, RACT controls for Marginal areas must be implemented before the start of the ozone season in the year in which the attainment deadline falls.

Response: The EPA disagrees with the comment that states must submit RACT corrections or additions for Marginal areas within 6 months of designation for the 2008 ozone NAAQS. The EPA clarifies that the obligations under §182(a)(2)(A) section apply only to nonattainment areas designated before 1990. The 2008 ozone NAAQS implementation rule takes the same position as the 1997 ozone implementation rule for the application of the RACT "fix-up" obligations under §182(a)(2)(A). The 1997 ozone implementation rule took the position that §182(a)(2)(A) only applies to pre-1990 nonattainment areas. The RACT fix-up provision under §182(a)(2)(A) for a nonattainment area classified as Marginal under the 2008 ozone NAAQS would only apply to those areas for which the EPA issued a RACT SIP Call before the 1990 CAA Amendments.

6. RACT Implementation deadline

Comment: Commenter (0180) stated, the proposed implementation deadline is unlawful and arbitrary as to the RACT requirements in section 182(a)(2)(A) for Marginal areas, as it would post-date the attainment deadline for such areas by more than 2 years.

Response: The EPA agrees with the comment that implementation deadline of 54 ½ months applies to states required to implement RACT for areas designated nonattainment for the 2008 NAAQS. The EPA does not agree that RACT is required for the designated nonattainment areas classified as Marginal.

Comment: Commenter (0180) believed that the EPA must rephrase the outside implementation deadline for RACT for sources covered by section 182(b)(2)(B) and (C) as 54 ½ months after the date of nonattainment designation for the 2008 standard.

Response: The EPA agrees with the comment that RACT rules should be implemented by the respective state within 54 ½ months after the date of nonattainment designation for the 2008 standard.

7. Timely issuance of SIP guidance and rules

Comment: Commenters (0139, 0150, 0153, 0155, 0157, 0163, 0169, 0175 and 0178) requested that the EPA issue guidance necessary for nonattainment areas to complete their SIP submittals on a timely basis.

Commenter (0139) stated that, states need to know what they are required to do as they prepare their SIP submissions. Commenter (0163) urged the EPA to update outdated guidance (e.g., RACT, Emissions Inventory) that states use in preparing their SIPs; most of these documents were prepared two decades ago to address the 1-hour ozone standard and are inadequate for the 2008 ozone NAAQS. Commenter (0150) stated, it is important to identify the test method in the rule, so that industry will know how compliance will be measured and for the EPA to include SIP implementation guidance as quickly as possible, so that states will know how the adequacy of their SIP revisions will be measured. Commenter (0169) stated, it is difficult to have meaningful public participation when the state cannot address stakeholder and community questions because the EPA has not finalized guidance and other requirements necessary to

implement the standards. Commenter (0175) stated that, states may be unable to meet the CAA deadlines if these rules are not issued in a timely manner.

Commenter (0130) stated that, in areas where reductions in VOC ozone precursors are shown to have minimal effects on ozone air quality, the EPA should update its redesignation request and maintenance plan guidance to reflect this science. Commenter (0130) added that, states also need other types of guidance on the analysis and regulation of High Electric Demand Days (HEDD) units, including RACT analyses and other types of controls which generally are not cost effective given current guidance on the calculations of cost/ton metrics.

Commenters (0139, 0141, 0150, 0153, 0155, 0157, 0169 and 0175) stated that, SIP guidance should be proposed and finalized on the same time schedule as the proposal and finalization of the standard itself. If the EPA is not able to simultaneously release both a NAAQS and the implementation rule (proposed and final), Commenter (0169) suggested that, the effective date for the standard should be delayed until the implementation rule is finalized.

Commenter (0154) implored the EPA to propose implementation guidelines when the EPA finalizes an NAAQS. Commenter (0154) stated that, failure on the EPA's part to issue timely rules, sets the states up for failure, invites lawsuits by frustrated interest groups and leads us all down a path where we spend most of our time fighting over missed deadlines, rather than focusing on environmental protection. Commenter (0139) requested the EPA's prompt action on SIP submittals that have already been received.

Response: The EPA issues NAAQS implementation guidance to aid air agencies in efficiently meeting their CAA obligations even though the Act does not mandate the EPA to issue such guidance (with a few exceptions). The EPA strives to issue these guidance and rules with clarity and in a timely manner, as we understand the challenges that states face in implementing actions to meet the intent of the statute. To improve our performance in this regard, over the past year, a joint EPA-state work group has been focusing on the timing of issuing guidance needed for states to meet their NAAQS implementation CAA deadlines. The work group's efforts have led to the development of an optimal schedule for the EPA to target for developing and issuing any implementation guidance and rules, as necessary, which the EPA intends to follow.

8. Multi-state nonattainment areas

Comment: Commenter (0159) supported the EPA's interpretation of the requirements for multi-state nonattainment areas, noting that it would be patently unfair for a cooperative and fully engaged state to be penalized for the actions, or lack thereof, of another state that is part of the same multi-state nonattainment area.

Commenter (0169) did not support the EPA's proposal that multi-state nonattainment areas adopt the same SIP submittal deadline and viewed this as impractical in light of South Carolina's past experience with the York County 1997 ozone nonattainment area (York County area) which is part of the Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina (Metrolina) nonattainment area. Commenter (0169) stated that, states often have differing regulatory processes and legislative timeframes, which make SIP submittal deadlines impossible to

coordinate across state lines.

Response: These comments were made in response to the EPA's proposed option to allow states to choose between the statutory SIP due dates or a consolidated approach with all SIP requirements due at 30 months from the designation effective date. The proposed option would have allowed the states the option to choose between the statutory or consolidated SIP due dates. The EPA proposal required states in a multi-state area to choose the same SIP due date option. The EPA is finalizing the approach requiring that all SIPs are due according to the statutory deadlines. We believe since the consolidated approach is not being finalized then the Commenter's concern is not an issue with the states not having a choice between different SIP due date schedules because all states in the multi-state area will be on the same statutory SIP due date schedule.

B. What are the requirements for modeling and attainment demonstration SIPs?

1. Marginal areas

Comment: Support proposal

Commenter (0163) stated, they agreed with the EPA's proposal and had requested a reclassification to Moderate based on a demonstration (with modeling) that the New York City metropolitan area is unlikely to attain the 2008 ozone NAAQS by the Marginal attainment deadline.

Response: Under the CAA section 181(b)(3) states are able to request a voluntary reclassification to a higher level. However, in this scenario, the state requesting a voluntary reclassification is one of several states in a multi-state nonattainment area. In line with CAA §182(j)(1) addressing multi-state nonattainment areas, the EPA believes that the states should behave in a coordinated manner when working toward attainment. For the EPA to honor any request for a reclassification of a multi-state area, the EPA has interpreted §182(j)(1) to require all states that are part of a multi-state nonattainment area to support the request.

Comment: CSAPR Model

Commenter (0159) agreed with the EPA's position that Marginal areas should implement such controls as needed to get the necessary emissions reductions to meet the 2008 ozone NAAQS within 3 years, but did not support the EPA's recommendation that such areas use the CSAPR model to examine whether they will timely attain the 2008 standard.

Response: The EPA recommended that states with Marginal areas look at available information (including modeling) to help determine if the area is likely to attain the NAAQS within 3 years. This was a recommendation and imposed no modeling or attainment demonstration requirements on Marginal nonattainment areas. The EPA is not "promoting" the use of the CSAPR modeling or any other specific technical information. We simply listed the CSAPR modeling as possibly providing useful information to the states. That may or may not be the case for any particular Marginal nonattainment area. There may be other information, including more recent modeling analyses that are more relevant to a particular area. Regardless, states with Marginal areas are not

obligated to submit an attainment demonstration or complete a modeling analysis for these areas.

Comment: Bump-up concern

Commenter (0169) questioned both how to prove to the EPA that York County has attained the 2008 ozone NAAQS and how to defend the area against a mandatory "bump-up" despite the SIP Requirements Rule suggestion that states "use available modeling information to examine the likelihood of whether a Marginal area would attain within 3 years." Similarly, given the current status of the CSAPR per the DC Circuit Court's opinion in *EME Homer City Generation v. EPA* (DC Cir. 2012), Commenter (0169) considered it largely inappropriate for the EPA to suggest states rely on modeling from the CSAPR and to assume that states have the ability to model as suggested in the rule. Commenter (0169) added that, in the letter denying the Department's request for reconsideration of the 2008 ozone NAAQS designation for York County, Lisa P. Jackson (former EPA Administrator) stated, "York County is properly designated nonattainment because of its contribution to ozone nonattainment in the Charlotte, N.C.-Rock Hill, S.C., area."

Response: The EPA is not promoting the use of the CSAPR modeling. Rather, we simply listed the CSAPR modeling as possibly providing useful information to the states. That may or may not be the case for any particular Marginal nonattainment area. There may be other data, including more recent modeling analyses that are more relevant to a particular area. But either way, states with Marginal areas are not obligated to submit an attainment demonstration or complete a modeling analysis for these areas. Regarding the issue pertaining to York County, the County is part of a multi-state nonattainment area. In line with CAA §182(j)(1) addressing multi-state nonattainment areas, the EPA believes that the states should behave in a coordinated manner when working toward attainment.

2. Moderate areas

Comment: The EPA exceeded its authority

Commenters (0151 and 0173) stated that, the EPA exceeded its authority to require states to utilize photochemical grid modeling for 2008 ozone SIP demonstrations.

Commenter (0173) added that, for the EPA to require photochemical modeling for Moderate nonattainment areas undermines states' discretion under the statute. Commenter (0173) asserted that, Courts have routinely noted that states have broad discretion in fashioning their control strategies where the CAA does not make a specific prescription (citing *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976); and *Train v. NRDC*, 421 U.S. 60 (1975). Commenter (0173) stated, the EPA's authority to prescribe requirements for Moderate nonattainment area SIPs is restricted to that which is specified by the CAA, which does not include photochemical modeling. Commenter (0173) also opposed the proposed expansion of photochemical modeling requirements because it would worsen existing bottlenecks in the SIP development and approval process. Commenter (0173) asserted, the EPA should not require more areas to submit modeled attainment demonstrations where the EPA cannot keep up with the existing rate of SIP submissions.

Response: The EPA disagrees with the Commenters and believes that EPA has the authority to require states to use appropriate modeling to predict the effect of emissions on air quality of any NAAQS, as we did for the 1997 ozone NAAQS. States are required to submit an attainment demonstration for Moderate areas. Since photochemical modeling is the most scientifically rigorous technique to determine NO_x and/or VOC emissions reductions needed to show attainment of the NAAQS, we are requiring photochemical modeling for all attainment demonstrations, including those for Moderate areas. However, in concert with the flexibility applicable to Serious and above areas under section 182(c)(2)(A), EPA will consider on a case-by-case basis other analytical methods that are at least as effective as photochemical modeling.

The CAA section 182(c)(2)(A) requires Serious nonattainment areas to submit an attainment demonstration which includes photochemical modeling or any other analytical method determined by the Administrator to be at least as effective. Section 182(j)(1)(B) also requires multi-state nonattainment areas to use photochemical grid modeling (or any other analytical method determined by the Administrator to be at least as effective) for their SIPs. Since 182(j) applies to all nonattainment areas, not just Serious and above, we have interpreted this provision to also apply to multi-state Moderate nonattainment areas.[3]

The specific authority to require photochemical modeling for Moderate nonattainment areas is derived from section 110(A)(2)(k) which gives the Administrator the authority to require air quality modeling for the purpose of predicting the effect on ambient air quality of emissions of any air pollutant for which there is an established NAAQS. Here, the EPA is requiring states to use photochemical modeling to predict the amounts of NO_x and/or VOC reductions that are needed to show that the area will attain the ozone NAAQS. Since the EPA has the legal authority to require photochemical modeling, and there is no technical reason to differentiate between the rigor of the attainment demonstration for all Moderate and above areas, the EPA continues to believe that it is appropriate to require an attainment demonstration based on photochemical modeling (or any other analytical method determined by the Administrator to be at least as effective) for all Moderate areas.

Comment: State discretion

Commenter (0152) stated that, modeling should be left at the state's discretion because the state is in the best position to determine if, and when, a more in-depth analysis than required by statute may be necessary and it should not be mandated by the EPA in all instances.

Response: The EPA believes that a minimum requirement for all Moderate and above nonattainment areas is to submit an attainment demonstration that is based on photochemical modeling or any other analytical method determined by the Administrator to be at least as

[3] The photochemical grid modeling requirement does not apply to multi-state Marginal areas because Marginal areas are not required to submit an attainment demonstration.

effective. Although photochemical modeling is the most scientifically rigorous technique to determine NO_x and/or VOC emissions reductions needed to show attainment of the NAAQS, states still have discretion to propose to EPA other techniques that would fulfill the attainment demonstration obligation. Since states need EPA approval of alternative analytical methods, they should work closely with the EPA to determine the most appropriate option(s) for the attainment demonstration.

Comment: Rural wintertime exemption

Commenter (0154) stated that, there are now a number of rural areas in the country with wintertime ozone attainment issues and recommended that the EPA exempt rural wintertime ozone nonattainment areas from the photochemical modeling requirement for the same reason—that a wintertime PGM or proven alternative analytical method has not been developed. Commenter (0154) stated, the EPA clearly has a lead responsibility to develop and test models that can be used consistently across the nation.

Response: The EPA recognizes that the causes of rural wintertime ozone exceedances are different than typical summer exceedances. However, the CAA does not distinguish between summer and winter ozone areas. Areas with wintertime violations are designated as nonattainment based on the same classification tables as all other nonattainment areas. They therefore must meet all of the appropriate CAA requirements for their particular nonattainment classification.

Nonattainment areas classified as Moderate and above, even those that may experience wintertime ozone problems, are required to submit an attainment demonstration. However there is flexibility in determining analytical methods to be used in developing the demonstration. The EPA will consider the nature of the ozone problem in reviewing available models and potential alternative methods for demonstrating attainment. There is also ongoing research which has successfully identified model science enhancements which have improved photochemical model performance in wintertime ozone situations. Some of these science updates may be available for states to use in their attainment demonstrations by the time modeling is needed for areas with wintertime ozone problems.

Comment: Alternatives to photochemical modeling

Commenters (0173, 0175 and 0179) requested that, the EPA support states in using alternatives to photochemical grid modeling for their attainment demonstrations.

Commenter (0175) stated that, while photochemical modeling is an important and long-used tool for ozone SIP planning, it also has key limitations. For example, Commenter (0175) claimed modeling relies heavily on limited spatial and temporal information on emissions and meteorology and often cannot be precisely calibrated to reflect measured air quality data and that some control strategy elements may be difficult to assign to emissions at a distinct point and time. Commenter (0175) stated that, an example of a successful SIP that relied on an alternative to photochemical modeling was the Houston area's SIP, approved by the EPA in 2006, which demonstrated that a photochemical model could not replicate the events involving rapidly formed

ozone that then drove the area's design value. Commenter (0175) stated, the Houston SIP relied in part on photochemical modeling, but also included assessments of ambient monitoring data, aircraft studies and other tools to support a change from the previous control strategy, including a tailored strategy to reduce emissions of selected highly-reactive VOC species by approximately 36 percent. *See* TCEQ, *Post-1999 Rate-of-Progress and Attainment Demonstration Follow-Up SIP for the Houston/Galveston Ozone Nonattainment Area* (Rule Log No. 2002w046a-SIP-AI) (Dec. 13, 2002).

Response: The EPA agrees that additional information, including alternative techniques, could be used to help demonstrate that an area will attain the NAAQS. Photochemical modeling is the most technically credible tool to estimate emissions reductions needed to show attainment. However, other tools, such as ambient data and emissions analyses can be used to supplement modeling. In addition, as the Commenter notes, modeling conducted by other groups, including multi-jurisdictional organizations and the EPA, can be used as part of the attainment demonstration.

In some cases, regional or national photochemical modeling may be sufficient to serve as the modeling analysis for the attainment demonstration. In that case, the EPA could consider appropriate regional or national scale photochemical modeling as having satisfied the "photochemical modeling" requirement for Moderate and above areas. Photochemical modeling conducted by a third party needs to be well documented and shown to be appropriate for the area. But since it is photochemical modeling, it would not need to be approved as "an equivalent method".

Comment: Support for weight-of-evidence

Commenter (0160) supported allowing Moderate areas to use an alternative attainment demonstration approach such as weight-of-evidence (WOE). Commenter (0160) suggested this approach could include a combination of regional air quality modeling and data analysis techniques. Commenter (0160) noted that, in California, some rural Marginal areas may become Moderate in the future making it important to include this alternative attainment demonstration approach in the final rule. Commenter (0160) added that, use of air quality modeling done for upwind areas, transport analyses and other technical information could be included in a WOE approach. Commenter (0160) appreciated the flexibility to address SIP planning for Moderate nonattainment areas in a manner that is tailored to specific situations, providing an alternative to resource-intensive modeling for each Moderate area.

Response: The EPA agrees that an alternative attainment demonstration approach may in some cases substitute for photochemical modeling (with proper approval). But we wish to clarify that the EPA does not use the term "weight of evidence" (WOE) to specifically refer to such an approach. As used by EPA, WOE refers to a set of analytical information that supplements a modeled attainment demonstration. While there are analyses that could be included in a typical WOE demonstration that could potentially serve as alternative analytical method to photochemical modeling, WOE itself does not serve as an alternative. States are encouraged to submit WOE information to supplement their attainment demonstration. Any state contemplating

an alternative analytical method to substitute for photochemical modeling must identify and document the method and seek formal approval from the EPA.

Comment: Do not support weight-of-evidence

Commenter (0180) stated that, because WOE determinations have often led to litigation or SIP disapproval, this method wastes limited state and EPA resources and impedes achievement of emissions reductions. Although the Commenter cited two cases in which the EPA prevailed regarding WOE, the Commenter (0180) stated that, the cases nonetheless indicate the limits of a weight of evidence approach and asserted the EPA's guidance appears to violate the directive of *Environmental Defense v. EPA*, where the demonstration would, contrary to the court's admonition, "abandon the model all together."

Commenter (0180) stated that, the guidance would go far beyond legal bounds if the EPA allowed the modeled attainment test to be supplemented with evidence of unusual events that were not the "but for" cause of an exceedance. Commenter (0180) stated, the EPA must look at monitored values that reflect air quality at the time of the measurement, not values that are arbitrarily lowered if the state or the EPA believes the reading to be too high on a certain day. Commenter (0180) stated, Congress provided a mechanism through exceptional events (EE) for those situations to be addressed *after* they have occurred, once the facts can be evaluated, not in an anticipatory and speculative manner as the EPA describes it. Commenter (0180) objected to the EPA's WOE approach because it appears to be designed to let states specifically ignore years like 2012 and the impacts of climate change in general.

Response: The EPA disagrees with the comment that WOE analyses should not be allowed to support attainment demonstrations. While modeling is still the critical component of an attainment demonstration, there is always uncertainty associated with modeling results. WOE analyses are meant to support and supplement the modeling results. Many types of information can be used to demonstrate that expeditious attainment is likely. These include alternative modeling applications, ambient data analyses and trends, emissions analysis and trends and in some cases additional emissions controls that were not directly accounted for in the modeling demonstration.

The Commenter notes cases where the EPA both approved and did not approve attainment demonstrations based on the combined strength of modeling and weight of evidence analyses. These examples illustrate that WOE arguments are sometimes convincing and sometimes not. EPA has approved attainment demonstrations with WOE demonstrations and has also dis-approved demonstrations where the overall evidence does not support an approval. Contrary to the Commenter's assertion, the EPA is not skeptical of WOE demonstrations. We recognize that some attainment demonstrations and WOE are convincing and some are not. The fact that we do not always approve attainment demonstrations is not a reason to abandon the WOE concept.

In addition, the Commenter notes several court cases that support the ability to use WOE in evaluating attainment demonstrations. Since the EPA clearly has the legal authority to do so and since there are numerous technical reasons to evaluate as much data and information as

appropriate, the EPA will continue to allow states to use WOE in support of modeled attainment demonstrations.

Comments related to the Exceptional Events (EE) are addressed in section 2.B.5.

3. Modeling guidance

Comment: Commenters (0132, 0152 and 0154) requested that, the EPA update its ozone modeling guidance as soon as possible since modeling must be completed well in advance of SIP submission. Commenter (0152) stated that, too often the EPA modeling guidance is issued too late for states to meaningfully apply it to SIP submittals that are on strict deadlines.

Response: The EPA agrees with the Commenters that, revised ozone photochemical modeling guidance is needed. A revised draft has been released for public comment and a final version will be released soon after the final implementation rule is published.

4. Capturing high emissions days in inventories

Comment: Use a summer day emissions inventory

Commenters (0143, 0144, 0146 and 0167) stated that, the EPA should include the requirement in the rule that the baseline inventory for RFP and contingency measures should be a summer day, rather than an annual inventory. One Commenter (0167) commented that, a "high ozone season day" inventory be required. The Commenter indicated that, the EPA states in the proposed rule, "On December 4, 2008, the EPA promulgated the Air Emissions Reporting Requirements (AERR) rule (40 CFR 51, Subpart A). The AERR requires states to submit comprehensive statewide 3-year cycle emission inventories (2008, 2011, 2014, etc.) regardless of an area's attainment status. The EPA indicates it would be appropriate for states with periodic inventory obligations under 182(a)(3)(A) to rely on their 3-year cycle inventory as described in the AERR to satisfy their 182(a)(3)(A) periodic inventory obligation." Ozone concentrations are most likely to be higher in the summer time since ozone concentrations are dependent on atmospheric conditions typical of a summer day. States depend on accurate summer day emissions of NO_x and VOC to develop atmospheric modeling runs. An accurate account of summer daily emissions is necessary for Pennsylvania's planning effort. The Commenter believed that, this is especially important if an air agency will also be required to model the effect of HEDD units which could elevate ozone concentrations on certain summer days. (0143)

Another Commenter (0144) contended that, current inventory guidance is inconsistent. The proposal and background section references the air emissions reporting requirements (AERR) for the purposes of defining the data elements for the emissions inventories for ozone relevant data element requirements, but the simultaneous AERR proposed amendments are removing the ozone related definitions and guidance. The background section of the proposal also references the EPA August 2005 inventory guidance document. This 2005 guidance document references and includes the consolidated emissions reporting rule (CERR), which no longer exists. States need clear guidance and definitions on ozone inventory development that is no longer obsolete. (0144)

Another Commenter (0146) requested that, the EPA expressly state that the baseline inventory for RFP and contingency measures be based on a summer day inventory, not on annual emissions. Such specificity was expressed in the previous ozone implementation rule as follows: "Consistent with the manner in which [rate of progress (ROP)] plans under the 1-hour ozone standard were developed, the RFP baseline for 2002 will have a typical summer day tons/day basis. As such, the attainment year target will also be a typical summer day target." If the intent of the language in the proposal was to allow such elements to be based on annual inventories, then the EPA is misguided. If this is instead an error of omission, then the EPA must clarify the requirements with language consistent with that used previously. (0146)

Commenter (0167) stated that, the EPA's proposed rule does not clearly state the baseline inventory requirements. The EPA's proposed rule mentions only annual data inventory. OTC states firmly believe that a high ozone season day inventory is also required. The EPA should expressly state that the baseline inventory for RFP and contingency measures be based on a summer day inventory. (0167)

Response: The EPA agrees that the baseline inventory for RFP should be based on an actual summer day inventory, which is consistent with the existing AERR requirements of 40 CFR Part 51 (the AERR). The EPA also partly agrees with the comment to use a "high ozone season day" inventory. In particular, the EPA agrees with the concept of an "ozone season day" inventory, because some areas have been observed to have exceedances during periods other than the summer season, which is typically when violations occur. Otherwise, the EPA believes that the existing definition is sufficient, which is supported both by those Commenters asking for a return to use of "summer day" emissions as well as by the progress achieved to date for reducing NO_x and VOC with the existing inventory approaches. Thus, the EPA disagrees with the addition of the word "high" to the "ozone season day" emissions.

Consequently, the EPA has included in the final rule the requirement that the inventories required by the CAA sections 182(a)(1) and 182(b)(1)(B) include actual ozone season day emissions, but has otherwise used a definition consistent with the "summer day" emissions definition previously in 40 CFR Part 51. Thus, ozone season emissions are defined in this final rule as an average day's actual emissions for a typical ozone season work weekday. Also consistent with 40 CFR Part 51, this final rule specifies that the "ozone season" is defined by the state in consultation with the regional office. This approach adopts the previous approach in 40 CFR Part 51 for the period defined as "summer," but replaces "summer" with "ozone season." The EPA also clarifies that the concept of "ozone season" for inventory purposes is not the same "ozone season" as that used for monitoring requirements. In general, the EPA expects that the period used for defining the ozone season for computing emissions inventories will be shorter and aligned with periods of the most significant ozone exceedances.

Comment: Require maximum daily emissions

Commenters (0144 and 0146) recommended that, the EPA address whether maximum daily emissions should be included in SIP planning. The Commenter (0144) stated that, the EPA should require a maximum daily actual emissions inventory during the ozone season to more accurately depict the cause of ozone exceedances, which are not predicted by an annual or

typical ozone season day inventory; such an inventory would more accurately capture HEDD units and distributed generation units. (0144). Another Commenter (0146) expressed that, the EPA should consider requiring maximum daily emissions, such as HEDD emissions, during the ozone season to more accurately depict the cause of ozone exceedance. These emissions are not currently captured in an annual or typical ozone season day inventory.

Response: While the first Commenter used the term "actual" in the comment and the second Commenter did not, we are assuming that based on the context in which these comments were given, both Commenters would like maximum actual emissions to be used as part of SIP planning. The context of both of these comments were for using emissions during HEDD periods, which we address in the response to the next comment summary.

In the final rule, we have indicated the need for areas to use emissions that are consistent with periods that have ozone exceedances. These periods can include HEDD periods for areas where emissions are higher during HEDD events. Rather than change the wording to include "maximum," we have elected to take a similar approach as in past rules as encouraged by Commenter 0146. As described in the response to the previous comment, we are requiring ozone season day emissions, the definition for which the EPA believes achieves the intent of these Commenters to use emissions estimates from periods of high ozone.

Comment: Require HEDD emissions in SIP planning

Commenters (0167 and 0168) recommended that the EPA require that HEDD emissions inventories be included in SIP planning. The Commenters recommended, as part of the high ozone day inventory, states need to factor in HEDD data into their modeling to appropriately factor in the impact of HEDD. The OTC states request that EPA take steps to account for and address peak emissions that contribute to high ozone days. (0167). Commenter (0168) agrees with the EPA proposal that, these emissions must be appropriately accounted for in modeling. Because of their significance we recommend that the EPA take a stronger stance in the proposal and clearly require areas to specifically address HEDD not only in modeling, but also in all other SIP requirements, to include ROP calculations and RACT determinations. (0168)

Response: The EPA agrees with the Commenters that HEDD emissions should be included in SIP inventories where appropriate. The EPA also agrees with the principle of a Commenter's (0168) recommendation to include HEDD-related emissions in non-modeling inventories, but the EPA believes that such emissions are already required based on existing definitions and continue to be required by the final rule.

The final rule requires a base year inventory for the nonattainment area in accordance with the CAA 182(a)(1) and 182(b)(1)(B) requirements for states to develop current and baseline inventories of actual emissions for the nonattainment area as part of SIPs. This "base year inventory for the nonattainment area" is used to form the baseline for ROP/RFP calculations and for motor vehicle conformity, as well as to provide an ozone season average overview of the current emissions sources. The emissions required for this base year inventory are ozone season day emissions as defined above and the spatial extent includes only the nonattainment area.

Furthermore, the final rule relies on 40 CFR Part 51 for defining which emissions are to be included in emissions inventories reported to the EPA. The current requirement for emission inventories in 40 CFR 51.20 (a) states: "All anthropogenic stationary sources must be included in your inventory as either point or nonpoint sources." In addition, 40 CFR 51.20(d) further clarifies that "Nonpoint source categories or emission events reasonably estimated by the state to represent a *de minimis* percentage of total county and state emissions of a given pollutant may be omitted." The EPA believes that for nonattainment areas for which emissions sources inside the area contribute emissions during HEDD periods, those emissions sources would not pass the *de minimus* test of 40 CFR 51.20 (d) and should therefore be included in the base year inventory for the nonattainment area. The EPA additionally recommends that the use of the phrase "typical" does not prevent areas from including emissions associated with HEDD events, particularly if the conditions causing nonattainment typically include HEDD-related emissions within the nonattainment area.

States are encouraged to examine emissions data and other information to determine if HEDD emissions sources need to be considered in their plan. As is the case with other emissions sources, it is inherently a state responsibility to develop emissions inventories, perform modeling (where necessary) and submit an attainment demonstration that shows how the state will attain the ozone NAAQS. It is also the state's responsibility to ensure that the emissions and modeling accurately represent the conditions that form ozone in the area and will show that they will attain the NAAQS by their attainment date (for Moderate and above areas).

The EPA has also considered the possibility that the intent of these comments may include seeking to compel other states to include HEDD-related emissions in their inventories. Such emissions estimates could be needed by downwind states from upwind states to help characterize the downwind state's nonattainment problems. However, since the purpose of the CAA 182(a)(1) and 182(b)(1)(B) emissions inventory requirements are to characterize the emissions *within* a nonattainment area that are needed for SIP development purposes for *that* nonattainment area, the EPA does not believe it should compel states to include HEDD-related emissions if those emissions are not relevant for bringing their own nonattainment area(s) into compliance. The resulting approach in this final rule allows for HEDD emissions to be included, but does not require them.

Comment: Create guidance and require emissions from the distributed generation sector for SIP planning

Commenter (0130) urged the EPA to provide specific guidance on the quantification of emissions from the distributed generation sector. The Commenter claimed widely available data from sources such as PJM seem to indicate that this emissions sector may be a segment of the emissions inventory that is currently under-estimated by the NONROAD model. Also important is the temporal and spatial profiles for this sector, which are poorly understood and could be important to air quality modeling. The Commenter contended it is known that such units operate during HEDD events and may emit NO_x in quantities that could be of concern in the short term, yet no federal guidance exists for the quantification, temporalization and spatial allocation of emissions in the base year or the future attainment years from this category. Without such basic information, estimating the impact on ozone air quality from this sector using EPA-approved

models is not possible. (0130)

Commenter (0144) stated, the EPA should require data from uncontrolled diesel engines used for demand response purposes as a part of a demand side management program be incorporated into the inventories and the modeling.

Response: The EPA agrees with the comments that distributed generation emissions could be important in some nonattainment areas. The EPA also agrees with the comment that emissions from uncontrolled diesel engines should be included in emissions inventories and modeling, but the EPA also believes that states are already required to do so under 40 CFR Part 51. The EPA disagrees with the comments that no guidance is provided for these sources of emissions and that it is not possible for states to estimate the impact on ozone from this sector without additional information from the EPA.

As described in the response to the comments above (*See* "Require HEDD emissions in SIP planning"), the governing rule for which sources to include in emissions inventories is found in 40 CFR Part 51. As with HEDD emissions, the EPA believes that these sources of emissions are already required and do not pass the *de minimus* test for being able to be excluded from inventories. Thus, the EPA concludes that the governing emissions reporting regulations already require the reporting of emissions from distributed generation where such emissions are important for analysis of ozone nonattainment. Because of the intermittent and smaller capacity of these sources, the EPA anticipates that they would be included as nonpoint sources, as an individual generator may be unlikely to meet the potential-to-emit point source reporting thresholds included in 40 CFR Part 51. However, states are permitted to get more detailed than required and include these sources as point sources.

Furthermore, the EPA disagrees with the implication that the EPA is required to provide information and emissions approaches for a given category prior to a state being able to include emissions in their SIP planning from that category. As is the case with other emissions sources, it is inherently a state responsibility to develop emissions inventories, perform modeling (where necessary) and submit an attainment demonstration that shows how the state will attain the ozone NAAQS. It is also the state's responsibility to ensure that the emissions and modeling accurately represent the conditions that form ozone in the area and will show that they will attain the NAAQS by their attainment date (for Moderate and above areas). While the EPA can assist in preparing these estimates by publishing emission factors, compiling national inventories and producing emissions models, any lack of such information does not remove the state responsibility of complete emissions inventories for SIP planning purposes.

In addition to the comments on the rule requirements, this comment also reflects on the EPA's guidance documents. While comments on the EPA's guidance does not directly impact the outcome of the rule, the EPA addresses these comments here to be complete.

The EPA disagrees with the Commenter's assertion that, no federal guidance exists for the quantification of emissions in the base year or the future attainment years for this category. Emissions from generator engines are covered in AP-42, Chapter 3, Section 3 provides emissions methods for these engines. As stated in that section: "The engine category addressed by this

section covers a wide variety of industrial applications of both gasoline and diesel internal combustion (IC) engines such as aerial lifts, fork lifts, mobile refrigeration units, *generators* [emphasis added], pumps, industrial sweepers/scrubbers, material handling equipment (such as conveyors) and portable well-drilling equipment." The emission factors for NO_x and other pollutants included in this AP-42 section are provided in two forms: power output (emissions in lb/hp-hr) and fuel input (emissions in lb/MMBtu). To use these emission factors, state and local air agencies can conduct surveys of their area to obtain the necessary activities of power output and/or fuel input. Such surveys are a typical part of the SIP planning process, especially for new or unfamiliar source categories.

The Commenter asserts that, the NONROAD emissions model underestimates the emissions from the distributed generator sector of the emission inventory. The EPA disagrees with the Commenter's assertion. The NONROAD model only calculates emissions from a generator that is "trailer or skid mounted self-contained engine\electric generator designed to supply electric power at a job site. (User's Guide for the Final NONROAD2005 Model, EPA420-R-05-013, December 2005, Table B-6)[4] Therefore, NONROAD2008 should not be used to calculate emissions from generators that are installed at a fixed location. This is consistent with the definition of a nonroad engine, which states in part that an internal combustion engine is not a nonroad engine if the engine...remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. (40 CFR part 89.2)

The EPA also disagrees with the Commenter's assertion that, no federal guidance exists for temporalization and spatial allocation of the distributed generation sector. These emissions allocation steps are particularly relevant for inventories used for modeled attainment demonstrations and temporal allocation may be important for estimation of ozone season emissions for the nonattainment area inventories. While the Commenter is correct that, there is no formulaic approach provided by the EPA for use in distribution generation emissions, the general guidance on temporal and spatial allocation of the emissions provided in the modeling guidance applies sufficiently for this sector. In addition, to the extent that distributed generation emissions are included in a state's inventory as a nonpoint source, the EPA provides several spatial allocation surrogates that could be appropriate for this type of industrial/commercial source. In addition, local survey data would benefit the spatial allocation approaches. Lastly, temporal allocation of these types of emissions is highly specific to a given episode and electricity generation and so those local conditions should be considered. The EPA does not believe that any default temporal profiles would sufficiently describe the temporal nature of these sources given their specificity, intermittent use and variability from one ozone season or episode to the next. For areas where such distributed generation emissions are significant, such a local-specific approach is consistent with the temporal allocation guidance provided in the modeling guidance.

---

[4] The user's guide is available at:
http://www.epa.gov/otaq/models/nonrdmdl/nonrdmdl2005/420r05013.pdf

Comment: State discretion

Commenter (0152) stated that, it should be up to the states to decide if HEDD days necessitate modeling.

Response: The EPA agrees that it is up to the states to decide if HEDD issues (selection of modeling time periods, emissions generation and control strategies) are important in their area and attainment demonstration. This final rule does not impose any new HEDD-related requirements for SIPs. It simply raises the issue so that states are aware that HEDD emissions could be important on some days in some areas. States are encouraged to examine emissions data and other information to determine if HEDD emissions sources need to be considered in their plan. As is the case with other emissions sources, it is inherently a state responsibility to develop emissions inventories, perform modeling (where necessary) and submit an attainment demonstration that shows how the state will attain the ozone NAAQS. It is also the state's responsibility to ensure that the emissions and modeling accurately represent the conditions that form ozone in the area and will show that they will attain the NAAQS by their attainment date (for Moderate and above areas).

Comment: Reporting of HEDD emissions by industry for use in modeling

Commenter (0143) stated that, the EPA should utilize its existing authority under section 114 of the CAA to require owners or operators of all HEDD units to report their daily NO_x emissions to the EPA and the EPA should publish that data for states to use in their atmospheric modeling analysis.

The Commenter believed that, the EPA indicates that the episode selection for the modeling should be used to address HEDD emissions timeframes by each state in which HEDD issues exist. The Commenter pointed that, in the proposed rule, the EPA stated, "Since NO_x emissions from electric power generation are a significant contributor to the total NO_x emissions for many ozone nonattainment areas, states that experience this phenomenon should be careful to fully account for it by ensuring that these emissions are included in photochemical modeling of episode days on which the phenomenon occurs. In order to properly account for HEDD emissions, careful attention should be paid to the temporalization of emissions to the specific day and hour of the day when these emissions occur (78 FR 34186)." The Commenter believed that, the EPA, however, fails to use its authority under section 114 of the CAA to either require reporting from companies that contract HEDD units or obtain the information that they are proposing the states obtain to perform the analysis and modeling. If companies were required to submit information to the EPA on the location of generating units with a power rating below 25 megawatts, the associated emissions information from these units could be appropriately analyzed and modeled to determine if smaller HEDD units have an impact on air quality. This is especially important for distributed generation that is participating in a Demand Response Program. The EPA should request data from owners/operators of sources that do not currently report data to states or the EPA. After the EPA obtains this information, this data should be provided to states so they can use the data to determine appropriate control measures as needed. (0143)

Response: Section 182(a)(3)(B)(i) mandates States to include in their SIP a requirement that owners and operators of each stationary source of VOC and NO_x emissions must provide to the state a showing of actual emissions of VOC and NO_x from that source. The EPA acknowledges that it could use its authority under Section 114 of the CAA to require additional reporting of emissions when appropriate; however, adding such a reporting requirement would be outside of the scope and context of the final rule. Additionally, neither the CAA nor the EPA has determined a way to subcategorize electricity generating units into a class, as the Commenter suggest, of "HEDD units." The EPA agrees that some units are used predominantly during HEDD periods, but classification of units based on when they are used is not a trivial exercise that the EPA believes can be resolved as part of this response. Nor can it be resolved as part of this rule.

The EPA disagrees that it needs to require additional reporting of location of generating units with a power rating below 25 megawatts. This information is available already through the database provided by the EPA entitled the "National Electric Energy Data System" database. The most current version (version 5.13) of this database is publicly available at *http://www.epa.gov/powersectormodeling/BaseCasev513.html* and includes a user's guide. While the database does not explicitly include latitude longitude, it does include the state and county code and the ORIS Plant Code field that the EPA has used to match to the National Emissions Inventory, which does include the latitude/longitude locations.

Further, the EPA notes that one key aspect of the EPA's identification of this issue in the preamble to this rule is that episodes selected for the modeled attainment demonstration should include HEDD periods and associated emissions when it is appropriate to do so. While the EPA agrees that quantifying all emissions associated with HEDD periods is difficult, the EPA believes that in most if not all cases, existing data collection programs provide enough information to identify the HEDD periods. After such identification, air agencies should then work to better quantify the emissions from important extra sources of emissions during these periods. The EPA points to existing EPA programs that require the use of Continuous Emissions Monitoring System (CEMS). While the emissions from all units operating during HEDD periods are not captured by the CEMS, the EPA believes that enough information is captured to identify HEDD periods and to determine if such periods are potentially contributing to ozone formation.

The EPA acknowledges challenges to estimating additional emissions during HEDD periods, but points to the following mechanisms as reasonable approaches to collecting more information. First, air agencies should collaborate with their state energy and public utility commission counterparts, who may have established (or can establish) mechanisms for information collection and sharing. Air agencies may also need to assess the demand response programs in their area by working directly with utilities and independent system operators (ISOs). Second, starting in 2015 the National Emission Standard for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) for Reciprocating Internal Combustion Engines (RICE) (40 CFR Part 60, Subparts IIII and JJJJ and 40 CFR Part 63, Subpart ZZZZ), also called the RICE rules, will require owners/operators of emergency engines participating in emergency demand response programs to report the dates and times that the engines operate for emergency demand response as well as engine information such as horsepower and model year. While the RICE rules do not require the reporting of NO_X emissions or information about non-emergency programs, they will

start to help provide information useful for understanding the activity of these back-up generators and engines, which may also be helpful for ozone planning purposes.

Comment: States need guidance on HEDD periods for modeling issues

One Commenter (0130) stated that, states need other types of guidance on the analysis and regulation of units operating during HEDD periods. The Commenter provided an example that, since these units have relatively low ozone season emissions, RACT analyses and other types of controls generally are not cost effective given current guidance on the calculations of cost/ton metrics. Federal regulation and/or guidance on the application of various CAA requirements to these units would allow states to develop strategies for their control and would standardize the approach to these units across regions. (0130)
Commenters (0131, 0144 and 0177) recommended that, the EPA update its guidance to account for the potential for high contributions of emissions during HEDD.

Commenter (0131) referenced a study by Northeast States for Coordinated Air Use Management (NESCAUM. *Air Quality, Electricity and Back-up Stationary Diesel Engines in the Northeast.* August 2012) and stated that, given the potential of high contributions of NO_x emissions during high electricity demand days, the EPA should revise its guidance to require consideration of emissions from emergency generators that participate in emergency demand response programs, particularly given their potential impacts on HEDDs and implications for attainment. The Commenter added that, the EPA should provide guidance on how states should quantify the amount of additional capacity dispatched during HEDD events that is attributable to exempt emergency generators, in light of the EPA's acknowledgement that little data exist on the number or location of such generators at this time. At the very least, the EPA should publish assumptions that states can use in the absence of such data to accurately assess the contribution from exempt emergency RICE participating in demand response programs to regional ozone formation, which assumptions, if used in a state's photochemical modelling, will be deemed acceptable by the EPA for purposes of attainment demonstration. (0131)

Commenter (0144) agrees that, HEDD emissions should be properly accounted for. The Commenter contended that, the EPA should update its modelling guidance to ensure accounting for daily peaks in HEDD usage and ozone levels.

Commenter (0158) stated that, the EPA suggests that states experiencing the phenomena of HEDD should make efforts to include emissions during these days in photochemical modeling but believed the EPA should make clear that states must continue to follow the procedures identified in current EPA photochemical modeling guidance for ozone episode selection for attainment demonstration modeling purposes. The Commenter maintained that, while HEDD may coincide with high ozone days, HEDD events should not be the driving force behind episode selection. The Commenter pointed out that, the EPA also states it will consider whether additional updates to current photochemical modeling guidance are needed to address modeling of HEDD. The Commenter endorsed to the extent that, the EPA revises existing guidance to address HEDD issues, such revisions should be undertaken through a public review and comment process.

Commenter (0177) encourages the EPA to consult with all eastern U.S. regional grid operators, state and regional modeling partners to obtain specific HEDD emissions profiles and develop explicit HEDD procedures for incorporation into the modeling guidance. The Commenter also notes that, the Eastern Regional Technical Advisory Committee (ERTAC) has gathered and analyzed available Electric Generating Unit (EGU) data to develop a tool that projects hourly growth rates in EGU generation during peak-demand times. The commenter claims this information could prove useful in developing appropriate procedures to more accurately simulate HEDD emissions in photochemical modeling. (0177)

Response: To address these comments, the EPA has assumed that all Commenters are referring to the modeling guidance and not the emission inventory guidance (some Commenters specifically state this while others do not). The EPA also notes that these are comments on guidance rather than comments on the ozone implementation proposal for which this response to comments document is intended. Nevertheless, the following response is included for the purposes of completeness and to provide these Commenters with more information regarding the EPA's intentions for guidance related to HEDD emissions.

The modeling guidance provides information for states to use in creating the emissions for their modeled attainment demonstrations. This is in contrast to the emissions inventory guidance, which provides information for states to use in creating the nonattainment area inventories for the base year and projected attainment year. The inclusion of HEDD-related emissions in the nonattainment area inventories is addressed in the response above to separate comments on including such emissions in the nonattainment area inventories (*See* "Comment: Require HEDD emissions in SIP planning").

The EPA believes that in answering these questions, it is important to clarify that the EPA has no expectation that the same emissions will be used in the nonattainment area inventories as are used in the modeled attainment demonstration. To the contrary, the EPA expects that these inventories will not be consistent in many cases. The inventories should be consistent where consistency makes sense, but there are valid reasons why the inventories would not be the same. These reasons are related to the purpose of the inventories.

The purpose of the base year inventory for the nonattainment area is to form the baseline for ROP/RFP calculations and for motor vehicle conformity, as well as to provide an overview of the emissions sources in the nonattainment area relevant to the nonattainment problem.

In contrast to the base year inventory for the nonattainment area, the purpose of the inventory used for the modeled attainment demonstration is to represent the actual emissions during the modeled episode. As many Commenters have noted, this period may include higher emissions from smaller electricity generating units that operate only on high electricity demand days and distributed generation sources. Since modeled attainment demonstrations use high ozone periods rather than an ozone season average conditions to help ensure future attainment, the emissions during those periods are unlikely to match the ozone season day emissions included in the inventories for the nonattainment area. The EPA believes that existing guidance and this final rule allow for inclusion of the HEDD-related emissions and distributed generation emissions in

both the nonattainment area inventories and the inventories used for the modeled attainment demonstrations.

In addition, the EPA does intend to update the photochemical modeling guidance to specifically mention high electricity demand days as an issue when selecting time periods to model, generating emissions for modeling and selecting control strategies. Since attainment demonstration modeling and SIP submittals are the responsibility of the states, it is up to individual states to determine the importance of HEDD emissions in their nonattainment area (and the surrounding region) and whether HEDD emissions and emissions controls need to be considered in their demonstration. This responsibility includes collecting information needed to estimate emissions of these sources. As with any other source of NO_x or VOC emissions, it is also up to the states to determine a set of controls that will demonstrate attainment by their attainment date.

Comment: Climate change

Commenter (0180) stated, the EPA needs to require states to model meteorology that reflects the impacts of climate change. Commenter (0180) stated, for example, 2012 was a very hot year for a large part of the country and had very high ozone levels and states should be using 2012 meteorology in their modeling as it represents what may become more common as we suffer the effects of climate change.

Response: The modeling guidance contains details on "episode selection" for ozone modeling applications. States should refer to the guidance when choosing base year modeling periods. In general, states should model ozone periods which are generally conducive to ozone formation and which are representative of observed design values. There have been several recent summers with above normal temperatures in some parts of the country. However, the impact of climate change on the meteorology in any particular year in any particular area is unclear. Therefore, we believe the current guidance recommendations are sufficient. Base modeling periods should be selected based on several criteria, the severity of meteorology being one of them.

In addition, recent research indicates that there could be an ozone "climate penalty" in the future. Assuming temperatures will rise in the future due to climate change and that other meteorological variables may also become more conducive to high ozone concentrations, there could potentially be a need for more stringent emissions reductions to counteract the higher ozone potential from warmer conditions. However, there are significant uncertainties in the impacts of climate change on air quality. Generally, the analytical horizon for climate applications is on the order of 20 to 100 years, while the horizon for attainment demonstrations is typically shorter. Additionally, the forcing mechanisms that drive near-term natural variability in climate patterns (e.g., El Nino, North American Oscillation) have substantially larger signals than the driving forces related to climate change over short time spans. Research also suggests that the variability between climate modeling platforms is larger than the variability between modeled climate scenarios. Given the relatively short time span between base and future year meteorology in most SIP demonstrations, the EPA is not requiring states to explicitly account for long-term climate change, but does suggest states consider potential impacts in their specific

areas, when impacts are believed to be important.

5. Modeled attainment test

Comment: Modeling in unmonitored areas

Commenters (0137, 0151 and 0152) did not support the EPA's proposal that states model unmonitored areas. Commenter (0137) stated that, if a state has a monitoring plan that has been approved by the EPA, then use of the modeled attainment test in unmonitored areas should only be performed at the discretion of the state. Commenter (0152) stated that, attainment tests should be performed at monitored locations where real world checks can occur to confirm the accuracy of the model. Commenter (0151) stated that, additional modeling of areas that lack monitors only should be done if the state has a reason to believe that a number of people are likely to be exposed to ozone concentrations above the standard or there are large and/or clustered VOC/NO_x emitters that may be contributing to those excursions unhealthful air. Commenter (0151) asserted, the EPA already presented guidance adopting such a strategy for modeling of the SO_2 NAAQS. Even though ozone is a regional pollutant, in contrast to SO_2, which tends to have more localized effects, Commenter (0151) believed, that requiring statewide modeling is neither needed nor required by the Act.

Commenter (0180) stated, the EPA should clarify in its regulations that the ozone attainment demonstration modeling must include a receptor grid that covers the entire nonattainment area and that the design value for all receptors in the attainment year must be below the 2008 ozone NAAQS. Commenter (0180) asserted that, 42 U.S.C. § 7502(c)(1) provides that nonattainment SIPs must provide for "attainment of the national primary ambient air quality standards" and that 42 U.S.C. § 7511a(c)(2)(A) contains a similar requirement. Commenter (0180) stated that, only modeling for modeling receptors at ambient monitoring locations is arbitrary and capricious because it ignores whether there will be attainment throughout the nonattainment area except for the tiny percentage of the nonattainment area where the ambient monitors are located. Commenter (0180) believed, this could result in subjecting millions of people to unsafe ozone levels because they happen to live, work or exercise in areas not right next to an ambient monitoring location.

Response: The EPA continues to require a modeling analysis of future year ozone concentrations in locations with current or recent ozone monitors. In the proposed rule, the EPA also recommended for states to perform an attainment test in unmonitored areas. The recommended attainment test methodology for unmonitored areas has been used in 8-hour ozone SIPs developed for the 1997 ozone NAAQS. The EPA continues to believe that this is a valid approach. To make it easier for states to apply the attainment tests, both the monitor-based test and the unmonitored area test have been incorporated in a software package called the "Modeled

Attainment Test Software."[5]

Under the CAA section 110(a)(2)(B), all states are required to have an approved monitoring plan. The EPA's monitoring requirements for ozone are designed to ensure a robust nationwide monitoring network in both nonattainment and attainment areas. Air agencies have done this by maintaining their ozone networks in accordance with the EPA's network design criteria. These criteria provide that Core Based Statistical Areas (CBSA's) have at least one ozone monitoring site located in a location of expected maximum concentration. Thus, by assuring compliance with the NAAQS at the expected highest concentration area, air quality is protected throughout each CBSA. However, due to limited resources, there are limits to the number of air quality monitors that can be deployed and it therefore may be useful to consider, what, if any additional monitoring needs there may be as agencies prepare their implementation plans.[6]

The EPA proposed to require states to follow the existing modeling guidance which recommended a modeled attainment test where states demonstrate attainment at ambient monitors. The guidance also recommends that states conduct further analyses based on the modeling results to determine whether there are unmonitored areas that merit additional analysis or investigation. We believe this approach was appropriate, but the requirements for the unmonitored area analysis in the 2007 modeling guidance were not entirely clear. We are therefore clarifying the treatment of model results in unmonitored areas and will update the modeling guidance to reflect the latest recommendations on handling and documenting the results of an unmonitored area analysis. In the final rule, the attainment test must be performed at current or recent monitor locations. An unmonitored area analysis is not required as part of the attainment demonstration. However, we continue to recommend states perform an unmonitored area analysis and encourage states to use information available to them to determine the likelihood of violations in unmonitored areas. This may be especially important in areas with a relatively sparse ozone monitoring network or in locations where information such as modeling, emissions, or other monitoring data may indicate potential high ozone concentrations in areas that are currently unmonitored.

The EPA does not believe that the CAA requires states to specifically determine through modeling that attainment has been shown in unmonitored areas. The CAA section 172(c)(1)

---

[5] The Modeled Attainment Test Software is available for no charge at: ***http://www.epa.gov/scram001/modelingapps_mats.htm*.**

[6] Annual monitoring network plans and 5-year assessments are required by regulation in section 58.10. The 5-year monitoring network assessment is a comprehensive evaluation of the monitoring agencies ambient air monitoring network, while the annual plans describes the existing network and changes being proposed to support implementing recommendations from the most recent 5 year assessment as well as any applicable changes from revisions to NAAQS.

requires the SIP to provide for attainment of the 2008 ozone NAAQS and the CAA section 182(b)(1)(A)(i) requires the SIP to provide for annual reductions in emissions of VOC and NO_x as necessary to attain the NAAQS. The EPA requires states to show that they are attaining the ozone NAAQS by showing that they are attaining at monitoring locations which are representative of air quality in the entire nonattainment area.

Determining future year attainment at monitoring locations is consistent with how attainment of the ozone NAAQS is determined for purposes of designations and redesignations. The EPA promulgates designations for ozone NAAQS nonattainment areas based primarily on ambient data measured at monitors.[7] Although the EPA considers other forms of information for purposes of evaluating areas with sources that contribute to those monitored violations for inclusion within the nonattainment area boundaries, the fundamental basis for a designated nonattainment area is the presence of one or more monitors with data showing violations of the NAAQS in question. Similarly, determinations of attainment of the ozone NAAQS for purposes of redesignation actions are based primarily on monitored data. When all ozone monitors in a nonattainment area measure attainment of the NAAQS, the area is eligible to submit a redesignation request, assuming compliance with the other requirements for redesignation. The EPA's approval of a redesignation request is subject to meeting the requirements of the CAA section 107(d)(3)(E). Among those requirements is that the area has attained the NAAQS. For the ozone NAAQS, this determination is based on ambient data measured at the ozone monitors in the area in question. Thus, neither ozone designations nor redesignations are premised upon whether there are violations of the NAAQS at unmonitored locations throughout a given area. Therefore, consistent with how ozone areas are designated and redesignated, the EPA is only requiring that states show attainment at ozone monitoring locations as an element of their attainment demonstration for the ozone NAAQS.

In addition, the "relative" attainment test for ozone uses ambient ozone monitoring data, combined with future year modeled percentage changes in ozone concentrations, to project future year design values. Since the attainment test relies on ambient monitoring data, an analysis of future year concentrations in unmonitored areas can only be accomplished by interpolating ambient data to a particular location where there is no existing monitor or recent monitoring data. Therefore, in the context of an attainment demonstration, the projection of future year ozone concentrations in unmonitored locations is inherently more uncertain than projections in monitored locations due to the fact that the ambient concentrations from which these projections are developed are unknown in the unmonitored locations.

States should consult with their EPA Regional Office to determine if an unmonitored area analysis should be conducted for a particular nonattainment area. Where an unmonitored area analysis is performed, states should use the unmonitored area analysis results to develop an assessment of the likelihood of violations in unmonitored areas. The nature of the assessment

[7] Determinations are based on design values which is an average of 3 years of ambient data. A monitor must have 3 years of ambient data to be used to determine compliance with the NAAQS.

depends on the local area modeling, but could include, as appropriate, elements such as an evaluation of the emissions inventory, the existing ambient data for the area and meteorological model inputs to determine if the modeled violations in unmonitored areas appear to be credible. If potential violations are found to be credible, additional steps may include imposition of enforceable emissions reductions at nearby emission sources or a commitment to deploy special purpose monitors and/or saturation monitors in the area (in order to further evaluate the problem). The state should document the assessment, including analyses of emissions, meteorological inputs and ambient data and/or make a commitment to establish special purpose monitors as part of the attainment demonstration. Special purpose ambient air monitoring data that is collected after the attainment demonstration is submitted should be summarized for use in the area's 5-year monitoring assessment and where appropriate, annual monitoring network plans.[8]

Comment: Regional modeling

Commenter (0141) stated, RAPCA does not have direct responsibility for the modeling and attainment demonstration; that responsibility falls to Ohio EPA. Given the limited resources available to many agencies today, the Commenter recommended maximum flexibility on this issue including the allowance of regional modeling plans covering large area as conducted either by the EPA or regional planning organizations such as LADCO.

Response: The EPA intends to allow flexibility regarding the nature of the modeled attainment demonstration. We understand that there are limited resources to conduct modeling. We urge RAPCA to closely coordinate with Ohio EPA, the EPA and LADCO to ensure that any attainment demonstration modeling requirement is adequately satisfied for the area.

Comment: Discourage across-the-board reductions

Commenter (0151) requested that, the EPA actively discourage states from imposing another round of proportional "across-the-board percentage VOC and/or NO_x reductions" on stationary sources based on their estimate of needed area-wide ozone reductions in the final rule because regulators now know so much more about the interactions of NO_x, VOC and the reactivity of different VOC in different air-sheds. A number of jurisdictions, according to Commenter (0151), thought such an approach was more politically viable for meeting the 1997 ozone NAAQS, but it appears arbitrary legally and even less likely to work for meeting the 2008 ozone NAAQS and could result in more pollution. Commenter (0151) believed, states have to be encouraged to take a look at the reactivity of the VOC and the likely impact of VOC reductions on actual ozone concentrations before requiring addition controls for the sake of controls.

[8] All states are required to have an annual monitoring plan which meets the siting criteria for ozone monitors (40 CFR 58.10).

Response: States should use science-based judgments to determine the appropriate mix of NO_x and VOC controls that are necessary to bring an area into attainment. The purpose of an attainment demonstration is to identify the emissions reductions that are needed by states to attain the NAAQS as expeditiously as practicable. However, as detailed in the RFP, ROP and RACT sections of the final preamble, the CAA section 182 requires a certain percentage reduction in area-wide VOC and/or NO_x emissions for Moderate and above areas for RFP. *See* sections C and D in Part 2 of this document for more details. Any additional VOC and/or NO_x reductions needed to show attainment can come from any source sector, in any amount that is found to lead to expeditious attainment.

Comment: EE proposal

Commenters (0130, 0132, 0159 and 0173) generally supported the EPA's approach for the upcoming Modeling Attainment Test guidance, footnote 20 (78 FR 34186), that may allow the adjustment of air quality data to remove the effect of EE from the ozone design values. Commenter (0130) added that, guidance on the application of the Exceptional Events Rule (EER) to ozone exceedances is needed.

Commenter (0132) stated, the adjustment of monitored ozone values needs to be carefully evaluated and should only be based on scientifically validated unusual natural events and catastrophic occurrences, whether human-caused or not. Regarding the EPA's suggestion, at Footnote 20, of an alternative method for calculating future design values for WOE determinations by adjusting monitored air quality days if influenced by unusual natural or anthropogenic events, Commenter (0132) stated that, without specific and limited definition criteria, any day could be interpreted to be influenced by an unusual event.

Commenter (0132) supported the exclusion of days impacted by major industrial accidents, such as refinery fires, as well as foreign transport or other unusual natural events or events outside the control of the state, from the calculation of baseline design values, since it would be inappropriate to include effects of such rare but extreme events in the development of control strategies.

Commenter (0151) requested the EPA to address how states should handle EE that contribute to ozone nonattainment in this round of SIP planning. Commenter (0151) noted that, the EPA proposed revisions to its EE policy in 2012 and that a final policy is critical for states to flag and exclude excess ozone values caused by EE from 2008 NAAQS SIP planning.

Commenter (0180) stated, the EER was overbroad and the guidance goes beyond legal bounds, swallowing the WOE demonstration and the attainment demonstration. Commenter (0180) believed the EPA seems to acknowledge as much, since the agency "expects that there will be limited situations where this potential adjustment would make a difference between future year estimated attainment and nonattainment." Commenter (0180) stated, the EER is an example of the harms wrought by similar exclusions and asserted Congress crafted a narrow definition of "exceptional event," reserving the term for certain extraordinary natural events and for human activities that are "not reasonably controllable or preventable" and "unlikely to recur at a

particular location." 42 U.S.C. § 7619(b)(1)(A).

Response: The EPA does not intend to update its guidance on attainment demonstrations, *Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$ and Regional Haze* (April 2007), to permit states to supplement their attainment test with evidence that could include recently monitored values that have been adjusted to better represent the air quality that would have existed in the absence of any unusual natural or anthropogenic events (if any) that influenced (ozone/$PM_{2.5}$) concentrations on the monitored day(s). While analysis of ambient data related to EE can be an appropriate component of a weight of evidence demonstration, EPA believes it is premature to formally allow such ambient data adjustments without first addressing this issue through revisions to the EER anticipated to be proposed in mid-2015 and finalized in mid-2016. The photochemical modeling guidance will continue to recommend adjustments to ambient data as allowed under the EER and as otherwise appropriate as part of a weight of evidence analysis.

Comment: Request for clarification

Commenter (0155) requests that, the EPA clarify in footnote 15 on p. 34185, relative to multi-state nonattainment areas, that the requirement to prepare an attainment plan applies only to Moderate and above areas and not to all multi-state nonattainment areas.

Response: The EPA agrees that the requirement to prepare an attainment plan only applies to Moderate and above areas. Marginal nonattainment areas are not required to submit an attainment demonstration and are therefore not required to perform photochemical modeling.

Comment: Flexible modeling approach

Commenter (0162) endorsed a flexible attainment demonstration approach that recognizes the site-specific nature of each nonattainment area and the need to tailor emission reduction strategies based on local, site-specific factors. Commenter (0162) supported the use of science-based judgments to determine the appropriate mix of NO_x and VOC controls that are necessary to bring a nonattainment area into attainment on schedule rather than having to rely on an across-the-board VOC reduction strategy. Commenter (0162) stated that, ample evidence shows that a tailored control program is much more effective in reducing ozone concentrations than an inflexible, across-the-board program and such a program should apply to RACT/RACM control decisions as well as any new RFP requirements.

Commenter (0162) further supported a flexible modeling approach that would allow states preparing attainment SIPs to take credit for emission reductions from existing federal programs and for on-the-way federal programs that will be implemented before the first attainment deadline, thus minimizing need for additional state-specific control requirements.

Response: The EPA agrees in part and disagrees in part with the comments. The EPA agrees that states should use science based judgments to determine the appropriate mix of NO_x and VOC controls that are necessary to bring an area into attainment. The purpose of an attainment demonstration is to identify the emissions reductions that are needed by states to attain the

NAAQS as expeditiously as practicable. This can include emissions reductions from Federal programs that achieve emissions reductions before the area's attainment date. However, as detailed in the RFP, ROP and RACT sections of the preamble, the CAA section 182 requires all Moderate and above areas to meet certain minimum percentage reductions in VOC and/or NO_x emissions in the nonattainment area. *See* sections C and D of Part 2 on this document for more details. Any additional VOC and/or NO_x reductions needed to show attainment can come from any source sector, in any amount that is determined to be expeditious attainment.

Comment: Over-prediction by models

Commenter (0159) stated that, the agency should not push states to rely on the EPA's models as part of attainment demonstrations and did not support the use of modeled data when monitored data is available. Commenter (0159) asserted that, current models for attainment demonstrations have an unacceptably high margin of error. Commenter (0159) noted that, just recently, the model used by the EPA as part of the CSAPR rule had to be technically adjusted several times to "address discrepancies in unit-specific modeling assumptions that affect the proper calculation of Transport Rule state budgets and assurance levels in" several states, including Louisiana. *See EME Homer City Generation v. EPA,* 696 F.3d 7, 19 (D.C. Cir. 201 2). *See also* 77 FR 10,324 (Feb. 2 1, 201 2). Commenter (0159) asserted that, the EPA's models over predict air quality problems.

Response: The EPA disagrees with the Commenter. Photochemical grid modeling is the most technically credible scientific technique to estimate future NO_x and VOC emissions reductions that are needed to attain the NAAQS in an expeditious manner. Ambient monitoring data cannot be used to project future ozone concentrations. To clarify, when the commenter uses the term "model," it appears that they are referring to the Integrated Planning Model (IPM), which is used to generate future year emissions from EGUs. These are among many emissions inputs used in photochemical models. When performing photochemical modeling, states must project EGU emissions to the future modeling year, but they are not required to use IPM. Although IPM has been used extensively by the EPA in modeling analyses to support national rules, states have the flexibility to use whatever model or projection technique they believe is most credible to generate future year emissions for input to a photochemical model.

6. Future years to model

Comment: Commenter (0130) suggested that, the EPA consider the difficulty and practicality of changing attainment years in their discussion of RACM and of attainment year determination. Commenter (0130) agreed that, this is a literal interpretation of the CAA requirements for RACM and attainment dates, but stated that, in practice, base years and future projection years must be chosen well in advance of the actual development of the RACM analysis and the attainment SIP submittal; due to the extensive work needed to develop a defensible base year inventory and meteorological data files for input into the CMAQ model.

Commenter (0159) supported the proposal that, for the 2008 ozone NAAQS, control measures relied upon to demonstrate attainment should be implemented by the beginning of the last full ozone season prior to the area's attainment date. Commenter (0173) requested that, the EPA

clarify that the ozone season to be modeled should be the ozone season during the attainment year. Commenter (0179) agreed that, the future modeling year should be selected such that all emissions control measures relied on for attainment will have been implemented by that year.

Commenter (0152) disagreed with the EPA's statement that control measures relied upon to demonstrate attainment should be implemented by the beginning of the last full ozone season prior to the area's attainment date. Commenter (0152) believed there may be scenarios where this is not plausible or necessitated; e.g., there could be a reliance on shutdowns from large sources to demonstrate attainment and the shutdown date may not fall precisely at the beginning of the last full ozone season. Commenter (0152) stated, it should not matter when the control measure is implemented if the demonstration shows attainment by the attainment date.

Commenter (0159) did not support a rule that, requires nonattainment areas to demonstrate attainment prior to the dates set forth in the CAA section 181(a). To the extent that this proposal could be viewed to require that the demonstration of attainment be required earlier than is required by statute, Commenter (0159) objected to this proposal.

Response: Most Commenters supported the proposal to allow modeling of the last year of the statutory attainment date. As requested, by way of clarification, for a Moderate area with a 6-year attainment date the state would be able to model the 6th year after designation. Controls needed for attainment must be in place by the beginning of the ozone season that is being modeled. The EPA agrees with these Commenters that modeling of the final year of the statutory attainment date is reasonable. Even though attainment is determined by averaging 3 years of ambient data, states do not have to model 2 years before the attainment date to show modeled attainment. Since the design value is an average of 3 years of data, attainment can still be shown even if concentrations exceed the NAAQS in one or two of the 3 years used to determine attainment (as long as the 3 year average is less than the NAAQS). Therefore, it can be appropriate to model any of the 3 years used to determine attainment. Also, if ambient data shows attainment level concentrations in the final statutory attainment year, a state may be eligible for up to two 1-year extensions of the attainment date, if the area meets the criteria for such extensions. Therefore, modeling attainment level concentrations for the last year permitted by statute is acceptable.

We disagree that it is not also necessary to analyze potential emissions controls in earlier years as part of a RACM analysis. Despite the maximum statutory attainment date, all attainment dates are "as expeditious as practicable." In spite of Commenters' discussion that modeling or analyzing emissions controls in earlier years is difficult, time consuming and/or not necessary, the attainment demonstration must include a demonstration that attainment cannot be advanced. The EPA wants to clarify that a RACM analysis could include modeling of earlier attainment years, but modeling is not required.

States are not required to submit an attainment demonstration for Marginal areas and therefore are not expected to submit modeling to support their attainment date. Because attainment demonstrations are not required, Marginal areas are also not subject to specific RACM or RFP

requirements. But even though they do not have to do a RACM analysis, all nonattainment areas, including Marginal, have to attain the NAAQS as expeditiously as practicable.

One Commenter questioned whether all emissions reductions needed for attainment need to be in place by the beginning of the attainment year ozone season. They argued that it should not matter when the control measure is implemented if the demonstration shows attainment by the attainment date. The EPA believes the explanation in the proposed rule was appropriate, which says that control measures relied upon to demonstrate attainment should be implemented by the beginning of the last full ozone season prior to the area's attainment date. To be clear, emissions control measures may be implemented during the last full ozone season or in later years, but emission controls that are used to demonstrate attainment in the modeled attainment demonstration must be implemented by the beginning of the last full ozone season.

Comment: Modeling to advance the attainment date

Commenter (0180) noted that, most SIPs only model attainment for the final year and do not provide any data necessary to evaluate the potential for earlier attainment. To carry out the statute that RACM be implemented and provide for attainment, as expeditiously as practicable, 42 U.S.C. § 7502(c)(1), Commenter (0180) asserted, the EPA must require that modeling also demonstrate what emissions reductions would be necessary to advance attainment by each year remaining in the period. Commenter (0180) believed this additional data essential to lawful and rational decisions regarding RACT and RACM, and the demonstration that the "as expeditiously as practicable" mandates in the statute are met.

Response: The EPA agrees that states must perform a RACM analysis to determine if the attainment date can be advanced. However, the EPA disagrees that modeling for multiple years must be used to estimate the ozone reductions that can be achieved from potential RACM controls. The EPA believes that it is not reasonable to require states to model each and every year to determine the appropriate attainment date. Developing and modeling future year inventories is a time-consuming and resource intensive process. Multiple emissions models are needed in order to generate year-specific emissions for the various emissions sectors (*e.g.*, mobile, non-road, non-EGU point, EGU point, etc.). In some cases it may be reasonable to model one additional interim year before the maximum statutory attainment date. However, in most cases, the air quality benefits of an identified set of RACM controls can be estimated through development of transfer factors (factors to relate tons of emissions reductions in the area to ozone concentration changes in the area). For example, states can model across the board percentage reductions in NO_x and/or VOC emissions to determine the impact of emissions reductions on ozone concentrations in the area. This modeling can be performed with a single attainment modeling platform, which is much less resource intensive than modeling additional future years. The identified potential emissions reductions available from RACM can be compared to the magnitude of the modeled ozone reductions from the sensitivity analyses to determine if all such controls will advance attainment by at least a year. In some cases, emissions reductions from identified RACM measures may be so small that modeling would not be necessary to determine that attainment would not be affected by the available local controls. The EPA strongly recommends that states discuss the selection of the future year(s) to model with the

appropriate EPA regional office as part of the modeling protocol development process.

Comment: Support original 4-year timeline for developing a meaningful attainment demonstration

Commenter (0157) stated, the EPA severely underestimates the time required to produce a meaningful attainment demonstration and believed the original 4-year timeline allows sufficient time to select a proper base year and provide the time needed to quality assure the variety of inventories needed to complete the modeling demonstration. Commenter (0157) attached a long-term study of ozone showing that every 3 or 5 years an ozone season occurs with a greater than average number of ozone violations, often followed by a lower than normal year.

Thus, Commenter (0157) stated, it is important to select a year that will demonstrate the selected control measures that will provide adequate relief even in a high pollution year. Commenter (0157) believed, the EPA appears to disregard the cyclic nature of ozone in development of several areas in this guidance. Although the most recent triennial inventory year can be selected, Commenter (0157) stated that, year is not always the most appropriate year to select as a base year to ensure the attainment demonstration is adequate to protect against high ozone pollution years. Although it may take longer to select a year that ensures more than average ozone pollution, Commenter (0157) stated, the resulting control scenario is more robust and protective.

Commenter (0157) asserted, the OTC states have been concerned that current modeling does not accurately represent HEDD emissions and have developed new models to better represent the electricity generation sector. These models, according to Commenter (0157) will be tested in the upcoming attainment demonstrations under this standard and may require additional time to model successfully and that, as generators may be one the categories regulated for RFP purposes under this standard, this is a very significant part of the attainment demonstration.

Response: Section 182 contains two attainment demonstration submittal dates, 3 years from the designation date for Moderate areas (182(b)) and 4 years from the designation date for Serious and above areas (182(c)). The Phase 2 rule established regulations (*See* 40 CFR 51.908(a)) that required all attainment demonstrations to be submitted within 3 years of designation. However, the EPA proposed in the SIP Requirements Rule for the 2008 NAAQS to allow the original CAA deadlines of up to 3 years for Moderate areas and up to 4 years for Serious and higher classified areas. While EPA agrees that the development of emissions inventories and modeling for attainment demonstrations can be a lengthy process, the statute does not allow for more than 3 years for a Moderate area attainment demonstration. However, since the statute does allow up to 4 years to submit a Serious (and above) area attainment demonstration, in the final rule we are allowing the full amount time granted by the statute for such areas. Therefore, EPA is finalizing the attainment demonstration submittal dates as proposed; up to 3 years from the effective date of designation for Moderate areas and up to 4 years from the effective date of designation for Serious and above areas.

C. What are the RFP requirements for the 2008 ozone NAAQS?

NOTE: The CAA contains three separate provisions regarding RFP. Section 172(c)(2) under subpart 1 contains a general requirement that nonattainment plans require RFP, while sections 182(b)(1) and (c)(2) under subpart 2 contain specific percent reduction targets for Moderate and above and Serious and above areas, respectively. Section 182(b)(1) of the CAA requires all ozone nonattainment areas classified as Moderate and above to submit a SIP which describes, in part, how the areas will achieve an actual VOC emissions reduction of at least 15 percent during the first 6 years after being designated as nonattainment. The portion of the SIP revision that illustrates the plan for the achievement of this emission reduction was subsequently defined as "rate-of-progress (ROP) plan" in the past. In this document, the EPA will refer to the requirements for Moderate and above areas identified in the CAA section 182(b) that requires a 15 percent reduction in VOC emissions from the baseline emissions over the 6-year period between designation and the Moderate area maximum attainment date as the ROP requirement. Also, the EPA will refer to the requirements for Serious and above areas contained in section 182(c)(2), which require an additional 3 percent per year beginning 6 years after designation until the attainment date, as the RFP requirement.

1. 2008 ozone nonattainment areas for which no portion of the area has previously been required to meet the 15 percent RFP requirement for VOC

Comment: Support showing of 15 Percent VOC reduction from 1990

Commenter (0130) stated that, for areas without a previously submitted 15 percent VOC reduction plan from 1990, the EPA should use national emission inventories to show that all areas of the United States (U.S.) have substantially met this CAA requirement, rather than requiring each area to make a submittal on the topic. Commenter (0130) stated that, the EPA should be able to use available data to show that this requirement has been substantially met by all areas. Commenter (0146) stated that, the EPA can best provide flexibility and ease state burdens for developing 15 percent plans by providing states with 15 percent plan templates, supporting documentation on federal measures that can help demonstrate already achieved VOC reductions. Commenter (0152) stated that, the 15 percent RFP requirement should be gauged against only the 1990 baseline in all circumstances as the EPA's proposal is inconsistent and not the intent of the CAAA. Commenter (0159) supported allowing an area to meet the 15 percent RFP requirement in whole or in part with NO_x reductions in lieu of VOC reductions if that area can demonstrate that it has in fact achieved a 15 percent reduction in VOC emissions from a 1990 baseline. Commenter (0163) stated that, areas within the OTR, including new nonattainment areas, that have already implemented VOC control measures, such as RACT, motor vehicle inspection and maintenance programs, and Stage II or comparable measures, in response to statutory requirements, can be assumed to have met and would not have to document meeting the 15 percent RFP requirement.

Response: Designated 2008 ozone nonattainment areas[9] that have neither been subject to nor have adopted and implemented a SIP providing for the section 182(b)(1) 15 percent VOC emission reductions, will be subject to the 15 percent ROP requirement in section 182(b)(1). We are finalizing that where a state has previously submitted, adopted and implemented a SIP providing for a 15 percent reduction in VOC emissions from a nonattainment area's baseline emissions within 6 years following the baseline emissions inventory year, that area is allowed to meet the 15 percent ROP requirement in whole or in part with NO_x reductions in lieu of VOC reductions. For 2008 ozone nonattainment areas, the EPA is not finalizing either of the approaches that would have allowed areas that have not previously provided a 15 percent VOC emission reduction within six years to meet the 15 percent ROP requirement in whole or in part with NO_x reductions in lieu of VOC reductions.

Comment: Supports inclusion of NO_x reductions in progress demonstrations.

Commenter (0160) agreed with the proposed alternative that would allow newly classified Moderate areas to substitute NO_x for VOC in the 15 percent plans and further stated that, since the enactment of the 1990 CAA amendments, the scientific understanding of the relative roles of VOC and NO_x control has improved and strongly supports the inclusion of NO_x reductions in progress demonstrations. (0160)

Response: The EPA appreciates the Commenter's support. The EPA has interpreted the requirements of subpart 2 as they would apply to areas for the 1997 ozone NAAQS. We are now following the same interpretation with regard to the 2008 ozone NAAQS. With respect to RFP requirements, we interpret the 15 percent VOC emission reduction requirement in section 182(b)(1) such that an area that has already met the 15 percent requirement for VOC reductions under either the 1-hour ozone NAAQS or the 1997 8-hour ozone NAAQS (for the first 6 years after the RFP baseline year for the 1-hour ozone NAAQS) would not have to fulfill that requirement again. Instead, such areas would be treated like areas covered under section 172(c)(2) if they are classified as Moderate for the 2008 standard and would need to meet the RFP requirements under section 182(c)(2)(B) if they are classified as Serious or above for the 2008 ozone NAAQS.[10] For the purposes of the 2008 ozone NAAQS, the EPA is interpreting section 172(c)(2) to require such Moderate areas to obtain 15 percent ozone precursor emission reductions over the first 6 years after the baseline year for the 2008 ozone NAAQS and is interpreting section 182(c)(2)(B) to require such Serious and above areas to obtain 18 percent ozone precursor emission reductions in that 6 year period. Under the section 172(c)(2) and

[9] Hereafter in the discussion of RFP requirements within this section, when we use the term "2008 nonattainment area" we mean "nonattainment area classified as Moderate or higher under the 2008 ozone NAAQS."

[10] Similar interpretations were made for the 1997 8-hour ozone NAAQS Phase 2 Ozone Implementation Rule, (70 FR 71615, November 29, 2005) and were upheld in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

182(c)(2)(B) RFP requirements, NO_x emission reductions could be substituted for VOC reductions.

Comment: Do not support showing of 15 percent VOC reduction from 1990

Commenter (0180) stated that, an area which may have by now (or by the time of SIP submittal) experienced a 15 percent cut in VOC emissions from the 1990 baseline cannot be deemed to satisfy the 15 percent reduction mandate in section 182(b)(1) because emission reductions are only creditable toward the 15 percent cut required in 1990 baseline emissions to the extent "they have actually occurred, as of 6 years after November 15, 1990. . ." 42 U.S.C. § 7511a(b)(1)(C). Commenter (0180) stated, reductions are only creditable if they have occurred "from the implementation of measures required under the applicable implementation plan, rules promulgated by the Administrator, or a permit under" Title V. *Id.* Commenter (0180) asserted that, option 2 does not satisfy the statutory requirements in section 182(b)(1).

Response: The EPA has interpreted the requirements of subpart 2 as they would apply to nonattainment areas for the 1997 ozone NAAQS. We are now following the same interpretation with regard to the 2008 ozone NAAQS. With respect to RFP requirements, we interpret the 15 percent VOC emission reduction requirement in section 182(b)(1) such that an area that has already met the 15 percent requirement for VOC under either the 1-hour ozone NAAQS or the 1997 8-hour ozone NAAQS (for the first 6 years after the RFP baseline year for the 1-hour ozone NAAQS) would not have to fulfill that requirement again. Instead, such areas would be treated like areas covered under section 172(c)(2) if they are classified as Moderate for the 2008 standard and would need to meet the RFP requirements under section 182(c)(2)(B) if they are classified as Serious or above for the 2008 ozone NAAQS.[11] For the purposes of the 2008 ozone NAAQS, the EPA is interpreting section 172(c)(2) to require such Moderate areas to obtain 15 percent ozone precursor emission reductions over the first 6 years after the baseline year for the 2008 ozone NAAQS and is interpreting section 182(c)(2)(B) to require such Serious and above areas to obtain 18 percent ozone precursor emission reductions in that 6 year period. Under the section 172(c)(2) and 182(c)(2)(B) RFP requirements, NO_x emission reductions could be substituted for VOC reductions.

Comment: Generally support allowing use of NO_x emission reductions

Commenters (0130, 0143, 0152, 0155, 0157, 0161, 0162, 0169, 0172, 0177, 0178 and 0179) generally supported the proposed provision allowing states to meet the RFP requirements using NO_x emission reductions. Commenters (0130, 0143, 0160, 0161 and 0169) stated, this provision reflects the latest science showing that NO_x emission reductions are more effective than VOC emission reductions in reducing ground level ozone concentrations. Commenters (0143, 0161)

[11] Similar interpretations were made for the 1997 8-hour ozone NAAQS Phase 2 Ozone Implementation Rule, (70 FR 71615, November 29, 2005) and were upheld in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

stated that, finding reductions in VOC emissions could be increasingly difficult to achieve in future years based on the current knowledge of VOC control technology and phase-in of current regulations. This being so, Commenter (0161) stated that, fulfilment of RFP requirements would be unnecessarily difficult if states were not allowed to substitute NO_x reductions for VOC reductions.

Commenters (0143 and 0178) stated that, substituting NO_x emission reductions for a portion of the needed VOC reductions is a practice that the EPA has approved in certain instances for the purposes of RFP SIP revisions and they supported the continued use of substituting NO_x for VOC as appropriate in RFP plan analyses. To the extent that the EPA believes it has the legal authority to allow NO_x reductions to substitute for VOC reductions for RFP, commenters (0155 and 0157) supported this approach. Commenter (0152) stated that, each state, based upon its analysis, should determine if NO_x or VOC reductions are most beneficial towards achieving a 15 percent RFP requirement and urged the EPA to reconsider the proposal requirements. Commenter (0152) stated that, a state should not be bound by a CAA requirement that is no longer applicable based upon current science that was intended to address a different standard at a different time and was developed when there was an entirely different inventory of emission sources to address.

Commenters (0140, 0145 and 0160) agreed with the proposed alternative that would allow newly classified Moderate areas to substitute NO_x for VOC in the 15 percent plans. Commenter (0140) stated that, restricting RFP emission reductions to VOC is not a reasonable interpretation of the statute for areas like Texas where ozone is NO_x -limited and where ozone transport typically accounts for well more than half of an area's ozone levels on high ozone days. Commenter (0145) stated these alternatives give nonattainment areas more flexibility in working towards attaining the ozone NAAQS, particularly those areas that have already achieved VOC reductions and need to obtain additional reductions. Commenter (0172) stated that, although the CAA requires RFP reductions to be VOC, the Commenter supports the substitution of NO_x reductions for VOC in the 15 percent RFP SIP.

Commenter (0179) agreed with the EPA that, due to the success of VOC control measures over the past 20 years in certain areas of the U.S., future reductions in anthropogenic VOC may have little to no impact on ambient ozone levels. Commenter (0179) believed that addressing NO_x levels could have a greater impact on attainment of the ozone standard and will help carry out Congress' intent to reduce ozone levels while allowing for flexibility in applying section 182(b) and is a narrow yet feasible method of making RFP toward ozone attainment.

Response: The EPA appreciates the support of the Commenters. We are finalizing as proposed, such that 2008 nonattainment areas that have met the CAA requirement for a 15 percent ROP VOC reduction plan for the entire area are not required to fulfill that requirement again. This decision is consistent with the D.C. Circuit Court's reasoning in *NRDC v. EPA*.[12] In that case,

[12] *See NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009),

concerning the EPA's same interpretation for implementing the 1997 ozone NAAQS, the Court held that section 182(b)(1) is ambiguous and that it was reasonable for the EPA to interpret it not to require areas that had already met the 15 percent VOC emission reduction requirement to obtain another 15 percent reduction in VOC emissions. Instead, for purposes of the 1997 ozone NAAQS and for purposes of the 2008 ozone NAAQS, the EPA interprets the RFP requirement of section 172(c)(2) to require an area classified as Moderate to achieve an average 3 percent reduction in VOC and/or NO_x per year for the first 6 years following the baseline year and the RFP requirement in section 182(c)(2)(B) to require the same thing for areas classified as Serious or higher. Thus, areas that had previously met the 15 percent VOC-only requirement under section 182(b)(1) are subject instead to provisions that allow NO_x to substitute for VOC to satisfy the RFP requirements.

Comment: Reservations about substituting NO_x for VOC

Commenters (0158, 0166 and 0174) expressed reservations about substituting NO_x emission reductions for VOC reductions. Commenter (0166) stated, that for policy, economic and scientific reasons, the EPA should not place a higher overall priority on NO_x reductions than VOC reductions to attain the ozone NAAQS. The Commenter added, that given that substantial reductions have been made in emissions of both VOC and NO_x, decisions on whether to emphasize VOC or NO_x controls now must be scientifically justified on a case-by-case basis. Commenter (0166) cited and attached a technical report, explaining the state of scientific understanding of the relative contributions of NO_x and VOC to ozone formation and claimed there is no scientific basis for favoring NO_x emission reductions over VOC reductions in nonattainment areas nationwide. The Commenter suggested that, decisions concerning whether to emphasize NO_x or VOC controls must be made on an area-by-area basis.

Commenter (0174) stated that, their biggest concern with the current proposed implementation plan is the assumption that the EPA makes that NO_x emission reductions can be substituted for VOC emission requirements, mandated by the RFP portion of the rule. Commenter (0174) believed VOC emission reductions in many nonattainment areas will lead to greater progress reducing ground-level ozone at the critical ozone monitoring site(s) than NO_x emission reductions. Commenter (0174) stated, detailed photochemical modeling analyses are needed to confirm which ozone precursor is more effective, prior to choosing an effective strategy to achieve this NAAQS, especially in and downwind of the urban core of many large metropolitan areas in the Midwest.

Commenter (0158) questioned, whether the EPA has the authority under the CAA to allow NO_x reductions as a substitute for VOC reductions with respect to the initial 15 percent VOC RFP requirement in all areas where the requirement must be met for the first time. The commenter argued, that section 182(b)(1)(A) of the CAA specifically requires a 15 percent VOC reduction for Moderate and above nonattainment areas and does not make any provisions for any substitution of NO_x reductions for these initial VOC RFP requirements. The CAA, under section 182(c)(2)(C), allows only Serious and above nonattainment areas to substitute NO_x reductions for required VOC reductions, but allows such substitution only for the 3 percent per year reductions required under section 182(c)(2)(B) after initial 15 percent VOC reduction is met. The Commenter further argued that the assertion that additional VOC reductions in

nonattainment areas will be difficult to achieve and have little effect on further reducing ozone, given the variety of national and local VOC controls measures that have been imposed on mobile and stationary sources and have substantially reduced VOC emissions, does not properly recognize that significant NO_x reductions have also been achieved throughout the country through both local-scale measures, such as RACT in nonattainment areas and regional programs such as the Acid Rain (Title IV) Program, the NO_x SIP Call and Clean Air Interstate Rule (CAIR). Commenter (0158) believed that, to the extent the EPA does allow NO_x for VOC substitutions for meeting the initial 15 percent RFP requirement, it should only be allowed on a case-by-case basis with a technical demonstration from the state that such a substitution is scientifically justified.

Response: The EPA agrees that today's understanding of the role of NO_x reductions would suggest that, in some areas, it would be relatively more efficient to focus attainment planning efforts on achieving reductions in NO_x rather than VOC emissions. However, the CAA section 182(b)(1) expressly requires the 15 percent ROP plans to reduce emissions of VOC. It does not provide discretion to meet these requirements by reducing emissions of other pollutants. Where Congress intended to allow such a substitution, it specifically provided so, such as in section 182(c)(2)(C) which allows NO_x to be substituted for VOC in the 3 percent annual RFP plans for Serious and above areas.

We are finalizing as proposed, such that 2008 nonattainment areas that have met the CAA requirement for a 15 percent ROP VOC reduction plan for the entire area are not required to fulfill that requirement again. This decision is consistent with the D.C. Circuit Court's reasoning in *NRDC v. EPA.*[13] In that case, concerning the EPA's same interpretation for implementing the 1997 ozone NAAQS. the Court held that section 182(b)(1) is ambiguous and that it was reasonable for the EPA to interpret it not to require areas that had already met the 15 percent VOC emission reduction requirement to obtain another 15 percent reduction in VOC emissions. Instead, for purposes of the 1997 ozone NAAQS and for purposed of the 2008 ozone NAAQS, the EPA interprets the RFP requirement of section 172(c)(2) to require an area classified as Moderate to achieve an average 3 percent reduction in VOC and/or NO_x for the first 6 years following the baseline year and the RFP requirement in section 182(c)(2)(B) to require the same thing for areas classified as Serious or higher. Thus, areas that had previously met the 15 percent VOC-only requirement under section 182(b)(1) are subject instead to provisions that allow NO_x to substitute for VOC to satisfy the RFP requirements. As explained in the proposal, we believe there are two policy reasons for interpreting this ambiguous provision in this manner. First, both our understanding of the effects of reductions of VOC and NO_x on ambient ozone levels and the technical tools to help predict what combinations of reductions of ozone precursors will be most effective in ozone reduction have improved. Since the purpose of the RFP provisions in sections 172 and 182 is to foster the achievement of RFP toward attainment, we believe that it makes the most sense to allow states to credit toward the RFP requirement those reductions that an area most needs to reach attainment. Second, as explained more fully in the proposal, the mix of

[13] *See NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009),

emissions across the country and in specific areas is very different than it was in 1990 because of various measures and developments that have substantially reduced the anthropogenic VOC emissions inventory such that additional area-specific VOC reductions will be increasingly difficult to achieve.

Comment: NO_x substitution in the OTR

Commenter (0159) did not support the third option, as the Baton Rouge Area is not located within the OTR, which means that the implementation of this proposal would result in the Area being unable to participate in this portion of the SIP Requirements Rule. Commenter (0161) objected to the EPA's proposal to finalize a rule that would allow NO_x substitution only in nonattainment areas that are located in the Ozone Transport Region (OTR) and that would be subject to the 15 percent RFP requirement for the first time based on a nonattainment designation for the 2008 ozone NAAQS. Commenter (0161) asserted that, the preamble fails to articulate any reasonable basis upon which to allow only a subset of nonattainment areas to substitute NO_x reductions for VOC reductions and that none exists. Commenter (0161) believed all nonattainment areas should be allowed to take advantage of this alternative, not just a few nonattainment areas in the northeastern part of the U.S.

Response: The EPA has reconsidered its proposal and now believes it does not have authority under the CAA to allow NO_x substitution for VOC emissions reductions for the 15 percent ROP in any area, including an area located in the OTR. Therefore, the EPA is not finalizing as proposed the flexibility to allow areas in the OTR to substitute NO_x for VOC to meet the 15 percent ROP requirement.

Comment: Do not support allowing NO_x substitution

Commenters (0163, 0166, 0168 and 0180) stated that, section 182(b)(1) does not allow substitution of NO_x reductions for VOC reductions to meet the 15 percent requirement. Commenter (0163) stated, new Moderate nonattainment areas must meet this CAA requirement and, therefore, are subject to the 15 percent VOC RFP requirement from the time the area is subject to this section of the CAA. Commenter (0166) stated that, section 182(b)(1)(A) of the CAA requires Moderate (and higher) nonattainment areas to submit a SIP revision that requires reduction of VOC emissions by 15 percent and does not allow any NO_x emission reductions to be substituted for the required VOC emission reductions. That provision requires a state with a Moderate or higher nonattainment area to: submit a [SIP revision] to provide for *VOC emission reductions . . . of at least 15 percent* from baseline emissions . . . . Such plan shall provide for such specific annual reductions in emissions of VOC and oxides of nitrogen as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this Act. (Emphasis added.) The Commenter added that, under section 182(c)(2)(C), the Act allows substitution of NO_x emission reductions for required VOC reductions only for the 3 percent per year reductions required under section 182(c)(2)(B) *after* the 15 percent RFP demonstration required by section 182(b)(1). Because the EPA has failed to demonstrate it has discretion to allow for substitution of NO_x emission reductions for the 15 percent reduction of VOC emissions in an area that has never adopted and implemented a SIP providing for such VOC emission reductions, UARG urged the EPA to adopt "Alternative 1"

under its proposed 40 CFR § 51.1110(b). Alternative 1 mandates that nonattainment areas classified as Moderate or above that have yet to satisfy the requirement for a plan to reduce VOC emissions by 15 percent adopt a plan providing for such reduction of VOC emissions to demonstrate RFP toward attaining the ozone NAAQS. The Commenter pointed out that, in *NRDC v. EPA*, however, the D.C. Circuit did not hold – and nothing in that decision implies – that an area that had never adopted or implemented a 15 percent VOC emission reduction SIP provision may avoid the statutory requirement for such a SIP provision. Thus, nothing the D.C. Circuit said in that case supports substitution of NO_x emission reduction for VOC emission reduction in an area for which the state never adopted or implemented a SIP provision that required a 15 percent reduction in VOC emission. The Commenter stated that, if the EPA nevertheless adopts a NO_x-for-VOC substitution approach for areas without an existing plan for reducing VOC emissions by 15 percent, there is no basis for only one part of the country – the OTR – being granted the NO_x-for-VOC substitution option for the initial 15 percent VOC reductions while denying the rest of the country the option. The EPA has not adequately explained why there is any greater legal or policy justification for allowing NO_x emission reductions to satisfy the 15 percent VOC emission reduction requirement under section 182(b)(1) in the OTR as opposed to the rest of the country. Furthermore, if the EPA does adopt the option only for the OTR, any expansion of the OTR should not result in NO_x-for-VOC substitutions in new areas unless the rest of the country is similarly granted the option.

Commenter (0168) did not support substitution of NO_x reductions for VOC reductions in 15 percent RFP plans. Commenter believes that, RFP must be calculated and complied with as a percentage of base year inventory emissions, which is consistent with the plain reading of the CAA and with prior EPA interpretations and has resulted in the necessary control of both VOC and NO_x emissions in the covered areas.

Commenter (0180) stated that, the first option is the only option permissible under the statute. The Commenter added that, the mandate for a 15 percent VOC cut hardly prevents the EPA or a state from requiring NO_x cuts in addition to the VOC reductions. The Commenter further stated that, even if the EPA could lawfully allow substitution of NO_x reductions for the VOC reductions required by section 182(b)(1), the EPA cannot lawfully or rationally allow such substitution in areas where the EPA has granted NO_x waivers under subsection 182(f) or otherwise limited the requirements for NO_x control under that subsection.

Response: The CAA section 182(b)(1) expressly requires the 15 percent ROP plans to reduce emissions of VOC. It does not provide discretion to meet these requirements by reducing emissions of other pollutant precursors. Where Congress intended to allow such a substitution, it specifically provided so, such as in section 182(c)(2)(C) which allows NO_x to be substituted for VOC in the 3 percent annual RFP plans for Serious and above areas. Also, for nonattainment areas that have met the CAA requirement for a 15 percent ROP VOC reduction plan for the entire area are not required to fulfill that requirement again. Instead, for purposes of the 1997 ozone NAAQS and for purposed of the 2008 ozone NAAQS, the EPA interprets the RFP requirement of section 172(c)(2) to require an area classified as Moderate to achieve an average 3 percent reduction in VOC and/or NO_x for the first 6 years following the baseline year and the RFP requirement in section 182(c)(2)(B) to require the same thing for areas classified as Serious

or higher. Thus, areas that had previously met the 15 percent VOC-only requirement under section 182(b)(1) are subject instead to provisions that allow NO_x to substitute for VOC to satisfy the RFP requirements.

Comment: EPA should develop information regarding when NO_x emission reductions can be substituted for VOC reductions

Commenter (0166) stated that, although it may make sense in certain areas (to the extent that substitution of NO_x reductions for VOC reductions is legally permissible) to allow states to require greater NO_x reductions than VOC reductions, there is insufficient data on these issues available for states to make informed decisions about when NO_x emission reductions would justifiably be substituted for VOC emission reduction requirements. The commenter urged the EPA to develop the necessary information that may allow for better NO_x-versus-VOC comparisons and decision-making.

Response: The EPA has already developed the information requested by the commenter. The EPA developed the *NO_x Substitution Guidance*, December 1993, that provides a procedure that can be applied to meet the section 182(c)(2)(B) RFP requirement as well as the section 182(c)(2)(C) equivalency demonstration requirements. This guidance is intended to facilitate implementation of the most effective ozone precursor control strategies, while meeting the intent of the CAA RFP provisions. This document can be accessed at the following web address: *http://www.epa.gov/ttn/caaa/t1/memoranda/noxsubst.pdf*. The EPA, on August 5, 1994, issued a memorandum titled, *Clarification of Policy for NO_x Substitution*, John S. Seitz, Director, Office of Air Quality Planning and Standards, which issues a clarification on NO_x substitution for ROP plans, specifically, what the EPA will accept as evidence that NO_x substitution for VOC reductions is a viable approach. This memorandum can be accessed at the following web address: *http://www.epa.gov/ttn/caaa/t1/memoranda/clarisub.pdf*.

Comment: Disagree with 15 Percent RFP Requirement

Commenter (0152) stated that, a 15 percent RFP requirement is outdated and not necessitated under the current ozone standard using recent baselines. The Commenter added that meeting a 15 percent RFP requirement can be a difficult challenge. The 1990 CAA Amendments required RFP to address the 1-hour ozone standard at a time when the baseline was significantly higher and there were more cost effective reductions available. Even then it was a challenge to show where RFP could occur, but today it would be even more challenging because significant reductions in VOC, and NO_x, have occurred since the 1990 CAA Amendments.

Response: The EPA disagrees. The regulation must comply with the CAA. Section 182(b)(1) of the CAA explicitly requires that ozone nonattainment areas classified as Moderate or higher submit a ROP plan to achieve a 15 percent reduction in VOC baseline emissions over a 6-year period following the baseline year.

2. 2008 ozone nonattainment areas which previously met the 15 percent RFP requirement for VOC

Comment: New 15 percent VOC plan not required

Commenters (0145, 0146, 0151, 0158, 0159, 0160, 0163, 0166, 0169 and 0179) agreed with the EPA's proposal that 2008 nonattainment areas that have already met the CAA requirement for a 15 percent VOC reduction plan are not required to fulfill that requirement again. Commenters (0146, 0151 and 0166) agreed that, this is a reasonable approach and that it is consistent with the decision in *NRDC v. EPA*, 571 F.3d 1235 (D.C. Cir. 2009).

Commenter (0151) stated, the proposed approach will reduce the burden on state agencies in the next rounds of SIP planning and that Congress did not intend the 1990 Amendments to the Act to create repetitive implementation of the same requirements that Congress listed in 1990 to ensure state and the EPA actions took place for ozone reduction. The Commenter added that, evidence in the record recounts that during discussion of adoption of these measures, members of Congress simply doubted the ability of the EPA and/or the states to prescribe the measures that would be capable of bringing ozone values down in the country. Therefore, just as it did with implementation of the hazardous air pollutant (HAP) program, the Congress prescribed the measures that would be required for the next round of ozone SIP revisions. In contrast to the HAP program, however, here is no further evidence that Congress meant for the 15 percent RFP or the 3 percent ROP requirements to re-apply every time that the ozone standard was revised. In fact, once a state has obtained approval of its 15 percent RFP (and ROP plan if in an area with a worse ozone issue), Congress thought that most areas of the country would attain the ozone standard. This makes it even less likely that members of Congress intended the states to have to adopt another 15percent RFP plan for reducing stationary source emissions. Moreover, it is unlikely that after a round of RACT and RFP for most areas once designated nonattainment for the ozone NAAQS, further reductions of ozone precursors would be available on this scale.

Commenter (0163) state, the pertinent requirement of the CAA is to reduce VOC by 15 percent in an area once it is subject to this section of the CAA. If a state has already produced a 15 percent RFP plan for VOC, it has met the CAA obligation and can be allowed to substitute NO_x for the 15 percent RFP requirement for the 2008 ozone NAAQS. Commenter (0180) supported the EPA's proposal (78 FR at 34189/1) to require, for Moderate areas that previously met the 15 percent VOC reduction requirements in section 182(b)(1), an additional 15 percent emission reduction in VOC and/or NO_x in Moderate and above areas to meet the ROP requirement in section 172(c)(2).

Response: The EPA acknowledges that 15 percent VOC reductions are required for all Moderate and above areas, but we continue to maintain that if a state has submitted, adopted and implemented its nonattainment area ROP/RFP emissions reduction plan to meet the requirements

of section 182(b)(1)(A) for either the 1-hour standard or the 1997 8-hour standard, they will not have to meet it again for the 2008 ozone NAAQS. The EPA believes the CAA is quite clear that the SIP must provide for a 15 percent reduction in baseline VOC emissions within 6 years of the baseline inventory year for some period after 1990 in an area subject to 182(b)(1)(A). It is the EPA's position that states must only submit ROP SIPs if the EPA has not already approved a state's 1-hour or 1997 ozone SIP ROP Plan. We believe that this is consistent with the decision in *NRDC v. EPA*, 571 F.3d 1235 (D.C. Cir. 2009), and this policy will reduce the burden on state agencies in SIP-planning for the 2008 ozone NAAQS. We believe Congress did not intend the 1990 Amendments to the Act to create repetitive implementation of the same requirements that Congress listed in 1990 to ensure state and EPA actions took place for ozone reduction. The EPA believes that the CAA plainly does not require that a second ROP SIP providing for 15 percent reduction in VOC baseline emissions under a revised ozone standard. Instead, for purposes of the 1997 ozone NAAQS and for purposed of the 2008 ozone NAAQS, the EPA interprets the RFP requirement of section 172(c)(2) to require an area classified as Moderate to achieve an average 3 percent reduction in VOC and/or NO_x for the first 6 years following the baseline year and the RFP requirement in section 182(c)(2)(B) to require the same thing for areas classified as Serious or higher. Thus, areas that had previously met the 15 percent VOC-only requirement under section 182(b)(1) are subject instead to provisions that allow NO_x to substitute for VOC to satisfy the RFP requirements.

Comment: Disagree with the EPA's two proposed approaches

Commenter (0152) stated that, treating the entire area as if no RFP requirement had applied was nonsensical and without basis and that RFP should only occur from the 1990 baseline in all circumstances and only a 15 percent requirement should be applicable over a 6-year period.

Response: The EPA believes that states must only submit RFP SIPs if the EPA has not already approved a state's ROP/RFP Plan. The EPA believes that the CAA plainly does not require that a second ROP SIP providing for 15 percent reduction in VOC baseline emissions within 6 years of the baseline inventory year under a revised ozone standard.

Comment: Require an additional 15 percent VOC plan

Commenter (0180) stated that, although the Court in *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009), held the EPA could permissibly read the statute as requiring SIPs to provide for the 15 percent VOC reduction only once, the Court did not address the question of whether mere EPA approval of a prior 15 percent ROP SIP would satisfy the 15 percent requirement for a subsequent NAAQS, or whether the area would have to show it actually achieved the 15 percent VOC reduction within the 6 years required by the statute. Commenter (0180) asserted that, to be creditable, the 15 percent reduction must have actually occurred within 6 years of November 15, 1990 due to implementation of measures required under the SIP, rules promulgated by the EPA, or Title V permits. Accordingly, Commenter (0180) believed, the EPA cannot treat previously approved ROP plans as satisfying the 15 percent ROP requirement unless the state also shows that the required VOC reductions were actually achieved as required by section 182(b)(1)(C).

Response: The EPA disagrees with the Commenter. We have maintained in the 1997 8-hour ozone NAAQS implementation rule and in the proposed 2008 NAAQS SIP requirements rule that if a state has already submitted, adopted and implemented its 15 percent ROP/RFP plan for an area to reduce VOC emissions for the either the 1-hour standard or the 1997 8-hour standard, the state should not be required to meet that requirement a second time for that area for the 2008 ozone NAAQS but instead the area will be subject to the other applicable RFP provisions of the CAA.

Comment: Support using NO_x emission reductions in areas that have already satisfied the 15 percent VOC reduction requirement

Commenters (0139, 0150 and 0163) supported the EPA's proposal to allow areas that have already satisfied the 15 percent VOC reduction requirement of the CAA section 182(b)(1) to use NO_x reductions in lieu of VOC (78 FR 34178, 34187 col. 2). These Commenters stated that, in many areas, NO_x reductions are far more effective than VOC reductions in making progress toward attainment and NO_x substitution is a logical means of achieving the purposes of the RFP requirement which is to ensure steady progress towards the goal, since it will provide more progress than would relying on VOC reductions. Commenters (0139 and 0150) stated that, given the advancement in scientific knowledge since the 1990 Amendments demonstrating that in many areas NO_x reductions are far more effective than VOC reductions, the EPA may reasonably conclude that the requirement for VOC RFP reductions need only be met once, and any remaining RFP requirements may be set as the Administrator may reasonably require, as under Subpart 1 (CAA §172(c)(2); CAA §171(1)-definition of RFP). Commenter (0139) stated, the EPA has the ability to authorize the use of equivalent planning procedures under §172(c)(8); therefore, the EPA may reasonably interpret the RFP requirements to allow such substitution.

Commenter (0150) added that, some may argue that NO_x substitution may only be used for RFP requirements beyond the first 6 years, as referred to in CAA §§ 182 (c)(2)(B) and (c)(2)(C). However, this position ignores the fact that the EPA proposes to allow NO_x substitution for the first 15 percent RFP requirement only for those areas that have already satisfied that requirement in an earlier approved ozone plan. The EPA is not required to apply each and every requirement of Subpart 2 according to a literal application of its terms. The U.S. Supreme Court held that the CAA is ambiguous as to the interaction between Subpart 1 and Subpart 2 with regard to a revised ozone standard and explained that it would defer to the EPA's reasonable resolution of the ambiguity. *Whitman v. American Trucking Ass 'ns,* 531 U.S. 457, 484 (2001). The Court noted that some parts of Subpart 2 may be ill-suited to implementing the revised standards, such as the statutory attainment deadlines and would require some interpretation.

Response: In previous responses, we have stated that, if a state has already submitted, adopted and implemented its 15 percent ROP/RFP plan to reduce VOC emissions in a nonattainment area for either the 1-hour standard or the 1997 8-hour standard, the area should not be required to meet that requirement a second time for the 2008 ozone NAAQS. Instead, such areas would be treated like areas covered under section 172(c)(2) if they are classified as Moderate for the 2008 standard and would need to meet the RFP requirements under section 182(c)(2)(B) if they are

classified as Serious or above for the 2008 ozone NAAQS.[14] For the purposes of the 2008 ozone NAAQS, the EPA is interpreting section 172(c)(2) to require such Moderate areas to obtain 15 percent ozone precursor emission reductions over the first 6 years after the baseline year for the 2008 ozone NAAQS and is interpreting section 182(c)(2)(B) to require such Serious and above areas to obtain 18 percent ozone precursor emission reductions in that 6 year period. Under the section 172(c)(2) and 182(c)(2)(B) RFP requirements, NO_x emission reductions could be substituted for VOC reductions.

2. 2008 ozone nonattainment areas where portions have a previously approved 15 percent VOC reduction plan

Comment: Support the proposed approaches

Commenter (0163) stated that, if a nonattainment area is expanded to include new jurisdictions, the RFP plan for this area must include either a separate 15 percent VOC reduction for the new jurisdictions or a reduction equal to that separate 15 percent VOC requirement from the entire nonattainment area. The Commenter added that, the requirement to reduce VOC emissions cannot be eliminated in its entirety except as provided for in CAA section 182(b)(l)(A)(ii).

Response: The Commenter is correct to recognize that, the EPA cannot simply eliminate the 15 percent emission VOC reduction requirement of section 182(b)(1). We have already stated that for nonattainment areas with an approved 15 percent ROP/RFP plan for a previous ozone standard, a state will not be required to submit, adopt and implement a second 15 percent plan under section 182(b)(1) for purposes of the 2008 ozone NAAQS.

Comment: Do not support the second proposed approach

Commenter (0180) stated that, the second option is not permissible under the Act. Commenter (0180) stated that, a prior 15 percent plan for just part of the 2008 nonattainment area cannot be deemed to satisfy the 15 percent requirement for the 2008 nonattainment area, because that "area" is different from the area encompassed by the prior 15 percent plan. Commenter (0180) asserted that the prior plan could not have purported to provide for a 15 percent cut from baseline emissions in an "area" that was not even defined at the time of the prior plan, nor does the statute allow for dividing up "the area" into multiple sub-areas with separate 15 percent ROP plans or requirements. Commenter (0180) stated, the statute requires the SIP to calculate the total amount of actual VOC emissions from all sources in "the area" – meaning the nonattainment area (not just some portion thereof) – and provide for a 15 percent reduction from that total baseline.

Commenter (0180) stated that, even if option 2 was otherwise permissible (which it is not), it

[14] Similar interpretations were made for the 1997 8-hour ozone NAAQS Phase 2 Ozone Implementation Rule, (70 FR 71615, November 29, 2005) and were upheld in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

would be illegal and arbitrary to let the sub-area claim credit for emission reductions from outside the sub-area without having to also add emissions from outside the sub-area to its baseline. Commenter (0180) stated that, unless the EPA is proposing to require that the non-former ROP sub-area assure a net 15 percent cut from new baseline emissions for the entire 2008 nonattainment area, it cannot – consistent with section 182(b)(1) – allow the sub-area to claim credit for reductions outside the sub-area. Commenter (0180) asserted that, if the EPA is going to create sub-areas within the nonattainment area, each with its own 15 percent reduction obligation, then the required VOC emission reductions must come from inside each sub-area respectively. *See* NRDC, 571 F.3d at 1257 (statutory mandate for reductions "in the area" requires "that any reductions emissions derive from reductions at sources within a particular area").

Further, Commenter (0180) stated that, although NRDC held that the EPA could read the statute as requiring a SIP to provide for the 15 percent VOC reduction only once, option 2 does not assure such a result as there is no assurance that the entire 2008 nonattainment area will in fact achieve a total 15 percent VOC emissions cut either from a 1990 baseline or a 2011 baseline for the whole area. Commenter (0180) concluded that, the EPA offers no rationale for how its proposed option 2 approach is consistent with the Act or advances its purposes.

Response: We agree with the commenter that the first option, to treat the entire 2008 nonattainment area as having never met the 15 percent requirement, is permissible under the CAA. However, we disagree with the commenter's assertion that the second option, to treat a portion of the 2008 nonattainment area as having met the 15 percent requirement, and a portion as still needing a 15 percent plan is not allowable. We believe that the portion of a nonattainment area that has a previously approved 15 percent ROP plan has satisfied the ROP requirement for that area and we have maintained that areas or portions of areas that have already met the 15 percent VOC emission reduction requirement for a previous ozone standard are not required by the CAA to meet that requirement a second time for the 2008 ozone NAAQS.

The EPA recognizes that the new portions of the nonattainment area that have not met the 15 percent VOC emission reduction requirement are subject to section 182(b)(1). We disagree with the Commenter that a prior approved 15 percent plan for just part of the new 2008 nonattainment area cannot be deemed to satisfy the 15 percent requirement for the 2008 nonattainment area simply because that area is different from the area encompassed by the prior 15 percent plan. The final rule offers states two options for addressing the 15 percent ROP requirement. First, the state could choose to treat the entire area as an area that never met the 15 percent requirement and meet the requirements as described in the final rule. Second, the state could choose to treat the 2008 nonattainment area as divided into two portions: the former non-ROP plan portion and the former ROP plan portion. For the former non-ROP plan portion of the 2008 nonattainment area, the plan would establish a separate 15 percent VOC reduction requirement under section 182(b)(1). However, it is important to recognize that VOC emissions reductions to meet the 15 percent requirement must come from within the boundaries of the non-ROP plan portion. Additionally, the ROP plan for the 2008 ozone NAAQS for the new non-ROP plan portion remains responsible for achieving the 15 percent VOC reductions.

The second option in the final rule differs from the second approach described in the proposed rule in that we make it clear that the approved RFP plan portion cannot entirely provide for a 15 percent reduction from baseline emissions in the entire area. We believe that the CAA provides the EPA with the authority to define ROP plan areas and non-RFP plan areas if the new non-RFP areas become subject to section 182(b)(1) and the 15 percent emission reduction credits come from within the non-RFP section.

Comment: Clarification needed for the second proposed approach

Commenter (0132) requested clarification concerning the VOC reduction target stipulation for the existing counties: The Commenter asked, if states would be allowed to set a VOC target for existing counties that is not reduced from the base year VOC target? In this case, there would be a "VOC target" for the existing counties, but no further VOC reductions would be required, and the 15 percent reduction requirement for those counties could be demonstrated with NO_x reductions only. Alternately, would states choosing to use VOC emission reductions from the entire 2008 nonattainment area to satisfy the newly designated portion's initial 15 percent VOC reduction requirement be required to then demonstrate an additional VOC reduction for the existing portion's 15 percent NO_x and/or VOC reduction requirement, beyond the base year VOC target? Please clarify whether the language describing the second approach in Section III.C.2.e of the proposal is meant to be read as either of the above interpretations, or if the EPA intended a

completely different interpretation.

Response: In consideration of nonattainment areas that include portions consisting of all or a piece of one or more nonattainment areas for a previous NAAQS and which achieved their ROP plan to reduce VOC by 15 percent combined with portions that have never been subject to or have not fulfilled the 15 percent ROP plan requirements, the EPA has reevaluated the proposed second approach that allows states to choose to use VOC emission reductions from a designated 2008 nonattainment area that can demonstrate 15 percent ROP VOC emission reductions previously achieved in an older portion of the nonattainment area to satisfy the newly designated portion's initial 15 percent VOC reduction requirement. In consideration of the comments received, the EPA has concluded that the approach should be modified. The EPA recognizes that the new portions of the nonattainment area that have not met the 15 percent VOC emission reduction requirement should be subject to section 182(b)(1). We find merit with the commenter's suggestion where they argued that prior approved 15 percent ROP plans for a previous nonattainment area cannot be applied to the new 2008 nonattainment area and cannot be deemed to satisfy the 15 percent requirement for the 2008 nonattainment area in cases where the entire area is different from the area encompassed by the prior 15 percent plan.

The final rule offers states two approaches for addressing the 15 percent RFP requirement. First, the state could choose to treat the entire area as an area that never met the 15 percent requirement and meet the requirements as described in the final rule. Second, the state could choose to treat the 2008 nonattainment area as divided into two portions: the former non-RFP plan portion and the former RFP plan portion. For the former non-RFP plan portion of the 2008 nonattainment area, the plan would establish a separate 15 percent VOC reduction requirement under section 182(b)(1). However, it is important to recognize that VOC emissions reductions to meet the 15 percent requirement must come from within the boundaries of the non-RFP plan portion. Additionally, if a portion(s) of the nonattainment area was not subject to an approved 15 percent plan for either the 8-hour standard or the 1-hour standard, referred to as a non-RFP plan portion, then section 182(b)(1) applies to that non-RFP plan portion(s) of the 2008 ozone nonattainment area and the initial ROP requirements may be met by achieving 15 percent VOC reductions.

The second option in the final rule differs from the second approach described in the proposed rule in that we make it clear that the approved RFP plan portion cannot entirely provide for a 15 percent reduction from baseline emissions in the entire area. We believe that the CAA provides the EPA with the authority to define RFP plan areas and non-RFP plan areas if the new non-RFP areas become subject to section 182(b)(1) and the 15 percent emission reduction credits come from within the non-RFP section.

Comment: Serious and above areas

Commenters (0139, 0155 and 0157) supported the RFP requirements as proposed in the 40 CFR 51.1110, which comports with CAA section 182(c)(2)(B). The commenter added that, for the 1997 standard, 40 CFR 51.910(a)(1)(ii)(B) went beyond the authority of the CAA and required nonattainment areas classified Serious and above to get 18 percent reductions during the first 6 years rather than 15 percent and also required Serious and above areas to submit RFP SIPs for the period after the first 6 years in 3 years after designation, rather than the 4 years allowed by

the CAA. Unfortunately, the preamble language in the proposed rule (78 FR 34189 col. 1) confuses the matter by sounding like the EPA might be proposing requirements similar to those for the 1997 standard. CAPCOA strongly supports the EPA's proposed CFR regulatory language, which comports with the CAA section 182(c)(2)(B). RFP requirements beyond those in section 182(c)(2)(B) are not authorized by the CAA for areas classified Serious and above.

Response: The final rule allows submission of the RFP plan up to 4 years from the date of designation. We do not believe the RFP provisions of subpart 2 of the CAA provide relief from the requirement to obtain the specified percent reductions from the RFP baseline within the time frame specified in those provisions.

Comment: RFP in expanded (old) nonattainment areas

Commenter (0151) stated that, it does not support either alternative because it believes that the 15 percent VOC RFP requirement applied only once after adoption of the 1990 CAA Amendments and that the Congress did not intend for a state to adopt a new RFP plan either when the ozone standard is revised or when a state expands an ozone area for an existing or a revised standard, once the EPA approved the initial RFP. The commenter urged, the EPA to require a state *only* to demonstrate that the major sources will be subject to RACT and that other federal and state controls on other sources, including unconventional, minor and mobile sources will result in progress (i.e., obtains reductions in excess of the already approved RFP demonstration.). If any RFP demonstration is required for expanded nonattainment areas," the EPA only should require a state to demonstrate that "additional reductions" have been made beyond the original 15 percent RFP and major sources in these areas meet RACT.

Commenter (0169) stated the EPA should use its discretionary authority to provide states with deference when determining how to treat new nonattainment areas which encompass old nonattainment areas, as each area is unique in its needs and potential for reductions. Commenter (0169) provided the following additional points. The Commenter stated they appreciate the EPA's attempt at addressing various scenarios to make the SIP Requirements Rule as useful to states as practicable. The commenter, however, believes the EPA should use its discretionary authority to provide states with deference when determining how to treat new nonattainment areas which encompass old nonattainment areas, as each area is unique in its needs and potential for reductions. The Commenter believes that, the provisions spelled out in Section 111.C.2.e of the SIP Requirements Rule will not only impact RFPs but also emission inventory reporting, emissions statements, transportation conformity, etc. As such, the commenter would like to applaud the EPA for its efforts, but caution the EPA to fully consider the ramifications of the proposed provisions. (0169)

Response: It is the EPA's position that if a portion of a nonattainment area for the 2008 NAAQS was not subject to an approved 15 percent plan for either the 1-hour or the 1997 NAAQS, then section 182(b)(1) applies to that portion of the 2008 NAAQS area and may be met by one of two approaches described in the rule, which are as follows: The state could choose to treat the entire area as an area that never met the 15 percent requirement, or the state could choose to treat the 2008 nonattainment area as divided into two portions: the former non-RFP plan portion and the former RFP plan portion. For the former non-RFP plan portion of the 2008 nonattainment area,

the plan would establish a separate 15 percent VOC reduction requirement under section 182(b)(1) of subpart 2. However, VOC emissions reductions to meet the 15 percent requirement may come from source located anywhere within the 2008 nonattainment area, provided that the former RFP plan portion of the area also achieves its separate VOC reduction target as part of its RFP plan for the 2008 ozone NAAQS. If the RFP plan for the 2008 ozone NAAQS for the former nonattainment area relies solely on NO_x reductions, then the portion of the nonattainment area never before subject to nonattainment requirements must still achieve the required 15 percent VOC reductions.

The EPA disagrees with the Commenter that, the 15 percent VOC RFP requirement should only be applied once and that a state should not need to adopt a new RFP plan when a NAAQS has been revised or when a state expands an ozone area. The EPA does not believe the statute authorizes an area that has not already met the 15 percent requirement for the 1-hour or the 1997 standard to be exempt from that obligation, except as provided in section 182(b)(1)(A)(ii), which specifies the circumstances under which a percentage of less than 15 may be used for purposes of meeting the RFP requirements. The EPA followed a similar approach in the preamble and regulatory text for the final Phase 2 Implementation Rule for the 1997 NAAQS (70 FR 71612, November 29, 2005). Based on this reasoning, the EPA also disagrees with the Commenter that a state should only be required to demonstrate that "Additional Reductions" have been made beyond the original 15 percent RFP and that major sources in these areas meet RACT. Additionally, the EPA notes that RACT requirements apply to sources in the entire nonattainment area, not solely one portion. Therefore, in cases where the nonattainment area for the 2008 NAAQS covers a geographic area that is larger than that of a previous NAAQS, states would need to conduct a RACT analysis that evaluates all sources in the 2008 NAAQS nonattainment area.

Lastly, the EPA appreciates the comment regarding the fact that each nonattainment area is unique and has its own needs for reductions. The EPA will review all SIP submissions on a case-by-case basis to evaluate the extent to which CAA requirements have been met.

3. Non-creditable reduction calculations

Comment: Support removing the calculation requirement

Commenters (0130, 0141, 0152, 0153, 0155, 0157, 0159, 0160, 0163, 0169, 0175 and 0179) supported the proposal to remove the requirement of performing non-creditable reduction calculations. Commenters stated that, these calculations are tedious and burdensome (0130, 0155, 0175, 0177 and 0179), they add no environmental benefit to the planning process (0130), with fleet turnover, such emission reductions are *de minimis* for SIP planning purposes (0160), and removing the requirement will streamline the RFP process somewhat and make the process easier to explain to interested parties such as section 174 planning organization participants.

Commenter (0177) stated that, the pre-1990 calculation will be necessary if the EPA decides to allow states submitting a first-time 15 percent RFP Plan to substitute NO_x for VOC reductions. According to the Commenter, the EPA indicated in the preamble (78 FR 34188) that states with such nonattainment areas must first demonstrate that a 15 percent VOC reduction was achieved

relative to a 1990 baseline. The Commenter indicated that since those nonattainment areas would be required to look back to a 1990 baseline, the emission reductions from pre-1990 control measures are not likely to be *de minimis*, so they would need to be considered.

Response: The EPA appreciates the Commenters' support in removing the requirement to perform non-creditable reduction calculations. The final rule does not include a requirement to perform non-creditable reduction calculations.

Comment: Clarification needed for non-creditable reduction calculations

Commenter (0132) stated, more clarification and consistency is needed throughout the section discussing the requirements to account for non-creditable reduction calculations when calculating RFP emission reduction targets. The Commenter stated that, the proposal indicated that non-creditable emissions reductions, as specified in federal CAA (FCAA), §182(b)(1)(D), would no longer be calculated and removed from RFP emissions reduction targets because their effects are considered *de minimis.* The Commenter agrees that these effects are *de minimis.* However, the proposal also states that all SIP-approved or federally promulgated emissions reductions that occur after the baseline inventory year, except those listed in §182(b)(1)(D), are creditable toward RFP. These sections seem to be inconsistent, and the requirements are therefore unclear. The EPA should provide justification for why the non-creditable reductions would not be *de minimis* for both purposes. Is the EPA proposing that states would no longer be required to calculate non-creditable reductions for RFP targets but that non-creditable reductions must still be removed from the emission reductions used to meet RFP targets? Or is the EPA proposing that states would no longer be required to consider, due to their *de minimis* effects, non-creditable reductions in RFP demonstrations?

Response: The final rule provides that states would no longer be required to calculate non-creditable reductions in RFP demonstrations, due to their *de minimis* effects.

Comment: Do not support proposal for non-creditable reduction calculations

Commenter (0180) states that, the EPA is completely without authority to allow states to claim ROP credit for control measures for which such credit is explicitly barred under CAA section 182(b)(1)(D). Commenter (0180) stated that, the prohibition on crediting such reductions is the sort of extraordinarily rigid statutory provision that does not allow for *de minimis* exceptions. Commenter (0180) asserted that, section 182(b)(1)(D) says unequivocally that the reductions from the measures listed therein "are not creditable toward the 15 percent reductions. . ." 42 U.S.C. § 7511a(b)(1)(A). Commenter (0180) stated, the EPA has not demonstrated that the impact of the non-creditable reductions will always be trivial – a prerequisite to invoking the *de minimis* exception and failed to review the impact of this exception on any specific nonattainment areas, relying instead on national modeling from which – it concedes – local results may vary.

Response: The EPA disagrees. The statute provides that motor vehicle emission reductions resulting from measures promulgated "by January 1, 1990," (which can only come from pre-1990 vehicles), are "not creditable." To ensure that such emissions are not credited it is first

necessary to calculate them. The EPA found that making such a calculation would be "a very resource intensive process requiring multiple modeling runs and extensive staff time," and that emissions from pre-1990 vehicles would be a very small part of the total emissions inventory by the time the credits could first apply, in 2017. Thus it proposed to relieve states of the burden of doing the calculations "based on the *de minimis* nature" of the potential credits.

The comment does not dispute the principle that agencies need not apply the literal terms of a statute to mandate pointless expenditures in circumstances that can fairly be considered *de minimis*. *See Alabama Power v. EPA,* 636 F.2d 323, 360 (D.C. Cir. 1979). But the comment notes that this principle does not apply to "extraordinarily rigid" statutes, and baldly asserts that the statement in section 182(b)(1)(D)(i) that emissions are "not creditable" is such a provision. The comment offers no further explanation. It suggests no standard for determining when a statute is too rigid for *de minimis* exemptions, does not explain how the use of "not" makes the statute "extraordinarily" rigid and cites no instance when a provision like this has precluded use of *de minimis* principles in otherwise appropriate circumstances. The EPA therefore rejects the comment as unsupported.

The comment also claims that the EPA has not demonstrated that these circumstances are *de minimis*. Without disputing the EPA's conclusions as to either the share of the emissions inventory or the resource burdens of the calculations, the comment nevertheless claims that because "local results may vary," the EPA must assess "specific nonattainment areas." The comment does not identify any such area or offer any basis to believe that the impact of the credits anywhere would be more than *de minimis.* Moreover, the EPA evaluated and concluded that reductions associated with pre-1990 vehicles "everywhere will be a very small fraction of the total on-road VOC emissions inventory by 2017." In sum, this comment, too, is unsupported and the EPA rejects it.

4. Alternative VOC-weighted RFP approach

Comment: Support for the VOC-weighted approach

Commenters (0147, 0151, 0154, 0158, 0162, 0175 and 0179) supported the VOC-weighted approach. Commenters (0147, 0151 and 0179) added that controlling VOC emissions based on photochemical reactivity is a scientifically sound and appropriate means of addressing ozone formation potential. Commenter (0147) provided the following additional points. They stated that, scientific research shows that photochemical reactivity has a more direct correlation to the ozone-forming potential (i.e., potential air quality impacts) of VOC emissions than does a simple mass-based measure of emissions. Comparative photochemical modeling is described in (report attached to comment 0147), Assessing Near-field and Downwind Impacts of Reactivity-based Substitution. Reactivity-based VOC emissions limits, by considering the rate and mechanism of photo-oxidation in the troposphere, are reflective of the actual processes that lead to ozone formation. Relative photochemical reactivity thus provides a more rigorous scientific approach to assessing an individual compound's potential contribution to ozone accumulation than consideration of its mass alone. The Commenters stated that, accordingly, the EPA's approach is scientifically sound and represents a significant step forward in ozone regulation. The reactivity

method has already been adopted in other national, state and local ozone regulations such as the current national aerosol coatings rule and the Texas highly-reactive VOC emissions cap and trade program. These programs may serve as a legal and administrative precedent for other reactivity-based standards. We have appended a whitepaper entitled *Control of Ozone Formation from Household and Commercial Product Use* that outlines additional information on the benefits and history of reactivity-based VOC regulation (report attached to comment 0147).

Commenter (0151) supported adoption of both of the proposed alternative approaches in the SIP Requirements rule because they reinforce the states' ability to apply these constructs and because they are far more practical and likely to be more successful in reducing ozone than the section 182(b) RFP 15 percent VOC reductions specified in the 1990 Amendments. The Commenter stated that, as a consequence of this well-accepted appreciation of the relative contributions of different VOC species and NO_x to ozone formation, it would be unreasonable and arbitrary to require states to impose control requirements on low-reactivity VOC where it will make little difference in an area's ability to achieve the ozone standard. It would be particularly irrational to control such minimally reactive VOC if it is feasible to reduce higher reactivity VOC or NO_x from other sources instead. This conclusion is borne out by marked improvement in ozone nonattainment days following imposition of controls on highly reactive VOC in Texas. The EPA has proposed to codify this understanding in the proposed RFP regulations at proposed 40 CFR § 11.1110 (a). The commenter added that Congress did not intend when it amended the CAA in 1990 to require the states to continue to peddle a proverbial "Section 182(b) hamster wheel" every 5 years as the EPA reexamined and adjusted the ozone NAAQS. In that respect, we believe therefore that the principal function of Title I, Subpart II is to prevent any state backsliding that would be caused by removing features of approved RFPs and other mandate pollution controls required by Congress in the 1990 Amendments. At the time of the 1990 CAA Amendments, the Committees of the respective houses believed that many large VOC sources had not been subject to RACT-controls and that for most nonattainment areas that 15 percent reductions in baseline VOC would bring areas into attainment and that incremental additional rate-of-progress 3 percent reductions would ultimately be successful in resolving all but perhaps the most intransient ozone nonattainment problems in peculiar geographically/meteorologically-challenged areas. With this perspective, it should be concluded that subpart 2 was designed to forcibly dictate the floor for all nonattainment SIP programs, but that thereafter as long as states do not backslide from these requirements, additional measures are to be once again subject to state's discretion under subpart 1 to adopt additional measures. Both alternatives that the EPA describes in the proposal are wholly consistent with authorities set out in CAA section 172, which allows the states thereafter to determine how and when the application of the alternative would be useful in lowering ozone in a particular air shed. The commenter argued that both of the proposed alternative approaches in the SIP Requirements rule are far more practical and likely to be more successful in reducing ozone than the section 182(b) RFP 15 percent VOC reductions specified in the 1990 Amendments. In combination with each other, they are likely to be even more successful in achieving ozone reductions in some areas. For all the reasons discussed on page 34190 of the NPRM, reducing NO_x and highly reactive species of VOC are likely to result in more ozone improvement than a 15 percent overall reduction in various VOC. From a practical point, Dr. Douglas Carter's reactivity tables are readily available and generally accepted. We believe they have been used successfully already in Texas SIP-planning to lower

ozone levels closer to attainment.

Commenter (0152) generally supported the use of alternative approaches to achieving RFP and believed more flexibility and common sense approaches are needed in today's regulatory environment, as standards are getting lower and lower and available cost-effective emission reductions are more difficult to find. However, Commenter (0152) stated, such approaches should not be mandated by EPA and must be left to the state's discretion. Commenter (0154) stated this alternative supports a common sense approach whereby states can focus reductions on the particular VOC that are causing elevated ozone levels. Commenter (0162) stated, an across-the-board VOC reduction program in an area with significant non-reactive VOC is likely to be less effective than a tailored program focused primarily on highly-reactive VOC and noted that the ability of the Houston CMSA to significantly reduce ozone concentrations demonstrates the effectiveness of a VOC reactivity-based approach.

Response: The EPA appreciates the many comments it received on this issue. Commenters asserted that scientific studies show that photochemical reactivity has a more direct correlation to the ozone-forming potential (i.e., potential air quality impacts) of VOC emissions than does a simple mass-based measure of emissions, and urge the EPA to allow states the option to use a reactivity-based approach to RFP. The EPA agrees that the alternative approach ideas discussed in the proposed rule and in the comments received are interesting and designed to achieve useful goals. However, the EPA believes that much more work is needed in a separate effort to work through the many scientific and legal issues involved before such an approach would be determined appropriate. It can be argued that the RFP requirements in section 172(c)(2) are defined in section 171(l) as "annual incremental reductions in emissions," not reduction in ambient pollutant levels. Also, section 182(b)(1) requires plans for Moderate and above areas that provide for specific overall percentage reductions *in emissions*, and those reductions must be achieved "from baseline emissions" regardless of the reactivity of the VOC being reduced. The EPA recognizes that even though the science of reactivity has advanced to a point where it could support policy directives, this alternative approach would be complicated to implement.

The EPA did not specifically include this alternative approach in the final rule, however the EPA believes there is potential for this alternative to be implemented in the future. If a state or another air quality management entity were to develop a weighted VOC approach that is adequately supported by scientific studies and consistent with the CAA requirements, the EPA could evaluate the program and the studies to determine if it could be readily implemented in a separate rulemaking. The EPA believes that states and the agency will need time to understand and consider the outcomes and whether it may be practical for the states to pursue this alternative, possibly on a case-by-case basis. If the EPA determines in the future that such an approach appropriately meets CAA obligations, it will be established in a separate rulemaking action.

Comment: EPA should suggest in the final rule what those "reactivity groupings or 'bins'" would be or incorporate the reactivity scales adopted by California agencies

Commenters (0151, 0158, 0166 and 0175) suggested the EPA should establish default national VOC weighting ratios. Commenter (0151) stated that, requiring states to make demonstrations based on the relative reactivity of pollutants would be burdensome and unnecessary duplicative

since any such demonstration would likely depend on the same detailed analysis of the atmospheric chemistry and behavior of families of VOC. Commenter (0151) requested the EPA to suggest in the final rule what "reactivity groupings or 'bins'" would be or incorporate the reactivity scales adopted by California agencies. The commenter stated that, this is not to imply that all nonattainment areas are the same, in the sense of their make-up of sources or the predictability of emission reductions from certain sources. That analysis will need to be guided by other local criteria that the states will need to use for implementing the RFP, such as the NO_x/VOC ratio and other variables involving monitors and terrain and weather. But at least having the EPA classify three (or more as the science supports) tiers of VOC based on their relative reactivity and assign ratios for comparison is simpler than burdening state governments with overcoming the challenge of documenting why they chose to define the "reactivity bins" themselves, allowing them to focus limited resources on unique issues related to their industrial and area source emission inventories.

Commenters (0158 and 0166) supported the proposed option and stated that, if the agency does provide this alternative RFP option in the final rule, it should allow states the option to use the EPA-developed and provided default VOC weighting functions or to develop alternative state- or area-specific weighting functions. Commenter (0175) stated, the EPA should establish default national VOC weighting ratios through rulemaking and allow states the flexibility to establish region specific VOC weighting ratios with review and approval from the EPA.

Response: The EPA appreciates the commenters' suggestions on ways to make the VOC weighting approach a viable approach. However, the EPA also recognizes that there are lingering legal issues, scientific unknowns and uncertainties associated with developing and implementing defensible methods that allow the weighing of VOC emissions based on ozone reactivity for purposes of meeting RFP requirements. The EPA recognizes such an approach would provide states with increased flexibility. While interested in exploring ways to provide flexibility to states where possible, the EPA has decided not to include this alternative approach in the final rule at this time. The EPA believes there is potential for this alternative to be implemented in the future.

Comment: Concerns regarding the VOC-weighted approach

Commenters (0132, 0144, 0146, 01060 and 0166) expressed concerns related to the alternative VOC-weighted RFP approach. Commenter (0132) stated, the proposal does not provide enough detailed information on how a VOC-weighted approach would be practically implemented and requested the EPA provide additional guidance and/ or clarification as to how the alternative approaches would be implemented. Commenter (0144 and 0146) stated that, there is not enough scientific data and guidance available to implement this approach, especially considering that even low reactivity VOC do have adverse ozone impacts downwind. Commenter (0160) stated, the proposed alternative to allow weighting of VOC emissions according to reactivity would be of limited utility in California, unless it is expanded to weight the value of NO_x reductions relative to VOC reductions. Commenter (0166) stated that, to the extent legally permissible, the EPA should clarify that it is looking for the best *mix* of *both* VOC and NO_x emission reductions when it states that "[t]he emission reduction targets for the area should be expressed in terms of the pollutant (VOC or NO_x) which, when reduced, is most effective in reducing ozone concentrations in the area." 78 FR at 34,190/1.

Response: The EPA agrees that there are concerns in implementing a VOC weighted approach. The EPA also recognizes from concerns expressed by Commenters that, there may be lingering legal issues and that the underlying science has some uncertainties associated with the reactivity of VOC approach. The EPA recognizes the alternative VOC-weighted approach would provide states increased flexibility in satisfying ROP/RFP requirements. However, the EPA has decided not to include this alternative approach in the final rule at this time. The EPA believes there is potential for this alternative to be implemented in the future and if the EPA decides to make this approach available, it will do so in a separate rulemaking.

Comment: Do not support the VOC-weighted approach

Commenters (0146, 0163 and 0168) opposed this approach, stating that the CAA clearly requires a percentage reduction "from baseline emissions" for purposes of RFP. Commenter (0163) added that, the CAA specifies a percentage reduction and even provides for alternatives for using a percentage less than 15 percent for RFP (CAA section 182(b)(1)(A)(ii). While reactivity-based weighting is recognized in another section of subpart 2, it is not mentioned in this context. Furthermore, this approach would presumably only be utilized by states to avoid either meeting the 15 percent VOC reduction requirement or to permit the substitution of NO_x prior to meeting the 15 percent VOC requirement. Neither is allowed under the CAA.

Response: The EPA believes that it might be argued that there are legal barriers to implementing the VOC reactivity-based alternative approach. The Commenter argues that, section 182(b)(1)(A)(ii) provides a specific reduction percentage with an alternative for using a percentage less than 15 percent for ROP/RFP and prohibits the weighted VOC approach. However, the EPA disagrees with the Commenter that states would use this approach only as a means to avoid meeting the 15 percent VOC reduction requirement. The EPA believes there is potential in this approach and if the EPA decides to propose a change, it will be undertaken in a separate rulemaking action.

5. Alternative Air quality approach

Comment: Concerns regarding the alternative air quality approach

Commenters (0132, 0144, 0159 and 0166) expressed concerns related to the alternative air quality based RFP approach. Commenters (0132 and 0166) stated, the proposal does not provide enough detailed information on how an air quality-based approach would be practically implemented. Commenter (0132) added that, for the air quality-based approach, without more detail on how the EPA would expect states to translate RFP emissions reduction targets (tons) into ozone air quality targets (ppb), it is difficult to provide comment. Based on the brief summary provided by the EPA, the Commenter assumes, that additional photochemical modeling would be required to achieve this translation. The EPA should provide additional guidance and/ or clarification as to how both these alternative approaches would be implemented. Commenter (0166) added that, the air quality alternative proposal appears to be reasonable on its face, but it is not clear how it would work and the EPA should provide further detail on this alternative in a supplemental notice (with an opportunity for public comment) if it decides to adopt this approach in the final rule. It is not clear from the proposed rule to what

extent an ambient measurement approach is consistent with the statutory definition of "RFP," which requires "annual incremental reductions in emissions of the relevant air pollutant." CAA § 171(1). The EPA needs to provide in a supplemental notice additional legal justification for such a proposal if it decides to proceed to adopt it. To the extent legally permissible, the EPA should clarify that it is looking for the best *mix* of *both* VOC and NO_x emission reductions when it states that "[t]he emission reduction targets for the area should be expressed in terms of the pollutant (VOC or NO_x) which, when reduced, is most effective in reducing ozone concentrations in the area." 78 FR at 34,190/1.

Commenter (0144) stated, there is not enough scientific data and guidance available to implement this approach and, even low reactivity VOC do have adverse ozone impacts downwind. The commenter stated that, it is not clear how a state would distinguish between reductions from control measures, transport and natural or nonpermanent reductions. This approach is more complicated and not as accurate as the current requirement in assessing control measure benefits from individual control measures.

Response: It can be argued that the RFP requirements in section 172(c)(2) are defined in section 171(l) as "annual incremental reductions in emissions," not reductions in ambient pollutant levels. Also, section 182(b)(1) requires plans for Moderate and above areas provide for specific overall percentage reductions *in emissions* and those reductions must be achieved "from baseline emissions" regardless of the air quality targets of the criteria pollutant being reduced. The EPA recognizes that an alternative approach would be complicated to implement because the science of the air quality targeting approach has to advance to a point where it could support policy directives. The Commenters plainly contend that the CAA's RFP provisions do not appear to provide for variations in the required percent reduction in VOC based on differences of ozone forming potential. The requirement to obtain the required percent reduction of total VOC remains, and if EPA decides to propose a change, it would be undertaken in a separate rulemaking action.

Comment: Support for increased flexibility in air quality approach

Commenters (0132, 0136, 0139, 0140, 0150, 0151, 0153, 0160, 0161, 0175 and 0179) generally supported the air quality approach. Commenters (0132 and 0161) stated this, approach provides increased flexibility since it would provide an avenue by which VOC and NO_x emissions could be substituted for one another on an air-quality basis instead of on a percent-for- percent emissions basis. Commenter (0132) endorsed this increased flexibility since it would provide an avenue by which VOC and NO_x emissions could be substituted for one another on an air-quality basis instead of on a percent-for-percent emissions basis. Commenters (0136 and 0139) stated, this approach would allow us to translate the region's RFP emissions reduction targets (tons) into ozone improvement targets (ppb) based on air quality modeling or other appropriate analyses. Commenter (0136) stated, the emission reduction targets for the area should be expressed in terms of the pollutant (VOC or NO_x) which, when reduced, is most effective in reducing ozone concentrations in the area. Commenters (0150 and 0160) supported the proposal to allow use of an air quality based approach to demonstrating RFP, especially if the proposal to disallow use of emission reductions from outside a nonattainment area is finalized.

Commenter (0160) stated, that this alternative would better reflect the air quality progress being made in areas adjacent to the South Coast nonattainment area, such as Coachella Valley and the Western Mojave Desert, which must rely on large upwind emission reductions to attain the ozone standard. In addition, there may be other appropriate uses of air quality based progress benchmarks to demonstrate RFP. States should have the opportunity to demonstrate that such an approach is equivalent to or better than an emission reduction target. Such an alternative would qualify as an equivalent planning procedure that can be approved under section 172(c)(8) and should be included in the final rule.

Commenter (0150) stated that, this approach would be very useful because their best technical judgment is that the Coachella Valley will be able to meet the air quality improvement targets, but would not necessarily be able to meet the RFP tonnage targets using emission reductions solely from within the Coachella Valley nonattainment area. The Commenter added that, the EPA has requested comment on whether there is adequate legal basis to allow such an interpretation. Again, the basic purpose of RFP is to ensure adequate and consistent annual emission reductions to ensure progress toward attaining the standards. CAA § 171(1). The requirement to reduce tons of emissions is, of course, intended to produce improvements in air quality. The EPA's proposed air quality-based approach clearly qualifies as an equivalent planning procedure that is not "less effective" than the bare requirement to reduce tons. Thus, the EPA may approve it under CAA § 172(c)(8). It may be argued that under this section, the EPA may only approve equivalent methods to those "specified by the Administrator," not those specified in the CAA. But that argument assumes that each and every word of Subpart 2 is directly applicable to the revised standard. As explained above, it is not. The EPA may reasonably assume that Congress would have wanted states to be allowed to use measures of progress that are directly related to the goal, i.e., air quality improvement.

Commenter (0179) stated that, the approach is feasible given the current state of science and modeling tools available to measure RFP in terms of ozone improvement targets. It can serve as a menu of choices that states and the EPA can use to measure progress toward and to attain the ozone standard. It would retain a state's accountability for making consistent incremental progress while focusing on the most direct measurement of improvement, namely air quality. We recognize that a similar approach is already included in the implementation rules that govern SIP development for the June 6, 2012 court decision on $PM_{2.5}$ NAAQS (40 CFR 51.1009(g) and (h)), and the same logic could be applied for 2008 ozone NAAQS implementation. The Commenter believes that sections 1 (b)(4) and 6(a) of the Executive Order 13563 could be applied to serve the overall intent of the CAA to attain the NAAQS in an expeditious manner. In particular section 1 (b)(4) states, "to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt" and section 6 (a) states, "To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible."

Commenter (0151) supported adoption of both of the proposed alternative approaches in the SIP

Requirements rule because they reinforce the states' ability to apply these constructs and because they are far more practical and likely to be more successful in reducing ozone than the section 182(b) RFP 15 percent VOC reductions specified in the 1990 Amendments. With respect to 2008 ozone nonattainment areas where portions have a previously approved 15 percent VOC reduction plan, Commenter (0179) requested maximum flexibility in dealing with nonattainment areas. Commenter (0179) stated that, air quality improvements are better accomplished with current scientific understanding rather than mandates in a law from a generation ago that was aimed at achieving compliance with a different air quality standard prior to emission reduction achievements from many sources of VOC and NO_x.

Commenters (0155 and 0157) stated, they had no comment on these specific proposals regarding alternative approaches to achieving RFP or their legal merits, but noted that some state and local agencies will face serious difficulties achieving the required RFP reductions by the prescribed deadlines. Commenters (0155 and 0157) urged, the EPA to engage in meaningful and timely dialogue with states and localities on this issue and to provide states and localities all legally available flexibility in reaching attainment, provided there is no adverse effect on other states' efforts.

Response: The EPA appreciates the commenters' support. We recognize that implementing alternative approaches such as the weighing of VOC emissions based on ozone reactivity may provide states increased flexibility in satisfying RFP requirements based on air quality improvements rather than adopting control methods to meet prescriptive emission limits. Air quality improvements recognize the benefits or reducing both VOC and NO_x where one could be substituted for another.

The EPA also recognizes that there are lingering legal and technical issues, unknowns and uncertainties associated with allowing either the air quality improvement approach or the weighting of VOC emissions based on ozone reactivity. It can be argued that the RFP requirement in section 172(c)(2) is defined in section 171(l) as "annual incremental reductions in emissions," not reduction in ambient pollutant levels. Also, in the section 182(b)(1) requires plans for Moderate and above areas to provide for specific percentage reductions *in emissions*, and those reductions must be achieved "from baseline emissions" regardless of how much ozone levels are reduced. The EPA recognizes that this alternative would be complicated to implement because it would require the state to determine the percentage emissions reduction and translate that result into an air quality benefit and subsequently determine if control programs would result or have resulted in an equivalent air quality benefit. However, Congress has expressly allowed air quality benefits analyses to supplant emission control requirements in certain sections of the CAA. For example, section 182(f) provides for waiver of certain NO_x control requirements for major sources where the EPA determines that net air quality benefits are greater in the absence of NO_x reductions from the sources concerned.

The EPA has not included these alternative approaches in the final rule, however, the EPA believes there is potential for these alternatives to be implemented in the future. If EPA decides to propose a change, it would be undertaken in a separate rulemaking action.

Comment: Do not support air quality approach

Some Commenters (0146, 0154, 0163, 0168 and 0180) did not support the air quality approach. Commenter (0146) opposed this approach, stating that, the CAA clearly requires a percentage reduction "from baseline emissions" for purposes of RFP. Commenter (0154) stated, it is not a requirement of the CAA, places a severe additional burden on the states to complete a difficult and costly technical demonstration and was not developed in the spirit of Executive Order 13563 to improve regulation. Commenter (0163) stated that, because of the legal issues and other complications, unknowns, uncertainties and questions, the EPA should not offer this alternative and instead implement the CAA as written. The commenter added that, the alternative to convert to an equivalent ozone improvement metric does not appear to be consistent with the CAA, which requires a percentage reduction "from baseline emissions." In addition, this alternative would be more complicated to implement than the requirement as specified in the CAA as it would entail determining the percentage reduction, translating that into an air quality benefit and then determining if the control programs developed would in fact result in an equivalent air quality benefit. If an area is NO_x limited, a reduction in VOC would result in a *de minimis* ozone benefit which in tum would be equivalent to a *de minimis* NO_x reduction. This would effectively result in no NO_x reductions being determined equivalent for RFP purposes. New York, therefore, believes there is no sound policy or legal basis for this approach. In addition, this approach fails to consider the impact of emissions from outside a given state on its ability to reduce ozone levels. Furthermore, slower reacting VOC could lower ozone in the immediate area and create more ozone downwind and ground level emissions have different impacts that elevated sources. (0163)

Commenter (0168) did not support translating an area's RFP emissions reduction targets (tons) into ozone improvement targets (ppb) based on air quality modeling or other appropriate analyses. Commenter believes, that RFP must be calculated and complied with as a percentage of base year inventory emissions, which is consistent with the plain reading of the CAA and with prior EPA interpretations and has resulted in the necessary control of both VOC and NO_x emissions in the covered areas.

Commenter (0180) stated that, the alternative is not legally permissible, to the extent the EPA is proposing to allow a nonattainment area to avoid providing for, or actually achieving, the statutorily required percentage emission reductions as long as it achieves specified reductions in ozone levels. Commenter (0180) asserted that, section 182(b)(1) requires plans for Moderate and above areas to provide for specific percentage reductions *in emissions*, and those reductions must be achieved regardless of how much ozone levels are reduced. Likewise, Commenter (0180) stated the "RFP" required under section 172(c)(2) is defined in section 171(1) as "annual incremental reductions in emissions" – not reductions in ambient pollutant levels. 42 U.S.C. §§ 7501(1) and 7502(c)(2). In addition, Commenter (0180) stated, section 182(g) requires that compliance with subsections 182(b)(1), (c)(2)(B) and (C), (d) and (e) be determined based on whether the area "has achieved a reduction *in emissions*" equivalent to "the total *emission reductions* required to be achieved" by those subsections. *Id.* § 7511a(g)(1). Commenter (0180) concluded that, the language of the Act forecloses substitution of air quality improvements for

the required percentage reductions in emissions, either in establishing SIP requirements or in determining compliance with ROP requirements.

Commenter (0180) added that, where Congress has intended to allow an air quality benefits analysis to supplant emission control requirements, it has expressly said so. Commenter (0180) stated, the EPA's proposed air quality benefits approach would also be arbitrary and capricious as there would be no requirement that the state establish that the reduction in ambient ozone levels is not due to a random factor such as the weather, the economy or temporary voluntary actions by certain polluters. For example, Commenter (0180) stated, that the 2008 to 2010 period saw much lower ambient ozone levels due to weather and the recession, whereas, in 2012, ambient ozone levels went back up, but the EPA had taken regulatory actions based on the lower 2008 to 2010 data so that many mechanisms to address the 2012 levels in a timely manner are not in place.

Regarding, the weighting of the amount of ROP credit given for reductions of individual species (or similar groups) of VOC based on their ozone forming potential, Commenter (0180) asserted that section 182(b)(1) requires that plans for Moderate and above areas provide for VOC "*emission reductions*. . . of at least 15 percent from baseline emissions," and defines "baseline emissions" as "the *total amount of actual VOC* or NO_x emissions from all anthropogenic sources in the area. . ." 42 U.S.C. § 7511a(b)(1) (emphasis added). Thus, Commenter (0180) asserted the statute requires a 15 percent cut in the total amount of actual VOC emissions, not some lesser percentage reduction based on claims that some VOC have greater ozone-forming potential than others.

Response: The EPA appreciates the Commenters' concerns. The EPA believes that while the alternatives are a reasonable concept, the detailed information necessary to direct states on how to implement either an air quality-based approach or a VOC-weighted approach is inadequate and more research and investigation must be completed. The EPA has not included these alternative approaches in the final rule, however, the EPA believes there is potential for these alternatives to be implemented in the future and the EPA will consider the flexibility of suitable methods to allow states to address RFP requirements. If EPA decides to propose a change, it would be undertaken in a separate rulemaking action.

6. Baseline year for RFP

Comment: Support most recently available triennial inventory

Commenters (0143, 0159, 0163 and 0179) generally supported the use of the most recently available triennial emission inventory at the time RFP plans are developed. Commenter (0143) supported using the latest triennial inventory, provided the state's version of the inventory is used for SIP submittal purposes when discrepancies exist between versions of the state's and the EPA's inventory. The Commenter added that using the most up-to-date triennial inventory as a base year inventory should reduce inventory development burden for states. Nevertheless, the EPA in some cases refines or "augments" the triennial inventory that the DEP submits to the EPA in ways that DEP does not support. For instance, DEP does not agree with an EPA augmented version of emission estimates of Pennsylvania Marcellus Shale gas activity submitted

by DEP. DEP strongly believes if DEP and the EPA cannot agree on some aspect of the triennial inventory, DEP should be able to use the version of the inventory that DEP deems the most accurate. For purposes of a SIP submittal, a reasonable version of DEP's inventory, produced with due diligence should be approved by EPA.

Response: For the 2008 ozone NAAQS, the EPA is specifying as the baseline year for RFP, the calendar year for the most recently available triennial emission inventory at the time of designation, which for areas designated nonattainment effective July 20, 2012 translates to 2011. Additionally, the EPA is also providing states with the option of selecting an appropriate and justifiable alternate year between the years of 2008 to 2012 as a baseline year for RFP. We finalized a nearly identical interpretation for purposes of implementing the 1997 ozone NAAQS. *See* 40 CFR 51.910(d). For the 1997 ozone NAAQS, our regulations also provided that a state has flexibility to use an alternative baseline year if it shows that the alternate year is appropriate and justifiable. We believe it is appropriate to continue to apply these policies to the 2008 ozone NAAQS.

Comment: Support use of 2011 baseline year

Some Commenters (0130, 0143, 0154 and 0175) generally supported use of 2011 as the base year. Commenter (0130) stated that, use of the 2011 base year rather than 2007 is supportable for many reasons, however, the EPA should acknowledge in its preamble that timing and resource factors exist and that, unless additional resources are provided, documentation for the 2011 base year as well as for future year inventories and modeling results will be minimal at best in SIP submittals as resources are not available for developing in depth documentation. The Commenter added that the CAMD data for 2011 partially reflects the EGU sector's growing reliance on natural gas as a fuel source, as do 2011 activity data for the area and non-EGU point sectors. On-road data for 2011 also reflect alterations in driving patterns due to the increases seen in the cost of fuel. However, the EPA should realize that the development of a 2011 base year inventory is a significant and costly undertaking for states and MPOs. Very little money exists for such efforts, and timing is a significant issue. The preamble noted the following: ". . . As noted above, the AERR Rule required states to report emissions for calendar year 2011 to the EPA by December 31, 2012. This is about 2.5 years before the attainment date deadline for 15 percent RFP plans to be submitted. . ." The commenter argued that just because AERR inventories are submitted to the EPA in that timeframe does not mean that regional inventories are then immediately available for review by state staff nor have the data been processed via SMOKE for attainment modeling demonstrations. Additionally, time must be provided for the creation of base year documentation as well as for the development and documentation of future year inventories. To develop base year inventories, the MOVES and NONROAD models must be run using area-specific inputs. EGU data must be developed and quality assured. Data gaps within the NEI must be back filled using defensible data sources. These are time consuming and resource consuming efforts. In the attainment modeling, the use of a 2011 base year requires the design value data for 2013 be available, since the recommended approach to modeling design values is to use a 5-year span. In the case of 2011, this 5-year span would be 2009 through 2013. A switch to 2011 as the base year would also necessitate the development of new meteorological data and base case model performance analyses. Commenter (0175) supported using 2011 as an emissions base year because it is a National Emissions Inventory (NEI) year and it was a fairly representative ozone

season not biased by climatologically abnormal meteorological conditions.

Response: The EPA acknowledges the resource and timing challenges posed by the implementation requirements and timing of the final rule. The EPA is making earnest efforts to assist states in meeting the requirements of the rule. The EPA has created and released a complete modeling platform using 2011 emissions data and other modeling components, and has made this available to states for use and review in preparing their SIPs. While additional updates may be needed in some areas, the EPA believes that the data provided to date should allow states to meet their plan development obligations in an expeditious manner.

Regarding the use of local-specific mobile model inputs, the EPA has made every effort to include such inputs in its 2011 modeling platform. Where states elect to further refine the EPA approach for their areas, that may include modeled attainment demonstrations, but perhaps at the cost of time and resources as the commenters point out.

The EPA appreciates the commenters' support for establishing the baseline year of 2011 for RFP SIPs. For the 2008 ozone NAAQS, we are finalizing as proposed a baseline year of 2011. While 2011 may be the most suitable year for many areas, we believe it is appropriate to provide some flexibility to choose an alternate year that falls between the year the NAAQS was established (2008) and the year of designation (2012 for the initial area designations). The final rule will provide states with the option of selecting an appropriate and justifiable alternate year between the years of 2008 to 2012 as a baseline year for RFP for areas designated nonattainment in July 2012. We finalized a nearly identical interpretation for purposes of implementing the 1997 ozone NAAQS. *See* 40 CFR 51.910(d). For the 1997 ozone NAAQS, our regulations also provided that a state has flexibility to use an alternative baseline year if it shows that the alternate year is appropriate and justifiable. We believe it is appropriate to continue to apply these policies to the 2008 ozone NAAQS.

Comment: Flexibility on RFP base year

Commenters (0139, 0141, 0144, 0153, 0155, 0157, 0160 and, 0177) generally agreed with the EPA's proposed flexibility on the base year for RFP reductions. Commenter (0144) supported the flexibility in the rule for a state to use an alternative baseline year for RFP, including 2007. The commenter stated that, the year 2007 was chosen as the regional baseline year for modeling in the Northeast/Mid-Atlantic States. Development of this SIP quality inventory was a significant investment by the Northeast/Mid-Atlantic States. In addition, states that took early action on control measures, such as updating 1990 RACT controls, should not be penalized. The same rationale that the EPA applied in the selection of the 2002 base year could be applied in this situation. (70 FR 71638, November 29, 2005) EPA stated in the 11/29/2005 rule, that while there would be a difference in the RFP requirement based on the choice of the RFP baseline, there should be little if any difference in terms of emissions reductions needed to demonstrate timely attainment. If a state uses an earlier base year, the state can take credit for additional emission reductions, and the state also has a higher baseline to start from and additional target years before attainment. The commenter urged the EPA to allow for emission reduction credits from certain control strategies made within the Ozone Transport Region (OTR) states that occurred between

2008 and the year of the baseline emissions inventory (2011), if 2011 is used as the baseline inventory, so that states that made early reductions in ozone precursors are not economically and environmentally disadvantaged.

Commenter (0140) urged, the EPA to allow states to use 1990 or another year relevant to the adoption of emission reduction measures as the baseline (for the Austin-Round Rock area, it would be 2002 or 2005 in conjunction with the EAC SIP). Commenter (0140) stated, the EPA should allow states to model the baseline emissions used for setting RFP targets without including emission reduction measures that were adopted prior to the baseline year (such as the voluntarily adopted inspection and maintenance program in place in Travis and Williamson Counties) so as not to penalize areas for taking proactive measures prior to being designated nonattainment.

Commenters (0153, 0155 and 0157) supported the EPA's proposal to allow states the flexibility of selecting a year prior to 2011 as the RFP baseline year with the understanding that this would require an additional 3 percent emission reduction for each year prior to 2011. Commenter (0160) supported the flexibility and noted that, the SCAQMD staff proposes to use 2012 as its baseline year because it corresponds to baseline year for the 2016 regional transportation plan to be prepared for the region. [Also see discussion later in this section.] Commenter (0177) agreed that, this is a reasonable approach, as long as sufficient justification is provided and the alternate baseline year does not significantly deviate from the design value period used to establish designations.

Commenters (0149 and 0150) urged EPA to allow for a baseline year later than 2011 for RFP calculation, if appropriate and justifiable. Commenters (0149 and 0150) added that, the draft rule discussed provisions for use of a baseline year of 2011 or earlier for the emission inventory for meeting the RFP requirement. However, the SCAQMD proposes to use the year 2012 as its baseline year because it corresponds to the baseline year for the 2016 regional transportation plan to be prepared by the Southern California Association of Governments (SCAG) for the seven-county southern California region of which the SCAQMD is a part. Under state law, the SCAQMD is required to use SCAG's demographic projections and transportation strategies in its air quality plan. Cal. Health & Safety Code § 40460(b). Matching two different baseline years creates a great deal of extra work and some uncertainty in the baseline inventory that can be avoided by using the same year for both plans. SCAQMD staff would like to confirm our understanding from EPA staff that the same timeframes for RFP still apply in this case; i.e., an area with a baseline year of 2012 would have until the attainment date at the end of 2018 to demonstrate 15 percent reductions.

Response: For the 2008 ozone NAAQS, the EPA is providing that states should use as the baseline year for RFP, the calendar year for the most recently available triennial emission inventory at the time ROP/RFP plans are developed, which in the case of areas designated nonattainment in 2012 translates to 2011. We are finalizing, as proposed, that all SIP-approved or federally promulgated emission reductions that occur after the baseline emissions inventory year from sources located in the nonattainment area are creditable for purposes of the ROP/RFP requirements, provided the reductions meet the standard requirements for creditability and are

not prohibited by section 182(B)(1)(D) of the CAA. We finalized a similar interpretation for purposes of implementing the 1997 ozone NAAQS (40 CFR 51.910(d)) to the nearest calendar year, however, we are allowing states to select baseline years from a limited range of alternate years in the final rule for the 2008 ozone NAAQS. We received support from Commenters that 2011 would be an appropriate baseline year while other Commenters urged the EPA to allow the option of justifying an alternative baseline year, including 2012, 2008, 2007 and 1990. In determining the appropriate alternate years, the EPA recognizes that some states may have initiated certain control strategies between the year the standard was finalized (2008) and the most recently available triennial emission inventory year (2011), and that, it would be appropriate to recognize these recent investments in implementing early reductions to achieve improved air quality. We also believe that allowing alternate baseline years prior to 2008 (e.g., 1990 and 2007) would not be appropriate because we believe that it is necessary for RFP credit for attainment planning to be tied as directly as possible to promulgation of the 2008 ozone NAAQS. Emission reductions occurring prior to promulgation of the 2008 NAAQS from measures adopted into the SIP prior to promulgation of the 2008 NAAQS are certainly helpful for improving air quality and consequently, may lower the nonattainment classification of an area and the base year emissions level. However, they are not unquestionably tied to attainment planning for a standard that was not established final until 2008, and the associated nonattainment designation for that standard which did not exist until 2012. Therefore, we have determined these emissions reductions are not appropriate to be credited for fulfilling nonattainment area RFP requirements. We also recognize that since we designated most areas on April 30, 2012, with an effective date 60 days after publication in the *Federal Register (FR)*, that 2012 (the designation year) is an appropriate alternative baseline year consistent with the subpart 2 structure. With these considerations, the EPA is finalizing that states may use an alternate year (i.e., other than 2011) between the years of 2008 to 2012 that the state justifies as appropriate. Lastly, the EPA confirms the commenter's understanding that the RFP timeframes for an area with a baseline year of 2012 would have until July 20, 2018 to demonstrate 15 percent reductions.

Comment: Additional 3 percent emissions reduction per year

Commenters (0153, 0155 and 0157) supported the EPA's proposal to allow states the flexibility of selecting a year prior to 2011 as the RFP baseline year with the understanding that this would require an additional 3 percent emission reduction for each year prior to 2011.

Commenters (0154, 0158 and 0166) stated the EPA should not penalize states for choosing early baseline years in establishing and demonstrations RFP requirements. Commenters (0154 and 0158) recommended that the EPA allow for selection of an earlier baseline year, but drop the 3 percent per year penalty. Commenter (0154) questioned why the EPA imposes an additional 3 percent per year penalty for every year prior to 2011 selected for a base year—the penalty for early reductions tells states that early reductions are a bad idea, that the state is better off waiting until the EPA publishes an implementation plan. Commenter (0158) stated, it is not clear why the EPA would penalize states for choosing an earlier baseline year, nor is it clear that such a penalty is justified by the statute which simply requires a 15 percent VOC reduction below the baseline year. Commenter (0166) stated, the EPA cannot properly penalize states (i.e., require

more emission reduction than the required 6 percent) for choosing an earlier baseline year for Moderate areas, because no such penalty is justified under the statute, which simply requires a 15 percent VOC reduction below the baseline year. The Commenter added that, under the proposed rule, the choice of a 2011 baseline year would likely mean that the same baseline year generally would be used for both RFP purposes and attainment demonstration modeling purposes because the EPA guidance on attainment demonstration modeling recommends the use of the average of the three three-year design value periods that include the baseline inventory year (e.g., for a 2011 baseline inventory year, the three three-year periods would be 2009-11, 2010-12 and 2011-13). *See* EPA, EPA-454/B-07-002, "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$ and Regional Haze," April 2007, at 22, *available at http://www.epa.gov/ttn/scram/guidance_sip.htm*. The EPA should make clear that a state may choose a different baseline period for attainment demonstration modeling if the state concludes that that period is more meteorologically representative than the period that would result from use of the RFP baseline year.

Commenter (0132) stated that, the EPA should more clearly define the "whatever additional emissions reductions" requirement for January 1, 2018 to December 31, 2018 as a specific percentage (such as 3 percent). The Commenter argued that, because RFP calculations are based on emissions reductions (tons) and not ozone concentrations (ppb); it is difficult to define these "whatever additional emissions reductions." For areas that choose a pre-2011 baseline year, the EPA has proposed that the area is responsible for a specific 3 percent emissions reduction each year after the initial 6-year period has concluded up to the beginning of the attainment year. The EPA should apply the same requirement to Moderate areas that choose 2011 as a baseline year (as recommended by the EPA's proposal) and require an additional 3 percent emissions reduction for the final year before the attainment deadline. This approach would be more clear and consistent between areas that choose 2011 as a baseline year and those that choose a different year. It would also be more consistent with the EPA's proposal for Serious and higher nonattainment areas to provide an additional average of 3 percent emissions reductions beyond the initial 6-year period through the attainment year. If the EPA chooses to leave the "whatever additional reductions needed" requirement in the final rulemaking rather than change it to a specific percentage requirement, then the Commenter (0132) suggests that, the EPA also include a method for calculating the requirement.

Response: The EPA believes it is reasonable to provide flexibility to states in selecting an appropriate alternate baseline year within the authorities provided to the EPA by the CAA. In the final rule, the EPA has selected a baseline year of 2011, but is also allowing states to select an alternate baseline year that would occur no earlier than 2008 and no later than 2012. The EPA believes this conforms with the language of both the CAA and the NEI cycle. As noted above, the use of an alternative year for the baseline inventory for RFP does not change the requirement to use 2002 as the baseline year for transportation conformity as described in 40 CFR 93.119.

The EPA disagrees with the Commenters' assertion that, the EPA is penalizing states for selecting pre-2011 years as their baseline. The CAA contains three separate provisions regarding RFP. Section 172(c)(2) under subpart 1 contains a general requirement that nonattainment plans require RFP, while sections 182(b)(1) and (c)(2) under subpart 2 contain specific percent

reduction targets for Moderate and above and Serious and above areas, respectively. A state ROP-RFP plan must show increments of progress from the baseline emissions inventory year out to the attainment date. We do not believe it is a penalty as described by the commenters. However, we are certain that our policy is consistent with the CAA subpart 2 and 172 requirements because by allowing 2008-2010 reductions to be credited, we continue to provide an incentive for early reductions prior to designations.

The RFP plan for a Moderate area must show increments of progress from the baseline emissions inventory year (2011/2012) out to the attainment date (no later than July 20, 2018). The RFP plan would first have to provide for a 15 percent emission reduction from the 2011/2012 baseline year within 6 years after the baseline year. We have consistently indicated that Moderate areas must "achieve" the reductions need to provide for attainment by July 20, 2018. Therefore, if 2011 is used as the base year for an RFP plan, a 15 percent reduction must be shown between January 1, 2012 and December 31, 2017, and "whatever additional reductions needed" must occur by the end of 2018 in order for the area to attain. The final rule specifies that RFP for this 1-year gap period is whatever additional emissions reductions are needed to achieve the goal of attainment. We believe that requiring Moderate areas using 2011 as a base year to obtain an additional 3 percent per year during the 2018 attainment years where doing so is not necessary to attainment would be more than Congress intended to require through the RFP requirements under Part D of Subchapter I of the CAA Amendments of 1990. However, because a pre-2011 baseline would be voluntarily selected by a state and would create a larger gap period before the attainment date than a 2011 baseline (as much as 2 to 4 years), we believe the language "whatever additional emissions reductions are needed for attainment" is not specific enough to ensure annual incremental progress through the latest attainment date. Therefore, we are finalizing as proposed an additional 3 percent per year as a reasonable RFP reduction requirement for a state that chooses to take advantage of the regulatory flexibility this regulation offers by selecting a pre-2011 baseline. CAA Section 171(1) defines reasonable further progress under Subpart D to include such annual emission reductions as "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." Consistent with that, the EPA concludes that it is reasonable to require that if a state chooses to use an earlier baseline year, its total RFP emission reduction obligation should be to ensure that additional reductions averaging 3 percent per year for each year beyond the first 6 years until the year before the attainment year are provided for in the RFP plan. However, the EPA continues to believe the 2011 NEI reporting year is the preferred baseline year for RFP planning purposes.

Comment: Design value years

Commenter (0163) opposed allowing a state to use an alternative baseline year that falls outside of the area's design value calculation. Commenter (0163) stated emissions reductions that fall outside the years in which the design value was calculated are irrelevant to the designation of the area and its progress towards attainment.

Response: While the situation noted by the commenter is unusual, the EPA wants to provide the necessary flexibility to states to prepare their attainment plans, in some cases because of the

resource constraints noted by other commenters. The design value used for the 2008 ozone nonattainment designations finalized in 2012, was gleaned either from the years of 2009-2011 or 2010-2012. The 2008 ozone SIP requirements rule allows 2008 as an alternate baseline year which would be outside the design value range noted by the commenter. The EPA acknowledges that the commenter's scenario may be possible and it may be likely the areas designated nonattainment in 2012 may have also been violating the new NAAQS with the 2008, 2009 and 2010 design values and all of these design values reflect emissions from 2008, even though the area was not yet officially designated nonattainment. The EPA believes it is appropriate to credit any emissions reductions from SIP-adopted measures that occur in 2008 and after toward satisfying RFP requirements because these reductions contribute to attainment. Additionally, the EPA believes that this policy provides an incentive for states to achieve additional reductions prior to designations.

The EPA notes that states that choose to use an alternative RFP baseline are not relieved of their obligation to achieve a 15 percent emission reduction within 6 years. Additionally, states that choose an alternative baseline that comes before 2011 are required to achieve additional emission reductions that average out to 3 percent per year for each additional year earlier than 2011. EPA disagrees with the Commenter's assertion that emission reductions that fall outside the years in which the design value was calculated are irrelevant. One of the criteria for emission control programs that are made part of a SIP is that the reductions must be permanent. Therefore, control programs begun any number of years prior to an attainment date assist towards the area's goal of reducing emissions and achieving the NAAQS.

Comment: Baseline year multi-state agreement

Commenters (0163 and 0179) supported the multi-state proposal. However, Commenters (0144 and 0177) did not agree with the EPA's proposal that for a multi-state nonattainment area, all states associated with the nonattainment area must consult and agree on the same alternate year to use as the baseline year for RFP. Commenter (0144) stated that, the RFP demonstration is state specific and does not rely on a regional inventory. Commenter (0177) provided the following additional points. The Commenters argued that, the CAA 182(j)(1)(A) requires multi-state areas to take all reasonable steps to consult and coordinate when developing SIP plans. There may be reasonable and legitimate reasons justifying the use of different RFP baseline years by the states in a multi-state area. For example, one state may want to take RFP credit for a state control strategy implemented just prior to the "default" baseline year, thus justifying expending the additional resources needed to generate an inventory for a year outside the triennial emission inventory cycle. Meanwhile, another state in the multi-state area may not have the same motivation, instead preferring to rely on the most recent triennial inventory as the RFP baseline inventory. Generally, as long as each state within the multi-state area is able to independently demonstrate RFP for its portion of the area for the 2008 ozone NAAQS, RFP should be achieved in the nonattainment area as a whole, especially when the sizeable emission reductions expected from mobile source fleet turnover are considered.

Response: We received mixed reactions on our proposal to have states consult and agree on the same baseline year when those states are associated with a multi-state nonattainment area. The CAA requirement to establish a "default" baseline year for a multi-state area is an area-wide

requirement. The EPA believes that accounting for multi-state emission reductions on an area-wide basis for the same baseline year, satisfies the act. We also acknowledge that the choice of baseline year for a multi-state area impacts the area-wide inventories necessary for the areas and for nonattainment modeling that is conducted for the area. We believe that it would not make practical sense for the areas to have multiple different baseline years because this would impact attainment planning. We have finalized that for a multi-state nonattainment area, all states associated with the nonattainment area must consult and agree on the same year to use as the baseline year for RFP.

Comment: The baseline year must be 2012

Commenter (0180) stated that, the EPA's proposal to set 2011 as the presumptive baseline year and further, to allow states to pick a baseline year other than 2011 for ROP purposes if "appropriate and justifiable" is unlawful, as it is not consistent with the statute. Commenter (0180) asserted that both the Supreme Court and the D.C. Circuit have made clear that the EPA cannot construe the Act in a way that renders nugatory subpart 2's explicit restrictions on EPA discretion or that substitutes the EPA's policy preferences for the approaches specified by Congress. *Whitman*, 531 U.S. at 484-85; *SCAQMD*, 472 F.3d at 894-95, 902-03.

Commenter (0180) stated that, the EPA's proposal to let states pick an alternative baseline year is also unlawful and arbitrary because it would apparently allow states to pick a baseline year that predates nonattainment designations, thereby allowing states to claim ROP credit for emission reductions that occurred before an area was even designated nonattainment, contrary to the approach in section 182(b)(1) of the Act. Commenter (0180) asserted, that the proposed approach would lead to attempts by states to game the selection of a baseline year to minimize the emission reductions required to satisfy the percent reduction requirements and that the proposed criteria for selecting an alternative baseline year are so vague and standard-less as to render the proposal arbitrary.

Commenter (0180) added that, it would be particularly arbitrary to allow an area to use an older baseline year if that area is late in submitting its ROP plan as this would undermine the Act's progress requirements by allowing the area to arbitrarily delay submission of the ROP plan and then, rely on reductions that occurred in the interim (due to no plan requirements or other effort on that area's part) in order to provide less in the way of total emission cuts than would otherwise have been required. Commenter (0180) asserted that such an approach would also effectively allow these areas to illegally delay achievement of the 15 percent target, because the EPA has typically (and illegally) approved 15 percent ROP plans based on their purported achievement of the 15 percent reduction by the time of ROP plan approval – even if that approval occurs years after the 6-year period following the baseline allowed under the statute.

Response: The EPA disagrees with the Commenters' claim that, the CAA provides no flexibility in allowing a choice of a baseline year for RFP. Further, the EPA disagrees with the Commenter's implication that the rule provides unlimited choice to states to choose inappropriate years for the choice of an RFP baseline year. The final preamble states "…a state has flexibility to use an alternative baseline year if it shows that the alternative year is

appropriate and justifiable." The requirement that the year be "appropriate and justifiable", along with the requirement that the EPA approve attainment plans, allows the EPA to ensure that inappropriate years will not be used. To clarify the intent of the "appropriate and justifiable" wording, the EPA has further added the explanation to the rule that says, "The inventory should be representative of the emission source contributors understood to have resulted in a nonattainment designation for the area."

The EPA disagrees with the Commenter's assertion that 2012 must be the base year for RFP plans for consistency with the timeframes within the 1990 amendments to the CAA because it overlooks a critical aspect of emission inventory development and updating prescribed by this law. In addition to requiring a base year emissions inventory, the 1990 amendments to the CAA set in place a requirement for periodic updates to the base year inventory on a 3 year cycle, beginning with 1993. Since that time, most states have prepared emission estimates of stationary and mobile sources on a 3 year cycle, and the EPA has made this a regulatory obligation for all states within its Air Emissions Reporting Rule (AERR).

The EPA disagrees with the Commenter's claim that 2012 is the only viable year for an RFP baseline. The EPA has flexibility in determining how to interpret provisions of the statute for purposes of implementing the 2008 ozone NAAQS. Nothing in the statute explicitly or implicitly suggests that all areas must use the same baseline year. The purpose of the RFP requirement is to ensure areas achieve percentage reductions in emissions that will help an area attain the NAAQS and to not delay emission reductions until close to the attainment date. Thus, we believe a baseline year that is reasonably close to the designation date and within the implementation timeframe of the revised NAAQS will ensure that the goal of the RFP provisions is met. We note also, that regardless of the baseline year selected, the final regulations provide that areas must continue to achieve annual percentage reductions up to the attainment year. This will further ensure that the purpose of the RFP provisions is fulfilled. We do not believe it is reasonable to select a baseline year for RFP purposes that predates both the revisions to the NAAQS in 2008 and nonattainment designations.

We disagree with the Commenter's assertion that by allowing alternative selections for the choice of a base year, we are awarding states RFP credit for emission reductions that occurred before an area was designated nonattainment. We received support from commenters that 2011 would be an appropriate baseline year while other Commenters urged, the EPA to allow the option of justifying an alternative baseline year, including 2012, 2008, 2007 and 1990. In determining the appropriate alternate years, the EPA recognizes that some states may have initiated certain control strategies between the year the standard was finalized (2008) and the most recently available triennial emission inventory year (2011) and that, it would be appropriate to recognize these investments in implementing early reductions to achieve improved air quality. We also believe that allowing alternate baseline years prior to 2008 (e.g., 1990 and 2007) would not be appropriate because we believe that it is necessary for RFP credit for attainment planning to be tied as directly as possible to promulgation of the 2008 ozone NAAQS. Emission reduction measures adopted into the SIP prior to promulgation of the 2008 NAAQS are certainly helpful for improving air quality and consequently, may lower the nonattainment classification of an area, but are not readily tied to attainment planning for a specific standard and the associated

nonattainment designation that did not yet exist and therefore, are not appropriate to be credited for fulfilling nonattainment area RFP requirements. We also recognize that since we designated most areas on April 30, 2012, with an effective date 60 days after publication in the *FR*, that 2012 (the designation year) is an appropriate alternative baseline year consistent with the subpart 2 structure. With these considerations, the EPA is finalizing that states may use an alternate year (i.e., other than 2011) between the years of 2008 to 2012 that the state justifies as appropriate. We provide this incentive and remind commenters that this flexibility in choosing a baseline year is tempered by a 3 percent addition that we believe is necessary to ensure the CAA's requirement of progress is nonetheless.

The EPA disagrees with the Commenter's contention that allowing states to specify an alternative RFP baseline is arbitrary and that the criteria for states to justify an appropriate year are vague and arbitrary. The EPA's approach for allowing states to select and justify an appropriate alternate baseline year is the same RFP SIP requirement we established for the 1997 ozone standard, and we refer the Commenter to our more detailed treatment of this topic in materials developed for that standard, such as our November 29, 2005 final implementation rule (*See* 70 FR 71637).

The EPA disagrees with the Commenter's contention that the EPA should not approve RFP plans that demonstrate the RFP milestone has been achieved, but was not achieved by the relevant milestone date. First and foremost, the EPA only approves RFP plans that comply with the Clean Air Act. Secondly, we believe that once a statutory deadline has passed and has not been replaced by a later one, it is reasonable to require the plan to comply with the act "as soon as possible." *See Delaney v. EPA*, 898, F.2d 687, 691 (9th Circuit, 1990). EPA has interpreted this requirement to be "as soon as practicable." Therefore, in some instances the EPA may determine that circumstances surrounding the delayed achievement of RFP reductions merit approval of a plan demonstrating delayed achievement of the RFP milestone, and that, this is a more appropriate course of action than disapproval of an original plan that did not meet this requirement. The EPA evaluates such actions on a case by case basis, and only approves such actions after a public notice and comment period has been offered.

Comment: Support for credit from SIP and federally promulgated measures

Commenters (0159, 0161and 0179) supported the proposal that, emission reductions resulting from SIP approved or federally promulgated measures occurring after the baseline emissions inventory year would be creditable toward RFP requirements, provided that the reductions are enforceable, quantifiable, permanent and surplus. Commenter (0159) noted that, this interpretation has been adopted by the EPA in the past, most notably during the process of implementing the 1997 ozone NAAQS, and such approach is required under federal regulations, 40 C.F.R. § 51.910(a)(2). Commenter (0161) argued that, there is no reason to disallow RFP credit for reductions simply because they were required by the EPA. These are significant reductions that clearly will result in progress toward NAAQS attainment. It would be inappropriate to require sources to comply with these new controls but then to withhold RFP credit for the air quality improvements that will result therefrom. The EPA has authority under the CAA to allow states to credit SIP-approved and federally promulgated reductions toward

RFP requirements. In 42 U.S.C. §751la(b)(l)(D), Congress listed the emissions reductions that are not creditable toward RFP requirements. Because Congress specifically set forth those reductions that it believed were inappropriate to credit toward fulfillment of RFP requirements, its failure to exclude other reductions, such as those contemplated by the EPA in this rulemaking, shows that Congress did not intend to prevent states from taking RFP credit for such reductions [*See TVA v. Hill*, 437 U.S. 153, 188 (1978)]. Allowing RFP credit for federally required reductions would be within the EPA's authority and would appropriately recognize the air quality improvements that are being achieved through controls such as those contained in the new NSPS for oil and gas sources.

Response: In the final rule, the EPA is allowing states to credit federally required reductions, occurring within the nonattainment area and that aligns with the requirements of sections 182(b) and 182(c). The EPA believes that Congress did not intend to prevent states from taking RFP credit for these reductions because Congress specifically set forth reductions that were deemed inappropriate to credit toward fulfillment of RFP requirements and no other reductions have been set forth.

Comment: Baseline inventory for RFP should be a high ozone summer day

Commenters (0144, 0146 and 0167) stated that, the EPA should include the requirement in the rule that the baseline inventory for RFP and contingency measures should be a high ozone summer day, rather than an annual inventory. Together, these Commenters stated that, the current inventory guidance is inconsistent: the ozone rule proposal and background section references the air emissions reporting requirements (AERR) for the purposes of defining the data elements for the emissions inventories for ozone relevant data element requirements, but the simultaneous AERR proposed amendments are removing the ozone related definitions and guidance; further, the background section of the ozone rule also references the EPA August 2005 inventory guidance document, but this 2005 guidance document references and includes the consolidated emissions reporting rule (CERR), which no longer exists.

Commenter (0146) stated, specificity was expressed in the previous ozone implementation rule as follows: "Consistent with the manner in which [ROP] plans under the 1-hour ozone standard were developed, the RFP baseline for 2002 will have a typical summer day tons/day basis. As such, the attainment year target will also be a typical summer day target." Commenter (0146) stated, if the intent of the language in the proposal was to allow such elements to be based on annual inventories, then the EPA is misguided; if this is instead an error of omission, then the EPA must clarify the requirements with language consistent with that used previously.

Response: The EPA concurs that the current inventory guidance is outdated. The EPA intends to provide updated draft inventory guidance early in 2015 that reflects the updated AERR final rule,

signed by the Administrator on February 6, 2015,[15] and other developments occurring since the 2005 version of that guidance. The guidance will define all data fields relevant for ozone attainment plans, including the ozone season day emissions fields that will be required for ozone attainment plan emission inventories.

The EPA will also modify the language of the rule to reflect "ozone-season day" emissions rather than "summer-day" emissions, since not all ozone exceedances occur in the months commonly referred to as "summer." In fact, some area violations occur in the winter season under very specific conditions.

The EPA concurs with the comment that this rule needs to clarify that ozone season day emissions are required for proper implementation of the ozone NAAQS. The EPA does not concur that "high" ozone season day is necessary in all cases, and so the final rule allows states to work with their regional offices to define the days included in the ozone-season day emissions calculation. The purpose of this latitude is for states to create emissions that will be appropriately representative of the ozone problem for their nonattainment area(s). While the EPA has removed the requirement to report daily and seasonal emissions in the AERR final rule, signed by the Administrator on February 6, 2015, the ozone season day emissions will be required as part of the ozone implementation rule. The final rule has been updated to reflect that proper wording.

7. Emissions outside the nonattainment area

Comments: Supporting EPA's proposed approach for RFP

Commenters (0159 and 0163) noted that, the EPA's proposed approach is legally correct, insofar as it applies to RFP. Commenter (0146) stated that, the majority of NESCAUM states generally oppose allowing RFP credit for emissions reductions that occur outside of the nonattainment area (78 FR 34191), on the grounds that RFP reductions tie back to baseline emissions described in section 182(b)(1)(B) of the CAA, which references emissions "in the area." Commenter (0161) stated that, nonattainment areas seeking reductions needed to fulfill RFP requirements should obtain those reductions from sources located within the nonattainment area, not from sources outside the nonattainment area. Commenter (0180) stated that, the EPA correctly proposes that states may not take credit for VOC or NO_x reductions occurring outside the nonattainment area for purposes of meeting the 15 percent and 3 percent ROP requirements. The Commenter stated that, allowing credit for outside the area reductions is contrary to the Act as construed by the D.C. Circuit Court. The Commenter also believed that, the EPA's solicitation of comments on whether there is clean legal rational for allowing credit for reductions outside the nonattainment area to satisfy the RFP requirements for the 2008 ozone NAAQS was nonsensical.

Commenter (0146) stated that, the majority of NESCAUM states generally oppose allowing RFP

[15] AERR Final Rule signed by the Administrator on February 6, 2015 is available at: http://www.epa.gov/ttn/chief/aerr/final_rule_preamble.pdf

credit for emissions reductions that occur outside of the nonattainment area (78 FR 34191), on the grounds that RFP reductions tie back to baseline emissions described in section 182(b)(1)(B) of the CAA, which references emissions "in the area."

Commenter (0163) maintained that the RFP provisions specify the minimum level of reductions required in the area. The CAA section 182(b)(1)(A)(ii) details what an area must do to obtain less than the minimum (15 percent) reduction. In addition, CAA section 107(d)(l)(A)(i) states that the nonattainment area would be any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the NAAQS. Taken together, it is clear that the RFP reductions need to be from the nonattainment area.

Commenter (0180) opposed RFP credit for emissions outside the nonattainment and stated that, allowing credit for such "outside" reductions is contrary to the Act (citing *NRDC*, 571 F.3d at 1256). Commenter (0180) asserted that, the agency says it believes "there may be cases where the most beneficial and cost-effective reductions are from sources located outside the nonattainment area boundaries," *See id.*, but even if that is true, it cannot override Congress' specification that the reductions to satisfy the percentage ROP requirements must come from within the nonattainment area.

Response: The EPA appreciates the Commenters' comments in support of the proposed approach that, states may not take credit for emissions reductions from outside the nonattainment area for purposes of meeting the ROP/RFP requirements under sections 182(b) and 182(c). The EPA generally agrees with the supporting comments and, for the reasons outlined in the proposal and in light of supporting comments, is finalizing the proposed approach.

Comments: Opposing EPA's proposed approach for RFP – Legal Rationale Comments

Commenter (0140) recommended that, the EPA allow states to use areas outside of the boundaries of the nonattainment area yet within the Air Quality Control Region (AQCR), which are already part of a SIP and supposedly represent the "airshed" for a given area, to credit emission reductions toward satisfying RFP. The Commenter (0140) stated that, restricting RFP emission reductions to the boundaries of the nonattainment area is not a reasonable interpretation of the statute for NO_x-limited areas and where ozone transport typically accounts for well more than half of an area's ozone levels on high ozone days. The Commenter recommended, that the EPA allow states to use the entire AQCR (or AQCRs if the boundaries cross AQCR boundaries) in which a nonattainment area is located to set the baseline and target emission levels; and to allow states to also include in the baseline and target emission levels an adjacent AQCR if modeling demonstrates that emissions from that AQCR are causing an average contribution of over 0.75 ppb or over 0.99 ppb to ozone standard violations within the nonattainment area. Commenter (0140) argued that, the authority for allowing emission reductions within an AQCR can be found in section 107(c) of the CAA, which states that the Administrator designates as an air quality control region "any interstate or intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards." The Commenter stated that, since these regions are formally adopted as part of the SIP, they represent meaningful boundaries that are "necessary" or "appropriate" for the attainment of any air quality

standard, including the 2008 ozone NAAQS. The Commenter further stated that, the language in this section does not indicate that just because a smaller geographic area within an air quality control region is designated as nonattainment for a specific pollutant, emission reductions elsewhere within the air quality control region are not also "necessary" or "appropriate" for making RFP towards attainment of a standard within the nonattainment area. The Commenter suggested that, a legal basis for an even broader geographic area can be found in the definition of "RFP" in section 171(1). The Commenter argued that, there is no mention of the emission reductions being restricted to only the boundaries of the nonattainment area, and indeed, this language would presumably require emission reductions from outside of the nonattainment area if those emission reductions were used by the state to demonstrate "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." The Commenter similarly believed that, section 182(b)(1)(A)(i) does not specifically require that the emission reductions occur within the boundaries of a designated nonattainment area, but rather that "such plan shall provide for such specific annual reductions in emissions of VOC and NO_X as necessary to attain the national ambient air quality standard for ozone by the attainment date applicable under this act." Commenter (0151) believed that, it would be good policy to allow outside the area reduction credits toward satisfying RFP, even if the emissions are not in a state's emission inventory and the Commenter believed that, the CAA section 110(h) supported this policy. The Commenter further stated that, since this rule would already allow states to take credit under EPA's transport modeling for upwind reductions under state and other federal CAA measures (e.g., auto standards, NSPS and maximum achievable control technology (MACT) requiring VOC and NO_x reductions outside the state, it seems that the legal theory is already in place to credit upwind reductions.

Commenters (0139, 0148, 0150 and 0160) supported allowing nonattainment areas to take RFP credit for emission reductions that occur in upwind areas and suggested consideration of a "transport couples" approach. Specifically, one Commenter (0139) recommended that, the EPA redefine the term "area" for purposes of the RFP requirement. The term "area" should be considered to include the entirety of the "transport couple" area. Commenter (0148) urged, the EPA to continue allowing nonattainment areas to take RFP credit for emission reductions that occur in upwind areas, especially in cases where it can be shown that: 1) emissions from transport are contributing to the nonattainment status of the downwind area; and, 2) an area included emission increases as well as reductions from outside the nonattainment area in its RFP calculations. The Commenter specifically indicated, the consequences of being adjacent to the State of California's South Coast Air Basin that transports air pollution that contributes to ozone violations in the downwind area. The Commenter added that, air pollutants from the South Coast Air Basin are periodically blown offshore then carried to the coastal cities of Ventura County and further inland. The Commenter further stated that, South Coast air pollutants can also affect a downwind area by way of a direct inland route from the San Fernando Valley during periods when winds blow from the east. Conversely, and not surprisingly, Ventura County emissions can affect ozone levels in the South Coast Air Basin when winds blow air pollutants from the our coastal areas, eastward into the San Fernando and Santa Clara River Valleys, thereby contributing to elevated ozone there. The Commenter continued to point out that, pollutant

transport among areas in Southern California is well documented by the California Air Resources Board and is the primary reason for including most of Southern California in the 1997 Southern California Ozone Study (SCOS) modeling domain used for the Southern California components of California's 8-hour ozone SIP. The Commenter stated that, other ozone nonattainment areas in California and the country are similarly interconnected through air pollutant transport couples. The Commenter further stated that, many of these areas are nonattainment largely because of transport from nearby upwind areas and could therefore find demonstrating RFP a great challenge. The Commenter believed that, given that many nonattainment areas are affected by transported air pollutants, it is technically sound and good public policy to allow emission reductions generated in one area to be counted towards RFP in adjoining areas in cases where such pollutant transport relationships between the areas have been verified. Commenter (0139) also stated that, in the case of RFP, the demonstration is intended to be a collective “area” demonstration and that by allowing outside area reductions to be included, the EPA would be authorizing additional area emissions to be included and subject to the 15 percent RFP obligation if the emissions meet certain other criteria (the additional areas must be Moderate or above classification and contribute to attaining the standards).

Commenter (0150) noted that, unlike the definition of RACT involved in the NRDC case, there is no express requirement that RFP reductions come from within the "area." The Court in NRDC relied on specific statutory language requiring nonattainment plans to include: "The implementation of all RACM as expeditiously as practicable (including such reductions from existing sources in the area as may be obtained through the adoption, at a minimum, of RACT) .... " The Commenter believed, the Court ruled that the CAA expressly required RACT to be imposed on existing sources in the area; the requirement could not be satisfied by obtaining equivalent or greater reductions from outside the area. In contrast, there is not language expressly requiring that RFP must be obtained from sources "in the area." The basic definition of RACT is: 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. CAA § 171(1); 42 U.S.C. §7501(1). The Commenter further stated that, with regard to ozone, there are two different RFP requirements. The Commenters stated that, first, the plan must provide for VOC emission reductions, within 6 years, of "at least 15 percent from baseline emissions." § 182(b)(l)(A); 42 U.S.C. § 7511a(b)(1)(A). The Commenter stated that, second, the plan must "provide for such specific annual reductions in emissions of VOC and NO_X as necessary to attain the national ambient air quality standards (NAAQS) by the attainment date..." The Commenter indicated that, neither requirement contains the term "in the area." The Commenter stated that, since the EPA agrees that areas can rely on upwind reductions for attainment, 78 FR 34101 col. 2, the EPA has the flexibility to set the targets for the second RFP requirement at whatever levels will allow attainment, taking into consideration the reductions occurring in upwind areas. The Commenter concluded that, the second requirement may be administered in a reasonable manner even if all the reductions are required to come from inside the area. The Commenter further stated that, the only basis for any concern that reductions must come from within the nonattainment area is the fact that the term "baseline emissions," from which the plan must reduce emissions by 15 percent in the first RFP requirement, is defined to mean "the total amount of actual VOC or NO_x emissions from all anthropogenic sources in the area during the

calendar year 1990..." § 182(b)(l)(B); 42 U.S.C.; § 7511a(b)(1)(B). The Commenter pointed out that, this is the only sense in which the term "in the area" is used in the RFP provisions of the Act. The Commenter argued that, if the reductions are calculated from a baseline that includes only emissions "in the area" the reductions must also come from within the area. Of course, the Act does not expressly so state. But even assuming this conclusion is correct, EPA has the flexibility to interpret the term "in the area" to allow for the concept of the "transport couple area" discussed above. Commenter (0139) also recommended that, the EPA redefine the term "area" for purposes of the RFP requirement and that the term "area" should be considered to include the entirety of the "transport couple" area. Commenter (0139) provided the following additional statements on the legal rationale for allowing out-of-area reductions to be counted toward the 15 percent RFP.

Commenter (0139) understood that, section 182(b) uses both the terms "in the nonattainment area" at section 182(b)(1)(A)(ii)(I) and "in the area" at section 182(b)(1)(B). The Commenter added that, section 182(b)(1)(B) does not so restrictively define the term "in the area" as to mean just the particular nonattainment area of interest. In fact, with respect to RFP, it does not explicitly define the term at all. It merely says "in the area" without defining the geographical boundaries of the "area." The Commenter concluded that, the intent of this section is to allow a larger area than the subject nonattainment area based on the specific air quality circumstances in question and that the EPA does have authority to interpret the term to mean two or more geographic areas for which emission transport couples have been established. Such areas could be considered one area for purposes of both central RFP requirements of section 182(b)(1)(A), the 15 percent from baseline requirement, and the annual reductions in emissions for timely attainment requirement, provided that there are enforceable mechanisms in place to guarantee that the upwind emissions actually occur. Doing so would establish consistency between these two RFP mandates and help areas meet their RFP obligations more cost-effectively than the EPA's current RFP proposal.

Commenter (0166) stated that, RACT by definition refers to sources "in the area," The CAA § 172(c)(1), and the D.C. Circuit in *NRDC v. EPA* latched onto that language, confirming that areas cannot go outside their boundaries for RACT purposes. However, the case did not address RFP requirements in this regard, so it does not control here. Furthermore, the statutory provisions addressing RFP do not explicitly state that such reductions must in all cases take place within the area. *See* CAA §§ 172(c)(2), 182(b)(1). The Commenter added that, to the extent a nonattainment area does seek credit for RFP purposes with respect to emission reductions occurring outside the area, though, the state should also expand the emissions inventory establishing the baseline by covering the area being used for RFP purposes. The Commenter further believed, if the EPA takes this approach, it must be prepared to disallow NO_x-for-VOC emission reduction substitutions where they are not appropriate or justified, such as in core urban areas. The Commenter maintained that, in core urban areas, VOC emission reductions are demonstrably more effective and therefore, it would be inappropriate to substitute NO_x emission reductions outside the core urban area for VOC emission reductions inside the core urban area.

Commenter (0150) pointed toward the D.C. Circuit Court of Appeals recent decision that, although there is a presumption that a term appearing in several places in a statute is to be read

the same way each time, the presumption "readily yields" based on differences in the context in which the words are used. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 142(D.C. Cir. 2012). The Commenter believed, that the Court in that case interpreted a similar term: "in any area to which this part applies." Id. The Commenter further argued, that moreover, words that can have more than one meaning are given content by their context. Whitman, supra, 531 U.S. at 466. The Commenter concluded that, in this case, the EPA would be justified in treating the language relative to RFP differently from the way it treat as the language relative to RACT, because by definition, it is possible for all sources in a downwind area to comply with RACT. The Commenter believed that, this is because RACT is defined as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." 44 FR 53762 (Sept. 17, 1979). In contrast, it may not be possible for a downwind area to attain the 15 percent reduction. Even though the sources are fewer in the downwind area, and thus, the 15 percent target is smaller, if the sources are primarily mobile sources, such as in the Coachella Valley, and the area has no ability to reduce emissions from those sources, it may not be possible to attain the 15 percent. The Commenter concluded, that in this case, the EPA could use the term "in the area" when referring to "baseline emissions" for RFP purposes to refer to a "transport couple area." The Commenter believed that, as noted earlier, this approach addresses the concerns the environmental group expressed about the EPA's earlier approach and is consistent with the intent and purpose of the RFP requirement. The Commenter believed that, a literal interpretation of the term "in the area" as proposed by the EPA could produce absurd results. Such an interpretation would require the EPA to disapprove a plan based on failure of the downwind area to have 15 percent reductions "in the area" even if the plan provides for (1) more than 15 percent reductions in total pollution in the area; (2) more than 15 percent emission reductions within the "transport couple area"; and (3) attainment on or before the required date. EPA may rely on the concept of "absurd consequences" to avoid even a "plain meaning" of a statute; thus, it may certainly rely on such consequences to allow it to use the concept of "transport couple area" as being the "area" referred to in the definition of baseline emissions for RFP purposes. See EPA's discussion in the GHG Tailoring Rule, 75 FR 31514 (June 3, 2010).

Commenter (0161) stated their belief that states should not step outside the boundaries of nonattainment areas to achieve emission reductions to satisfy RFP requirements. The Commenter maintained that, the CAA provides that, with certain listed exceptions, emissions reductions are creditable toward RFP requirements to the extent that the reductions resulted from implementation of measures required under the applicable implementation plan, EPA rules, or a Title V permit. 42 U.S.C. § 7511a(b)(I)(C). The Commenter stated that, the listed exceptions do not pertain to out-of-area reductions. 42 U.S.C. § 7511a(b)(l)(D)(i-iv). The Commenter further stated that, because the CAA contains no exception that would disallow credit for out-of-area reductions, the EPA has discretion to allow states to credit out-of-area emissions reductions toward fulfillment of RFP requirements.

The Commenter stated that, the EPA would be incorrect to apply this holding to the present rulemaking, however, because the holding is limited to specific the CAA language regarding RACT requirements. The Commenter believed that, the CAA unambiguously requires that a SIP provide for "reductions in emissions from existing sources *in the area"* as may be obtained

through the adoption of RACT, and the Court's decision followed directly from this congressional directive in CAA section 182(c)(l). The Commenter believed that, the Court's holding does not pertain to RFP requirements and it, therefore, has no bearing on the way that RFP requirements are to be interpreted or applied. The Commenter concluded that, the EPA should not view *NRDC v. EPA* as expressing any limit on the agency's authority to allow RFP credit for out-of-area reductions. The Commenter further stated, their belief that Congress did not intend to prohibit RFP credit for out-of-area reductions is also shown by the language that it used in CAA section 172(c), where general nonattainment plan provisions are set forth. The Commenter stated that, it has been noted before that the RACT provision set forth at section 172(c)(l) specifically requires reductions from sources "in the area." But in the subsection that immediately follows, section 172(c)(2), the RFP provision is set forth and it states merely that "plan provisions shall require RFP, section 172(c)(2)] with no "in the area" limitation. The Commenter believed that, Congress knew how to limit SIP requirements to in-area sources when it wanted to, as it did in the RACT provision in subsection (c)(l). The fact that it chose not to engraft such limiting language in the RFP provision in subsection 172(c)(2) is further indication that Congress did not intend to prevent states from crediting out-of-area reductions toward RFP targets. [*See Russello v. U.S.*, 464 U.S. 16, 23 (1983).] The Commenter also considered it significant that, the CAA lists four specific types of emissions reductions under section 182(b)(1)(D)(i)-(iv) that are not creditable toward fulfillment of RFP goals and that Congress could have included reductions from out-of-area sources among these non-creditable reductions, but it did not do so. The Commenter concluded that, if Congress had 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

Commenter (0151) believed that, the "inside the area" limitation comes from the definition of "baseline inventory" in CAA section 182(b)(1)(B). Therefore, the commenter supported the EPA's earlier rulemaking, never completed, that allowed states to add these sources outside of the state to their emission inventory. The Commenter stated that, the question, then, could morph into whether addition of the source for which credit is being taken to the emission inventory triggers additional RFP, if a state's original plan was approved. The Commenter did not believe that, additional RFP measures are required in an expanded nonattainment area.

Response: In the proposed SIP Requirements Rule, 78 FR at 34191, we proposed that ". . . .states may not take credit for VOC or NO_x reductions occurring outside the nonattainment area for purposes of meeting the 15 percent and 3 percent RFP requirements of sections 172(c)(2), 182(b)(1) and (c)(2)(B)." This approach means that ROP credit for meeting the 15 percent VOC requirement for Moderate and above ozone nonattainment areas in section 182(b)(1) and the additional 3 percent per year RFP requirement for Serious and above ozone nonattainment areas in section 182(c)(2)(B) can come only from emissions reductions from within the nonattainment area. In the preamble to the proposal, the EPA noted that it would be sound policy to allow areas to use outside the area reductions to meet RFP requirements, but concluded that in light of *NRDC v. EPA*, 571 F.3d 1545 and the language of the CAA there is no legal basis for allowing credit for emissions reductions outside the nonattainment area for satisfying ROP/RFP requirements. In the proposed rule, we also stated that, if the EPA received comment providing a clear legal justification for this approach, we would consider including this approach in the final

rule. We received several comments supporting this approach, including suggested legal arguments, but after carefully considering them, we have concluded that no comment provided a persuasive legal rationale for that approach and therefore, are finalizing the approach outlined in the proposal of not allowing out of area credit.

The RFP requirements in CAA 182(b)(1)(A)(i) and 182(c)(2)(B) require that nonattainment SIPs provide for emission reductions from "baseline emissions." And CAA section 182(b)(1)(B) defines baseline emissions as "the total amount of actual VOC or NOx emissions from all anthropogenic sources in the area." The RFP language in 182(b)(1)(B) and 182(c)(2)(B) is almost identical to the language in the CAA's RACT provision that the D.C. Circuit held required that reductions come from within the nonattainment area and not "from sources outside the nonattainment area." *NRDC v. EPA*, 571 F.3d at 1256. Accordingly, EPA has concluded that it has no legal basis for allowing credits for reductions outside the nonattainment area.

Comment: Suggestions that would allow out of area reductions

Commenters suggested various mechanisms and rationales for allowing out of area reductions. Some suggested allowing credit for emission reductions from an area larger than the nonattainment area but related to or affecting it, such as the same airshed or an air quality control region or a "transport couple area." These comments emphasized the close connection between air quality within the nonattainment area and emissions from outside that area but within the larger unit proposed for consideration. The Commenters also argued that, controlling emissions from outside a nonattainment area may be a very effective way to of improving air quality within that area and that statutory references to "the area" do not necessarily refer only to the "nonattainment area." To some extent, these comments were either policy arguments in support of allowing out of area credits, or suggestions about how best to implement a program allowing such credits. But, upon examination, they did not provide a legal rationale that, in light of the language of the statute and the reasoning in *NRDC*, would support doing so.

Another Commenter suggested that, the CAA section 107(c) provides the EPA the authority to allow outside the area reduction credits for satisfying RFP requirement. The EPA disagrees with this rationale because CAA section 107(c) enables EPA to designate air quality control "regions," as necessary or appropriate for the attainment or maintenance of NAAQS. That process is distinct from and has no effect on the legal requirement to designate nonattainment "areas" and develop SIPs providing RFP toward attainment in those areas. As already noted, RFP requires reduction from baseline emissions in the nonattainment area.

Commenters also argued that, requirements for reductions from "the area" do not necessarily require reductions from within the nonattainment area. The EPA disagrees with this reasoning because, as noted sections 182(b)(1)(B) and 182(c)(2)(B) require reductions "from baseline emissions," and baseline emissions come from sources "in the area." EPA does not believe it would be plausible to argue some references to "the area" in section 182, which deals with SIPs for nonattainment areas, do not refer to nonattainment areas, or that some uses of the term have that limitation but that others do not. Moreover, the D.C. Circuit's interpretation of virtually identical language referring to the "area" in *NRDC* as referring to the nonattainment area for

RACT, confirms that the RFP language refers to nonattainment areas.

Another Commenter suggested that, the CAA section 110(h) provided for crediting measures outside the ozone nonattainment area toward attainment. The Commenter did not suggest any basis for this argument, and we are not convinced that our policy as stated in the final rule is influenced by section 110(h), and we are also not convinced that this rule provides the necessary legal support for allowing out of area reduction credits to satisfy RFP requirements.

Another argument some Commenters suggested for not construing references to "the area" as applying to the nonattainment area is that *NRDC*, and thus, the decision's reasoning, is only relevant to RACT and does not necessarily apply to RFP. The *NRDC v. EPA* decision construed "reductions in emissions from existing sources in the area" to refer to sources in the nonattainment area for purposes of meeting RACT nonattainment SIP requirements under CAA 172(c)(1). The comment necessarily argues that nevertheless the RFP nonattainment SIP requirement for reductions from "baseline emissions," CAA 182(b)(1)(A)(i) and 182 (c)(2)(B) which CAA 182 ((b)(1)(B) defines as emissions from "sources in the area" does *not* refer to sources in the nonattainment area. The EPA does not believe it is plausible to argue that the same words, "sources in the area," applied in the same context, nonattainment SIP requirements, can have different meanings such that RACT applies to reductions from sources in the nonattainment area but the RFP applies to reductions from sources outside the nonattainment area.

The EPA requested comment on whether there is a defensible legal rationale for allowing credits for out of area reductions. We did not receive any comments that provide a viable legal rationale for doing so, and therefore, we are not including the approach to allow areas to credit "outside the area" emissions reductions for ROP/RFP fulfillment. None of the comments we received persuaded us that the reasoning in the "background" section of the preamble was incorrect or that the reasoning in *NRDC* regarding RACT does not apply to RFP, or that some other defensible reading of the statute is possible. Therefore, the EPA is finalizing the interpretation that states may not take credit for VOC or NO_x reductions occurring from sources outside the nonattainment area for purposes of meeting the 15 percent ROP and 3 percent RFP requirements of sections 172(c)(2), 182(b)(1) and (c)(2)(B). This approach means that ROP credit for meeting the 15 percent VOC requirement for Moderate and above ozone nonattainment areas in section 182(b)(1), and the additional 3 percent per year RFP requirement for Serious and above ozone nonattainment areas in section 182(c)(2)(B), or for meeting the RFP requirement of section 172(c)(2) for Moderate areas that met the 15 percent requirement for a previous NAAQS can come only from emissions reductions from sources located within the nonattainment area.

Commenters (0129, 0139, 0140, 0141, 0148, 0149, 0150, 0151, 0152, 0153, 0160, 0169, 0172, 0175 and 0179) generally supported consideration of emissions reductions outside a nonattainment areas stating that, the EPA should allow states to consider reductions from transport sources when calculating RFP reductions if the baseline similarly includes contributions from transport sources. Commenters also agreed with the EPA's assessment that, there may be cases where the most beneficial and cost-effective reductions are from sources located outside the nonattainment area boundaries and, in such cases, it would be good policy to credit the emission reductions toward meeting RFP requirements. Generally, Commenters urged,

the EPA not to act as though nonattainment areas are isolated from adjacent areas and not impacted by emissions and emission reductions in neighboring areas. Commenter (0166) stated that, RACT by definition refers to sources "in the area," CAA § 172(c)(1), and the D.C. Circuit in *NRDC v. EPA* latched onto that language, confirming that areas cannot go outside their boundaries for RACT purposes but did not address RFP requirements in this regard. Commenter (0146) stated that, the NESCAUM states would support providing some RFP credit for energy efficiency and renewable energy (EE/RE) measures instituted in the nonattainment area but whose reductions may not necessarily occur in that area. Commenter (0169) stated that, allowing RFP credits for out-of nonattainment-area sources is consistent with EPA's Roadmap for Incorporating Energy Efficiency/Renewable Energy Policies and Programs into State and Tribal Implementation Plans ("Roadmap" page 15 and 16) which is referenced throughout the proposed SIPs Requirements Rule.

Commenters (0146, 0163 and 0168) generally stated that, if emissions reductions necessary for RFP and attainment were to come from a nearby area, then the nonattainment area should be expanded to include that area and all of its emissions in the baseline.

Commenter (0146) stated, the NESCAUM states would, however, support providing some RFP credit for energy efficiency and renewable energy (EE/RE) measures instituted in the nonattainment area but whose reductions may not necessarily occur in that area. Commenter (0146) stated, this support is conditioned on the availability of sound evidence that: (1) those measures would produce public health benefits; and (2) the approach does not conflict with the CAA.

Response: The EPA appreciates the Commenters' suggestions. The EPA continues to recognize that emissions of ozone precursors can impact wide geographic areas. In some cases observed concentrations of ozone arise predominantly from sources within the nonattainment area while in other cases, ozone concentrations in one particular area may be influenced by sources across a broad area extending outside a particular nonattainment area. The EPA recognizes that ozone travels over long distances, and that, distant emissions of ozone can influence area's air quality. An area may be classified nonattainment in large part due to distant sources impacting the area. The EPA's past procedures for addressing these situations was to allow emission reductions, originating at distant emission sources and influencing downwind areas, to credit these out of the area emission reductions toward the affected area in fulfilling RFP obligations to attaining the NAAQS standards. With our previous RFP policy, it was the EPA's intent to define RFP requirements in terms of emissions reductions that can be expected to provide generally regular, constant improvement in air quality in the nonattainment area. However, the EPA's preferred policy to allow ROP credit for "outside" reductions was refuted by the D.C. Court in the *NRDC* case, therefore, the agency believes we cannot lawfully allow credits for emissions reductions occurring outside of a nonattainment area to apply to ROP/RFP requirements in the area. Therefore, the final rule will require ROP/RFP reductions to be achieved from "baseline emissions," defined as emissions "in the area."

D. How do RACT and RACM requirements apply for 2008 ozone NAAQS nonattainment

areas?

1. RACT SIP

Comment: RACT "Fix Up": Marginal area pre-1990 RACT rules

Commenter (0132) stated, the EPA should make clear any requirements regarding RACT for Marginal nonattainment areas under the 2008 8-hour ozone NAAQS. The Commenter requested that, the EPA clarify that if a state has already made corrections to any applicable pre-1990 RACT rules that have been approved by the EPA as a SIP revision, then the state has already satisfied its obligation under §182(a)(2)(A) for a Marginal nonattainment area for purposes of the 2008 ozone NAAQS. Commenter (0132) stated that, if the EPA is considering a different interpretation for Marginal nonattainment areas under §182(a)(2)(A) for the 2008 8-hour ozone NAAQS, then the EPA should propose a supplemental notice of rulemaking and an additional comment period so that states have adequate opportunity to review and comment.

Commenter (0180) stated, the rule must require states to submit, within 6 months of designation, the RACT provisions required for Marginal areas under 42 U.S.C. § 7511a(a)(2)(A). Commenter (0180) stated that, neither the preamble nor the regulatory text in the proposal expressly directs Marginal areas for the 2008 standard to submit SIP revisions to meet pre-1990 RACT requirements. 78 FR at 34191; *See also* 42 U.S.C. § 7511a(a)(2)(A). Because the EPA has (correctly) determined that implementation of the 2008 standard is governed by subpart 2, Commenter (0180) stated, the EPA must require states to comply with all subpart 2 requirements, including the RACT mandate for Marginal areas.

Response: The EPA clarifies that the obligations under §182(a)(2)(A) section apply only to nonattainment areas designated before 1990. The 2008 ozone NAAQS implementation rule takes the same position as the 1997 ozone implementation rule for the application of the RACT "fix-up" obligations under §182(a)(2)(A). The 1997 ozone implementation rule took the position that §182(a)(2)(A) only applies to pre-1990 nonattainment areas. The RACT fix-up provision under §182(a)(2)(A) for a nonattainment area classified as Marginal under the 2008 ozone NAAQS would only apply to those areas for which the EPA issued a RACT SIP Call before the 1990 CAA Amendments.

Comment: Another round of RACT revisions is neither required by law nor necessary

Commenter (0151) stated that, the EPA's final rule should not require major sources to adopt another round of new or incremental RACT or RACM. Commenter (0151) is claiming that, Congress should have considered that the short period of time between ozone NAAQS revisions would not allow a facility to recoup the investment in the original pollution control before requirement to reconsider if the next round of newer controls is required. The Commenter also contents that, it would be enormously burdensome for states to adopt new RACT SIPs and resubmit them for EPA approval. For the 2008 ozone NAAQS revisions, the Commenter claims another round economy-wide technology evaluation would not reveal significant additional technology-based reductions. The Commenter suggested in lieu of another round of RACT analysis, the overall ability of a state to adopt a more tactical approach to RACT and SIP-

planning, such as the proposed ozone reduction targets discussed in the Notice for RFP. The Commenter noted that such flexibility should provide states with the ability to determine that "incremental RACT or RACM" adjustment is not "reasonable" if additional control is minimally-effective at reducing emissions because of the size of a particular facility (or sources within the emitting facility), the number and/or types of "other" sources in the nonattainment area, or the relative reactivity of the VOC/NO_x species that are emitted by local sources and should not require a comprehensive demonstration or showing for each type of industrial source in the 2008 ozone emission inventory. Importantly, requiring "additional controls for the sake of controls" runs counter to the EPA's recognition elsewhere in the Notice that NO_x and/or the control of reactive VOC species are a more effective and therefore "reasonable" strategy for attaining the ozone standard. Thus, the EPA's final rule should not require major sources to adopt new or incremental RACT or RACM, particularly if it would not be particularly effective at reducing ozone in the nonattainment areas. (0151)

Response: The EPA disagrees. First, the CAA includes a requirement that an attainment plan must provide for the implementation of all RACM as expeditiously as practicable, including such reductions that may be obtained through RACT. Second, the EPA believes the RACT SIP provides cost-effective emission reductions that are necessary to attain the NAAQS as expeditiously as practicable. Furthermore, as pointed out by a Commenter (0168), an initial round of RACT emission reductions in areas upwind of NAAs can be important to attainment of the NAAQS in the downwind area, regardless of whether the downwind area has gone through prior rounds of RACT SIPs.

The EPA recommends that states refer to the BACT/LAER Clearinghouse and the EPA's Menu of Control Measures as resources for recent technical information. States must provide adequate documentation that they have considered control technology that is economically and technologically feasible, including consideration of information submitted during the state's public comment period.

Excluding a round of RACT determinations differs considerably from excluding a portion of the RFP requirements; i.e., the 15 percent VOC emissions reduction requirement. While the EPA believes it is appropriate in some cases to not require a 15 percent VOC emissions reduction a second time, additional RFP provisions continue to apply and help provide for attainment as expeditiously as practicable. That is, if a state has already met the 15 percent VOC emission reduction requirement for the 1-hour standard for an area, then it should not be required to meet that requirement a second time for the 8-hour standard but instead will be subject to the other applicable RFP provisions of the CAA (70 FR 71635). This provision is a logical means of achieving the purposes of the RFP requirement which is to ensure steady progress towards attainment and it was upheld in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009). The EPA's proposal to allow states to consider whether additional RACT is required for VOC sources based, for example, on the incremental reactivity of VOC species, similarly does not waive the overall RACT requirement, since RACT would apply to all major NO_x sources even if some VOC sources were not required to conduct a RACT analysis.

The EPA disagrees with the Commenter that Congress did not realize the implications of setting

the 5-year NAAQS review cycle would result in the requirement for RACT revisions with each NAAQS review to be implemented. While there is no explicit requirement in the CAA for states or EPA to periodically review and revise technical assistance for meeting RACT requirements, the CAA clearly includes a requirement that an attainment plan must provide for the implementation of RACT. The EPA believes the RACT SIP requirement conforms closely to the clearly articulated goal of the CAA that states implement measures that provide for attainment of the ozone standard as expeditiously as practicable.

Comment: Support RACT emission reductions

Commenter (0168) stated that, experience has shown that properly implemented RACT achieves significant cost effective emission reductions and sets an effective baseline level of emission control, and that, experience also shows that for many source sectors the most bang-for-the-buck is achieved in the first round of RACT. Commenter (0168) noted that, while they agree that the periodic update of a RACT SIP is beneficial, and that, the periodic review and update of RACT is good air quality policy, Delaware notes that 1) little reduction in emissions in their state is anticipated, 2) this review will take substantial time and resources to complete and most importantly, 3) the first round of RACT has yet to be implemented in many of the upwind areas that are the primary cause of the state's ozone air quality problems.

Response: The EPA agrees that the initial round of RACT implementation can be especially effective in achieving emission reductions, however the periodic update of a RACT SIP can also be beneficial. The EPA acknowledges that as a state with previous nonattainment areas and part of an ozone transport region, Delaware has been subject to RACT requirements under the 1979 and 1997 ozone NAAQS and that many Delaware sources currently may have beyond-RACT controls, in which case it is possible that little reduction in Delaware emissions may be expected due to another round of RACT reviews. The EPA also agrees that implementation of emissions controls, including RACT (where required), in areas upwind of NAAs can be important to the ability of the downwind NAA to attain the NAAQS.

2. CTGs and ACTs

Comment: Update CTGs and ACTs and other RACT Guidance

Commenters (0144, 0146, 0155, 0157, 0163, 0167, 0177 and 0180) encouraged the EPA to update the CTG and ACT documents.

Commenter (0155) recommended that, with respect to RACM and RACT, the EPA provide all legally available flexibility for reaching attainment.

Commenters (0144, 0146, 0163, 0167, and 0177) stated, the CTG and ACT guidelines need to be updated in order to set a nationwide baseline for presumptive norms and provide consistency in states' RACT determinations for CTG and ACT source categories.

Commenter (0144) stated that, although the proposal (page 34192) indicates states should use

current EPA guidance including CTGs and ACTs in making RACT determinations, many of the CTGs and ACTs are outdated and no longer represent RACT due to technological advances. Commenter (0146) stated, the EPA's NO_x RACT guidance and many of its CTGs are nearly 20 years old and to allow states, especially those with new nonattainment areas, to develop SIPs and rules based on outdated assumptions about available control technologies would undermine progress and public health protection.

Commenter (0167) stated that, the potential inequities using outdated RACT guidance may compel some states to expend limited resources reviewing and commenting on other states proposed SIPs. Commenter (0167) stated, such national guidance may provide air quality agencies with leverage needed to complete rule adoption where state law or stakeholder resistance may otherwise present obstacles to unilateral state action.

Commenter (0167) stated, the EPA must as part of RACT, or as a separate action, require sources that have installed pollution control equipment continue to operate such equipment. Commenter (0177) stated, this piecemeal approach will likely result in drastically different interpretations of appropriate RACT levels across the country and compel states to expend considerable resources on RACT determinations. (0177)

Commenter (0153) recommended that, the EPA use its authority under section 183(b) and revise all existing CTGs (or otherwise make a blanket policy change) so that they do not cover VOC sources in a NO_x- limited area as long as the area makes NO_x reductions toward attainment.

Commenter (0163) supported updating the EPA's outdated RACT guidance including its April 16, 1992 RACM Policy.

Commenter (0180) stated, the EPA needs to update its NO_x RACT guidance because the proposal says states should consider more recent information although the EPA does not propose to update any of its existing RACT guidance documents, many of which are badly outdated. Commenter (0180) believed, the EPA's failure to update those documents is unlawful and arbitrary, as is its directive to states to use such outdated guidance documents. *See* 42 U.S.C. §7511b(c). Commenter (0180) added that, the RACT requirement is not met by allowing sources to rely on guidance as to the lowest emission limitation that the source *was* capable of meeting decades ago with control technology that *was* (purportedly) reasonably available back then.

Given the substantial contribution to ozone nonattainment from NO_x emissions from utility boilers (*see, e.g.*, 76 FR 48208 (Aug. 8, 2011)), Commenter (0180) was particularly concerned about continued reliance on the EPA's grossly outdated 1992 and 1994 RACT guidance for utility boilers. *See* 57 FR 55620, 55625 (Nov. 25, 1992); Memorandum from D. Kent Berry, Acting Director, Air Quality Mgmt. Div., EPA, to Regional Air Directors, "Cost-Effective NO_x RACT" (Mar. 16, 1994).

Further, regarding the basic requirements for RACT SIP submittals (78 FR at 34192/3), Commenter (0180) stated, the EPA needs to clarify that: a) states *must* (not merely "should") provide adequate documentation that they have considered all control technologies, including

post-combustion controls and fuel switching, that are economically and technologically feasible, and must further show that the technology chosen as RACT provides the lowest emission limitation; b) the analysis of economic and technological feasibility must be based on information that is current as of the time of development of the RACT SIP for the 2008 ozone NAAQS, and it is not sufficient for states to rely on previous RACT determinations without considering more recent information; c) states must consider controls that public comment identifies as meeting the definition of RACT and must provide a reasoned justification for rejecting such controls in favor of less stringent controls; and d) controls that have been achieved in practice by other existing sources in the same source category must ordinarily be considered technologically and economically feasible.

Commenter (0180) stated that, NO_x RACT should be based on an emission limit no less stringent than 0.070 lb/MMBtu. Commenter (0180) asserted that taking even the highest emission rate that, the EPA has set with no post-combustion control, 0.5 lb/MMBtu and applying the 90 percent control from SCR, an emission limit of 0.05 lb/MMBtu should be RACT. Commenter (0180) suggested, the EPA could add a 40 percent "safety factor" and recommend that NO_x RACT be set at 0.070 lb/MMBtu. Commenter (0180) asserted that, a review of the RACT/BACT/LAER clearinghouse demonstrates that numerous PSD permits for coal-burning boilers were issued during the "coal rush" of the first decade of this century with emission limits of 0.07 lb/MMBtu and that actual data confirms that 0.070 lb/MMBtu is easily achievable. (*See* Exhibit B to these comments.)

Commenter (0180) stated that, the NO_x RACT limit should be based on an averaging time of no longer than 24 hours, ideally, based on a 1-hour or 8-hour averaging time to protect the 8-hour averaging time of the 2008 ozone NAAQS. Commenter (0180) asserted, this is especially important for coal burning EGUs because electricity demand tends to be highest on hot, summer days and these are also times when ozone is the worst. Thus, Commenter (0180) concluded that, without short-term averaging times, EGUs will emit NO_x at higher levels at precisely the times when the ozone problem is the worst and then comply with a longer-term average emission limit by lowering their NO_x emissions at times when the ozone problem is not as severe.

Response: The agency developed many of the CTGs and ACT documents over a period from the late 1970s to mid-1990s. The CTG's recommend "presumptive norms" of control for each source category, but individual sources may have alternative RACT requirements imposed by making an adequate infeasibility demonstration (44 FR 53761, September 17, 1979). The CTGs address entire source categories and entire industry processes and describe what requirements the EPA generally will approve as RACT.

The EPA recommends the BACT/LAER Clearinghouse and the EPA's Menu of Control Measures as resources for recent technical information, but does not require consultation by each state with these resources. Rather, states need to provide adequate documentation that they have considered control technology that is economically and technologically feasible, including consideration of information submitted during the state's public comment period. States should refer to the existing CTGs and ACTs for purposes of meeting their RACT requirements, as well as all relevant information (including recent technical information as well as information

received during the public comment period) that is available at the time that they are developing their RACT SIPs for the 2008 ozone NAAQS. We believe that there is sufficient information available to states to inform their RACT determinations.

The EPA disagrees that failure to update the CTG documents is unlawful and arbitrary. Under CAA section 183(c), CTGs and ACTs are to be revised and updated "as the Administrator determines necessary." Additionally, we disagree with the statement that the EPA issued a "directive" to states to use outdated guidance documents. Rather, the issued guidance through the preamble to the proposed rule, stating the following: "States should use current EPA guidance and any other information available in making RACT determinations. The EPA recognizes that existing CTGs and ACTs for many source categories have not been revised in a number of years. However, in many cases, more recent technical information is available in other forms, such as the BACT/LAER Clearinghouse." (78 FR 34192). We agree with the Commenter that, in some cases, it may not be appropriate for states to rely solely on a CTG document for purposes of meeting their RACT requirements, which is why we encouraged states in the preamble to the proposed rule to consider additional information that may be available.

The EPA appreciates the Commenter's thoughtfulness regarding recommended cost-effectiveness and emission limits as well as averaging times for certain sources. We will take this input into consideration if we are updating any CTG documents in the future.

Comment: CTG for oil and gas equipment

Commenter (0170) requested that, the EPA issue CTGs for oil and gas equipment to assist states in meeting the 2008 ozone NAAQS as part of the Ozone Implementation Rule. (Commenter incorporated by reference the document filed with the "In re Petition for the U.S. Environmental Protection Agency to 1) Promptly Require Oil and Gas Owners and Operators to Monitor for Ozone and 2) To Issue CTGs for Oil and Natural Gas Operations in Non-Attainment Areas" (December 19, 2012), EPA Doc. No. EPA-HQ-OAR-2010-0505-4608.) Commenter believes that, CTGs provide a valuable framework allowing the EPA to issue guidance on cost-effective emission reduction technologies for the oil and gas sector and provide important air quality planning tools for communities that are seeking to reduce emissions and achieve compliance with the NAAQS along with those attainment areas that are pursuing reductions under the EPA's Ozone Advance Program.

Response: The EPA is evaluating issues raised in the petition submitted to the EPA that is noted in the comment (Doc. No. EPA-HQ-OAR-2010-0505-4608).

Comment: RACT implementation timing

Commenter (0152) was concerned that, the EPA's proposed requirement to have RACT in place by January 1, 2017, may not provide enough time for implementation. Commenter (0152) believed, RACT requirements require regulation development with prior notice of implementation deadlines and that if the EPA needs to further develop additional CTGs for the current ozone standards, states may not have ample time to develop regulations that provide sufficient time for sources to implement RACT.

Response: The EPA disagrees with the Commenter that, a requirement for RACT to be in place by January 1, 2017, for areas designated nonattainment effective July 20, 2012, (and all areas of the OTR) does not allow enough time for implementation. The EPA believes that the January 1, 2017, date would allow a sufficient amount of time for states to make determinations and for sources to meet RACT requirements on the time-table originally anticipated under the 1990 CAA Amendments, consistent with the Moderate area attainment date of July 20, 2018.

The EPA appreciates the Commenter's concerns regarding the need for sufficient time for sources to meet RACT requirements. On consideration of the comment, the EPA believes that the proposal language may not have been clear with regard to RACT implementation deadlines. Thus, we provide more clarity in the paragraphs that follow.

First, the EPA notes that the requirement to develop a RACT SIP applies only to areas that are designated as Moderate or above (i.e., Serious, Severe, or Extreme). For such areas that were designated on July 20, 2012, RACT SIPs are due within 2 years of the effective date of designation, by July 20, 2014. Sources subject to RACT in those areas would then need to implement RACT by January 1, 2017.[16] If an area is reclassified from Marginal to Moderate at some later date, then at that time that area would become subject to the RACT requirement, and the EPA would set new SIP submission and RACT compliance dates on a schedule that the EPA will establish in the applicable notice and comment rulemaking reclassifying the area. For areas that are newly redesignated to nonattainment, the RACT SIP is due no later than 2 years from the effective date of designation and the implementation deadline is no later than January 1st of the 5th year after the effective date of redesignation.

Second, we wish to clarify that the January 1, 2017, RACT implementation deadline would not automatically apply to sources covered by future CTGs. If a new CTG is developed, all current Moderate or above areas would be required to revise their SIPs for the sources covered by the CTG within the period set forth by the EPA in issuing the CTG document (*See* section 182(b)(2) of the CAA), which would occur through notice and comment rulemaking. This will give sources lead time to comply with the new requirement.

3. RACT determinations

Comment: Supplement use of old CTGs and ACTs

Commenter (0168) agreed with the proposal that, technological feasibility should be based on information that is current as of the time of development of the RACT SIP for the 2008 ozone

[16] We note that the RACT compliance date does not change relative to the RACT SIP submission. This compliance date is fixed, such that if a state submits a RACT SIP past the July 20, 2014 deadline, then sources would still have to comply with the RACT requirements by January 1, 2017.

NAAQS - that it is not sufficient for states to rely on previous RACT determinations without considering more recent information.

Commenter (0172) supported flexibility in implementing the RACT requirements noting that, the EPA stated in the proposal that many CTGs and ACTs are nearly two decades old and more recent information such as BACT determinations should be taken into consideration for RACT.

Response: The EPA agrees with the Commenters.

Comment: Certification of existing RACT

Commenter (0153) stated that, the EPA should provide a clear indication of situations where a state may conclude that existing RACT meets RACT for the 2008 ozone NAAQS since, without such clarification, regional offices may find it difficult to approve a state submittal that contains such a conclusion.

Commenters (0144 and 0146) stated that, although in some cases a recent RACT analysis may result in such a certification, in no instance should 1-hour ozone (120 ppb) RACT be considered RACT for the 2008 8-hour ozone (75 ppb). Commenter (0144) stated that, such certifications of 20-year old RACT determinations put states that have implemented more stringent RACT measures at a disadvantage for attainment. Commenter (0144) supported the statement in the proposal (page 34192) "it is not sufficient for states to rely on previous RACT determinations without considering more recent information." Commenter (0146) stated that, RACT certifications for the 2008 ozone NAAQS must be based on a full RACT analysis, as required under the CAA, and under no circumstances should RACT for the previous 1-hour standard be considered RACT under the 2008 NAAQS.

Commenter (0159) supported the finding by the EPA that, in some cases, states may conclude that sources already subject to RACT for the 1-hour and/or 1997 ozone NAAQS are also meeting the 2008 ozone NAAQS RACT requirement.

Response: In the preamble to the proposed rule, the EPA noted that in some cases, states may conclude that sources already addressed by RACT determinations for the 1-hour and/or 1997 ozone NAAQS may not need to implement additional controls to meet the 2008 ozone NAAQS RACT requirement. The EPA disagrees with the comments that RACT for the 1-hour ozone NAAQS should not be considered RACT for the 2008 8-hr ozone NAAQS. In areas subject to the major source RACT requirement under the 1-hour and/or 1997 ozone NAAQS, states may in some cases, after careful assessment, conclude that a new RACT determination under the 2008 standard would result in the same or similar control technology as the initial RACT determination under the 1-hour or 1997 standard because the fundamental control techniques, as described in the CTGs and ACTs, are still applicable.

The EPA acknowledges the request for further information about circumstances that may lead a state to conclude that existing RACT controls meet the RACT requirement for the 2008 ozone NAAQS. We provide further clarity regarding this issue in the paragraphs that follow. However, the EPA disagrees with the Commenter that, the EPA Regional Offices may find it difficult to

approve a state conclusion that existing RACT meets RACT for the 2008 ozone NAAQS. Given the unique circumstances for each nonattainment area, the EPA intends to review each RACT SIP on a case-by-case basis. We strongly encourage states to work with their Regional Offices in determining RACT for purposes of meeting the RACT requirements for the 2008 NAAQS.

In cases where controls were applied due to the 1-hour or 1997 ozone NAAQS RACT requirement, we expect that any incremental emissions reductions from application of updated RACT controls may be small and, therefore, the cost for advancing that small additional increment of reduction may not be reasonable. In contrast, a RACT analysis for uncontrolled or partially controlled sources would be much more likely to find that updated RACT-level controls under the 2008 ozone NAAQS are economically and technically feasible.

The CTGs and ACTs for VOC were completed over a period from the late 1970s to mid-1990s. The EPA also issued additional CTGs in 2006, 2007 and 2008. In some cases these CTGs updated previously issued CTGs and in other cases, they covered new categories of sources. The CTGs are still used to presumptively define VOC RACT.

The EPA issued NO_x ACT documents between 1992 and 1995. In September 2000, updates to the NO_x ACT documents were completed for stationary internal combustion engines and cement kilns. The NO_x and VOC ACTs describe available control techniques and their cost effectiveness, but do not define presumptive RACT levels as the CTGs do. Updating the ACTs would not, by itself, change the EPA's NO_x or VOC RACT guidance, but it could provide information that would lead to a new conclusion as to which control measures constitute RACT for a specific source or source category. Progress has been made in improving the cost effectiveness of some NO_x and VOC controls.

We recognize that many of the CTGs/ACTs have not been revised in quite some time and thus may not provide the most accurate picture of current control options. Therefore, we advise states to consider new information that has become available before certifying that a prior 1-hour ozone RACT determination or a 1997 ozone RACT determination, even where controls were required, still represents an appropriate RACT level of control for the 2008 ozone program. In the alternative, the state should revise the SIP to reflect a modified RACT requirement for specific sources or source categories. In cases where additional information is presented, for example, as part of notice-and-comment rulemaking on a RACT SIP submittal, states (and the EPA) would necessarily consider the additional data in reviewing what control obligation is consistent with RACT.

In portions of 2008 ozone nonattainment areas where control technologies for major sources or source categories were previously reviewed and controls applied to meet the RACT requirement under the 1-hour or the 1997 standard, states should review and, if appropriate, may accept the initial RACT analysis as meeting the RACT requirements for the 2008 standard. Absent new data or public comments indicating that the previous RACT determination is no longer appropriate, the state may conclude that additional SIP controls are not necessary to meet the RACT requirement for these sources for the 2008 standard. In such cases, the state's SIP revision submitted after notice and comment should contain a certification, with appropriate supporting

information, (including consideration of new data), indicating that these sources are already subject to SIP-approved requirements that still meet the RACT obligation. There are cases where the initial RACT analysis under the 1-hour standard or the 1997 standard for a specific source or source category concluded that no additional controls were necessary. In such cases, a new RACT determination is needed to consider whether more cost effective control measures have become available for sources that were not previously regulated. A re-analysis may determine that controls are now economically and technically feasible and are necessary to meet the RACT requirements.

Comment: Alternate control technology for RACT

Commenter (0129) encouraged the EPA to provide the states the flexibility to consider alternate control technology when developing their RACT SIP, provided adequate justification for the technical and economic feasibility of such approaches is also provided.

Response: When developing their RACT SIPs, states must consider control technology that is economically and technologically feasible and is based on the most recent information available. In the preamble to the proposed rule, the EPA acknowledged that some CTGs and ACTs are outdated and provided examples of more recent technical information sources that states may refer to when developing their RACT SIPs. We would also encourage states to work closely with their respective Regional Offices should they need assistance locating additional information sources that may be helpful in developing their RACT SIPs.

Comment: Controls that have been achieved in practice

Commenters (0144 and 0180) supported the statement in the proposal where the EPA "generally considers controls that have been achieved in practice by other existing sources in the same source category to be technologically and economically feasible."

Response: The EPA agrees with the Commenters.

4. Averaging over a nonattainment area

Comment: Commenter (0144) did not support a nonattainment area-wide weighted NO_x averaging demonstration that exempts HEDD EGUs from NO_x control. The Commenter stated that, an exemption of HEDD EGUs from NO_x control does not reduce NO_x emissions when and where such reductions are necessary to attain the ozone NAAQS.

Commenter (0180) stated that, the EPA's definition of RACT plainly requires each individual source to apply control technology to achieve the lowest emission limitation that each particular source is capable of meeting considering technology and economic feasibility. Commenter (0180) stated that, substitution of area-wide averaging for source-specific RACT also flouts the language of section 182(b)(2) of the Act, which requires SIPs for Moderate and above areas to require implementation of RACT "with respect to … [a]ll VOC sources in the area covered by any CTG issued before November 15, 1990," and "[a]ll other major stationary sources of VOC

that are located in the area." 42 U.S.C. § 7511a(b)(2). Commenter (0180) stated, the EPA cannot supplant these statutory directives with an area-wide averaging program that allows some sources to avoid installing RACT controls at all.

Response: The EPA's existing policy recognizes that states can meet NO_x RACT requirements by submitting as part of their NO_x RACT SIP submittal a demonstration that the weighted average NO_x emission rate from sources in the nonattainment area subject to RACT achieves RACT-level reductions. We note, however, that this policy does not include an exemption for HEDD EGUs from NO_x control.

The EPA disagrees with the comment that "area-wide averaging is not a legally permissible method for complying with" RACT and that RACT requires reductions from "each and every source" in an area. The EPA believes that the statute, as interpreted by the court in *NRDC v. EPA*, allows each state the option of demonstrating that its program achieves RACT level reductions by showing emission reductions greater than or equal to reductions that would be achieved through a source-specific application of RACT in the nonattainment area. *NRDC v. EPA* interprets the CAA as requiring that each nonattainment area must achieve "RACT-level reductions," which is to say the reductions that would be achieved "if RACT-level controls were installed in the area." 571 F.3d at 1258. In sum, nothing in the CAA or in *NRDC v. EPA* requires that "each and every" source in the area employ RACT or individually achieve RACT-level reductions.

The Commenter attaches too much significance to the EPA's reference to RACT as the lowest emission limitation that "a particular source" is capable of meeting. 78 FR 34191 n. 33. The Commenter suggests that this requires that each particular source meet the limitation, but EPA does not agree with this. The quoted language does no more than reflect the fact that source-specific control assumptions would need to be developed in order to determine the overall reduction level that would be achievable in a nonattainment area through source-specific application of RACT. Moreover, as noted in the proposal, the EPA believes states are in a better position than EPA to conduct this analysis (78 FR 34193). Consistent with previous guidance, the EPA continues to believe that RACT can be met on average by a group of sources within a nonattainment area rather than at each individual source. Therefore, states can show that SIP provisions for these sources meet the ozone RACT requirement using the area-wide averaging approach.

5. Trading within a nonattainment area

Comment: Commenters (0132 and 0163) supported allowing states to rely on participation in a nonattainment area cap and trade program to satisfy RACT requirements.

Commenter (0132) believed that for sources located within a nonattainment area, cap and trade programs that are limited to that nonattainment area can provide additional flexibility to affected sources while still achieving significant emission reductions that satisfy RACT.

Commenter (0163) believed that it is possible to design and implement a trading program for

RACT that achieves enforceable, contemporaneous emissions limitations equal to RACT. Such a program could allow multiple sources within a nonattainment area to enter into an enforceable permit to comply with an overall weighted average RACT emission limit based on their operation over a single day. This assures that RACT is met in the area each day.

Response: Unless there are federal or state regulations, or permit(s) issued to a source containing a condition or conditions precluding such use, the EPA agrees with the Commenter that, states may rely on a cap-and-trade program that is limited to a nonattainment area for purposes of meeting RACT for sources located in the nonattainment area. In order to rely on such a cap and trade program for purposes of meeting the RACT requirements, the state should demonstrate that the program achieves reductions greater than, or equal to RACT and that, the program ensures that all necessary reductions will occur within the nonattainment area. For example; S*ee* 30 Texas Administrative Code, Chapter 117, sections 9800(a)(1) and (2).

6. Regional trading program

Comment: Support the option that a regional trading program may meet RACT

Commenters (0158, 0159, 0163 and 0166) supported the proposed option that would allow states to demonstrate that compliance with a regional trading program, such as CAIR, by affected sources within a nonattainment area will satisfy RACT requirements for those sources. Commenter (0159) supported this approach, as it focuses on sources within the non-attainment area that produce locally beneficial emissions reductions. Commenter (0166) encouraged the EPA to approve SIPs that make a showing to that effect and stated that the EPA also should assist states in making these determinations by providing tools and data that will allow states to do so.

Response: The EPA thanks the Commenters for their thoughtful comments in support of the proposed approach, which would allow states to demonstrate that compliance with a regional trading program by sources within the nonattainment areas are satisfying RACT requirements for the nonattainment area. A SIP that includes such an analysis will be reviewed by the EPA on a case-by-case basis to evaluate the extent to which the analysis demonstrates that source participation in the trading program in fact achieves emission reductions within the nonattainment area that are equal to, or greater than, application of RACT in that nonattainment area. The EPA encourages states to work with their respective EPA Regional Offices to seek guidance when conducting their local area analyses.

Comment: Do not support the option that a regional trading program may meet RACT

Commenters (0144, 0146, 0163, 0168, 0180 and 0177) did not support the proposal that states have the option of demonstrating that compliance with a regional trading program by certain sources within a nonattainment area will achieve RACT level reductions for those sources within that nonattainment area.

Commenter (0144) stated that it does not support ozone season trading of NO_x emissions. A trading program that allows higher NO_x emissions on high ozone days makes it difficult for

states that are subjected to upwind sources of NO_x to achieve the ozone standard.

Commenter (0146) stated that neither states nor the EPA can guarantee such reductions either locationally or temporally through a regional cap-and-trade program; instead, the EPA needs to thoroughly review source-specific RACT certifications and require the operation of all implemented RACT controls.

Commenter (0163) disagreed with this approach because a regional trading program such as CAIR does not include requirements for enforceable, contemporaneous reductions required by CAA section 172 (c)(6). Commenter (0163) stated that while RACT requires source-by-source application of controls with a daily or 30-day rolling average, CAIR is a multi-state, seasonal and annual program and, with the banking and trading provisions of CAIR, there is no certainty that emissions would remain below RACT levels from one year to the next. The commenter further stated that it is possible to design and implement a trading program for RACT that achieves enforceable, contemporaneous emissions limitations equal to RACT. New York has instituted such a program, which allows multiple sources within the New York City nonattainment area to enter into an enforceable permit to comply with an overall weighted average emission limit based on their operation over a single day. This assures that RACT is met in the area each day.

Commenter (0168) stated that the EPA's past reliance on trading programs to fulfill substantive requirements like RACT and best available retrofit technology (BART) have resulted in many significant sources remaining uncontrolled in upwind areas, which significantly and negatively impact air quality in some downwind areas. The Commenter recommended that RACT apply to every stationary source on a unit-by-unit basis.

Commenters (0144 and 0177) stated that the EPA should ensure that NO_x sources with previously installed air pollution control equipment are required to fully operate those controls during the ozone season. The Commenters pointed out that some sources that are upwind contributors to downwind nonattainment areas turn off their NO_x controls and simply buy NO_x allowances to meet their emissions requirements. This adversely impacts air quality in downwind areas.

Commenter (0180) cited *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009) for the proposition that the Clean Air Act does not allow states to rely on the participation of a source in a regional trading program to satisfy RACT requirements.

The Commenter stated that the EPA needs to clarify that such a demonstration is not sufficiently made merely because a source has installed controls to comply with a regional trading program, or is predicted to reduce its emissions to an assumed level since a source can install emission controls and then simply choose not to operate such controls on a given day or during a given time period as long as it has enough allowances under the regional trading program to cover its emissions. Commenter (0180) stated that, under CAIR, a source with RACT-level controls could shut down entirely and sell its allowances to other sources in the nonattainment area that do not have RACT-level controls. Commenter (0180) stated, the Act mandates that SIPs "*require*" implementation of RACT but that a "prediction" that sources are likely to choose to limit their

emissions to RACT levels within a nonattainment area under a trading program that does not require them to do so – and that in fact allows them to avoid implementing RACT controls – does not satisfy these statutory requirements.

Response: The EPA agrees that mere participation in a regional trading program, such as CAIR, by sources in a particular nonattainment area is not sufficient for purposes of demonstrating that those sources have met their RACT requirements for the nonattainment area. As explained in the preamble to the proposed rule, the statute provides that RACT SIPs must demonstrate that RACT-level emission reductions are achieved within the relevant nonattainment area. Thus, it does not allow states to rely upon the participation of a source in a regional cap-and-trade program to satisfy RACT requirements without a demonstration that that participation results in emission reductions equivalent to those achieved through the installation of RACT controls.

Additionally, the EPA agrees that states may not merely claim that a source has met RACT by installing controls as part of a regional trading program. States must, as part of their RACT SIP submission, demonstrate that the controls put in place at a source are in fact RACT.

The EPA disagrees with those commenters that say that states should not have the option to demonstrate that compliance with a regional trading program by sources in a nonattainment area achieves RACT-level reductions within the nonattainment area. In *NRDC v. EPA*, the case cited by Commenters, the D.C. Circuit noted that a determination that RACT was satisfied by compliance with a regional trading program might be permissible for an area if accompanied by a technical analysis demonstrating that the program in fact "results in greater emissions reductions in a nonattainment area than would be achieved if RACT-level controls were installed in that area."[17] In other words, the Court rejected the notion that a regional trading program intended to eliminate interstate transport of emissions consistent with section 110(a)(2)(D)(i)(I) could automatically constitute the RACT-level of control required by section 172(c)(1), but held open the possibility that an analysis could be conducted to determine whether such a program would result in the same or higher level of emissions reductions in individual nonattainment areas. We note that this is an option available to states, not a requirement, and if a state so chooses, it may establish RACT requirements on a unit-by-unit basis and not provide for area wide averaging. In such cases, a review of the past level of control achieved by units with SCR, SNCR, or any other type of NO_x control would be relevant to the review of RACT under the 2008 ozone NAAQS.

The EPA disagrees, however, with any comments that RACT requires a source-by-source application of controls and any implication by the commenters that, the proposal should address whether controls are required to be operational at all times at sources in the nonattainment area. RACT can be met on average by a group of sources within a nonattainment area rather than at each individual source. Nothing in the CAA or in *NRDC v. EPA* requires that each and every source in the area employ RACT or individually achieve RACT-level reductions. Further, the

[17] 571 F.3d 1245,1258 (D.C. Cir. 2009).

EPA's NO_x RACT guidance (NO_x Supplement to the General Preamble, 57 FR 55625, November 25, 1992) encouraged states to develop RACT programs that are based on "area wide average emission rates." Additional guidance on area-wide RACT provisions is provided by EPA's January 2001 economic incentive program guidance titled, "Improving Air Quality with Economic Incentive Programs." Thus, the EPA's existing policy recognizes that states may demonstrate as part of their NO_x RACT SIP submittal that the weighted average NO_x emission rate from a group of sources in the nonattainment area subject to RACT meets NO_x RACT requirements.

Regarding the Commenters' concerns about enforceability and the timeframe within which RACT controls should be applied (i.e., daily or 30-day rolling average), the EPA notes that through the final rule, we merely provide the option for states to make a demonstration that sources' participation in a trading program achieves equivalent or greater emission reductions within the nonattainment area as RACT-level controls would. The preservation of this option does not prejudge the substance of what those demonstrations will contain, and the specific arguments raised by commenters are more properly addressed in the context of the case-by-case determinations of whether the demonstrations meet the RACT requirement.

Comment: Is CAIR equivalent to RACT?

Commenter (0152) believed CAIR or other regional trading programs should continue to be equivalent to RACT for EGUs without the need for analysis beyond what EPA has already prepared. If challenged, Commenter (0152) stated, the EPA will be in a position to better explain to the courts why this is appropriate compared to prior decisions regarding the NO_x SIP Call.

Response: The EPA disagrees with the comment that CAIR or other regional trading programs should continue to be automatically treated as equivalent to RACT for EGUs without the need for an analysis. In *NRDC v. EPA* (571 F.3d 1245 (DC Cir. 2009), the Court rejected the notion that a regional cap-and-trade program intended to eliminate interstate transport of emissions consistent with section 110(a)(2)(D)(i) could automatically constitute RACT-level control as required by section 172(c)(1).The Court specifically held that the Phase 2 Ozone Implementation Rule allowing use of the NO_x SIP call to constitute RACT without any locally applicable analysis regarding the equivalence of NO_x SIP Call and RACT reductions: "is inconsistent with the CAA . . . in allowing participation in a regional cap-and-trade program to satisfy an area-specific statutory mandate." The Court emphasized that: "the RACT requirement calls for reductions in emissions from sources in the area; reductions from sources outside the nonattainment area do not satisfy the requirement . . . Accordingly, participation in the NO_x SIP call would constitute RACT only if participation entailed at least RACT-level reductions in emissions from sources within the nonattainment area." This reasoning applies equally to any trading program that allows trading across nonattainment area boundaries. Therefore, the EPA could not, consistent with the *NRDC* opinion (*NRDC v. EPA*, 571 F.3d 1245) approve a SIP that found compliance with CAIR to satisfy RACT requirements but did not included the necessary analysis showing that sufficient reductions *in the nonattainment area* would be achieved under the trading program.

Additionally, the EPA disagrees with the Commenter that, there is no need for an analysis beyond what the EPA has already prepared. To the extent that the Commenter is referring to the Supplemental Technical Analysis that EPA conducted to assess whether compliance with CAIR could satisfy the NO_x RACT requirement for EGUs in certain geographic areas,[18] the EPA no longer believes that this analysis provides an adequate demonstration that participation in the CAIR is projected to achieve equal or greater annual emissions reductions from EGUs than source-by-source RACT for certain specific areas. The EPA has concluded that the analysis's across-the-board assumptions regarding what constitutes RACT for all sources in all nonattainment areas were inadequate and did not consider whether more advanced control technologies, such as post-combustion controls (e.g., selective catalytic reduction or selective non-catalytic reduction), might at some time be technically and economically feasible for specific sources in some areas.

7. Consideration of the limited impact of VOC emissions in some areas

Comment: Support consideration of limited impact of VOC controls in areas that are NO_x-limited

Commenters (0129, 0130, 0132, 0136, 0137, 0140, 0151, 0159, 0161, 0162, 0169, 0172, 0178 and 0179) generally supported an approach that would allow state RACT determinations to take into consideration the limited impact of VOC emission reductions on reducing ozone concentrations in some areas.

Commenters (0132 and 0179) stated, the EPA has historically interpreted CAA, § 172(c)(1) as a requirement that the SIP incorporate all RACM that would advance an area's attainment date (57 FR 13498) and, since §172(c)(1) and §182(b)(2) include RACT as a subset of the broader RACM requirement, the Commenter supported allowing state RACT determinations to take into consideration whether the associated VOC emission reductions would advance the area's attainment date.

Commenter (0129) suggested that, this substitution be allowed on a source category basis rather than a case-by-case basis to avoid unnecessary financial burdens on state agencies.

Commenter (0130) stated that, imposition of VOC controls in areas that are NO_x-limited is burdensome to both the regulated entity as well as the state, which must determine, implement, and enforce these controls.

---

[18] *See* "Technical Support Document for Phase 2 of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard-Notice of Reconsideration; NO_x RACT for EGUs in CAIR States – Supplemental Technical Analysis," December 2006.(Docket ID no. EPA-HQ-OAR-2003-0079, item number EPA-HQ-OAR-2003-0079-1044.2) (Supplemental Technical Analysis).

Commenters (0151, 0153) agreed with the EPA that, NO_x reductions also may be quicker to implement and can be made at lower cost.

Commenter (0169) stated that, it is burdensome and inappropriate for individual states to be asked to define thresholds for "ineffective" and to define a test for concluding that the effect of additional VOC reductions would be negligible; rather, the EPA is tasked with these types of decisions, not states, to ensure national consistency is met.

Commenters (0129, 0132, 0136, 0152, 0161 and 0169) stated that, this approach would allow states the flexibility to tailor RACT requirements to the geographically-specific limitations of each nonattainment area.

Commenter (0129) stated that, given the agency's recognition of the utility of NO_x control technology for reducing ozone, they strongly encourage the final rule to include an explicit requirement that state RACT determinations allow substitution of NO_x RACT rules for VOC RACT rules in geographic areas where biogenic and mobile source VOC production exceeds the VOC contribution from stationary sources.

Commenter (0153) stated, this flexibility should be limited to cases where it can be scientifically demonstrated that additional VOC controls are ineffective in reducing ambient ozone concentrations.

Commenter (0161) stated that, states should have the flexibility to implement a SIP tailored to the particular circumstances present in nonattainment areas in each state and that the EPA has authority under the CAA to implement rules giving states this flexibility, because Congress has delegated to the EPA identification and implementation of RACT requirements (*See* 78 FR 34191). Commenter (0161) stated that, allowing states to tailor RACT to the specific circumstances of the nonattainment area would be a reasonable exercise of agency discretion [*See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)].

Commenter (0178) supported state, flexibility in order to avoid the situation in which small additional VOC reductions actually yield a disbenefit to the ozone air quality concentration through the corresponding NO_x increases from RACT-required add-on thermal-oxidizing controls.

Commenter (0130) stated that, these modifications should extend beyond section 182(b)(2) RACT requirements to those required for areas within the OTR.

Commenter (0140) stated, the EPA should allow states to demonstrate that adoption of VOC RACT rules would not be “reasonable” if, as a whole, adoption of such rules for a nonattainment area would not reduce ozone levels “significantly.” The Commenter argued that, “significantly” can be defined as an average contribution of over 0.75 ppb (1 percent of the level of the standard, which EPA used for defining a “significant” air quality contribution for the Cross-State Air Pollution Rule) or 1 ppb (which would definitely be enough of an impact to make the difference between an area attaining or not attaining the standard) for all days when 8-hour ozone is

modelled to exceed 75 ppb. For example, the University of Texas at Austin's (UT's) modelling of 25 percent and 50 percent reductions in anthropogenic VOC emissions only reduced 8-hour ozone levels at Travis County's key regulatory ozone monitor by an average of 0.17 ppb and 0.35 ppb, respectively, across all of the days with an ozone violation during the June 2006 ozone episode developed by TCEQ. Likewise, APCA modelling on the same episode indicated that emissions from the Austin-Round Rock MSA only accounted for 21 percent of the ozone levels modelled at the key regulatory monitor in the MSA on high ozone days in the June 2006 episode, while other emissions from other areas of the state accounted for 26 percent of the ozone levels modelled within the MSA.

Commenter (0151) stated, the agency should assure states in the final rulemaking that even if there is not a more reactive VOC species or a NO_x source, the fact that it is relatively ineffective to control certain VOC with minimal photochemical ozone potential also should be considered in determining if RACT exists for that source. The EPA should address the situation where a state determines not to regulate the source of a low reactive VOC but the state still cannot demonstrate timely attainment of the NAAQS.

Commenter (0153) stated that; the evaluation of what is economically feasible should consider the cost/ton, impact/ton and cost/impact for NO_x and VOC. The commenter suggested that a demonstration should be provided for all point and area VOC sources in the nonattainment area. The commenter further suggested that a demonstration should involve running a photochemical grid model twice, once with all point and area VOC emissions and again with the point and area VOC emissions zeroed out. If the impacts are less than 1 percent of the NAAQS (0.75 ppb), then all RACT sources are "ineffective" at reducing ozone concentrations and the effect of additional VOC reductions would be "negligible." If VOC reductions are shown to be "ineffective", then the impact on public health and welfare would be "negligible." The commenter suggested that the EPA should set clear, unambiguous, minimum requirements for approvable scientific demonstrations so that state agencies can design, perform, and document their demonstrations with a reasonable assurance of the EPA approval. The commenter concluded that definitive requirements will also allow the EPA to promptly review and act on state demonstrations.

Commenter (0179) stated that, if control technology aimed at reducing anthropogenic VOC shows some benefit, but is not needed to attain and maintain the ozone standard because other measures are shown to be more than enough, then it should not be considered RACT. The Commenter requested this flexibility for individual sources as well as source categories.

Several Commenters (0129, 0130 and 0140) stated that, in some nonattainment areas, additional reductions of anthropogenic VOC emissions have been scientifically demonstrated to have a limited impact on reducing ozone concentrations and encouraged the EPA to allow such a scientific demonstration to be considered when determining whether a control technology is reasonable in a RACT analysis.

Commenter (0151) stated that, it would be unreasonable to require States to impose control requirements on low-reactivity VOC like ethanol or methanol where it will make little difference in an area's ability to achieve the ozone standard and potentially aggravate an ozone problem by

increasing NO_x as a result of incinerating VOC. The commenter believed that it would be particularly arbitrary and unreasonable to penalize states that failed to control such minimally reactive VOC if it were technically feasible and cost-effective to reduce higher reactivity VOC or NO_x from other sources. Commenter (0151) urged the EPA to amend 40 CFR § 51.1112 to clearly articulate a legal basis for use by the states of the RACT flexibility.

Commenter (0151) further stated, the EPA should "codify" its views on "VOC reactivity" to discourage states from regulating sources of VOC that are marginally reactive**.**

Response: The EPA recognizes that modification of the existing guidance on determining RACT could add flexibility that would be beneficial to the efficiency of ozone controls in some states. Several Commenters provided examples where photochemical modeling suggests that ozone formation in some areas is NO_x limited, such that changes in anthropogenic VOC emissions will have little effect on ozone concentrations. We agree that there appears to be scientific support for the existence of NO_x-limited nonattainment areas. Additionally, we agree that from a practical standpoint, modification of the existing guidance on determining RACT could add flexibility that would be beneficial to the efficiency of ozone controls in some states.

However, the Commenters supporting flexibility presented legal arguments that, the EPA does not currently view as sufficient to address potential statutory restrictions. The main legal arguments presented by Commenters in support of flexibility argue that, the EPA has "discretion" to determine what constitutes "reasonably" available control technology. However, the EPA is concerned that it may not have sufficient discretion to support this option. Section 182(b)(2) provides that SIPs must "require the implementation of RACT" with respect to "VOC sources." It does not clearly authorize consideration of whether technology that is "reasonably available" is also reasonably effective with respect to improving air quality or reducing ozone formation, and it does not specify criteria for discerning a level of air quality improvement below which available technology does not need to be implemented. Moreover, as noted by a Commenter, Congress has shown that when it intends Subpart 2 to allow exceptions based on air quality benefit considerations it knows how to say so expressly. *See* e.g. section 182(f), (allowing the EPA to waive certain NO_x reduction requirements where such reductions will not provide "net air quality benefits."). Thus, we agree with the Commenters finding it significant that 182(b)(2) contains no comparable language. The EPA's analysis is further informed by our recognition that the provisions of Subpart 2 of the CAA Subpart D generally reduce agency discretion in determining how to implement the Act. *See Whitman v American Trucking Assoc.*, 531 U.S. 457, 484 (2001).

The EPA is not prepared at this time to establish a specific definition for "negligible effect." Additionally, given the concerns raised by Commenters about whether the CAA authorizes such an approach, the EPA is not at this time revising our long-standing RACT determination guidance. The EPA may continue to explore this option and potential legal support for it in the future.

We also note that we received information from Commenters that may be useful in evaluating the definition of "negligible effect," which we will consider in the future as we further assess

whether to modify the existing RACT guidance.

Comment: Do not support consideration of the limited impact of VOC controls

Commenters (0146, 0163, 0168, 0177 and 0180) urged the EPA to remove the option for states to consider air quality impacts when performing VOC RACT analyses.

Commenters (0146 and 0177) stated that, since many states have expended considerable resources to adopt RACT and CTG rules, if the EPA were to allow this proposed circumvention of mandatory CAA requirements, it will exacerbate an already inequitable distribution of clean air costs; i.e., there are significant equity issues that the EPA should consider.

Commenters (0168, 0177 and 0180) stated, the EPA has issued NO_x waivers in the past and this appears to be setting up some type of VOC waiver scheme, which the Commenters do not support. Commenter (0180) stated that, where Congress intended to allow exceptions based on air quality benefit considerations it has expressly said so, as in section 182(f); however, no such exception appears in, or applies to, section 182(b)(2).

Commenter (0177) pointed out that, in the Phase 2 Rule for the 1997 NAAQS, the EPA responded to a comment urging the EPA to expand the waiver provisions of section 182(f) to VOC RACT as well as NO_x RACT (70 CFR 71662; 11/29/2005), saying: "We [EPA] do not see any provision in the CAA that would give us the authority to create such an exemption. While Congress could have created a VOC waiver at the same time the section 182(f) NO_x waiver provisions were enacted, Congress chose not to do so." Commenter (0177) also stated that, the EPA went on to note that the congressionally required CAA section 185B study conducted by the National Academy of Sciences concluded that, unlike NO_x, "*'control of VOC never leads to a significant increase in ozone.' Thus, the section 185B report does not support a waiver provision for VOC.*"

Commenters (0146, 0163, 0168 and 0177) stated that, the CAA requires RACT on all major sources of VOC in nonattainment areas and the Commenters do not believe that, the EPA has the authority to eliminate this requirement.

Commenter (0163) stated, this "flexibility" would effectively make the subpart 2 RACT requirements the same as the subpart 1 RACM/RACT requirements. Commenter (0163) cited *South Coast*, where the EPA was instructed not "to render Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory," nor could it "construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.* at 484-85.

Commenter (0177) stated that, the plain text of the CAA and the EPA's previous interpretations of it make it clear that RACT is a required control level for specific sources, with no direct link to a level of ozone improvement or to any required demonstration of attainment. Commenter (0177) stated, RACT/CTGs are a minimum control requirement for specific areas and consideration of related ozone improvements should continue to be restricted to any additional RACM measures needed to achieve attainment.

Commenter (0180) stated, the EPA does not have the discretion to override Congress' mandate based on the agency's belief that such controls are not warranted or that controlling other pollutants would be better policy. Commenter (0180) stated that, Congress could not have been clearer that VOC RACT is mandatory for all of the referenced source categories and sources. Commenter (0180) stated that, a key feature of the 1990 Amendments to the Act was Congress' decision to supplement the Act's prior focus on air quality results (an approach that had often failed to produce timely attainment) with explicit requirements for emission reductions. Commenter (0180) stated, the EPA and states cannot circumvent the clear Congressional commands in section 182(b)(2) via the artifice of claiming that the economic feasibility of further VOC controls depends in part on the air quality benefit of such controls. Commenter (0180) stated that, not only has Congress made clear that section 182(b)(2)'s mandates for VOC RACT are not limited by any sort of air quality benefit test, but the plain meaning of "economic feasibility" does not have anything to do with air quality benefits, citing several cases.

Response: The EPA thanks the Commenters for their thoughtful comments. Given the concerns raised by Commenters about whether the CAA authorizes such an approach, the EPA is not at this time revising our long-standing RACT determination guidance. Therefore, states should continue to rely on existing guidance when developing their RACT SIPs. The EPA may continue to explore this option and potential legal support for it in the future.

Comment: Clarify consideration of the limited impact of VOC controls

Commenter (0150) urged the EPA to clarify that, this concept is only to be used where a state determines that VOC reductions as a whole are not needed, not in determining whether an individual source or source category makes "negligible" contributions to the area's emissions.

Response: The EPA is not finalizing revised RACT guidance for the 2008 ozone NAAQS. Therefore, states should continue to rely on existing guidance when developing their RACT SIPs.

8. MACT

Comment: SIP credit for MACT measures

Commenter (0151) suggested that, before requiring states to apply NO_x RACT to all combustion sources, the EPA should study certain MACT rules and specifically recommend the SIP credit for federal MACT measures in SIP planning. Commenter (0151) stated, that Mercury and Air Toxics Standards (MATS) compliance in the next 2 years is likely to force utilities to repower a sizeable portion of the existing utility fleet and may provide, significant NO_x reductions, even though NO_x reduction is not the goal of either CAA section 112 rule. These reductions should be well within the time allotted for implementation of creditable reductions for SIP-planning, although anticipated delays in implementation for grid reliability may occur. Commenter (0151) suggested that, before requiring states to apply NO_x RACT to all combustions sources, the EPA should study this issue and specifically recommend the SIP credit for federal MACT measures in

SIP planning. That study should also discuss the consequence of any delays in implementation under the MACT and the EPA's MATS Administrative Consent Order Policy allowing certain facilities an extra year for compliance.

Commenter (0159) agreed with the EPA's position and supported allowing states to rely on MACT standards for the purpose of demonstrating that a source has met VOC RACT.

Response: States can rely on emission reductions from federal control measures (including the MACT rules) to help areas attain the 2008 ozone NAAQS or to meet other SIP-related objectives, as long as the federal measures achieve their reductions prior to the relevant SIP-related deadlines. Regarding the issue of whether to specifically recommend the SIP credit for federal MACT measures in SIP planning, the EPA is not planning at this time to develop specific recommendations for SIP credit for Federal MACT measures. Additionally, we note that regardless of whether or not the EPA conducts such a study, the RACT requirements remain requirements that must be met under the CAA, whether through reliance on MACT or otherwise.

The EPA agrees with the Commenter that supported allowing states to rely on MACT standards for the purpose of demonstrating that a source has met VOC RACT. We note, however, that states should ensure that any MACT controls relied on for RACT adequately address all VOC and not just those that are also HAPs.

Comment: Municipal Waste Combustors

Commenter (0177) stated that, the EPA should act to move forward with the analysis needed to determine appropriate revisions to the municipal waste combustors (MWC) MACT, preferably before the end of 2013 so that states can take them into account when preparing RACT analyses. Commenter indicated that, if further delays occur in the issuance of MACT limits, states may be faced with modifying regulations twice to comply with both the MACT and RACT requirements.

Response: Although the agency remains committed to addressing issues raised in the remand, we currently have no specific schedule to develop a new proposal for MWCs.

9. RACM in areas that are NO_x-limited

Comment: Commenter (0130) suggested amending RACM guidance to follow the same common-sense approach proposed for RACT; i.e., if studies show that reducing anthropogenic VOC emissions in an area has little effect on ground-level ozone concentrations, RACM analyses should not be required for that pollutant.

Response: In order for states to demonstrate attainment of a standard, the EPA's long-standing policy has been that states must address whether there are RACM that may advance the attainment date. (*See* memorandum titled, "Additional Submission on RACM from States with Severe 1-hour Ozone Nonattainment Area SIPs," John Seitz, December 14, 2000). Additionally, existing EPA guidance already provides some assistance to states with identifying the type of measures that might be considered for RACM (*See* General Preamble, 57 FR 13549, April 16,

1992). If a state demonstrates that implementation of VOC emission reduction measures will not contribute to an area's RFP or to attainment, then additional control of VOC emissions does not need to be considered for RACM purposes. Thus, the EPA concludes that it need not amend RACM guidance to address this comment.

E. Does the 2008 ozone NAAQS result in I/M programs?

1. Do not support check engine light proposal

Comment: Commenter (0128) stated that, the idea that states could meet their NAAQS requirements through programs that offer vehicle owners free or subsidized repairs of vehicles with lit "Check Engine" lights is inconsistent with the purpose and function of auto insurance and urged the EPA to remove this suggestion from future iterations of the proposal. The commenter stated that the EPA's proposal suggests that states could meet their NAAQS requirements through programs that offer vehicle owners free or subsidized repairs of vehicles with lit "Check Engine" lights. The commenter further indicated that the EPA proposed that the choice of how to fund these repairs would rest with the state, but could include "requiring vehicle insurance providers ... to cover the cost of repairing the vehicle when the 'Check Engine' light comes on." The commenter believed this idea is inconsistent with the purpose and function of auto insurance and the commenter urged the EPA to remove this suggestion from future iterations of the proposal. (0128)

The commenter also stated that auto insurance, like all property and casualty insurance, provides coverage for fortuitous losses, such as those incurred when a vehicle is involved in a collision. It is not designed and was never intended, to provide for upkeep and maintenance. The commenter pointed out that the responsibility for "Check Engine" repairs, and the maintenance to avoid them, rest with a vehicle's owner. The commenter believed that if this obligation is removed, or shifted to an insurance company, a moral hazard could be created where owners could simply neglect to maintain their vehicle with the knowledge that the costs of doing so would be borne by others. The commenter further stated their understanding that automobile insurance is provided based upon actuarial research into the statistical likelihood that a driver and a vehicle may be involved in a collision resulting in property or physical damages. The commenter believed that there are no existing actuarial models or processes for insurance companies to effectively evaluate and price any insurance policies that cover the maintenance and repairs of vehicles that are not a result of a collision resulting in property or physical damages. The commenter concluded that developing and implementing such standards would further increase the costs of providing insurance coverage and therefore raise the insurance rates for all drivers. The commenter further believed that the increased expense of coverage could have the unintended consequence of inducing more drivers to forgo having vehicle insurance. The commenter indicated that uninsured motorists already present a significant cost for insurance consumers, and this rule could exacerbate the problem. The commenter added a similar concern that drivers may opt to carry only liability coverage rather than collision/comprehensive coverage in response.

Response: The EPA did not propose and does not intend to propose to require either that states mandate or that insurance companies offer such an alternative to I/M. Instead, the EPA was

providing an example of one potential approach to achieving needed vehicle emission repairs that doesn't rely on traditional, periodic I/M testing. The EPA notes that some insurers are already accessing vehicles' OBD systems to provide – for example – safe driver insurance based upon data gathered from the OBD system for that specific vehicle and driver. The EPA believes that such insurance companies may have access to the data needed to determine whether offering coverage (or an extended warranty package) for OBD-triggered repairs would make business sense and, if it does, to then work with the I/M states in which they operate to accept such coverage as an alternative means of complying with the I/M requirement, but the EPA does not anticipate such coverage being a required element of insurance.

2. Alternative I/M programs

Comment: Commenter (0137) encouraged the EPA to provide the flexibility to substitute programs or requirements in place of I/M programs when they can be shown to be more beneficial and cost effective. The commenter stated that according to the implementation requirements, no new I/M programs are required as a result of the 2008 ozone NAAQS; however, new mandatory programs could be necessary due to future ozone standards. The commenter indicated that while EPA explains in the implementation rule that today's I/M programs are less expensive and easier to administer due to advances in technology, these programs still require significant state resources. The commenter added that advances in emissions control technology and fleet turnover, which will only continue over time, have lessened the effectiveness of these programs. For this reason, the commenter encouraged the flexibility to substitute programs or requirements in place of I/M programs when they can be shown to be more beneficial and cost effective.

Commenters (0144, 0146) supported the flexibility proposed by the EPA in designing alternative I/M programs, but also expressed concerns. The commenter stated that any alternative design must meet the appropriate I/M performance standard for the area. The commenter suggested that the EPA should provide guidance on how to calculate the benefits of such alternative designs to enable states to evaluate options and demonstrate that they meet the performance standards. The commenter appreciated the EPA's willingness to be flexible regarding alternative I/M programs, including using OBD-only emissions testing and telematics and no longer requiring tailpipe testing for applicable fleets. However, the commenter believed that any alternative I/M program approach must be consistent with CAA and any areas with new I/M programs should be treated with the same rigor as areas with existing I/M programs. The commenter stated that while advances in technology often afford new approaches to existing problems, any innovative program structure must be accompanied by guidance indicating minimum requirements to assure that the program's emission reductions are real, quantifiable and enforceable. Commenter (0146) suggested that the EPA must also ensure that its mobile source emissions model (e.g., MOVES) is updated to better simulate the impacts of any alternative I/M programs. Commenter (0146) believed that the EPA's proposed I/M program alternatives introduce issues that must be addressed to ensure that any alternative program design meets performance standards. The commenter stated that the EPA's specific suggestion that I/M programs that do not rely on required testing would be considered adequate is problematic. The commenter believed that the EPA's discussion is cursory and does not address significant implementation issues, including

vehicle tampering, motorist compliance and enforcement, program efficacy and potential regulatory conflicts in cases where EPA suggests other agencies assist in implementing the program. Moreover, the commenter believed that the EPA's proposed voluntary program overlooks that higher failure rates typically occur when enhanced I/M programs are first implemented and decline as vehicle owners and repair technicians learn what level of maintenance or repair is required to pass the periodic tests. The commenter concluded that the EPA's proposed metric for calculating equivalency, is therefore inappropriate and suggested that when designing alternatives, the EPA should consider appropriate incentives for motorists to better maintain their vehicles and seek repairs as failures occur. The commenter urged the EPA to ensure that such issues are addressed through a separate I/M rulemaking.

Commenter (0179) believes that, states should have maximum flexibility when developing an I/M program. Commenter believes that, the current state program in North Carolina takes a reasonable approach, but recognized that future improvements in vehicle technology and communications software could open up other possibilities that could cost effectively achieve I/M's primary goal of reducing emissions from the fleet in-use.

Response: In its discussion of I/M flexibilities and alternatives available to existing and future I/M programs in the preamble to the SIP Requirements proposal, the EPA was not proposing changes to the I/M rule to enable these flexibilities. Rather, these are flexibilities currently available under the I/M rule as promulgated. Specifically, the I/M rule states:

> … Equivalency of the emission levels which will be achieved by the I/M program design in the SIP to those of the model program described in this section shall be demonstrated using the most current version of EPA's mobile source emission model, or an alternative approved by the Administrator, using EPA guidance to aid in the estimation of input parameters. *States may adopt alternative approaches that meet this performance standard. States may do so through program design changes that affect normal I/M input parameters to the mobile source emission factor model, or through program changes (such as the accelerated retirement of high emitting vehicles) that reduce in-use mobile source emissions…*

40 C.F.R. 51.351(d) (emphasis added). Thus, the I/M Rule provides that alternative approaches that change the in-use fleet in such a way as to reduce the emissions of the in-use fleet by an amount equal to or greater than the applicable performance standard can be considered as acceptable alternatives to or supplements for the otherwise applicable I/M program. As discussed in the preamble to the proposed SIP Requirements rule, EPA believes that mobile source control measures like vehicle repair incentives, accelerated fleet turnover, remote OBD testing and repair and even as-yet unthought-of mobile source controls have the potential to meet this definition of "alternative approaches." It is up to the states to innovate in this regard, and the EPA will judge whatever proposals may come on a case by case basis. At the same time, I/M is a statutorily-mandated requirement, and the EPA does not believe it has authority to waive I/M requirements in exchange for states adopting programs in a SIP that do not achieve equivalent reductions in emissions of the in-use fleet, as those cannot be considered an alternative approach to meeting the performance standard for I/M.

It should also be stressed that while this flexibility to demonstrate the equivalency of alternative approaches exists in the I/M rule as currently written, such flexibility is an allowance and not a requirement. Traditional I/M programs like those currently approved in individual SIPs are under no obligation to change, and potential new I/M program areas under future standards will continue to have the option to adopt traditional I/M programs Furthermore, it should be noted that – contrary to Commenters' claims – the effectiveness of I/M testing has not lessened over time. I/M tests are still successfully identifying vehicles in need of repair. It is just that the number of vehicles needing repair has gone down as newer vehicles are staying cleaner, longer, so that the amount of excess emissions available for I/M to reduce has gotten smaller.

Regarding the suggestion that the EPA develop guidance on I/M alternatives, the agency has no plans at this time to develop guidance (or separate modeling options) for determining the equivalency of alternatives, given the number of alternatives and variations on alternatives which may or may not ever be adopted by actual program areas. Again, the flexibility to innovate in this regard exists in the I/M rule, but it is up to individual states to seize and make the best of this opportunity. EPA, in turn, will work with such states to assess the potential their proposed alternative approaches on a case-by-case basis to assure that the requirements of the I/M Rule are met.

Regarding the observation that existing I/M program areas and future I/M areas be treated equally, the EPA believes that any flexibility available to new I/M areas will be equally available to existing I/M areas. The EPA acknowledges that it may not be practical for some existing I/M programs to take immediate advantage of these flexibilities, due to contracts, equipment investments, or simply having an older-than-average in-use fleet requiring tailpipe testing longer than would otherwise be necessary, but these factors and considerations are the prerogative of the states designing I/M programs.

3. Substitute for I/M program

Comment:

Commenter (0172) did not support any I/M requirement, despite the EPA's preamble discussion of how the modern I/M program is much improved over the original program and the use of alternative programs for vehicle testing. Commenter recommended that, the EPA cite Executive Order 13563, "Improving Regulation and Regulatory Review," for the same common sense approaches cited in other instances of the proposal to evaluate equivalent methods beyond I/M.

Commenter (0146) stated, the EPA should ensure equity among nonattainment areas, and not treat new nonattainment areas differently than current nonattainment areas by allowing the use of non-I/M emission reductions to meet I/M program requirements.

The commenter believed that the language of the CAA is clear with respect to requiring vehicle I/M programs and that over the years, many nonattainment areas have successfully implemented I/M programs, and the resultant emissions reductions and public health protections have been substantial. The commenter believed that technical advances since 1990 provide for much more

streamlined, cost-effective, publicly-acceptable I/M programs and the on-board diagnostic (OBD) approach to I/M is straightforward and provides significant flexibility in terms of program design, oversight and enforcement. The commenter urged the EPA to focus on alternative I/M program approaches, rather than on alternatives to the I/M program. Moreover, the commenter expressed concern that some of the EPA's proposed approaches, as articulated in the draft rule, are not well developed. The commenter urged the EPA to reconsider these approaches as well as develop new approaches, provide technical support for any proposed approaches and vet them through a separate I/M rulemaking process, where they can undergo more rigorous scrutiny and review. The commenter stated that the EPA's backsliding provisions require that existing nonattainment areas maintain their I/M programs and stated that the EPA should ensure equity among nonattainment areas and not treat new nonattainment areas differently than current nonattainment areas by allowing the use of non-I/M emission reductions to meet I/M program requirements.

Commenter (0177) disagreed with the EPA's assertion in the proposed rule (pg 34180) that Inspection and Maintenance (I/M) programs may no longer be relevant because of technological advances or alternative solutions. The Commenter stated that, as the proposed rule acknowledges, (pg 34195) I/M programs are much easier to implement than in the past and remain important in controlling motor vehicle emissions, which continue to be a large contributor to the ozone problem. While the overall light duty fleet is cleaner than in the past, there remains a significant gap between well-maintained vehicles and malfunctioning gross-emitting vehicles that can best be identified through mandatory I/M inspections. The Commenter suggested that, the EPA should be consistent in its message about I/M programs in new nonattainment areas and require that all I/M programs meet applicable I/M performance standards consistent with the requirements of the CAA and the EPA's I/M regulation. (0177)

Response: As discussed previously, the flexibility to substitute mobile source emission reductions equal to or greater than those that would be achieved by an I/M program meeting the relevant performance standard already exists in the I/M rule as promulgated. It is only recently that technologies (like OBD) have become so widely available as to make alternative programs like those discussed in the preamble (and allowed by this existing flexibility) feasible. Also as previously discussed, this existing flexibility is equally available to both existing and future I/M program areas.

4. Flexibility needed for future I/M programs

Comment:

Commenter (0141) encouraged the EPA to review the possibilities for flexibility for this requirement in the future. The Commenter stated that, whereas the EPA concludes no additional I/M programs are required under the 2008 standard, we are concerned with the continued cost effectiveness of this program in the future if the EPA tightens the ozone standard in the 2014/2015 time frame. In Ohio, I/M is currently required in the Cleveland area. The cost of this program is met with general revenue funds in the state budget; individuals are not charged for the test. The Commenter stated that, the annual cost of the program exceeds the state collections of

title V fees. The Commenter expressed concern that, this cost would be expanded in the future if additional areas are required to implement I/M. At some point the EPA needs to review the possibilities for flexibility for this requirement in the future. (0141)

Commenter (0164) requested the EPA to consider a more holistic approach when incorporating emerging vehicle innovations such as safety measures that avoid vehicle collisions altogether, fuel economy technologies and multi-pollutant emissions controls that achieve the lowest emissions possible.

Response: As previously discussed, the EPA believes that the flexibility already exists for I/M areas – whether existing or future – to adopt alternative mobile source control programs, provided these alternatives achieve the same or better emission reductions from in-use mobile sources as would be achieved by implementing an I/M program meeting the relevant performance standard.

5. Onboard diagnostic (OBD) testing

Comment: Commenters (0143, 0163 and 0168) supported the EPA proposal to use OBD testing. The commenter agreed DEP agrees that OBD testing should be the I/M Program of choice for any areas that are required to start an I/M program in the future. OBD testing has proven to be an efficient, cost-effective means for reducing emissions. Tailpipe testing is fast becoming obsolete as pre-1996 model year vehicles and vehicles that are not equipped with OBD systems but are subject to I/M testing are being replaced with OBD-equipped vehicles. (0143)

> Commenter (0163) indicated that the preamble stated that modern I/M is vastly different and simpler than the I/M programs of 20 years ago. New York agrees that I/M programs no longer need to use tailpipe testing and has promulgated OBD or "Check Engine Light" testing regulations for motor vehicles throughout New York State. The commenter believed that these new programs can be designed to be equivalent to previous I/M programs. The commenter believed that the EPA has correctly characterized the advantage of OBD technology in the proposal - OBD offers vehicle owners all the information they need regarding whether or not their vehicle will pass or fail an I/M inspection and provides for a multitude of simplified inspection options. The commenter believed that on-road mobile emissions have decreased significantly due to vehicle emission controls, and OBD technology is a means to ensure these controls are repaired when they fail.

Response: The EPA agrees, but notes that for some existing I/M areas with older-than-average in-use fleets, it may be necessary to continue tailpipe testing of vehicles model year 1995 and older longer than would be the case for areas with average or newer than average aged fleets.

Comment: Commenter (0164) requested that, the EPA take a leadership position in quantifying OBD test results and enhance the program from its current PASS or FAIL status. The commenter believed that estimates of emissions readings may be possible and helpful to the driving public. The commenter believed that a gap exists in knowing emission levels of MY1996 and newer

vehicles. The commenter believed that current PASS and FAIL readings make it difficult to accurately quantify impacts of high emitting vehicles in the overall on-road mobile source apportionment and emission reduction benefits of vehicle repairs or replacements.

Response: The EPA collaborated with industry experts to investigate the possibility of developing a separate method for translating OBD-based repairs on individual vehicles into specific levels of mass emission reductions but was unable to identify an adequate surrogate for paired testing of the vehicles in question using OBD and a mass-emissions test like the IM240 or Federal Test Procedure (as originally required under the 1992 I/M rule). Nevertheless, the EPA believes that existing guidance for performing I/M program evaluations using alternatives to paired mass-emissions testing – including overall fleet characterization methods addressed in that existing guidance – is adequate for areas to meet the CAA's program evaluation testing requirement.

6. Support acceleration simulation mode (ASM) testing

Comment: Two Commenters (0156 and 0164) disagreed with the EPA's recommendation that acceleration simulation mode (ASM) testing of 1995 and older gasoline vehicles no longer be required as part of a state's I/M program.

> Although in North Central Texas, during calendar year 2012, 93 percent of all emissions inspections were OBD II tests and approximately 6 percent were ASM tests, the failure rate for OBD II tests was only 4 percent while the failure rate for ASM tests was nearly 11 percent. Although the EPA estimates that about 80 percent of the national vehicle fleet is already equipped with an OBD II system, there are still significant emissions reductions to be gained by testing and repairing or retiring pre-OBD II vehicles. Weather-related benefits extends the design life of roadway vehicles in our region resulting in a lower share of ASM tests. (0164)
>
> The EPA mentions the equipment needed for ASM testing, dynamometers, is expensive, but as of August 2013, 1,053 stations in North Central Texas still have functioning dynamometers and are capable of conducting ASM testing. NCTCOG can appreciate EPA's justification for discontinuing ASM testing, but requests this only apply to areas launching new I/M programs. For areas already performing ASM testing, NCTCOG requests the EPA keep this requirement until the time at which ASM vehicles leave the program through either natural or expedited attrition. (0164)
>
> Based upon analysis of emissions data collected from both State emissions testing and remote sensing, a failing ASM vehicle emits one-and-a-half times as much nitrogen oxides (NO_x) emissions as a failing OBD II vehicle. In addition, according to a Texas Commission on Environmental Quality (TCEQ) study conducted in 2010, the I/M program yields nearly a 5 ton per day reduction in NO_x emissions and 4.3 ton per day reduction in hydrocarbon (HC) emissions in DFW from the testing of ASM vehicles alone. If ASM is allowed to be omitted from the program, these reductions will be lost and additional measures will have to be implemented to offset them.

Despite State photochemical modeling consistently showing attainment of the ozone standard, the DFW region continues to be in nonattainment year after year. The region cannot afford to lose real world emissions reductions even if the model shows little emissions reductions or few SIP credits to be gained. Thus, NCTCOG implores the EPA to consider emissions benefits associated with each ASM test as the driving factor on whether or not to include them in the I/M program and not the cumulative effect of ASM testing, which is strictly the result of a smaller fleet size. In Texas, vehicles 24 years old and older are exempt from the emission test due to low mileage accumulation; therefore, the EPA has a built in sunset provision that already exists. (0164)

Local jurisdictions should be able to claim emission reductions needed for attainment demonstrations. According to a 2010 TCEQ study, ASM vehicles were responsible for nearly 5 tons/day reduction of NO_x and 4.3 tons/day reduction of hydrocarbon emissions in just one ozone nonattainment area. As of August 2013, over 1000 stations could still perform ASM testing in this area. If these reductions cannot be claimed, additional control measures would be needed to offset those lost reductions. In 5 years, pre-OBD vehicles will be 24 years old and will be exempt from tail-pipe testing at which time I&M programs can become OBD only. ASM remains a beneficial emission reduction option for local areas. (0156)

Response: The EPA did not suggest, recommend, or propose that areas needing the emission reductions achieved by tailpipe testing (like the ASM) drop such testing. As previously discussed, some areas of the country with older-than-average in-use fleets may need to retain tailpipe testing for a period of time, although as a general matter, the level of emission reductions achievable from testing these older vehicles is naturally shrinking as the fleet turns over. It is up to individual states to determine if and when the amount of emission reductions achievable through any of the several tailpipe tests available is worth the investment.

7. Incorporation of Diesel Vehicles in I/M Program

Comment: Commenter (0164) recommended that, the EPA allow credits for NO_x emissions testing of OBD II compliant diesel vehicles as part of the state's I/M program.

Diesel powered vehicles less than 8,500 lbs gross vehicle weight rating (GVWR) have been equipped with OBD II systems since model year (MY) 1997; vehicles between 8,500 lbs and 14,000 lbs have been equipped starting with MY2004; and vehicles greater than 14,000 lbs began being phased-in in MY2010. While studies show real-world emissions benefits to be gained by implementing a diesel I/M program, Texas has thus far held off on implementing such a program due to not being able to claim any additional SIP credits for doing so. Thus, NCTCOG requests the EPA's assistance in providing a mechanism for claiming SIP credits for a diesel I/M program to help overcome this hurdle. The emissions benefits associated with each diesel test should be the driving factor on whether or not they are included in the program; not the cumulative effect which is strictly the result of a smaller but growing, fleet size. And, while the magnitude

> of emissions from light-duty diesel vehicles does not compare to that of light-duty gasoline vehicles, the inclusion of such vehicles in an I/M program may help minimize the public perception that diesel vehicle owners do not equally contribute to regional efforts to improve air quality. (0164)

Response: The issue of SIP credit for OBD testing of OBD-equipped diesel vehicles was not one of the areas discussed in the I/M section of the 2008 8-hour ozone SIP Requirements proposal. The EPA does not have the before and after repair mass emissions data needed to establish possible SIP credit for testing and repairing these vehicles. Furthermore, such vehicles are either too few or too new to warrant the investment it would take for the EPA to gather such data at this time. Nevertheless, I/M program areas that believe there are real world benefits to be achieved by conducting OBD testing on diesel vehicles are free to pursue such testing, though the EPA recommends that states observe best practices with regard to testing such vehicles.[19] Furthermore, the EPA remains open to any state or program area wishing to make a technically and legally defensible case for assigning SIP credit for these tests. .

8. Funding for Vehicle Repair and Replacement Programs

Comment: Commenter (0164) supported the EPA's suggestion to consider implementation of a vehicle repair and replacement assistance program, but recommends it be a complement to the I/M program and not in lieu of an I/M program as proposed.

> The Low-Income Vehicle Repair Assistance, Retrofit and Accelerated Vehicle Retirement Program (LIRAP) is a light-duty repair and replacement assistance program that has been implemented successfully in Texas in years past. In Texas, fees are collected through emissions testing and are dedicated specifically for administering this program. The successful I/M program drives the market for repair and replacement of vehicles and is necessary to enforce federal involvement in advancing fleet turnover. (0164)

Response: The EPA encourages low-income repairs assistance programs as a way of reducing program avoidance on the part of vehicle owners statistically most likely to fail the test (and financially least likely to be able to afford the burden of vehicle repairs). As such, the EPA agrees that an assistance program like LIRAP is an appropriate supplement to the existing I/M program, while not itself constituting an adequate replacement for the program. For a repair assistance program to replace I/M, it would need to assure that as many vehicles would be repaired as would be the case under the I/M program. To make such a demonstration, it is unlikely that the program could rely only on low-income vehicle owners. Instead, the repair

[19] Best practices for such testing are detailed in the best practices document available at the following web address: *http://obdclearinghouse.com/index.php?body=obdinformation*.

subsidy would have to be more generally available, based upon the level of emission reduction achievable from repairing a given vehicle, as opposed to the income level of the owner.

9. Separate rulemaking needed for I/M

Comment: Commenters (0146 and 0177) stated, the EPA should defer to a more thorough and separate I/M program rulemaking process concerning I/M flexibility.

> NESCAUM members recognize the importance and continued relevance of I/M in controlling motor vehicle emissions. We agree with the EPA that significant technological advances, including the diminishing relevance of tailpipe testing and widespread implementation of OBD programs, have occurred and that practical flexibility is warranted for the future. The NESCAUM member agencies, however, are concerned with the example programmatic changes that the EPA has offered in this rulemaking. We urge the EPA to carefully consider the CAA requirements and the existing I/M performance standards in judging the merits of these concepts. Clearly, the EPA should develop modeling guidance for such alternatives if deemed feasible. As such, NESCAUM believes the EPA should defer to a more thorough and separate I/M program rulemaking process concerning I/M flexibility. (0146)
>
> NESCAUM disagrees with the EPA's assertion that I/M programs may no longer be relevant because of technological advances or alternative solutions. These programs are much easier to implement than in the past and remain important in controlling motor vehicle emissions. Modeling shows that emissions from the on-road sector remain significant for the ozone problem. While individual vehicle emissions have been substantially reduced and the overall light duty fleet is cleaner, there still remains a significant gap between well-maintained vehicles and malfunctioning gross-emitting vehicles that would be identified through mandatory I/M inspections. The EPA should be consistent in its message about I/M programs in new nonattainment areas: all I/M programs must meet applicable I/M performance standards consistent with the requirements of the CAA and the EPA's I/M regulation. (0146)

Response: As discussed previously, the flexibility to substitute mobile source emission reductions equal to or greater than those that would be achieved by an I/M program meeting the relevant performance standard already exists in the I/M rule as promulgated. It is only recently that technologies (like OBD) have become so widely available as to make alternative programs like those discussed in the preamble (and allowed by this existing flexibility) feasible. Also as previously discussed, this existing flexibility is equally available to both existing and future I/M program areas. The EPA notes that the approval of any specific program as meeting the requirements of the I/M Rule would be accomplished through notice and comment rulemaking on a state's proposed revision to its SIP.

10. Timing of I/M SIP

Comment: Commenter (0143) supported the EPA proposal to align Vehicle Inspection and Maintenance (I/M) programs and attainment SIP deadlines. The Commenter stated that, on April 7, 2006, the EPA finalized a suite of revisions to the I/M rule to address the implementation of I/M under an 8-hour ozone NAAQS (71 FR 17705). The revised rule included deadlines for 8-hour ozone nonattainment areas that were tied to the effective date of a given area's designation and classification under the 8-hour ozone NAAQS. The deadlines for implementing an I/M [program] are reasonable in that a nonattainment area that does not currently have an I/M program, that would be required to implement one, would have 4 years after the effective date of designation and classification to begin testing vehicles. (0143)

Commenter (0163) recommended that, the EPA not make any changes to the I/M SIP deadlines that are inconsistent with the deadlines prescribed in the CAA.

Commenter (0177) stated that, any contemplated changes in deadlines for submittal of I/M SIP revisions should be legally justified and in no case should result in delays in required I/M program implementation.

Commenter (0179) requested that, states be given the option of deciding on the timing of an I/M SIP submission based on their individual circumstances. The Commenter stated that, in the proposal, the EPA identified alterative implementation options to modernize I/M programs from the last time new I/M programs were required. In order to pursue such options, the Commenter stated that, states will need time to analyze various I/M program designs to determine which combination of program parameters is capable of meeting the emission reduction needs of the attainment SIP, present the concept to stakeholders, seek the appropriate legal authority from legislative bodies and adopt a rule which could take 1-2 years to undergo a state's administrative process.

Response: The EPA's proposal to align the I/M SIP submittal deadline with the deadline for submitting the attainment demonstration will not impact the emission reductions achieved through the I/M requirement because the proposal does not change the deadline by which new I/M areas would need to begin testing and fixing vehicles. Further, the EPA believes that it is required to interpret the Act's I/M SIP submission deadlines for basic I/M SIPs because the CAA's requirement of "immediately upon enactment" for these SIPs is impossible to meet. Additionally, the EPA sees no reason why basic and enhanced I/M programs should be put on different schedules, as the difference between basic and enhanced I/M programs has largely disappeared with the introduction and widespread use of OBD-based testing. And lastly, given the degree to which the attainment demonstration will be driven by emission reductions derived from I/M or an equally effective alternative, it is reasonable and cost effective to allow states to coordinate these two planning requirements.

11. Oppose implementation of additional I/M programs

Comment: Commenter (0152) stated, the EPA should consider the elimination of the requirement to implement any additional I/M programs. The Commenter added that, although this may be a CAA mandate, the EPA has exhibited flexibility in the past to modify the CAA

requirements. The EPA appears to acknowledge the practical difficulties with the implementation of new vehicle I/M programs. As the older vehicles are removed from the fleet, the newer, cleaner, more reliable replacement vehicles emit less and I/M programs become less effective in reducing overall emissions. Although the EPA did provide some "out of the box" examples of different program options, the fiscal reality makes those concepts impractical. (0152)

Response: While the EPA believes that there is flexibility in the I/M rule for allowing equivalent mobile source control-based reductions in lieu of traditional I/M, we do not believe we have the flexibility to waive the requirement that areas covered by the Act's I/M requirements reduce emissions from mobile sources equal to or greater than the amount they would be reduced if an I/M program meeting the applicable performance standard were adopted.

F. How does transportation conformity apply to the 2008 ozone NAAQS?

1. Requirements for VOC motor vehicle emissions budgets

Comment: The Commenter stated that, for areas where reductions in VOC ozone precursors are shown to have minimal effects on ozone air quality, the EPA should remove requirements for VOC transportation conformity motor vehicle emissions budgets, including any budget updates required for new emissions models. (0130)

Response: The existing transportation conformity regulation already addresses the general situation raised by this Commenter. Under 40 CFR 93.109(f), if an ozone nonattainment or maintenance area's SIP can demonstrate that regional VOC motor vehicle emissions are insignificant, the area would not be required to establish VOC motor vehicle emissions budgets for conformity purposes, and the area would not have to do a regional emissions analysis for VOCs. The criteria in this provision for determining insignificance for conformity purposes were not the subject of this rulemaking and as such no changes are being made to those criteria.

2. Elimination of conformity requirements

Comment: The EPA received two comments on the revocation of transportation conformity requirements for the 1997 ozone NAAQS. One Commenter (0172) supported the EPA's proposal that transportation conformity would no longer apply for the 1997 ozone NAAQS once that standard is revoked, which was effective July 20, 2013, 1, year after the effective date of designations. Another Commenter (0180) stated, the EPA's proposed revocation of these conformity requirements is not consistent with the CAA.

Response: The D.C. Circuit has held that the CAA did not authorize the EPA to revoke the 1997 ozone NAAQS for transportation conformity purposes only. *NRDC v. EPA,* F.3d . 2014 WL 7269521 (D.C. Cir. 2014).

Comment: The Commenter stated that, the EPA properly acknowledges that the Act mandates that transportation and general conformity requirements apply to all ozone nonattainment or

maintenance areas. The Commenter also states that, the EPA further proposes to leave those designations for the 1997 NAAQS in place. (0180)

Response: The EPA agrees with the Commenter that, both transportation and general conformity apply in all ozone nonattainment and maintenance areas. However, the EPA disagrees with the Commenter's conclusion that the EPA has proposed to retain the designations for the 1997 ozone NAAQS. The EPA is today revoking the 1997 ozone NAAQS for all purposes and establishing anti-backsliding requirements for the revoked standard. The June 6, 2013, NPRM, which addresses revocation of the 1997 ozone NAAQS and appropriate anti-backsliding measures for all purposes, very clearly states the EPA's intention with regard to the fate of the designations for the 1997 ozone NAAQS:

> After revocation of the 1997 standard, the designations for that standard are no longer in effect, and the sole designations that remain in effect are those for the 2008 ozone NAAQS. However, the EPA is retaining the listing of the designations of areas for the revoked 1997 ozone NAAQS in 40 CFR part 81, for the sole purpose of identifying the anti-backsliding requirements that may apply to the areas as a result of these designations at the time of revocation. Accordingly, such references to historical designations for the revoked standard should not be viewed as current designations under CAA section 107. (78 FR 34214)

Therefore, after the revocation of the 1997 NAAQS is effective, the EPA will publish a list of former designations and classifications for informational purposes in 40 CFR part 81 in order to assist state and local agencies and other interested parties in determining the anti-backsliding requirements for a given area. At that time, the only applicable designation will be the designation for the 2008 ozone NAAQS, the transportation and general conformity requirement will apply only for that ozone NAAQS.

Comment: The Commenter noted that, since the EPA's June 6, 2013, NPR proposed to revoke the 1997 ozone NAAQS for all purposes, that revocation would include transportation conformity if the EPA received an adverse decision in the on-going litigation on the revocation of the 1997 ozone NAAQS for transportation conformity purposes. Therefore, the Commenter asserts that, the NPRM proposes to revoke both the transportation and general conformity requirements for the 1997 ozone NAAQS, and that, its comments apply to both types of conformity. (0180)

Response: The Commenter is correct and because the D.C. Circuit vacated the EPA's partial revocation of the 1997 ozone NAAQS, today's rulemaking revokes the 1997 ozone NAAQS for all purposes, including both transportation and general conformity purposes.

Comment: The Commenter opines that Congress specified exactly when areas would shed conformity requirements, which is after a nonattainment area is redesignated to attainment and it completes a 20-year maintenance period. The Commenter believes that, by eliminating the conformity requirements before areas complete this process, the EPA contravenes the Act.

(0180)

Response: The EPA disagrees with the comment. While the obligation to determine conformity for a NAAQS ends after an area is redesignated to attainment and has completed its second 10 year maintenance period, this is not the only way an area's conformity obligation could end. Clearly, the EPA has revoked the 1-hour ozone NAAQS and areas where that NAAQS has been revoked have stopped demonstrating conformity for that NAAQS. The DC Circuit Court in the South Coast decision upheld the EPA's ability to revoke a prior NAAQS as long as appropriate anti-backsliding measures are required. (*South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006))

Comment: The commenter opines that even if the EPA could waive the conformity requirements by revoking the 1997 NAAQS, it would have to keep them in effect as anti-backsliding protections because conformity must apply in nonattainment and maintenance areas; therefore, the EPA's approach results in backsliding because it removes controls that would otherwise apply. The Commenter also offers that, Congress crafted the conformity requirements to prevent activities from causing or contributing to new violations of any NAAQS or from worsening existing violations of any NAAQS. Thus, according to the commenter, conformity determinations for the 1997 ozone NAAQS are "[s]omething designed to constrain ozone levels," making them "controls" that must be retained when strengthening a standard, and therefore, the EPA cannot do away with them. (0180)

Response: The EPA disagrees with the Commenter and does not understand how it could on one hand waive conformity requirements for the 1997 ozone NAAQS through revocation, but on the other hand still require conformity determinations for the 1997 ozone NAAQS as an anti-backsliding measure. Further, the EPA's interpretation has been upheld by the D.C. Circuit in a similar context, in which the court stated that, conformity determinations are not required as anti-backsliding measures for the NAAQS that is revoked. Instead, any existing budgets from a revoked NAAQS serve as the test of conformity for an applicable NAAQS of that same pollutant, until budgets are established for that applicable NAAQS. Therefore, while conformity for the 1997 ozone NAAQS no longer applies, the 1997 ozone NAAQS budgets apply for 2008 ozone NAAQS conformity until the area has budgets for the 2008 ozone NAAQS.

The EPA has concluded that the anti-backsliding requirements that apply to the transition from the 1997 8-hour ozone NAAQS to the 2008 8-hour ozone NAAQS for conformity purposes are well established in the CAA, the transportation conformity rule and recent court decisions. (CAA section 176(c)(1), 40 CFR 93.109(c)(2), *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) and *Environmental Defense v. EPA*, 467 F3.d at 1329) Specifically, areas that are designated nonattainment for the 2008 ozone NAAQS are required to demonstrate conformity for that NAAQS using adequate or approved motor vehicle emissions budgets for the 2008 ozone NAAQS. Before such budgets are available, areas would use adequate or approved budgets for another ozone NAAQS: budgets for the 1997 8-hour ozone NAAQS or, if not available, budgets for the 1-hour ozone NAAQS. If no such budgets exist the area would demonstrate conformity using the transportation conformity rule's interim emissions tests as they apply to the particular area. (40 CFR 93.109(c)(3) and 40 CFR 93.119(b)) The DC

Circuit Court concluded, as is relevant here, that "1-hour conformity [motor vehicle] emissions budgets constitute 'controls' under section 172(e)," and thus had to be retained to prevent backsliding (*South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006)) In a subsequent ruling denying petitions for rehearing, the Court clarified that this "reference to conformity determinations speaks only to the use of 1-hour motor vehicle emissions budgets as part of 8-hour conformity determinations until 8-hour motor vehicle emissions budgets are available." Further the court clarified that conformity determinations for the 1-hour ozone NAAQS are not required to fulfill anti-backsliding requirements for the 1-hour ozone NAAQS. (*South Coast Air Quality Mgt. Dist. v. EPA*, 489 F.3d 1245, 1248 (D.C. Cir. 2007)) The Court reached the conclusion that it was not necessary to continue to demonstrate conformity for the 1-hour ozone NAAQS after revocation in response to a joint request for clarification made by the EPA and the environmental petitioners after the court's issuance of its 2006 opinion in that litigation. Id. (granting "joint request by the EPA and Environmental Petitioners") clearly, the DC Circuit Court has already reached a conclusion, which was supported by environmental Petitioners, that conformity determinations are not required to prevent backsliding in nonattainment or maintenance areas for a NAAQS that has been revoked.

Comment: The Commenter believes that, the EPA has "contravened the statutory mandate" by eliminating the transportation conformity requirement in areas that are maintenance or nonattainment for the 1997 NAAQS, but attainment for the 2008. The Commenter points out that, although some nonattainment and maintenance areas for the 1997 ozone NAAQS have been designated attainment for the 2008 ozone NAAQS, conformity requirements remain important pollution controls in those areas. The Commenter argues that, to satisfy the conformity requirement, an action must not cause or contribute to any new violation, or worsen any existing violation, "of *any* standard in any area" (commenter's emphasis). Thus, the commenter believes that requiring conformity in these 2008 ozone NAAQS attainment areas would also protect against violations of the 2008 ozone standard, and the EPA should not revoke the 1997 ozone NAAQS because it removes the conformity requirement for these areas without providing anti-backsliding protections. In the commenter's view, this is harmful for implementing the 2008 standard in areas that have historically had ozone problems. (0180)

The Commenter also notes that, several areas that were nonattainment or maintenance for the 1997 ozone NAAQS but attainment for the 2008 ozone NAAQS in 2012 are either violating the 2008 ozone NAAQS or are close to violating that NAAQS based on more recent data. The commenter opines that retaining the conformity requirement would provide needed protection against dangerous ozone levels. (0180)

Another Commenter stated that, the EPA should act quickly under CAA section 107(d)(3) to make sure all areas violating the 2008 NAAQS are properly designated as nonattainment and thus properly subject to transportation conformity requirements for that NAAQS. (0177)

Response: The commenter is correct that some areas that were nonattainment or maintenance for the 1997 ozone NAAQS were designated attainment for the more health protective 2008 ozone NAAQS. These areas all had ozone design values of 75 ppb or less based on 2008-2010 data at the time that the designations were made in 2012. Therefore, these areas were attaining the 1997

ozone NAAQS by a wide margin since an area would need a design value of 0.085 ppm (85 ppb) or greater to be violating the 1997 ozone NAAQS.

As noted elsewhere in the record for today's rulemaking, the D.C. Circuit vacated the EPA's revocation of the 1997 ozone NAAQS for transportation conformity only. In doing so, the Court recognized that it had previously upheld the EPA's authority to revoke a standard for all purposes, provided that it introduces anti-backsliding measures, as the EPA is doing in today's rule. See NRDC, 2004 WL 7269521. (*South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006)) upholding revocation of 1-hour standard so long as adequate anti-backsliding measures are provided.

With regard to requiring conformity to the 1997 ozone NAAQS, the commenter attempts to make an argument that areas should be required to determine conformity to a revoked NAAQS because the CAA section 176(c)(1)(B) refers to "any standard in any area," including the 2008 standard in areas that are attaining it. The EPA disagrees with this new interpretation because it is inconsistent with other provisions of section 176(c) and with the South Coast decision. First, the CAA section 176(c)(5) clearly limits the applicability of conformity requirements to areas that are designated nonattainment or maintenance for a given NAAQS. The commenter's interpretation would expand the scope of the conformity requirement to include attainment areas, when the plain language of section 176(c)(5) states that the conformity requirement applies "only in" nonattainment and maintenance areas. Additionally, as explained above, the D.C. Circuit Court ruled in the South Coast decision that the anti-backsliding requirement that applies for transportation conformity is that nonattainment areas for the new NAAQS must use approved or adequate motor vehicle emissions budgets for the prior NAAQS in transportation conformity determinations until the area has approved or adequate budgets for the new NAAQS. The DC Circuit Court further held, in response to a joint request for clarification filed by the EPA and environmental groups, that conformity determinations were not required for the prior NAAQS after it was revoked. (South Coast Air Quality Mgt. Dist. v. EPA, 489 F.3d 1245, 1248 (D.C. Cir. 2007)) Implementing transportation conformity requirements in ozone areas by requiring transportation conformity determinations in nonattainment and maintenance areas for the 2008 ozone NAAQS, using approved or adequate motor vehicle emissions budgets for the 1997 ozone NAAQS until an area has emissions budgets for the 2008 ozone NAAQS and no longer requiring transportation conformity determinations for the 1997 ozone NAAQS after the effective date of that revocation for all purposes is completely consistent with the CAA requirements, transportation conformity regulations and relevant D.C, Circuit Court decisions.

The Commenter is also correct that, some of the 1997 ozone NAAQS nonattainment or maintenance areas that were designated attainment for the 2008 ozone NAAQS are now violating this NAAQS. In today's final rule the EPA is finalizing anti-backsliding measures that apply to the types of areas that the commenter is concerned about. Those anti-backsliding measures are designed to prevent the areas from slipping back into nonattainment of the 1997 ozone NAAQS. Maintenance areas for the 1997 ozone NAAQS are required to implement their approved maintenance plans and nonattainment areas are required to implement their approved SIPs for the 1997 ozone NAAQS. These SIPs could only be revised if the revision meets the anti-backsliding requirements of the CAA sections 110(l) and 193.

Areas designated attainment for the 2008 ozone NAAQS still have an incentive to monitor the growth of emissions from the transportation sector, because an area that violates the 2008 8-hour NAAQS could be redesignated to nonattainment under the EPA's discretionary authority to quickly redesignate areas.

Commenter (0177) stated that, the EPA should act quickly under the CAA section 107(d)(3) to make sure all areas violating the 2008 NAAQS are properly designated as nonattainment. The EPA has carefully evaluated the request by the commenter that the EPA should redesignate as nonattainment the counties designated as attainment with 2012 design values violating the 2008 ozone NAAQS. The EPA also obtained information from the respective states with the attainment areas violating based on 2012 design values. The EPA is using the discretion afforded to the Administrator under the CAA. If violations of the ozone NAAQS occur, the EPA would consider the factors in the CAA section 107(d)(3)(A), which include "air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate." To the extent an area is actively implementing control measures and programs, the EPA may allow time to determine whether such measures and programs bring the area back into attainment. As an initial matter, 22 areas with violations based on 2012 design values are again attaining the ozone NAAQS based on 2013 design values. As to those areas that remain in violation of the 2008 ozone NAAQS, the EPA believes it is appropriate to allow time for affected states to assess the new violations and to consider appropriate measures to address the air quality problems. The EPA expects that reductions of NO_x and VOC emissions from existing federal measures and state-led efforts will assist these areas in attaining the 2008 ozone NAAQS. For any such redesignated area, conformity would then apply 1 year after the effective date of that nonattainment designation.

3. Comment beyond the scope of the rulemaking

Comment: Commenter (0164) recommended further clarification be provided on the implications of aspects of the transportation conformity program not addressed by this rulemaking.

Response: These comments are outside the scope of today's rulemaking, which does not propose changes in the transportation conformity regulation.

G. What requirements for general conformity apply to the 2008 ozone NAAQS?

1. Emission budgets for General Conformity should not be mandated

Comment: Commenter (0152) does not believe this should be mandated and should be at the state's discretion as it is a resource burden that may not be necessary in some states with very few projects subject to General Conformity. Commenter (0159) supported the EPA's recommendation that state and local air quality agencies work with federal agencies with major facilities that are subject to the General Conformity Regulations to establish an emission budget for those facilities in order to facilitate future conformity determinations, noting that state and

federal agencies should work together in a cooperative manner to achieve establish emissions budgets that will ensure that transportation plans, TIPs and federally supported highway and transit projects are consistent with the applicable SIP.
Response: The EPA has not mandated facility emission budgets in this proposal or in its regulations for general conformity. Facility emission budgets are voluntary when a facility and a state believe it is beneficial to develop one.

2. Support proposal to not make revisions to general conformity regulations

Comment: Commenter (0159) supported the proposal to not make revisions to the General Conformity Regulations in this SIP Requirements Rule, agreeing with the EPA that states with approved General Conformity SIPs should not need to revise those SIPs, unless they need to do so to ensure the existing regulations apply in the appropriate newly designated areas.

Response: The EPA appreciates the commenter's support and concurs with the commenter's statement.

H. What are the requirements for contingency measures in the event of failure to meet a milestone or to attain?

1. 1 year's worth of progress

Comment: Allow approximately one year's worth of emissions reductions based on air quality improvements

Commenters (0139, 0150, 0155 and 0160) requested, the EPA to use the term "approximately 1 year's worth" to allow a certain amount of flexibility. Commenters (0139 and 0150) stated, flexibility may be needed for cases where the region either does not need a full year's worth of reductions or would find it impossible to find a measure that produces a full year's worth of reductions above and beyond what is required to attain. Commenter (0160) appreciated the flexibility the EPA exercised in approving the South Coast's $PM_{2.5}$ contingency measures, and a similar approach should be possible for ozone contingency measures. Commenter (0139) stated that, a strict requirement for a full 1 year's worth of reductions could have the perverse effect of delaying attainment. This is because if an area could attain in 5 years, its reduction line is quite steep, and 1 year's worth of reductions could be a significant amount, and the state may not be able to define a measure to obtain sufficient reductions above and beyond what is required to attain. On the other hand, if the state takes 8 years to attain, its reduction line will be less steep, and 1 year's worth of reductions will be smaller. Thus, the state may be forced to delay attainment in order to meet the requirement for 1 year's worth of reductions as a contingency measure.

Commenters (0139 and 0150) suggested that, similar to RFP, the EPA should allow an air quality improvement measurement in measuring 1 year's worth of progress for contingency measures. These Commenters stated that, in the case of contingency measures, Congress did not specify any particular method of measuring required progress, either tonnage reductions or air

quality improvement. Therefore, the EPA's interpretation must be upheld if it reflects a reasonable accommodation of the policy interests involved in interpreting the Act. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). The Commenters argued that, the EPA has already accepted the concept that air quality improvements may be taken into consideration for purposes of evaluating the level of emission reductions needed to meet the contingency measure requirements. "Approval and Promulgation of Implementation Plans; California; South Coast; Contingency Measures for 1997 $PM_{2.5}$ Standards"; 78 FR 37741, 37748 (June 24, 2013). The EPA allowed South Coast to have less than 1-year's worth of emission reductions in its contingency measures based on the degree of air quality improvement shown by the area. It is a small step from there to conclude that if any area can demonstrate that its proposed contingency measures will produce 1-year's worth of air quality improvements, that this can be accepted in lieu of 1 year's worth of emission reductions.

Response: The EPA appreciates the Commenters' suggestions to allow "approximately" 1 year's worth of reductions in area's that may not need a full year's worth of reductions or may find it impossible to find a measure that produces a full year's worth of reductions above what is required to attain. The contingency measures must be put in place if the area fails to make RFP or to attain. The "Guidance for Growth Factors, Projections and Control Strategies for the 15 Percent Rate-of-Progress Plans" (March 1993), Section 9.0, Contingency Measures, (pages 81-97), cites the April 16, 1992, General Preamble section III.A.3.c (57 FR 13498, at 13510 - 13512) as the source of the EPA's interpretation that 3 percent of the RFP baseline is the minimum contingency measure requirement. But the contingency measures would provide for reductions in emissions rather than measured ozone concentrations, and the EPA did not propose to alter this guidance or specifically allow an alternative air quality improvement-based approach.

The implementation of $PM_{2.5}$ NAAQS is governed by statutory and regulatory requirements that are separate from and not identical to requirements for ozone NAAQS implementation and provide flexibility for states to consider the degree of air quality improvement that may be needed in developing RFP plans and contingency measures. Thus, in a recent action,[20] the EPA has approved a state to adopt into its $PM_{2.5}$ SIP, contingency measure emissions reductions based on the degree of air quality improvements shown by the area. However, the CAA provisions for ozone NAAQS implementation provide for emission reductions of ozone precursors, VOC and NO_x, and do not explicitly authorize using measurements of ozone concentrations for fulfilling SIP emission reductions requirements for RFP and its associated contingency measures.

2. Reliance on already-adopted rules

Comment: Commenter (0150) requested that the EPA make it clear that a state may rely on already-adopted rules and regulations. The Commenter stated that, in proposing to approve the

[20] "Approval and Promulgation of Implementation Plans; California; South Coast; Contingency Measures for 1997 PM2.5 Standards"; 78 FR 37741, 37748 (June 24, 2013).

South Coast $PM_{2.5}$ contingency measures, the EPA recently made it clear that a state may rely on already-adopted rules and regulations, whether federal, state or local, provided they result in emission reductions that are surplus to what is needed for RFP or attainment. The EPA noted that it had approved numerous SIPs under this interpretation. 78 FR 37741, 37744 col. 1. The EPA explained that this approach has been upheld by the courts. *LEAN v. EPA*, 382 F.3d 575 (5th Cir. 2004). We request that the EPA repeat this analysis in the present implementation rule, so that the principle will be known to all parties and to provide a ready reference for the principle, without having to rely on individual SIP approval actions. Commenters (0159 and 0179) agreed that, federal measures that provide ongoing reductions into the future can be used as contingency measures, where appropriate.

Response: In regards of maintaining ongoing provisions where federal measures can be used as contingency measures, the EPA has a long-standing practice of allowing federal measures to be used as contingency measures as long as they provide emissions reductions in the relevant years in excess of those needed for attainment or RFP. The EPA has approved the use of federal measures to meet contingency measure requirements in several EPA actions approving 1-hour and 8-hour ozone SIPs. (62 FR 15844, April 3, 1997), (62 FR 66279, December 18, 1997), (66 FR 30811, June 8, 2001), (66 FR 586 and 66 FR 634, January 3, 2001) (74 FR 1903, January 14, 2009). The EPA is continuing to allow areas to use future reductions from promulgated federal measures as contingency measures for the 2008 ozone NAAQS final rule, consistent with our practice for both the 1-hour and 1997 ozone NAAQS.

Comment: Fleet turnover emission budgets

One Commenter (0132) stated that, additional "fleet turnover" motor vehicle emissions budgets (MVEB) for the year after the attainment year are unnecessary because fleet turnover is based on federal vehicle emission standards already in place, and the EPA has not indicated that those standards will be unavailable in the future. Further, the proposal does not address the implications of a 2019 contingency MVEB on conformity. It would be inappropriate and unduly restrictive to set a contingency MVEB and then, in effect, require areas to base conformity analyses on a contingency MVEB.

A second commenter (0169) MVEBs language on page 34199 is vague and requested that the EPA revise the current preamble language.

Response: One Commenter opined that, the motor vehicle emissions budgets should be unnecessary because the EPA has not indicated that the vehicle emissions standards would not be available in the future. It was not the EPA's intention to imply that the concern was with whether or not the national emission standards for new vehicles would remain in effect. The EPA recommended that these budgets be established to ensure that on-road emissions remain at or below the level established by the contingency measure. This level would be equal to the level of emissions in the attainment year minus the amount of emissions reductions attributable to the fleet turnover contingency measure. There are a number of reasons that emissions could increase such as an unanticipated increase in vehicle miles traveled or in the number of vehicle trips in the area. Demonstrating conformity to these budgets in the event that the contingency measure is triggered it would ensure that emissions were reduced at least to the level that the contingency

measure had anticipated. The EPA is not requiring states to establish these budgets. The EPA is recommending that states establish such budgets. The EPA agrees that, areas should not be required to demonstrate conformity to these budgets until such time that the contingency measure is triggered. Therefore, areas would only have to demonstrate conformity to these budgets in the event that the area misses its attainment date and the fleet turnover contingency measure is triggered.

The second Commenter suggested that, the discussion of this issue in the preamble to the NPRM is vague and should be revised. The commenter did not provide any specific information on the clarifications that they believe are needed. The EPA made revisions to the preamble in the final rule. If the commenter continues to have questions after the rule is finalized, they should contact their EPA Regional Office.

3. Flexibility to use NO_x or VOC measures

Comment: Support NO_x only flexibility for measuring contingency measures

Commenters (0130, 0139, 0143, 0150, 0155, 0157, 0159, 0163 and 0179) generally supported the proposal to modify contingency measures regarding emission reductions from VOC. Commenters (0130 and 0143) stated that, science shows that NO_x reductions are much more effective than VOC reductions for reducing ground-level ozone concentrations in much of the eastern U.S.; therefore, allowing states the flexibility to reduce the full 3 percent as NO_x for contingencies makes good sense. Commenter (0143) stated that, reducing NO_x emissions appears to have at least the same and possibly a larger, effect on reducing ozone levels as reducing an equal amount of VOC emissions. Recent studies indicate that NO_x, reductions have great potential to reduce the number of ozone exceedances where a NO_x-limited condition exists. In Pennsylvania, with the actual and pending shutdown of certain coal-fired power plants, NO_x-limited conditions will become more common. A NO_x for VOC substitution, which would rely on NO_x reductions in place of VOC reductions, should lower the number of ozone exceedances in ozone nonattainment areas of the Commonwealth.

Commenters (0139 and 0150) stated, a flexible and common sense approach is needed in interpreting the contingency measure requirement, and for that reason, we do support the EPA's proposal to change its guidance such that there would no longer be a minimum requirement for VOC reductions; instead the area's entire contingency measure content could consist of NO_x reductions (78 FR 34199 col. 1). Commenters (0155, 0157 and 0163) stated that, for Moderate and above areas that have completed the initial 15 percent VOC reduction required by the CAA section 182(b)(1)(A)(i), the 3 percent emissions reductions of the contingency measures may be based entirely on NO_x controls if that is what the state's analyses have demonstrated would be most effective in bringing the area into attainment; there is no minimum VOC requirement. Commenter (0179) took the position that only measures that are expected to offer a worthwhile reduction in ozone (i.e., NO_x controls) should be considered for contingency measures.

Response: The EPA appreciates the support and is finalizing requirements that contingency measures must be submitted for approval into the SIP as required by the CAA and must provide

for the implementation of specific measures without any further rulemaking action if the area fails to attain or meet any applicable milestone. Regarding content of the 1-year's worth of emissions covered by the contingency measures, the EPA is finalizing its proposal to allow the 3 percent emissions reductions of the contingency measures to be based entirely on NO_x controls if the area can demonstrate it has achieved the initial 15 percent ROP VOC reduction required by the CAA section 182(b)(1)(A)(i) and that the state's analyses determine that NO_x substitution would be most effective in bringing the area into attainment.

4. Extreme nonattainment areas

Comment: Support the proposal

Commenters (0139, 0149, 0150, 0160 and 0166) supported use of section 182(e)(5) measures for contingency measures. Commenter (0139) supported the EPA's acknowledgement that, contingency measures as previously implemented may not make sense in Extreme nonattainment areas and that allowing some flexibility and creativity for contingency approaches is important for areas that have implemented all reasonable and feasible measures under their regulatory control. Commenter (0160) stated, this approach reflects the need for Extreme areas to adopt all feasible measures, while recognizing that over time additional new measures will be possible as technology advances. Commenter (0166) stated that, it would in fact be unreasonable to expect a state that is already adopting all feasible controls to adopt additional contingency measures; once a state has adopted all measures that are feasible, by definition nothing more can be accomplished.

Commenter (0149) stated that, developing and adopting contingency measures in regulatory form (pursuant to CAA sections 172(c)(9) and 182(c)[9]) for an "Extreme" nonattainment area that qualifies for the CAA section 182(e)(5) is not practical. Commenter (0149) stated that such a nonattainment area has already included all reasonable control measures in its SIP to meet RACM and RFP requirements and is allowed to rely on section 182(e)(5)measures (which are themselves not fully developed) for its attainment demonstration.

Commenter (0150) stated that, unlike other contingency measures, these measures are not required to be in regulatory form at the time the attainment demonstration is submitted; instead, the Extreme area commits to submit those measures by 3 years before the time the reductions are needed. CAA § 182(e)(5); 42 U.S.C. § 7511a(e)(5). Commenter (0150) agreed that an Extreme area should not be forced to rely on infeasible or draconian measures to meet the contingency requirements. Commenter (0150) cited *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) and stated that, similarly, the specific§ 182(e)(5) contingency measures designed specifically to suit the needs of an Extreme ozone area should be considered to control over the more general requirements for ozone.

Commenter (0150) stated, the EPA may rely on the doctrine of unreasonable results and absurd consequences to support this interpretation and cited two court cases. Commenter (0150) stated since the EPA has already recognized that requiring the "normal" contingency measures for an

Extreme area would be unreasonable (78 FR 34199 col. 2), such an interpretation should be rejected.

Response: We appreciate the supportive comments. We recognize that all areas must meet the contingency plan requirements of sections 172(c)(9) and 182(c)(9). We agree that the CAA section 182(e)(5) provides the agency discretion to approve an Extreme area attainment plan that relies, in part, on the future development of new control technologies or improvements of existing control technologies. This authority can be exercised as long as the state has demonstrated that: all reasonably available control measures, including RACT, have been included in the plan; the area's RFP demonstration during the first 10 years after designation does not rely on anticipated future technologies; and the state has submitted enforceable commitments to develop and adopt contingency measures in the event that anticipated future technologies do not achieve planned reductions.

Comment: Do not support proposal where "reasonably available" control measure are appropriate for determining when to exercise discretion provided by section 182(e)(5)

Commenter (0180) stated, the EPA has no authority to waive the plain statutory requirements of sections 172(c)(9) and 182(c)(9). Commenter (0180) stated that, because section 172(c)(1) requires nonattainment plans for all areas provide for the implementation of all RACM, Congress assumed that all nonattainment areas–not just Extreme areas – would implement all reasonable measures. Commenter (0180) stated that, contingency measures are not limited to measures deemed "reasonable" because such "reasonable" measures must already be required and implemented in all nonattainment areas. Commenter (0180) stated the flaw in the EPA's description of the situation facing Extreme ozone nonattainment areas is that once all "reasonable" measures are adopted to meet RACM and RFP, additional measures are "unreasonable" and "draconian." Commenter (0180) stated the CAA contains several requirements with levels of control that are more stringent than RACM, including LAER, BACM and 7513(e) (requiring MSM). Commenter (0180) stated, there is no basis for suggesting that Congress did not contemplate areas adopting controls that go above and beyond RACM or that such controls could be ruled out as "unreasonable." Commenter (0180) further pointed out that, ozone nonattainment areas must adopt whatever controls are "necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part."

Commenter (0180) stated that, if an Extreme nonattainment area seeks to rely on a "black box" it should be required to demonstrate that all feasible control measures have been adopted, regardless of whether those control measures can be demonstrated to advance attainment by a year. Commenter (0180) stated, the EPA should also clarify that RACM is the minimum level of control required to be demonstrated in these nonattainment plans.

Response: The EPA believes that both its long-standing interpretation of RACM and its focus on whether control measures are "reasonably available" provide an appropriate framework for determining when to exercise the discretion provided by section 182(e)(5). As noted in the proposal, the determination of whether a SIP contains all RACM requires an area-specific analysis establishing that there are no additional economically and technically feasible control

measures (alone or cumulatively) that will advance the attainment date by 1 year. This requires close review of any measure that a commenter identifies as reasonably available for implementation in the area in light of local circumstances and of measures being implemented in other states. 78 FR 34187, at 34194 (June 6, 2013). This interpretation of RACM has been upheld as reasonable (*e.g. Sierra Club v. EPA*, 294 F3d 155, 162-163 (D.C. Cir. 2002)). Thus, the EPA believes that, it is appropriate to require that an area seeking to rely on the anticipated development of new technology demonstrate that its plan includes all control measures that come within this definition of "reasonably available." The EPA does not believe it is necessary for an area to demonstrate the use of measures that go beyond that definition in order to meet contingency measure requirements.

5. Innovative measures

Comment: Commenter (0179) supported the integration of innovative measures such as energy efficiency programs or renewable energy programs that meet the requirements of the CAA section 172(c)(9) and section 182(c)(9) for areas classified as Serious or higher to be used as contingency measures. Commenter (0180) agreed that, innovative measures may be allowed if they otherwise comply with the requirements for contingency measures; i.e., emission reductions must be quantifiable, surplus, permanent and enforceable.

Response: The EPA appreciates the Commenters support and the EPA will continue to allow and encourage implementation of innovative measures such as energy efficiency programs or renewable energy programs that may be satisfy the requirements of the CAA section 172(c)(9) and 182(c)(9).

I. How do the NSR requirements apply for the 2008 ozone NAAQS?

1. General NSR requirements for the 2008 ozone NAAQS

Comment: Permit programs must help ensure attainment and maintenance

Commenter (0140) encouraged EPA to use this implementation rule to ensure that states make changes to their permitting programs that would be necessary to avoid their interference with attainment and maintenance of the 2008 ozone NAAQS. The commenter indicated that as representatives of an area where elevated ozone levels primarily come from beyond our boundaries and are heavily influenced by emissions from rural counties, the CACAC believes that this implementation rule should provide more rigorous requirements for state agencies to show that their permitting programs do not interfere with attainment and maintenance of the ozone standard. This is particularly needed to address the problems from the issuance of broad "permits by rule" for smaller sources like oil and gas equipment that, in aggregate, can cause very significant ozone impacts if upwind of a nonattainment or near-nonattainment area. In order to address permitting for smaller sources, the CACAC recommends that the EPA require that any emissions authorized by permit – including permits by rule – be modeled in any future year projection, and that all sources holding an authorization be limited to only what emissions are

modeled in the attainment demonstration. This would ensure that state agencies institute limits on emissions from smaller sources that are consistent with their own modeling assumptions. Another way that would provide more flexibility would be to set emission authorization limits for counties, groups of counties, or an entire AQCR consistent with the modeling assumptions.

More robust requirements are also particularly needed for permitting larger point sources that may not cause ozone NAAQS violations through reactions of its own NO_X and VOC emissions, but which, when added to the ozone and precursors already in the atmosphere, cause violations nearby. The CACAC recommends that states require photochemical modeling using either the platform EPA uses for its modeling or a platform adopted by the State as part of a SIP submission. At a minimum, permit applicants seeking to build a new major source or undertake a major modification of an existing source within the same AQCR as an area that is designated nonattainment or has a design value within 5% of the NAAQS should have to model their permit's impacts on eight-hour ozone averages at regulatory monitors within the same AQCR, and should be limited to an average impact on those monitors of 0.75 ppb or less, and that the emissions would not cause a modeled violation in any grid cell where no violation was modeled if the source was not included. Provisions could be made to account for model performance measurements, adjusting the impacts and values in these grid cells to account for the model's bias. Regardless, photochemical modeling is common enough and inexpensive enough that a permit for a major new source should not be granted until photochemical modeling is performed that demonstrates that it won't interfere with attainment or maintenance of the standard, or cause a significant deterioration in ozone levels.

Response: The commenter appears primarily concerned about the effect that source growth occurring outside of a particular nonattainment area for ozone may have on downwind nonattainment areas, and urges that "this implementation rule should provide more rigorous requirements for state agencies to show that their permitting programs do not interfere with attainment and maintenance of the ozone standard." As discussed further below, there are several provisions in existing EPA regulations that require states to have permitting programs to ensure attainment and maintenance of the ozone standard within their boundaries and in neighboring states. The EPA believes the commenter's concerns can primarily be addressed through the application of those requirements in individual state plans. Thus, we do not believe additional changes to EPA regulations (beyond those in this rulemaking) are needed for this purpose. In a separate action, the EPA is considering the extent to which EPA regulations should be revised to provide more specific guidelines on the use of photochemical modeling.

To the extent that the commenter is addressing how a specific state with a nonattainment area accounts for new source growth in an attainment demonstration, that is best addressed in the review of individual state plans. We are not in this action adopting changes to our regulations or guidance that uniquely address a specific ozone nonattainment area. We recognize that each nonattainment area has unique characteristics and a state should take that into consideration in formulating an individual attainment demonstration.

The commenter provides various recommendations for enhancing the permitting requirements for both large and small sources to ensure permit programs do not interfere with attainment and

maintenance, including for permits by rule. It is important to note that the EPA did not discuss or propose any regulation or policy change for permits by rule in this rulemaking. Such permits are typically issued to minor sources pursuant to state minor source permitting programs, which are subject to the requirement in 40 CFR 51.160, that permitting authorities be able to prevent any construction or modification that would interfere with attainment or maintenance of any NAAQS. Accordingly, states are already required to ensure that no sources authorized for construction under its minor source program, including a source authorized by a permit by rule, regardless of its location relative to a nonattainment area, will interfere with the attainment and maintenance of any NAAQS.

With regard to new or modified sources that are located outside the nonattainment area and in areas designated as attainment or unclassifiable for the ozone NAAQS, such sources would not be subject to nonattainment NSR requirements, which include requirements to apply LAER control technology and to acquire emissions reductions from existing sources to offset the emissions increase that will result from the proposed new or modified major source. Instead, the applicable permitting requirements for new major stationary sources and major modifications locating in attainment and unclassifiable areas are the Prevention of Significant Deterioration (PSD) Program, which are required under Part C of subchapter I of the Clean Air Act.

The PSD program requires that major stationary sources conduct an air quality impact analysis to demonstrate that emissions from the construction or operation of the proposed source or project will not cause or contribute to a violation of any NAAQS or PSD increment. CAA § 165(a)(3); *see also*, 40 CFR 51.166(k), 40 CFR 52.21(k). Thus, to obtain a PSD permit, a new major source or major modification must demonstrate that it will not cause or contribute to a violation of any NAAQS. More specifically, consistent with section 165 of the Act, the PSD regulations at 40 CFR 52.21(k) and 51.166(k) require a source owner or operator to demonstrate that allowable emissions increases from the proposed source or modification in conjunction with other source emissions in the area will not cause or contribute to a violation of any NAAQS in any air quality control region. In light of these existing requirements, EPA does not agree that the changes the commenter recommends for PSD permitting are necessary. Moreover, the EPA works closely with states, primarily through its Regional Offices, to ensure that new and modified major sources are adequately reviewed to protect the NAAQS. To the extent that the commenter offers recommendations with regard to the manner in which sources locating near but not in nonattainment areas should be analyzed, we are not adopting new procedures into regulations or providing new guidance on how the air quality impact analysis should be done.

With respect to the commenters' suggestion that the EPA should require the use of photochemical modeling to complete the source impact analysis for permitting purposes, the EPA's judgment has been that it was not technically sound to designate specific models that must be used to assess the impacts of a single source on ozone concentrations. Thus, EPA does not require use of photochemical models to assess the impacts of a single source on ozone concentrations. Nevertheless, the EPA recognizes and has explained that sources subject to PSD have a statutory and regulatory obligation to conduct a source impact analysis and to demonstrate that any proposed emissions increase will not cause or contribute to a violation of any NAAQS. To satisfy that requirement, EPA has explained that the particular models or other analytical

techniques that should be used is determined on a case-by-case basis. As stated in Section 5.2.1.c of the EPA's "Guideline on Air Quality Models," (GAQM) codified in Appendix W to 40 CFR part 51, the "[c]hoice of methods used to assess the impact of an individual source depends on the nature of the source and its emissions." Under GAQM, the appropriate methods are determined in consultation with the EPA Regional Office on a case-by-case basis. A modeling protocol should be developed and approved by the EPA Regional Office, the state/local agency, and the applicant to ensure that the analysis conducted will conform to the recommendations, requirements, and principles of Appendix W. 40 C.F.R. Part 51, Appendix W, section 3.2.2.

The EPA is also engaging in a separate rulemaking process to evaluate whether updates to Appendix W are warranted for ozone and is planning to propose a rulemaking in 2015 to consider whether to update Appendix W. *See* Letter from Gina McCarthy, Assistant Administrator, to Robert Ukeiley (Jan. 4, 2012), available at http://www.epa.gov/scram001/10thmodconf/review_material/Sierra_Club_Petition_OAR-11-002-1093.pdf. To the extent that recent advances in photochemical modeling science suggest that it may now be reasonable for the EPA to provide more specific, generally-applicable guidelines that identify particular analytical techniques or models that may be used under specific circumstances for assessing the impacts of an individual source on ambient ozone concentrations, such emerging capabilities could be considered as part of the consultative process already in place and are also being considered as part of the ongoing process to evaluate potential updates to Appendix W.

With respect to emissions that cross state boundaries, section 110(a)(2)(D)(i) of the Clean Air Act requires that State Implementation Plans contain adequate provisions that prohibit "any source or other type of emissions activity with the state from emitting any air pollutant in amounts which will – . . . (II) interfere with measures required to be included in the applicable implementation plan for any other state under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility." EPA has previously promulgated a regulation which requires that SIPs contain a preconstruction review program or its equivalent to satisfy the requirements of this section of the Act. 40 C.F.R. § 51.165(b).

Comment: Grandfathering

Commenter (0180) stated that EPA has correctly refused to allow grandfathering of permit applications pending at the time of a NAAQS revision, citing section 165(a)(3) of the CAA and arguing that the CAA does not authorize such grandfathering**.** Commenter (0180) also stated the Agency must abandon any suggestion that it has any authority under the CAA to exempt facilities from the requirements of PSD if EPA or a state or local permitting authority receives a permit application prior to the issuance of new or revised NAAQS. In addition to the commenter's interpretation that the CAA prohibits such grandfathering, the commenter claimed that to allow for grandfathering of permit applications would be "a reversal of" the EPA's own policy, as contained in a 2010 Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards, entitled "Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards" (April 1, 2010).

Response: As acknowledged by the commenter, the EPA indicated in footnote 53 of the preamble to the proposed rule that we did not propose a PSD grandfathering provision for the 2008 ozone NAAQS, and we are not promulgating such a provision in this final rule. As explained in both the preamble to the final rule and the proposal, in this particular situation, because the 2008 ozone NAAQS has been in effect for a considerable time, we have concluded that a grandfathering provision is not necessary. Accordingly, these comments relating to EPA's grandfathering authority are outside the scope of this rulemaking. Nevertheless, we disagree with the commenter's position that the EPA lacks statutory authority to exempt pending PSD permit applications from certain PSD requirements that become applicable while the permit application is pending.

With regard to section 165(a)(3) of the CAA, as well as the implementing PSD regulations, the owner or operator of a proposed facility is required, among other things, to demonstrate that "emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any … national ambient air quality standard in any air control region." *See also* 40 CFR 51.166(k), 40 CFR 52.21(k). The EPA has interpreted this requirement to include any NAAQS that is in effect as of the date a permit is issued, unless the EPA has issued a regulation that grandfathers pending permit applications from the requirement to demonstrate that the proposed facility does not cause or contribute to a violation of the new or revised NAAQS. *See, e.g.*, 73 FR 28321, 28324, 28340 (May 16, 2008); 78 FR 3253 (Jan. 15, 2013); Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards, "Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards" (April 1, 2010). Thus, the EPA believes that the commenter's citation of the 2010 Page Memo does not correctly characterize what the EPA said in that memorandum. Nothing in that memo would preclude us from adopting a grandfathering provision where we deem one to be appropriate and follow the necessary rulemaking process. In fact, the memorandum recognizes that the EPA has previously issued regulatory provisions to grandfather PSD sources from new requirements under certain circumstances and includes examples of situations in which the EPA has taken such an approach. See, e.g., Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards, "Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards" (April 1, 2010) at 3.

As the agency has previously stated, and continues to believe, the relevant provisions of the CAA provide the agency with the discretion to promulgate regulations to grandfather pending PSD permit applications from requirements that become applicable while the applications are pending. *See* 45 FR 52683, August 7, 1980; 52 FR 24672, July 1, 1987; 78 FR 3086, January 15, 2013. As discussed in more detail in these referenced actions, section 165(a)(3) of the CAA requires that a permit applicant demonstrate that its proposed project will not cause or contribute to a violation of any NAAQS. At the same time, section 165(c) of the CAA requires that a PSD permit be granted or denied within 1 year after the permitting authority determines the application for such permit to be complete. In addition, section 301 of the CAA authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under this

chapter." When read in combination, these three provisions of the CAA provide the EPA with the discretion to issue regulations to grandfather pending permit applications from having to address a revised NAAQS where necessary to achieve both CAA objectives to protect the NAAQS and to avoid delays in processing PSD permit applications.

Moreover, in a recent opinion the U.S. Court of Appeals for the Ninth Circuit recognized the EPA's traditional exercise of grandfathering authority through rulemaking and indicated that this approach was consistent with statutory requirement to "enforce whatever regulations are in effect at the time the agency makes a final decision" because it involved identifying "an operative date, incident to setting the new substantive standard, and the grandfathering of pending permit applications was explicitly built into the new regulations." *Sierra Club v. EPA*, 762 F.3d 971, 983 (9th Cir. 2014). Thus, while this court decision vacated the agency's action to grandfather an individual permit application on a case-by-case basis without rulemaking, the EPA does not interpret this opinion to limit its authority to grandfather through rulemaking, and rather believes that the decision offers support for such authority. This authority includes, in appropriate circumstances, discretion to grandfather sources through rulemaking from the requirement to address a new or revised NAAQS that takes effect while the permit application is pending in its demonstration that the proposed project does not cause or contribute to a violation of any NAAQS.

Comment: PSD permitting and modeling

Commenter (0159) supported the EPA's position that the demonstration that a proposed source or modification will not cause or contribute to a violation of the 2008 ozone NAAQS does not necessarily require permit applicants to perform new air quality modeling. The commenter believed that the EPA has stated that PSD permit applicants and permitting authorities should continue to follow the current practice described in Appendix W to 40 CFR part 51. 78 FR at 34,200. The commenter supported the EPA's position on this matter, as the current practice stated that PSD permit applicants and permitting authorities should consult with the applicable EPA regional office to determine the appropriate means of addressing such impacts. The commenter also agreed that a spirit of cooperativeness and collaboration between the regulated community, the states, and federal government is the best method to achieve attainment with the ozone NAAQS.

On the other hand, commenter (0180) stated that the EPA should require applicants to undertake new air quality modeling when seeking a new PSD permit. This commenter stated that the proposal cites Appendix W to suggest that applications for PSD permits do not "necessarily require the permit applicants to perform new air quality modeling." 78 FR at 34200. The commenter believed that the EPA suggested that a "case-by-case" approach devoid of modeling could satisfy the requirement that applicants demonstrate that the "proposed source or modification will not cause or contribute to a violation of the 2008 ozone NAAQS." *Id.* However, the commenter believed the requirement that a source undertake modeling is dictated by the Act itself, in section 165(e), where the Administrator must "specify with reasonable particularity each air quality model or models to be used under specified sets of conditions." 42 U.S.C. § 7475(e)(3)(D). Moreover, the statute acknowledges that models may need to be

adjusted, where any model or models "designated . . . may be adjusted upon a determination, after notice and opportunity for public hearing . . . that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit." 42 U.S.C. § 7475(e).

The commenter further believed that the statute does not, however, provide for elimination of the modeling requirement, since, as section 165(e) makes clear, the analysis required by the section is critical to the execution of section 165(a)'s permitting processes. The commenter further stated though certain source-specific factors may vary when undertaking the air quality review described by section 165(e), the Act makes clear that modeling is expected with all applications, the results of which must then be available to the public for review. The commenter stated that failing to require modeling in an application provides a less complete picture of air quality in the area. The commenter concluded that, as such, permit applicants may be over- or under-correcting their emissions, and it is the public that pays the price. The commenter suggested that the EPA should require applicants to undertake new air quality modeling when seeking a new PSD permit.

The commenter implied that by the time the EPA finalizes this rulemaking, it will have been over two years since EPA granted Sierra Club's July 28, 2010 petition to designate air quality models for ozone for use by all major sources applying for a PSD permit. The commenter further pointed out that since that time, the EPA has held its Tenth Conference on Air quality Modeling and its 2012 RSL Modelers' Workshop where this topic was addressed. The commenter suggested that it is now time for the EPA to stop delaying and, in this rulemaking, designate a model or models for use in analyzing ozone impacts for PSD permits. The commenter believed this is especially critical because there are many, many areas of the country where the ambient levels of ozone are at or above the 2008 ozone NAAQS but are nevertheless, designated attainment so that PSD applies. The commenter considered that the EPA's concern that ozone modeling is too expensive to require of PSD applicants is factually incorrect and legally irrelevant. Furthermore, as the commenter noted above, even once the EPA designates a model or models, applicable regulations provide a mechanism for adjusting the designated model if that is truly needed.

Response: We agree with the comment supporting our position that air quality modeling is not necessarily required as part of every ambient impact analysis for ozone required by the CAA's PSD requirements. On the other hand, we disagree with the comment asserting that section 165(e) of the CAA compels each PSD applicant to undertake new air quality modeling when seeking a new PSD permit. Section 165(e)(3)(D), which the comment cites, requires in relevant part that the Administrator adopt regulations specifying "with reasonable particularity each air quality model or models to be used under specified sets of conditions." To carry out these requirements, in June 1978, the *Guideline on Air Quality Models* was first incorporated by reference in regulations promulgated for PSD (40 CFR Parts 51.166 (formerly 51.24) and 52.21). *See* 43 FR 26388, 26398 (June 19, 1978); 51 FR 32176 (Sept. 1986); 53 FR 392 (Jan. 6, 1988). With respect to ozone, the EPA has explained that the complex chemistry of ozone is well-documented and has historically presented significant challenges to the designation of particular

models for assessing the impacts of individual stationary sources on the formation of these air pollutants.[21]

Because of these considerations, the EPA's judgment has long been that it is not technically sound to designate with particularity specific models that must be used to assess the impacts of a single source on ozone concentrations. *Id.* Instead, the EPA has chosen to satisfy the requirements of Section 165(e)(3)(D) of the CAA through a process of determining particular models or other analytical techniques that should be used on a case-by-case basis. *Id.; see also* 40 C.F.R. part 51, App. W, section 5.2.1.c. Accordingly, the EPA has not previously interpreted and does not now interpret section 165(e)(3)(D) to create a requirement that every PSD applicant submit new air quality modeling whenever it seeks a PSD permit. Moreover, the opposing comment appears to assume that this provision applies directly to PSD permit applicants, but does not provide any analysis or explanation to support that assumption. Section 165(e) clearly directs EPA to promulgate regulations to address the requirements of this provision. Further description of how EPA interprets and implements the requirement under section 165(a)(3) of the CAA that a source demonstrate that its emissions will not cause or contribute to a violation of any NAAQS for ozone is provided in the Response to Comment I.1.A above and in Section I of the preamble to the final rule.

In addition, the PSD regulations, at sections 51.166(l)(1) and 52.21(l)(1), provide that "all estimates of ambient concentrations [required under the relevant provisions] shall be based on applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models)." Thus, all modeling done to meet the PSD requirements must be based on Appendix W, unless a modification or substitution has been made pursuant to 51.166(l)(2) and 52.21(l)(2). But as explained above and elsewhere in the Response to Comments and the preamble to the final rule, Appendix W does not require air quality modeling in all situations to satisfy the PSD requirements and does not require such modeling for all PSD sources that must provide an air quality impacts analysis for ozone.

With respect to the comments regarding the Sierra Club's July 28, 2010 petition as it relates to ozone, on January 4, 2012, EPA granted the Sierra Club petition requesting, among other things, that the EPA initiate rulemaking to designate air quality models for ozone.[22] The EPA agreed to engage in rulemaking to evaluate potential updates to its Guideline on Air Quality Models as published as Appendix W of 40 CFR Part 51 and, as appropriate, incorporate new analytical

---

[21] *See* Letter from Gina McCarthy, Assistant Administrator, to Robert Ukeiley, at 1-2 (Jan. 4, 2012), available at ***http://www.epa.gov/scram001/10thmodconf/review_material/Sierra_Club_Petition_OAR-11-002-1093.pdf***.

[22] *See* Letter from Gina McCarthy, Assistant Administrator, to Robert Ukeiley, at 1 (Jan. 4, 2012), available at *http://www.epa.gov/scram001/10thmodconf/review_material/Sierra_Club_Petition_OAR-11-002-1093.pdf.*

techniques or models for ozone. *Id.* Consistent with that petition grant, the EPA has been going through a process to evaluate potential updates to Appendix W. I*d.* at 1, 3. As noted by the commenter, we have initiated actions to support rulemaking, including the 10th Conference on Air Quality Modeling in March 2012 where we discussed methods for addressing ozone. The EPA is following the existing process and procedures under Section 320 of the CAA to complete the appropriate rulemaking process in response to the petition. Consistent with this process and past practice, the EPA expects discussion to occur in 2015 at the 11th Modeling Conference and is planning to propose a rulemaking in 2015 to consider whether to update Appendix W. Meanwhile, PSD permit applicants should continue to follow the existing procedures to determine the appropriate method for evaluating their impacts on ozone formation. *See* 40 C.F.R. part 51, App. W, section 5.2.1.c. Under the existing process, the appropriate methods are determined in consultation with the EPA Regional Office on a case-by-case basis. *Id.* Accordingly, the EPA will continue to work with permitting authorities to determine appropriate methods to satisfy the statutory and regulatory requirements for the air quality impacts analysis for ozone on a case-by-case basis.

Comment: PSD permitting and anti-backsliding

Commenter (0163) agreed that the obligation to implement nonattainment NSR requirements associated with two or more standards means that the area must implement the thresholds and offset ratios associated with the highest nonattainment classification and objects to any proposal to weaken these NSR requirements.

Commenter (0180) stated EPA must determine NSR permitting obligations with reference to the area's highest nonattainment classification, whether it is for the 2008 ozone NAAQS or a previous ozone NAAQS for which the area remains in nonattainment. The commenter believed that the EPA proposes that once areas are designated with respect to the 2008 ozone NAAQS, a particular area's New Source Review requirements will be based on the highest nonattainment classification that has applied to that area (either the 2008 ozone NAAQS classification or a previous ozone NAAQS for which the area remains in nonattainment). 78 FR at 34200. This approach is compelled by the D.C. Circuit's decision in *SCAQMD*. It is also appropriately protective and will help guard against worsening air quality. In *SCAQMD*, the court found that control measures pertaining to a prior, revoked NAAQS had to remain in place in order to prevent backsliding. In discussing the anti-backsliding implications of removing certain controls, the court noted that the Act "reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter." 472 F.3d at 900. Specifically, the court rejected EPA's attempts to waive continuing obligations to implement control measures, including NSR, because "EPA was to enforce a high threshold for removing controls from a SIP." *Id.* The court found that "something designed to constrain ozone levels is a 'control,' and this would include NSR" for the purposes of the Act's anti-backsliding requirements. *Id.* at 902. As such, in order to comply with the statute, EPA must determine NSR permitting obligations with reference to the area's highest nonattainment classification, whether it is for the 2008 ozone NAAQS or a previous ozone NAAQS for which the area remains in nonattainment. (0180)

Response: In the final rule, the EPA is including anti-backsliding provisions similar to those proposed with only minor edits for clarification. Accordingly, in an area designated nonattainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS at the time of revocation of the 1997 ozone NAAQS, the state will be obligated to implement the applicable requirements set forth in 40 CFR 51.1100(o). This could include, as applicable, anti-backsliding requirements associated with the revoked 1-hour NAAQS if the area was also designated nonattainment for the 1-hour ozone NAAQS when that NAAQS was revoked. Nonattainment NSR applies (specifically, the major source thresholds and offset ratios) in these areas in accordance with their highest nonattainment classification under any ozone standard for which they are (or were at the time of revocation) designated nonattainment. It is also important to note, as included in the final rule, that the previous 1997 ozone NAAQS standard is revoked with this rule, therefore if an area is designated attainment for the 2008 ozone NAAQS but is still nonattainment for the 1997 ozone NAAQS, the area will be considered attainment upon the effective date of the rule due to its inherent stricter value, and the PSD program will be applicable for new and modified major sources. However, the rule does not relieve older sources from the maintenance of controls applied due to an earlier classification of nonattainment. Please refer to section 3.G for further discussion about the revocation of the 1997 ozone standard.

Comment: 18-month period for Appendix S waiver provision

Commenter (0180) stated EPA is correct that no exemptions beyond 18 months are possible. The commenter supported the EPA's policy that states Appendix S governs in states that have yet to update their SIP requirements in newly designated nonattainment areas. The commenter considered this reading to be correct and appropriate in light of *NRDC v. EPA*, 571 F.3d 1245, and the EPA should revise 40 CFR § 52.24(k) as soon as possible, in accordance with the court's decision. *NRDC* addressed implementation of the 1997 ozone standards, where the court held that EPA's elimination of the 18-month limit on New Source Review exemptions violated the CAA's anti-backsliding provisions.

The commenter specifically indicated that section 110(a)(2)(c) of the CAA requires states to implement an NSR program. The commenter supposed the Act does not, however, specify what NSR requirements apply after an area is designated nonattainment but before the NSR SIP is approved. The commenter stated that historically, the EPA had applied Appendix S, which establishes interim NSR permitting requirements and provides for limited exemptions from NSR requirements. In 1980, EPA clarified that Appendix S should apply for no more than 18 months. That provision applied until 2005, when the rules implementing the 1997 ozone standards eliminated the 18-month permitting requirements.

The commenter stated that in finding that this elimination violated the Act, the court held that NSR is a "control" subject to section 172(e)'s backsliding prohibition []. Accordingly, the EPA's elimination of the 18-month exemption limit violates section 172(e) if the resulting NSR requirement is "less stringent" than the existing requirement. Insofar as Appendix S now provides for waiver of NSR for an unlimited time pending SIP approval, it is plainly "less stringent" than the previous version which limited an NSR waiver to an 18-month term." As petitioners argue, the EPA's revision could delay implementing NSR controls in eligible nonattainment areas for years beyond the previous 18-month limit. Accordingly, we conclude

that the revision constitutes backsliding in violation of section 172(e). 571 F.3d at 1271. The commenter further concluded that in light of this vacatur, EPA is correct that no exemptions from NNSR beyond 18 months are possible. The commenter agreed with the Agency that CFR § 52.24(k) should be revised to reflect this ruling as expeditiously as possible. (0180)

Response: We agree with the commenter to the extent that the exemptions at issue pertain to the exemptions contained in section VI of Appendix S, which waives certain NNSR provisions that would otherwise be required for each applicant. While the specific waiver provisions of section VI should not be allowed beyond 18 months from the date of designation, the EPA does not consider the remainder of Appendix S as it pertains to an interim NNSR program prior to the approval of a state NNSR SIP, to be subject to an 18-month time limitation. Please see the preamble Section I.1 for a more detailed discussion. The EPA intends to revise section 52.24(k) to reflect the court's vacatur of the extension of the 18-month time limit for section VI of appendix S; however, we did not propose such a revision in this rulemaking and we are not taking any final action in this rule to revise 52.24(k).

Comment: Clarification on construction ban

Commenter (0154) noted that the EPA discusses (pp. 34200-34201) implications of ozone nonattainment on NSR, including the requirement to impose nonattainment NSR, and a court ruling in NRDC v EPA, 571 F.3d 1245 (D.C. Cir. 2009), wherein EPA says "The court dismissed the petitioners' general objections as "untimely" but vacated "the elimination of the 18-month time limit for NSR waivers under Appendix S" on the grounds that it violated section 172(e) of the CAA. Commenter (0154) requested that EPA rewrite this section of the proposal to make it clear whether a construction ban is in place for all nonattainment areas that do not have approved nonattainment NSR programs in place. Commenter (0154) asserted they have discussed this issue with the EPA's regional offices on numerous occasions and it is still unclear what is meant by this section of the proposal.

Response: In *NRDC v. EPA* (571 F.3d 1245 (D.C. Cir. 2009)), the court considered the petitioners' general objections to the NSR waiver provision contained in section VI of appendix S, as well as the EPA's elimination of the 18-month limit on the applicability of that section. The court dismissed the petitioners' general objections as "untimely" but vacated "the elimination of the 18-month time limit for NSR waivers under Appendix S" on the ground that it violated section 172(e) of the CAA (571 F.3d at 1276). As stated in our response to comment in Section 2.I.1 above, the EPA intends to revise section 52.24(k) to reflect the court's vacatur of the extension of the 18-month time limit for section VI of appendix S, but is not revising 52.24(k) in this rulemaking. In the meantime, as a result of the vacatur, no section VI waivers may be granted beyond 18 months from the date of designation.

With respect to the construction ban, the Clean Air Act Amendments of 1990 removed the construction ban. Under 40 CFR 52.24(k), after designation of a nonattainment area and prior to EPA's approval of a nonattainment NSR program for that area that meets the requirements of part D of title I of the CAA, the Emission Offset Interpretative Ruling, 40 CFR part 51, appendix S governs permits to construct. As stated in the EPA's June 6, 2013 proposal for this rule, 78 FR 34200-201, in the EPA's 2005 promulgation of the phase 2 implementation rule for the 1997

ozone NAAQS, "the EPA revised section 52.24(k) to eliminate language stating that if a nonattainment area did not have an approved nonattainment NSR program within 18 months after designation, a construction ban would apply." The June 6, 2013 proposal explains that the DC Circuit Court of Appeal's decision in *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009) left this revision of § 52.24(k) undisturbed, except with respect to the availability of waivers under section VI of Appendix S after the 18-month period has expired. Thus, commenter's concerns about a construction ban are unnecessary, as Appendix S to 40 CFR part 51 (with the exception of waivers under section VI of Appendix S after January 20, 2014) will continue to govern construction permits within respective nonattainment areas until the EPA approves a SIP revision containing a NNSR program that meets the requirements of part D of title I of the Act, specifically the NNSR requirements contained in 40 CFR 51.165.

Comment: Clarification on section VI waivers

Commenters (0155 and 0157) stated that the EPA should clarify that the reinstated 18-month deadline applies only to section VI waivers, and not to the applicability of the remainder of Appendix S, which states should continue to be able to use for NNSR beyond the 18-month period.

Response: The commenters are correct that no section VI waivers may be granted beyond 18 months from the date of designation as nonattainment. The application of the remainder of appendix S, however, is not subject to an 18-month time limitation. Please see section I.1 of the preamble for the final rule for a more detailed discussion.

Comment: PSD significant emission rate

Commenter (0180) stated EPA must revise the PSD significant emission rate and exemption from the ambient impact assessment requirement. The commenter indicated that the EPA stated that after the 1997 ozone NAAQS is revoked, PSD will apply in areas designated attainment for the 2008 ozone NAAQS. 78 FR at 34216. EPA should not revoke the 1997 ozone NAAQS. However, if EPA does revoke the 1997 standard, it would be arbitrary and capricious for EPA to apply PSD under EPA's current PSD regulations to the 2008 ozone standard because there is no rational basis to apply certain parts of the PSD regulations to the 2008 ozone NAAQS. (0180)

EPA's regulations implementing the prevention of significant deterioration program set various *de minimis* thresholds specific to each national ambient air quality standard. For example, the significant threshold for prevention of significant deterioration applicability for ozone is 40 tons per year of volatile organic compounds or nitrogen oxides. 40 CFR § 52.21(b)(23)(i)(2011). The significance threshold for carbon monoxide is 100 tons per year but the significance threshold for lead is only 0.6 tons per year. *Id.*

These significance thresholds are generally based on the amount of pollution a polluter can emit before exceeding four percent (4%) of the ambient air quality standard expressed over a short term period or two percent (2%) of a standard expressed over an annual period. *See e.g.*, 52 FR 24, 678, 24,695 (July 1, 1987)(explaining that significant emission rates are set by "us[ing] an emission rate for which the modeled ambient [air pollution] concentration represent[s]

approximately 4 percent of the 24-hour primary standard."). Another prevention of significant deterioration *de minimis* exemption is that any net emission increase of less than 100 tons per year or more of volatile organic compounds or nitrogen oxides does not have to perform an ambient impact analysis, including gathering ambient air quality data. 40 CFR § 52.21(i)(5)(i)(f) and note (2011). (0180)

The thresholds are considered *de minimis* in relationship to a specific national ambient air quality standard. *See, e.g.*, 52 FR at 24695 (significant emission rate based on amount of pollution equal to 4 percent of NAAQS); 50 FR 13130, 13145 (April 2, 1985) (explaining basis for PSD implementation "significant emission rate" was based on four percent of the NAAQS); 45 FR at 52707-08 (explaining that the PSD implementing regulations are established based on "*de minimis*" values set as a percentage of the most stringent NAAQS for each pollutant). EPA has gone so far as to determine that these *de minimis* values should never exceed five percent of the national ambient air quality standards. 45 FR at 52707 ("levels higher than five percent of the primary [NAAQS] were not seriously considered" because such impacts would consume too much of the allowable airshed resource); *id*. at 52 708 (for nitrogen oxides, which had a NAAQS expressed only as an annual standard, the *de minimis* rate was set at 2 percent of the NAAQS). When the national ambient air quality standard changes, EPA necessarily must evaluate the PSD implementation regulations. If it does not, the PSD regulations *de minimis* standards no longer maintain their previously chosen proportion to the national ambient air quality standards and therefore no longer represent only *de minimis* impacts in relationship to the new national ambient air quality standard. In other words, a change in the national ambient air quality standard without changing the prevention of significant deterioration *de minimis* threshold regulations yanks the regulations from their national ambient air quality standard moorings. EPA is proposing to apply the current PSD regulation's *de minimis* thresholds to the 2008 ozone NAAQS but EPA offers no analysis to support that these *de minimis* standards are actually *de minimis* in relationship to the 2008 ozone NAAQS. Therefore, EPA must review and revise the PSD ozone significant emission rate and exemption from the ambient impact assessment requirement. (0180)

Response: The EPA disagrees with the commenter's assertions that (1) the 1997 hour ozone standard should not be revoked and (2) an area should not be allowed to transition to PSD if the 1997 standard is revoked and the area is attainment for the 2008 standard. Clearly, if an area is designated attainment for the 2008 ozone NAAQS, then it is meeting a stricter health based standard than the 1997 8-hour ozone NAAQS. Please refer to section 3.G for further details about anti-backsliding and the revocation of the 1997 ozone NAAQS.

The EPA does not agree that the Agency must update its PSD regulations every time the EPA revises a NAAQS. The EPA does not interpret the CAA to require an automatic update of the PSD regulations with every revision of the NAAQS. In fact, arguments similar to the commenter's arguments were raised in litigation in the US Court of Appeals for the Ninth Circuit, and that court agreed with EPA's position, issuing a decision holding that EPA does not have a nondiscretionary duty under section 166(a) of the CAA to promulgate revised PSD regulations for ozone just because it had revised the ozone NAAQS. *See WildEarth Guardians v. McCarthy*, No. 12-16797, Slip. Op. at 9 (9th Cir., Dec. 1, 2014). That court reasoned that "Congress could have … left to the agency's discretion the responsibility for making whatever

revisions to [the PSD] regulations might be warranted when the corresponding NAAQS were revised." *Id.* at 8.

The EPA also disagrees with the commenter's position that the fact that the EPA has revised the ozone NAAQS necessarily means it is arbitrary and capricious to apply the current PSD regulations to the 2008 ozone NAAQS and that the existing significant emission rates for ozone cannot rationally be applied once the NAAQS have been revised unless the thresholds are updated to maintain the same proportion to the NAAQS previously used to justify these values. The EPA has existing PSD rules that apply to PSD permit applications that trigger permitting obligations for ozone, including significant emissions rates which are used to determine whether the increase in emissions of a pollutant from a new source or modification trigger PSD requirements for that pollutant. *See, e.g.*, 40 C.F.R. §§ 51.166(b)(23)(i), 52.21(b)(23)(i). The PSD program is structured so that the PSD rules apply seamlessly to regulated NSR pollutants, including pollutants for which NAAQS exist, without needing to be updated for every NAAQS revision. *See, e.g.*, 40 C.F.R. §§ 51.166(j)-(k), 52.21(j)-(k) (applying best available control technology requirements to each regulated NSR pollutant for which the proposed construction would trigger PSD and applying air quality impacts analysis requirements to any NAAQS). This approach is sensible because, while the EPA has discretion to modify the PSD rules when such modification is necessary or appropriate, not every revision to a NAAQS necessarily warrants a change to the PSD regulations. With respect to the significance of thresholds, the mere fact that the values for ozone were originally based on a particular proportion to the NAAQS in effect at an earlier time does not mean that those thresholds must be updated to maintain the same proportion to the NAAQS in perpetuity. The EPA retains the discretion to continue applying the existing values, even if emissions at that rate might have an impact equivalent to a different percentage of the NAAQS. The value need not reflect a particular percentage of the NAAQS, but rather reflect a level at which the "burdens" of regulating ozone precursors emitted in amounts less than that value "yield a gain of trivial or no value." *Alabama Power Co. v. Costle*, 636 F.2d 323, 361 (D.C. Cir. 1980). The fact that the NAAQS has changed does not demonstrate that the existing significant emissions rates for ozone precursors are no longer established at *de minimis* levels for ozone (e.g., levels below which regulation would yield trivial value).

The commenter does not provide any specific facts to demonstrate that emissions of ozone precursors at rates below the existence significance levels for ozone have more than a trivial impact and should be regulated in the NSR permitting program. Thus, the commenter does not show that the EPA should have exercised the discretion to propose revised significance levels for ozone in the proposed rule. This notwithstanding, since the EPA did not propose such a change to its regulations, the Agency is unable to promulgate revised significance rates for ozone in this final rule. However, the EPA will take the commenters concerns under advisement and consider whether additional action by EPA may be appropriate in the future.

In addition, the EPA does not agree with the comment's characterization of the 100 tons per year threshold in 40 CFR § 52.21(i)(5)(i) as a *de minimis* exemption from ambient impact analysis. The EPA does not consider the stated threshold to represent an automatic exemption from an ambient impact analysis. In the EPA's response to Sierra Club's July 28, 2010 petition for rulemaking, the Agency stated, … this 100 tons per year (TPY) value has been used by some

permitting authorities in a manner similar to a [significant impact level] to assess whether a detailed air quality analysis should be conducted for ozone.[23] While [certain prior EPA] statements suggest a less rigorous analysis may be appropriate for sources emitting less than 100 TPY of these precursors [NO_x and VOC], they have not been revisited by the EPA since the promulgation of the 8-hour ozone NAAQS and do not reflect a categorical conclusion by the EPA that every source emitting less than 100 TPY of NO_x or VOCs will not cause or contribute to a violation of the current ozone NAAQS.

The EPA has since initiated actions to support rulemaking in response to Sierra Club's petition, including the 10th Conference on Air Quality Modeling in March 2012 where we discussed methods of addressing ozone and secondary $PM_{2.5}$ impacts in PSD air quality impacts analyses and released draft guidance for $PM_{2.5}$ permit modeling in March 2013. The EPA is following the existing process and procedures under Section 320 of the CAA to complete the appropriate rulemaking process in response to the petition. Consistent with this process and past practice, the EPA expects further discussion to occur at the 11th Modeling Conference and is planning to propose a rulemaking in 2015 to consider whether to update Appendix W.

2. Offsets

Comment: Support offsets outside NAA

Commenter (0140) suggested that major source construction and major modification offsets should be able to be obtained within the same expanded area from which the state would be able to obtain emission reductions to fulfill RFP. The commenter indicated that for many areas that are on the verge of nonattainment such as Austin, there are only a very limited number of major sources within the MSA from which a company could obtain an offset to build a new facility or modify an existing facility, but there are many very large sources elsewhere within the AQCR or in adjacent areas contributing to nonattainment that would not be included in the pool of available offsets or be required to obtain an offset for major expansion or new construction. This leaves open the very real possibility of companies opening plants just outside the boundaries of the MSA but close enough to contribute to ozone problems. (0140)

Response: The EPA believes the commenter's suggestion conflicts with the statutory requirements for offsets restricting geographic areas from where offsets can be obtained. In accordance with the requirements under section 173(c)(1) of the CAA, emissions offsets for purposes of nonattainment NSR permitting must be obtained from the same source or same

[23] Letter from Gina McCarthy, Assistant Administrator, to Robert Ukeiley (Jan. 4, 2012), at 4 available at http://www.epa.gov/scram001/10thmodconf/review_material/Sierra_Club_Petition_OAR-11-002-1093.pdf.

nonattainment area as where the source requiring the offsets is located, except that the state may allow a source to obtain offsets from another nonattainment area if (1) that area has an equal or higher nonattainment classification than the nonattainment area in which the source requiring the offsets is located, and (2) emissions from that other area contribute to a violation of the NAAQS in the nonattainment area in which the source requiring the offsets is located. To the extent that the commenter suggests that offsets should be able to be obtained from an attainment area, or from a nonattainment area that does not meet these criteria, that suggestion would be inconsistent with the CAA. Accordingly, the EPA is not revising the existing regulatory requirements as to where emissions offsets may be obtained to allow such use of offsets. The EPA encourages the state to consider offset-related issues when recommending nonattainment area boundaries. CAA section 107(d)(1)(A) requires that nonattainment areas be comprised both of areas not meeting the NAAQS and nearby areas contributing to the area not meeting the NAAQS. If the areas outside of the MSA (in the AQCR or adjacent areas) mentioned by the commenter are nearby areas that contribute to nonattainment, CAA section 107(d)(1)(A) requires that these areas be included in the nonattainment area.

With regard to the commenter's assumption that states may use emissions reductions from outside a nonattainment area to fulfill RFP, please refer to II.C.7 of the RTC for further information.

Comment: State discretion

Commenter (0152) believed that EPA's proposal implied that offset banks or registries could only be established in economic development zones as determined by the Housing and Urban Development Secretary. The commenter believes such a position usurps a State's right to set up offset bank and registry programs and that such programs should be able to be set up anywhere within that state where appropriate modeling and technical analysis continues to show that with such programs, attainment is still achieved.

Response: The comment appears to be based on a misunderstanding of the EPA's position concerning offset banks. The EPA does not take the position that offset banks (and registries) can only occur in economic development zones. To the contrary, the final rule states, "States can help facilitate continued economic development in a nonattainment area by establishing offset banks or registries. Such banks or registries can help new or modified major stationary source owners meet offset requirements by streamlining identification and access to available emissions reductions. Some states have established offset banks to help ensure a consistent method for generating and using NO_x and VOC offsets.[24] Offsets in these areas are generated by emissions

[24] *See*, for example, emission reduction credit banking programs in Ohio (OAC Chapter 3745-1111) and California (H&SC Section 40709).

reductions that meet specific creditability criteria set forth by the SIP consistent with EPA regulations. See existing 40 CFR 51.165(a)(3)(ii)(A)-(J) and part 51 Appendix S section IV.C."

The Agency respectfully disagrees, however, with the comment insofar as it suggests that such programs should be able to be established anywhere in a state. The Act requires new and modified major sources in nonattainment areas to secure emissions reductions (i.e., "offsets") to prevent proposed emissions increases from new and modified major sources from interfering with reasonable progress toward attaining the NAAQS. Section 173(c) of the CAA establishes specific requirements that such emissions reductions must satisfy in order to be used as offsets for purposes of nonattainment NSR permitting, including a requirement that the offsets come from the same source or a source in the same nonattainment area as the source requiring the offsets, though the State may allow use of offsets from another nonattainment area that meets certain statutory criteria. Thus, the Act itself limits States' discretion as to the areas from which offsets can be obtained for NNSR purposes, and this limits the areas from which offset banks may draw from for purposes of NNSR. These limitations are reflected in and implemented by existing EPA regulations. *See* 40 CFR 51.165(a)(3)(ii)(F) and 40 CFR Part 51, Appendix S, Section IV.D. Those requirements are not being revised in this rulemaking.

3. Interpollutant Offset Substitution

Comment: Support the proposal for interprecursor trading and suggest additional actions

Commenters (0129, 0130, 0141, 0143, 0145, 0153, 0159, 0173, 0175 and 0178) stated that they support the proposal to allow substitution between the ozone precursors NO_x and VOC for the purpose of obtaining offsets for nonattainment NSR permitting. Some of the commenters offered specific suggestions about requirements that EPA should establish for such substitutions, as reflected in the following paragraphs.

One commenter stated that the EPA acknowledges that allowing states to develop provisions which make it easier for new or modified major sources to satisfy offset requirements with interpollutant offset substitutions may facilitate new source growth and continued economic development. Specifically, these provisions would allow substitution of NO_x emissions reductions to satisfy VOC offset requirements and vice versa. The commenter strongly encouraged the EPA to incorporate this section in the final rule for implementing the 2008 Ozone NAAQS as it would provide more flexibility in achieving offset requirements in nonattainment areas where VOC control technology has fully matured. (0129)

Another commenter stated that permits for facilities to construct or modify in nonattainment areas need to ensure that the expansion or new facility will not hinder progress toward compliance with the NAAQS. However, requiring facilities to obtain offsets for pollutants that only minimally reduce ozone concentrations is overly burdensome and should be streamlined. In areas where NO_x is the predominant ozone precursor, which is the case in most areas on the eastern seaboard, NSR offset requirements for areas within and outside the OTR should reflect this fact. The commenter believed that in these areas, NSR rules should not mandate that VOC

offsets be acquired for major permit actions. This commenter also suggested that such an exchange should also be able to be implemented in the OTR regions, as well as in nonattainment areas outside of the OTR. (0130)

Another commenter agreed and supported the retention of "interpollutant offset substitution" provisions in the final rulemaking. The commenter stated their agency has worked closely with EPA Region III and potentially affected facility owners and operators in southeastern Pennsylvania to obtain approval of interpollutant offset substitutions for NO_x emission reduction credits to satisfy VOC offset requirements and vice versa. DEP believes that the flexibility provided by interpollutant offset substitutions, when feasible, is essential for continued improvement in the Commonwealth's economy. (0143)

Another commenter urged the EPA to approve any offset substitution ratio shown to be consistent with air quality planning in the relevant nonattainment area. Offset substitution ratios can incentivize air quality improvements in ways such as the following:

• Substitution ratios can enable more projects that are subject to nonattainment offset requirements greater than 1: 1. In many areas, offset substitution may be the only realistic option to enable major industrial projects. Because newly constructed facilities in nonattainment areas use state-of-the-art emission controls and must more than offset their emissions increases, each new project should incrementally reduce emissions in the airshed.

• Substitution ratios can make voluntary emission control measures cost effective. For example, if NO_x control costs are high in an area, a source seeking to offset VOC might look instead to VOC control projects. However, if each unit of NO_x reduction could substitute for a higher quantity of VOC (based on a demonstration that NO_x contributes more than VOC to ozone formation in the nonattainment area), the source could be appropriately incentivized to prefer the same controls (i.e. NO_x controls) that more effectively reduce ozone levels. Thus, a substitution ratio could align the source's control preferences with the area's air quality needs. (0173)

Another commenter stated that it supports the U.S. EPA’s proposal to allow additional flexibility for satisfying new source review (NSR) pollutant offset requirements. Specifically, the commenter supported allowing nitrogen oxide (NO_x) offsets to satisfy VOC offsets, and vice versa. Wisconsin supports the proposal to allow states to establish offset trading ratios; however, the U.S. EPA should clearly articulate the approval process for ratios in the rule. In addition, the U.S. EPA should establish some default trading ratio in rule that states could use if they do not have the ability to conduct complex photochemical modeling. (0175)

Another commenter stated that it supports interpollutant offset substitution [78 FR 34201] among ozone precursors similar to what was authorized in EPA’s final 2008 Fine Particulate Matter ($PM_{2.5}$) NAAQS implementation rule for $PM_{2.5}$ precursors. (0178)

Commenter (0153) supported the proposal to allow states to establish interpollutant offset substitution provisions and to allow states to determine appropriate exchange rates, and stated it is important that the decision on whether to allow interpollutant offset substitution, and the

specific requirements of such a program, should be clearly at the discretion of each state. The commenter believed that State air pollution control agencies are in the best position to determine how a program could impact nonattainment area(s) within their boundaries. States should be allowed to 1) determine whether or not to allow interpollutant offsets, 2) to limit interpollutant offsets to a certain direction (e.g., to allow for NO_x emission reductions to be used to offset VOC increases, but not vice-versa, in a NO_x limited area), 3) determine how and when exchange rates should be set (e.g., one-time state-wide or county-specific ratios, determined on a case-by-case basis, etc.). EPA should set clear, unambiguous, minimum requirements for approvable offset substitution provisions so that state agencies can craft programs with a reasonable assurance of EPA approval, which will allow EPA to promptly review and act on state interpollutant offset substitution programs. Approval of such programs should be made by EPA regional offices with guidance from headquarters. The final SIP requirements rule should also allow states to implement adopted offsite substitution provisions unless disapproved by EPA (i.e., not make EPA approval a prerequisite for allowing interpollutant offsets). (0153)

Response: The EPA agrees with the comments that support allowing trades between the ozone precursors VOC and NO_x for purposes of satisfying the offset requirements for nonattainment NSR permitting. As explained in more detail in the preamble to the final rule, the EPA is amending the regulatory text in both 40 CFR 51.165 and 40 CFR part 51, Appendix S as a logical outgrowth of the proposal and the submitted comments to ensure that the offset provisions of both rules are consistent with our proposal and our ongoing position to allow such trades for the ozone precursors (VOC and NO_x). In particular, the EPA is finalizing revisions to 40 CFR 51.165(a)(11) and part 51 Appendix S IV.G.5 in this action. These changes in the regulatory text are intended to clarify that interprecursor trading continues to be an option for the ozone precursors VOC and NO_x, as long as such trades are consistent with existing policy and legal requirements; these regulatory revisions are not intended to change the underlying requirements for such trades.

Because the agency is not changing the underlying requirements for such interprecursor trades, we are not taking action in this rulemaking on the specific suggestions offered by commenters. With regard to a commenter's recommendation that interprecursor trading be allowed in the OTR, the changes in the regulatory text in this action do not specifically address the use of such trading within the OTR regions and do not change existing law or policy with regard to such trading in such areas.

With regard to the commenters' suggestions that the EPA should establish default trading ratios or establish a particular process or specific criteria for such approvals in this rulemaking, the Agency did not propose to, nor is it, codifying such ratios, criteria, or procedures. The Agency is not establishing default interprecursor trading ratios in this rule due in part to the variability in specific circumstances and the contribution and classification requirements of CAA §173. As indicated in the previous response, the EPA encourages State and local air agencies to seek support from the appropriate EPA Regional Office for ozone modeling concerns. The agency does not see a need to change the existing criteria and procedures at this point. Therefore, the EPA respectfully disagrees with the commenters' suggestion that EPA promulgate default trading ratios, or establish the commenters' suggested criteria and procedures (0153, 0173,

0175).

In response to comment (0153), the EPA did not propose to add, nor is it finalizing, regulatory language to allow states to use offset ratios prior to EPA approval. While permitting authorities are not required to allow such interprecursor trading, the EPA does not believe that establishment of interprecursor offset trading programs should be at the sole discretion of each state, but rather believes that such programs should continue to be addressed through the existing framework of reciprocal interstate offset trading agreements, federal-state cooperation and through the existing policy and legal requirements.

Comment: lnterpollutant trading—confirm it is allowed under existing policy

Commenter (0151) requested that EPA confirm in the final rulemaking that interpollutant trading is allowed under existing federal ozone policy and that states can provide for such trading in their SIPs. The commenter added that it is important that states be allowed to provide for in their SIPs for interpollutant trading. Particularly in areas of the country like the Northwest which are NO_x limited due to forests and other environmental factors, it will be important to allow NO_x reductions to offset VOC increases for the purposes of lowering ozone. (0151)

Response: As explained further in the preamble in section III., I, 1, and above in section 2.0, I, 1, the EPA is taking action in this final rulemaking to amend the regulatory text in both section 51.165 and Appendix S as a logical outgrowth of the proposal and the submitted comments to ensure that the offset provisions of both rules are consistent with statements made in our proposal notice, as well as our ongoing position to allow such trades for the ozone precursors (VOC and NO_x) in SIPs. See revised 40 CFR 51.165(a)(11) and part 51 Appendix S IV.G.5. These changes in the regulatory text are intended to clarify that interprecursor trading continues to be an option for the ozone precursors VOC and NO_x, as long as such trades are consistent with existing policy and legal requirements; these revisions are not intended to change the underlying requirements for such trades.

Comment: lnterpollutant offset default ratios by region

Commenter (0141) supported the establishment of trading ratios between NO_x and VOC precursors and asked EPA to allow the establishment of default ratios on a regional basis, rather than by individual nonattainment areas.

Commenter (0175) stated EPA should establish some default trading ratio in rule that states could use if they do not have the ability to conduct complex photochemical modeling if needed to establish default ratios.

Response: As explained in 3.0, I, 2, of this document and in the preamble to the final rulemaking, the EPA is taking action in this final rulemaking to amend the regulatory text in both section 51.165 and Appendix S to ensure that the offset provisions of both rules are consistent with our ongoing position to allow such trades for the ozone precursors VOC and NO_x.

With regard to the commenters' suggestions that the EPA should establish trading ratios between NO_x and VOC precursors, the Agency did not propose to, nor is it, codifying default interprecursor trading ratios in this rule due in part to the variability in specific circumstances and the contribution and classification requirements of CAA § 173. States and local air agencies are encouraged to seek support from the appropriate EPA Regional Office for ozone modeling concerns. Therefore, the EPA respectfully disagrees with the commenter's suggestions that the EPA establish default trading ratios at this time.

Comment: Use of existing studies to eliminate the VOC offset requirements

Commenter (0130) suggested that the proposal should allow states to use existing studies to eliminate the need for VOC offsets in certain areas where VOC emission reductions have been shown to be only minimally effective in reducing ground-level ozone concentrations.

Response: The EPA begins by noting that Congress has created an express statutory framework that establishes certain circumstances under which NO_x requirements do not apply or may be limited. In particular, in subpart 2 of part D of the Act, section 182(f) requires States to apply the same requirements under that subpart to major stationary sources of NO_x as are applied to major stationary sources of VOC. However, section 182(f) additionally specifies circumstances under which these NO_x requirements may be limited or would not apply ("NO_x waiver"). While Congress could have created a VOC waiver at the same time the section 182(f) NO_x waiver provisions were enacted (or subsequently), Congress did not do so (and has not since done so). Furthermore, while ambient air analyses show that NO_x emission reductions can be counterproductive under certain circumstances, we do not see a similar case for VOC.

The legislative history of the 1990 CAA Amendments contains some discussion of the NO_x waiver that Congress established in section 182(f). In the process of adding the new NO_x requirements to the Act, Congress recognized that NO_x reductions would help achieve ozone reductions in some ozone areas, but stated that "there are some instances in which NO_x reductions can be of little benefit in reducing ozone or can be counter-productive, due to the offsetting ability of NO_x to 'scavenge' (i.e., react with) ozone after it forms" (H.R. Rep. No. 490, 101st Congress, 2nd Sess., at 204). Congress also provided for additional review and study under section 185B "to serve as the basis for the various findings contemplated in the NO_x provisions" (H.R. Rep. 490 at 257). Pursuant to section 185B, the EPA, in conjunction with the National Academy of Sciences (NAS), conducted a study on the role of ozone precursors in tropospheric ozone formation. The joint study examined the role of NO_x and VOC emissions, the extent to which NO_x reductions may contribute or be counterproductive to achieving attainment in different nonattainment areas, the sensitivity of ozone to the control of NO_x, the availability and extent of controls for NO_x, the role of biogenic VOC emissions, and the basic information required for air quality models. With respect to VOC, the NAS report from the study states that

"control of VOCs never leads to a significant increase in ozone" (December 1991 NAS report, *Rethinking the Ozone Problem in Urban and Regional Air Pollution,* page 377). The final section 185B report, which was submitted to Congress on July 30, 1993, incorporates this NAS report along with an EPA report addressing the availability and extent of NO_x controls. Thus, the final section 185B report indicates that there is not the same technical or scientific basis for a VOC waiver as there exists for the NO_x waiver.

The commenter does not identify any other specific, existing studies that might support a waiver provision for VOC. Moreover, the commenter does not identify any statutory basis for its recommended VOC waiver and does not provide any explanation for why such a waiver would be consistent with the statutory requirements for offsets under the CAA. Accordingly, the EPA is not taking action in this rulemaking to establish such a waiver for VOC offsets. However, the EPA does support the use of interprecursor trading which is discussed in more detail in response to comments 2.0, I,A above.

Comment: Use existing EPA regional modeling for approval of offset trading ratios

Commenters (0155 and 0157) recommended that the EPA consider using its regional modeling to specify presumptive offset trading ratios that air quality control agencies may use for each ozone nonattainment air quality control region, without requiring agencies to conduct their own complex regional modeling. Alternatively, commenters (0155 and 0157) suggested that the EPA might provide examples of where such analyses have been successful in obtaining EPA approval of offset trading ratios, so that other agencies can follow the same procedures.

Response: As explained in more detail in the response to comments in 2.0.I. 2, above, the EPA did not propose to establish presumptive offset ratios as described by the commenter and is not taking action to establish such ratios in this final rule. However, the Agency continues to recommend consultation with the Regional Office for ozone modeling concerns. Therefore, the EPA respectfully disagrees with the commenter's suggestions that the EPA establish default trading ratios.

4. Economic Development Zones

Commenters (0145 and 0159) stated that they support the proposal with respect to emissions offset relief in Economic Development Zones. The commenters supported this proposal for the reasons asserted by EPA. LCA agrees with the approach of states setting aside growth "allowances" to support new or modified major sources, rather than obtaining offsets via facility-specific emissions reductions or shutdowns in the nonattainment area. (0159)

Response: As explained in Section III.I.3.c of the preamble to the final rule, section 173(a)(1)(B) of the CAA authorizes the Administrator, in consultation with the Secretary of Housing and Urban Development (HUD), to identify areas within nonattainment areas as "zone[s] to which economic development should be targeted." Under this section, new or modified major stationary sources that locate in such a zone are relieved of the NSR requirement to obtain emission offsets if (1) the relevant SIP includes an NSR nonattainment program that has established emission

levels for new and modified major sources in the zone ("growth allowance"), and (2) the emissions from new or modified stationary sources in the zone will not cause or contribute to emission levels that exceed such growth allowance. Section 172(c)(4) of the CAA requires that the growth allowance be consistent with the achievement of reasonable further progress, and that it will not interfere with attainment of the applicable NAAQS by the applicable attainment date for the nonattainment area. The EPA is willing to work with HUD and states to identify potential areas that could be identified as EDZs.

5. SIP Submittal Date for Nonattainment NSR rules

Commenter (0151) noted that while the proposal notice proposes dates for submitting certain ozone nonattainment area SIP elements, the proposal did not discuss a SIP submittal deadline for nonattainment NSR rules for ozone. The commenter indicated that one of these dates that must be met sooner than later is not even discussed in the Notice and that is for states to adopt/make nonattainment "New Source Review (NSR)" applicable in expanded nonattainment areas or adopt NSR requirements within 18 months, as required by the D.C. Circuit in *NRDC v. EPA (Phase 2 Ozone Plan*).

Response: The commenter is correct that the EPA did not propose a specific due date for nonattainment NSR SIPs for the 2008 ozone NAAQS. This final rule includes a due date of 3 years from the effective date of designation for states with nonattainment areas for the 2008 ozone NAAQS to submit their NNSR SIPs. Please see section III.A.4 of the final rule for additional discussion.

We disagree with the commenter's conclusion that, because the *NRDC v. EPA* court decision vacated the EPA's elimination of the 18-month limit for Appendix S, the court required NNSR SIPs to be submitted within 18 months from the date of designation as nonattainment. The EPA believes that the court decision applied only with respect to the NSR waiver in section VI of Appendix S—not to Appendix S as a whole—(as described in the response to comments at 2. 2.I.1.E-G of this document and in section I.1 of the preamble to the final rule.) .

J. What are the emission inventory and emission statement requirements?

1. Emissions inventory

Comment: AERR data elements

Commenter (0179) agreed with aligning the data elements requirements with AERR. However, commenter added that if the EPA decides to pursue ambient monitoring approach for RFP determinations, the agency may need to consider adjustments to details of the emission inventory requirements.

Response: The EPA concurs with this comment. The EPA has not finalized the alternative air quality approach (*See* response to comments in section 2.C.5), therefore, the details requested by

the commenter to adjust the emission inventory requirements are not necessary at this time.

Comment: Marginal area emissions inventory reporting

Commenter (0169) did not agree with the need for Marginal area emissions inventory reporting as no modeling is required to be redesignated to attainment. Commenter (0169) stated that, any emissions inventory reporting for Marginal areas outside of what has already been collected into the National Emissions Inventory (NEI) seems to be redundant, burdensome and unnecessary.

Response: The EPA disagrees with this comment because this requirement stems from specific requirements in the CAA. Thus, the EPA does not have the discretion to eliminate the requirement for Marginal area inventory reporting. Section 182(a)(1) clearly requires such an inventory to be submitted as part of the Marginal area plan. Further, this inventory would need to reflect ozone season day emissions, consistent with other provisions of this final rule for implementation of the 2008 ozone NAAQS.

Comment: Partial county areas

Commenter (0169) stated, the SIP Requirements Rule is lacking in that partial county areas are not addressed. Commenter (0169) provided the following additional points. The Commenter stated that, there are instances where partial county data (which is what is required by the SIP Requirements rule at first glance) will be terribly burdensome for states to tease out of a previous AERR submittal. AERR requirements are met by full county emissions inventory submittals. Pulling out partial county data in some instances will provide little benefit as the theory behind a nonattainment area is that most of the area emissions are contained within the nonattainment area and adding emission reporting from the rest of the county will have a negligible impact on the data. Certain MSAs and CSAs, however, encompass very small portions of multiple counties and nonattainment area boundaries may be drawn based on MSAs and CSAs rather than county lines. In these instances, there may be significant benefit to partial county data submittals despite the resource intensive process required to pull that data from AERR reporting. The Department believes apportionment tools have been developed to be utilized on a case-by-case basis and that states should be granted deference. The Department also suggests the EPA put this case-by-case deference in rulemaking rather than presumed practice.

Response: The EPA concurs that, the rule does not specifically address partial county areas, which allows for flexibility in implementing the inventory requirements of the rule. The EPA further agrees that in some cases, there is no benefit for areas to develop partial county inventories. This issue will be addressed in the updated emission inventory guidance, and regional offices, and states will continue to work together to identify areas for which partial county emissions are needed for proper implementation of the 8-hour ozone NAAQS.
For areas in which partial county emissions are needed, the EPA provides allocation approaches that are also used for air quality modeling assignment of county-wide emissions to grid cells. The data are publicly available for download and use. These are the spatial allocation surrogates issued with the EPA's modeling platforms on the Emissions Modeling Clearinghouse section of the EPA's website. The EPA encourages use of these data or commonly available Geographic Information System (GIS) tools for estimation of partial-county emissions.

Comment: AERR amendments

Commenter (0146) stated concern that, the EPA's proposal is inconsistent with the amendments currently proposed for the Air Emissions Reporting Requirements (AERR) rule. Commenter (0146) provided the following additional points. The commenter pointed out that the EPA's proposal references AERR for purposes of defining the data elements for the emissions inventories, but the AERR is currently under rulemaking and the proposed amendments remove ozone-related emissions reporting requirements, definitions and guidance. The proposed ozone implementation rule's background section also references the EPA's August 2005 inventory guidance. That guidance document references the Consolidated Emissions Reporting Rule (CERR), which no longer exists and specifies that ozone season inventories should be reported as actual annual and actual summer weekday inventories. The Commenter indicated that, states need clear, consistent, and updated guidance on ozone inventory development. The NESCAUM states recommend that the EPA clearly indicate in the body of the final ozone implementation rule—as it did for the previous ozone implementation rule—what is required for ozone inventories and for RFP and contingency measure baselines. The final rule must also reference appropriate guidance. Any references to the AERR should be clearly addressed to ensure that the proper ozone season inventories are developed.

Commenter (0163) stated, the recently proposed revision to the AERR would eliminate a critical ozone planning element. Commenter (0163) stated that, unless the requirement to develop an inventory of daily ozone season emissions as part of the AERR is retained and that, requirement would need to be included as part of the ozone implementation rule.

Commenter (0177) stated that, the proposed rule is unclear as to whether the previous obligations for nonattainment areas to quantify ozone precursor emissions based on a "typical summer day" rather than annual emissions because the AERR is currently open for comment and proposes to eliminate the daily and seasonal reporting requirements relevant to ozone. Commenter (0177) provided the following additional points. The Commenter stated that, given the challenges of addressing HEDD and likely need to design control programs that address peak ozone levels, the EPA should clarify the final implementation rule and the AERR to specify that emission inventories must be representative of days that produce high ozone. On August 5, 2013, [the Connecticut Department of Energy and Environmental Protection] submitted comments on the proposed AERR urging the EPA to retain the daily and seasonal emissions reporting requirements relevant to ozone as a critical tool for ozone planning. (0177)

Commenter (0178) also discussed the AERR rule and proposed amendments as follows: The proposed emission inventory requirements under 51.1115 rely on 40 CFR part 51, the AERR specifically, the ozone-relevant data elements required by the ozone implementation rule are listed in AERR Appendix A tables 2A, 2B, 2C and 2D. The EPA is currently revising the AERR [EPA-HQ-OAR-2004-0489] with a proposal to remove the requirements to report daily and seasonal emissions. The proposed AERR would also change the required data elements in Table 2A and 2B, while removing Tables 2C and 2D. The Air Program supports the changes to the AERR, specifically changing ozone season emission data to an optional element and the

streamlining of tabular data elements. The EPA should review the ozone implementation rule proposal to ensure data states are requested to report is required by either the CAA section 182(a)(3)(A) obligation, the "Guidance on the Implementation of an Emission Statement Program," or "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality (NAAQS) and Regional Haze Regulations." The Air Program intends to voluntarily submit ozone season emissions information triennially under the revised AERR as it would satisfy the CAA section 182(a)(3)(A) periodic inventory obligation, in addition to provide the public with an opportunity to review and comment on the documentation of the inventory. (0178)

Commenter (0175) supported the EPA's proposal to allow states to rely on their 3-year cycle inventory to meet the CAA section 182(a)(3)(A) requirement.

Commenters (0155 and 0157) noted that, the AERR is being revised and the EPA has proposed to remove the provisions referenced in this proposal. Therefore, Commenters (0155 and 0157) stated, the EPA should either amend the AERR to reincorporate the cited provisions or include in the ozone SIP requirements rule provisions for developing an ozone season day emission inventory rather than an annual inventory.

Response: The EPA concurs that, an inconsistency was created between the proposed AERR updates and this proposal. As suggested by several Commenters, the EPA has updated the language in the final rule to specifically denote that emissions are required to be submitted as ozone season day emissions, reflecting the considerations leading to nonattainment in the area. The ozone season day field will be defined as part of the update to the emission inventory guidance.

Comment: Emission inventory guidance

Commenters (0155 and 0157) supported the EPA's proposal to allow states to defer public hearings on certain inventories until such time as the areas adopt and submit their RFP plans or attainment demonstrations that rely on these inventories.

Commenter (0163) supported the EPA's proposal to follow September 29, 1992, guidance entitled, "Public Hearing Requirements for 1990 Base-Year Emissions Inventories for Ozone and Carbon Monoxide Nonattainment Areas" in implementing the emissions inventory requirements under the CAA sections 182(a)(l) and 182(a)(3)(A) for purposes of the 2008 ozone NAAQS.

Commenter (0163) stated, the EPA should update its guidance on ozone inventory preparation and documentation, "Example Documentation report for 1990 Base Year Ozone and Carbon Monoxide SIP Emissions Inventories," March 1992 (EPA-450/4-92-007), since this guidance does not recognize the developments in software and technology which could reduce the workload necessary to prepare documentation.

Response: For purposes of the 2008 ozone NAAQS, the EPA is not finalizing the proposed approach, where we advised that states could follow our existing September 29, 1992, guidance

titled, “Public Hearing Requirements for 1990 Base-Year Emissions Inventories for Ozone and Carbon Monoxide Nonattainment Areas” in implementing certain SIP adoption and submission procedures for the emissions inventory requirements under the CAA sections 182(a)(1) and 182(a)(3)(A). In that guidance, the EPA indicated it could provide states with a time-limited “*de minimis*” deferral of the CAA’s state public hearing requirement for the emissions inventory SIP revision required to be submitted for each nonattainment area within 2 years of the date of designation. The EPA continues to believe that there are valid policy reasons to provide such a deferral since the inventories alone do not have significant regulatory context without the accompanying area-specific RFP plans or attainment plans, which are not required to be submitted until the 3rd year after designations at the earliest. However, as a general matter the CAA clearly requires that SIP submittals, including emissions inventories (S*ee* CAA sections 182(a)(1) and 182(a)(3)(A)), must meet the requirements of the CAA section 110(a)(2), which includes the requirement that the state provide reasonable notice and public hearing for SIP submittals. As there is nothing in these CAA provisions that provides for waiver or delay of the public notification and hearing requirements specified in CAA section 110(a), *de minimis* or otherwise, we no longer believe it is appropriate to advise states to follow the 1992 guidance. We instead remind states that the EPA’s implementing regulations at 40 CFR Part 51 (Requirements for Preparation, Adoption and Submittal of Implementation Plans) provide flexibility for states to streamline SIP-related public notification and hearing procedures (for example, only holding a public hearing if one is requested, per 40 CFR § 51.102), and we encourage states to take advantage of those provisions in meeting the emissions inventory requirements under the CAA sections 182(a)(1) and 182(a)(3)(A).

The EPA concurs that, the ozone inventory preparation and documentation guidance from March 1992 is outdated and plans to issue an updated draft guidance document with the final rule to implement the 2008 ozone standard.

2. Emissions statement requirements

Comment: Commenter (0163) supported the proposal that the Emission Statement SIP be due 2 years after the effective date of the designations as prescribed in the CAA section 182(a)(3)(B). Commenter (0169) agreed with and appreciated the EPA's acknowledgement that areas which were nonattainment for a previous NAAQS have already implemented emissions statement requirements. The Commenter added that, if states were required to make a SIP amendment for the 2008 ozone NAAQS, the amendment would amount to a paperwork exercise and would be redundant as facilities in the nonattainment area are already subject to the emissions statement requirement. Facilities have been submitting annual emissions statements in ozone nonattainment areas for years. The Department is encouraged by the EPA's common sense approach in this area.

Response: The EPA addresses the emission statement requirement in section III.J.2 of the SIP Requirements Rule. The final rule requires the emission statements or the emission statement certification letters to be "in the SIP". This will require that the emission statement letters do need to go through the public notice and comment process.

The EPA published guidance on source emission statements in a July 1992 memorandum titled, "Guidance on the Implementation of an Emission Statement Program." A memorandum titled, "Emission Statement Requirements Under 8-hour Ozone NAAQS Implementation," dated March 14, 2006, clarified that the source emission statement requirement under the CAA was applicable to all areas designated nonattainment for the 1997 ozone NAAQS and classified as Marginal or higher under subpart 2, part D, title I of the CAA. This requirement similarly applies to all areas designated nonattainment for the 2008 ozone NAAQS. Most areas that need an emission statement program already have one in place due to a nonattainment designation for an earlier ozone NAAQS. If a state has a previously approved emission statement rule in force for a particular area for the 1997 ozone NAAQS or the 1-hour ozone NAAQS that covers all portions of the nonattainment area for the 2008 ozone NAAQS, such rule should be sufficient for purposes of the emissions statement requirement for the 2008 ozone NAAQS. The state should review the existing rule to ensure it is adequate and if it is, may rely on it to meet the emission statement requirement for the 2008 ozone NAAQS. In cases when an existing emission statement requirement is still adequate to meet the requirements of this rule, states can provide the rationale for that determination to the EPA in a written statement in the SIP to meet this requirement. States should identify the various requirements and how each is met by the existing emission statement program. In cases when an emission statement requirement is modified for any reason, states must submit to EPA the revisions to the emission statement as part of their SIP.

K. What are the ambient monitoring requirements?

1. Cost of monitoring programs

Commenters (0175 and 0179) proposed that, any additional monitoring requirements be fully funded by the EPA.

Response: The EPA notes that it has historically funded part of the cost of the installation and operation of monitors used to satisfy Federal monitoring requirements. The EPA understands these concerns, although the CAA requirements from which this proposal derives (the CAA sections 109, 110, 172, 181 through 185B, 301(a)(1) and (501(2)(B)) are not contingent on the EPA providing funding to states to assist in meeting monitoring requirements. However, the EPA intends to work with NACAA and the state and local air agencies in identifying available state and Tribal Air Grant (STAG) funds and consider the resources that may be needed to plan, implement, and operate the minimum requirements for the ozone monitoring network.

2. Ambient monitoring rule

Comment: Commenters (0155, 0157) stated that, while the schedule for finalizing any or all aspects of the ozone monitoring proposal remains unclear at this time, if and when the EPA requires such monitoring, states will need time, resources and training to implement the

requirements.

Commenter (0180) stated that, the EPA proposed lengthening the ozone monitoring seasons in 29 states, including Wyoming. Commenter (0180) stated that, for the EPA to ignore data about ozone exceedances by not requiring it to be collected for places like Wyoming is to ignore an important aspect of the ozone problem, which is arbitrary and capricious. Therefore, Commenter (0180) requested the EPA to finalize the 2009 monitoring rule proposed changes. Commenters (0155 and 0157) stated that, while the schedule for finalizing any or all aspects of the ozone monitoring proposal remains unclear at this time, if and when, the EPA requires such monitoring, states will need time, resources and training to implement the requirements.

Commenter (0180) stated, the EPA must finalize its ambient monitoring rule and that failure to do so is arbitrary and capricious. Commenter (0180) asserted the proposed revisions would assist the EPA in implementing the 2008 ozone NAAQS. *See* 74 FR 34525, 34527 (July 16, 2009). Commenter (0180) incorporated by reference the docket in support of the EPA's proposed lengthening, by 1 to 5 months, the ozone monitoring seasons in 29 states, effective January 1, 2011. *Id.* at 34533-34. Commenter (0180) asserted that, to ignore data about ozone exceedances by not requiring it to be collected for places like Wyoming is to ignore an important aspect of the ozone problem, which is arbitrary and capricious.

Response: Ozone monitoring requirements are specified in 40 CFR part 58, Appendix D, section 4.1. Specific ozone season monitoring requirements are contained in Table D-3. These requirements are intended as minimum monitoring requirements, and as explained in paragraph 4.1, "The EPA Regional Administrator and the responsible state or local air monitoring agency must work together to design and/or maintain the most appropriate O3 network to service the variety of data needs in an area." The EPA notes that states can operate additional monitors beyond the minimum requirements and/or can operate ozone monitors for a longer period than the minimum required ozone season described in Table D-3. If such monitors are operated and the resulting data are acceptable quality, the EPA can use the data in support of actions that support the NAAQS.

Regarding the comment that states will need time, resources and training to implement any new requirements, S*ee* RTC in section K.1 of this RTC.

Comment: Definition of ozone season

Commenter (0154) asserted that, the EPA uses the term "ozone season" throughout the proposal, but states "ozone seasons" have not been updated since October of 2006, presenting implementation difficulties when violations of the NAAQS occur outside of the currently defined ozone season. Commenter (0154) noted that, the EPA proposed revisions to the ozone monitoring rules in July 2009, yet 4 years have passed without a final version of the rule. Since the requirements of these two rules are interwoven, commenter (0154) recommended that, the EPA complete the two rules at the same time or remove the term "ozone season" from the Implementation Rule.

Response: In the context of the proposal, the term "ozone season" has the same definition as "ozone monitoring season" as defined by requirements in 40 CFR part 58, Appendix D, section 4.1. Specific ozone season monitoring requirements are contained in Table D-3. These requirements are intended as minimum monitoring requirements, and as explained in paragraph 4.1, "The EPA Regional Administrator and the responsible state or local air monitoring agency must work together to design and/or maintain the most appropriate O3 network to service the variety of data needs in an area." The EPA notes that states can operate additional monitors in addition to minimum requirements and/or operate ozone monitors for a longer period than the minimum required ozone season described in Table D-3. If such monitors are operated and the resulting data are of acceptable quality, the EPA can use the data in support of actions that support the NAAQS, and states similarly could propose control strategies that account for any violations that occur outside of the currently defined ozone season.

L. How can an area qualify for a 1-year attainment deadline extension?

1. Support proposal

Comment: Commenter (0159) supported the EPA's proposal, as it is supported by statutory authority, and suggested that the 2-year averaging provided in section 51.1107(a)(2) also be applied to section 51.1107 (a)(1) for both the first and second extension years.

Commenter (0163) agreed with using the approach set forth in 40 CFR section 51.907 for purposes of the 2008 ozone NAAQS. Commenter (0179) agreed with the proposal to use the same approach used in the 1997 ozone NAAQS Phase 1 rule, applicable to concentration-based standards.

Response: The EPA appreciates the support to continue to implement the 1-year attainment deadline extension policy as applied previously under the 1-hour and 1997 8-hour ozone implementation rules. The suggestion to use a 2-year average for the first 1-year extension in section 51.1107 (a)(1) could result in fewer areas being eligible for a 1-year extension, even though such areas have already achieved the appropriate emissions reductions necessary to attain. The EPA does not wish to unnecessarily restrict eligibility for such areas, and is finalizing the 1-year attainment deadline extension policy as proposed.

M. How will the EPA address transport of ozone and its precursors for rural nonattainment areas, multi-state nonattainment areas and international transport?

1. Rural areas

Comment: Support for the approach to rural transport

Commenter (0159) supported the broad use of rural transport. The Commenter stated that, the EPA proposed to interpret language so that, to qualify for a rural transport classification, the nonattainment area's boundary could not include or be adjacent to an MSA, based on the Census Bureau's latest population estimates. *Id.* Under such an approach, any nonattainment area

associated with a census-defined micropolitan area or area too sparsely populated to be included in a census-defined statistical area, based on Census Bureau population estimates, may be able to qualify for a rural transport classification. Its usage would retain Marginal permitting requirements, but, for instance, would prevent an urban upwind problem from causing a downstream rural area to be forced to implement emission reduction and to be subject to more stringent permitting. (0159)

Response: The EPA appreciates the commenter's support. The EPA believes this interpretation of the CAA section 182(h) is consistent with the original scope of section 182(h) as promulgated in 1990 and provides maximum flexibility for areas to qualify for this classification where appropriate.

2. Methane as a Precursor

Comment: Support position not to regulate methane

Commenter (0151) supported the EPA's position not to regulate methane under this program. The Commenter stated that, the EPA solicited comment on regulating methane as an ozone precursor because reportedly the European Union controls it for ozone reductions. *Id.* 34205. Methane was originally excluded by the EPA as a negligibly reactive compound under the agency's ozone reactivity policy and California's historic Rule 66 for the regulation of hydrocarbons. Then it was determined to have some reactivity under the 1977 Reactivity Policy when compared with ethane, until it was once again excluded by rulemaking following extensive testing and evaluation on the basis of its photochemical oxidation potential on a molar and mass basis. Whatever the Europeans' motive for regulating methane as a VOC, there is little scientific justification for regulating methane as an ozone-precursor.

Response: The EPA appreciates the support from the commenter. Methane has not been addressed as part of ozone attainment planning in the past because of the limited effect that local measures to control methane would have on local or regional ozone concentrations in the immediate time frame. Given the temporal and spatial characteristics associated with methane and ozone, we continue to believe that it is inappropriate to require or rely on local methane emission reductions in ozone SIPs.

3. International transport

Comment: Support consideration of emissions from North American or intercontinental sources

Commenter (0132) stated that, they support the EPA's interpretation of the CAA § 179B to include consideration of any emissions from North American or intercontinental sources. The commenter stated that, the EPA's interpretation that, the CAA, §179B could include consideration of any emissions from any non-U.S. sources is appropriate. The TCEQ endorses this interpretation since it accounts for the potentially significant impact that international emissions can have on an area's air quality. The TCEQ seeks confirmation of the interpretation

that FCAA, § 179B may be applied to nonattainment areas other than those adjoining international borders. Further, the TCEQ seeks confirmation that "emissions emanating from outside the U.S. FCAA, §179B include anthropogenic sources and natural emission sources outside the continental U.S. EPA did not provide an explanation for why it proposed limiting the availability of a determination under FCAA, §179B to areas classified "Moderate" or above, excluding "Marginal" areas. Since FCAA, §179B does not limit this option to areas classified "Moderate" or above, the TCEQ supports its availability for all areas, including "Marginal" areas. Commenter (0159) generally supported the EPA 's promise to continue to work with its domestic and international partners to better understand the extent and implications of transboundary flows of air pollutants and where possible, to mitigate their impact on our domestic air quality.

Commenter (0159) supported the EPA's proposal to find that, if it approves a "but for" demonstration for an area, the area would not be subject to reclassification for failure to attain by its attainment deadline, and if such areas were classified as Severe or Extreme, the section 185 fee program would not apply based on a failure to attain by the attainment date; Commenter (0159) agreed that, a nonattainment area should not be penalized by the actions of others which are outside of such area's control.

Commenter (0159) supported the EPA's proposal that, where international transport meets the criteria contained in the EPA's EER (40 CFR § 50.14), it can be addressed by that rule. Commenter (0159) supported a reasonable interpretation of the EER, as "exceptional events" are truly exceptional occurrences that are beyond an affected area's control and such events should be excluded when they occur.

Response: The EPA appreciates the commenter's support. The EPA has interpreted the Act such that section 179B allows the EPA to approve an attainment demonstration if the state can satisfactorily demonstrate that ''but for emissions emanating from outside of the U. S.,'' the area would attain and maintain the ozone standard. The EPA has historically evaluated these demonstrations on a case-by-case basis, based on the individual circumstances, which may include areas not adjoining international borders, the classification of the area and the data submitted by the state. Also, in the proposal, EPA did not intend to give the impression that section 179B did not apply to all nonattainment areas. Since Marginal areas are not required to submit an attainment demonstration, the proposal indicated that for areas classified as Moderate and above, the modeling and other elements of the attainment demonstration must show timely attainment of the NAAQS but for the emissions from outside of the U.S. However, if a Marginal area were to submit to the EPA a demonstration that they could attain the standard but for international emissions, the EPA would be able to evaluate that demonstration similarly to demonstrations submitted for higher classified areas.

Comment: Make available international transport information

Commenter (0173) requested the EPA to take additional steps to facilitate state submissions. The Commenter stated that, where the EPA has already determined that international emissions increased U.S. ozone levels by a particular quantity or in a range of quantities, the EPA should publicize that quantification and allow states to rely on it in making section 179B

demonstrations. As the statute only requires the quantification to be "establishe[d] to the satisfaction of the Administrator," there would be no purpose in requiring states to duplicate evaluations that the EPA may have already made. In addition, the EPA should make available other information it has on evaluating transboundary ozone impacts and provide an electronic clearinghouse for use in states' demonstrations under section 179B. (0173)

Response: The EPA considers international transport of pollution an important issue. Given the challenge and complexity of assessing the potential impacts of international emissions on air quality in the U.S., the EPA has been engaged in a number of activities to improve our understanding of such transport. For example, the agency is actively participating in the Task Force on Hemispheric Transport of Air Pollution (HTAP) which is an international effort to assess intercontinental air pollution transport and to look for opportunities to mitigate its impact. While HTAP and other related analytical efforts can help improve the general characterization of the impacts of international emissions on U.S. air quality, the EPA has no plans to conduct determinations with the local specificity that would be required of a 179B demonstration which show that a specific locality would have attained over a specific time period "but for" the contribution of international emissions. We will continue to work with states that are developing plans pursuant to section 179B to ensure the states have the benefit of the EPA's developing understanding of the general nature of international transport of ozone and its precursors. However, the EPA continues to believe that the best approach for addressing international transport is to work on a case-by-case basis to develop international impact quantification analyses that are suited to the unique situation of each area.

4. Interstate transport requirements

Comment: Quantify interstate transport obligations

Commenter (0170) stated that, the EPA must quantify the states' interstate transport obligations for the 2008 ozone NAAQS as expeditiously as possible. The Commenter indicated that, the states were statutorily required to submit infrastructure SIPs for the 2008 ozone NAAQS by March 12, 2011. 78 *FR* 34,178, 34,182 (June 6, 2013). As the EPA notes in its proposal, this date "remained the legally applicable deadline for infrastructure SIPs" despite the reconsideration process the EPA undertook for the 2008 ozone NAAQS. *Id.* at 34,183. However, many states failed to meet the SIP deadline. On January 15, 2013, the EPA found that 28 states, the D.C. and the Commonwealth of Puerto Rico failed to submit infrastructure SIPs containing the CAA requirements necessary to implement the 2008 ozone NAAQS. 78 *FR* 2882 (Jan. 15, 2013). The Commenter added that, among other things, states must include provisions in their SIPs that satisfy the interstate transport requirements of the CAA, commonly known as "good neighbor" obligations. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). In *EME Homer City*, the D.C. Circuit held that the EPA must "define or quantify" the states' interstate transport obligations before the EPA can require the states to incorporate those obligations into their SIPs. *See EME Homer City Generation L.P. v. EPA*, 696 F.3d 7, 31 (D.C. Cir. 2012).2 Furthermore, "once the EPA defines or quantifies a state's good neighbor obligation, the state must have a *reasonable time* to implement that requirement with respect to sources within the state." *Id.* (emphasis added). The commenter indicated that the D.C. Circuit's instruction in *EME Homer City* is clear: the EPA

must "define or quantify" states' good neighbor obligations and give states "a reasonable time" to implement those requirements. *See* 696 F.3d at 38. States have an equally clear mandate and deadline under section 110(a) of the CAA: each state *shall*, within 3 years after promulgation of a NAAQS, submit a SIP to the Administrator that *shall* contain adequate provisions to address the state's good neighbor obligations under section 110(a)(2)(D)(i)(I). *See* 42 U.S.C. § 7410(a). Lastly, the D.C. Circuit, in *North Carolina v. EPA*, mandated that upwind states' good neighbor obligations must be harmonized with the NAAQS attainment deadlines for downwind states. *See* 531 F.3d 896, 912 (D.C. Cir. 2008). (0170)

The Commenter concluded, in order for the states to meet their section 110(a) SIP submission deadlines, the EPA must "define or quantify" the states' good neighbor obligations a "reasonable time" before the section 110(a) deadline arises for each NAAQS. But despite this clear directive, and despite the fact that the SIP deadline for the 2008 ozone NAAQS came and went *over 2 years ago*, the EPA's proposed implementation rule for the 2008 ozone NAAQS "does not address states' obligations under the [CAA] to reduce transported pollution." 78 FR at 34,183. Moreover, the EPA does not even plan to provide guidance "on how to meet the requirements of section 110(a)(2)(D)(i)(I)" in a forthcoming guidance memorandum laying out infrastructure SIP requirements for the 2008 ozone NAAQS. *Id.* (0170)

The Commenter believed that, the EPA's decision not to quantify the states' good neighbor obligations, or even provide guidance to the states, cannot be reconciled with the clear mandate established in *EME Homer City*. Indeed, the EPA does not attempt to justify its decision. Given the urgent need for the EPA to address the continuing problem of interstate air pollution, this delay is particularly unjustified. Therefore, we respectfully urge the EPA to comply with its mandatory obligation under the D.C. Circuit's decision in *EME Homer City* and "define or quantify" the states' good neighbor obligations with respect to the 2008 ozone NAAQS as expeditiously as possible.

Commenter (0177) stated that, the proposed rule does not address states' good neighbor responsibilities under the CAA section 110(a)(2)(D)(i)(I) concerning upwind emissions that significantly contribute to ozone nonattainment or interfere with maintenance in downwind states. The commenter supports the EPA's current efforts before the U.S. Supreme Court to clarify the legal framework necessary to address interstate air pollution, but reminds the EPA that both CAIR and the CSAPR were directed at meeting the 1997 ozone NAAQS. As such, a separate transport rule is needed as soon as possible to begin to address the 2008 ozone NAAQS. The transport rule will help solve the transport problem; however, it does not eliminate each state's responsibility to address transport under the good neighbor provisions of the CAA. The Commenter stated that, the Connecticut Department of Energy and Environmental Protection routinely measures ozone levels at Connecticut's upwind boundaries that violate the 2008 NAAQS. The EPA and other available modeling provide substantial evidence that Connecticut cannot comply with the 2008 ozone NAAQS without additional large-scale reductions in upwind ozone precursor emissions. At a minimum, the EPA should adopt a suite of new stringent national rules addressing mobile sources, EGU (including a focus on periods of high electric demand), and industrial/commercial boilers--which would be the most cost effective and legally defensible manner to achieve attainment with the 2008 ozone NAAQS as expeditiously as

practicable.

Commenter (0157) encouraged the EPA to move expeditiously to "define or quantify" upwind states' good neighbor obligations in order that upwind states may meet their section 110(a) infrastructure SIP obligations and downwind states may meet their attainment deadlines. The Commenter added that, controlling transported air pollution is key to Maryland attaining the ozone NAAQS and the fact that transport becomes central to attainment with every lowering of the NAAQS. Specifically, with every decrease in the NAAQS, the proportion of the NAAQS represented by transported pollution in states increases. (0157)

Commenter (0152) noted that, the EPA is not addressing the CAA section 110(a)(2)(D)(i)(I) provisions and believed states should not be required to meet them. The commenter directed attention to the D.C. Circuit's *EME Homer City Generation v EPA* decision (696 F.3d 7 (D.C. Cir. 2012)) that concluded that a SIP cannot be deemed incomplete or deficient for failure to meet this obligation until such time that the EPA quantifies the state's obligation under this provision.

Response: On April 29, 2014, the Supreme Court issued a decision reversing the D.C. Circuit's decision in *EPA v. EME Homer City Generation Co., No. 12-1182*. The Supreme Court held that the CAA does not require that the EPA give states a second opportunity to submit interstate transport SIPs after the EPA has quantified a state's obligation to eliminate its significant contribution to interstate transport. For all states, the Supreme Court decision means that each state has an obligation to develop interstate transport SIPs addressing the CAA section 110(a)(2)(D)(i)(I) requirements without an EPA rulemaking as a prerequisite. The Supreme Court decision clarifies that the deadline for submitting transport SIPs is 3 years from the promulgation of the NAAQS. The EPA is still reviewing the implications of the Supreme Court decision on the SIP process. The EPA agrees that to date, the EPA has not provided guidance to states substantively addressing CAA section 110(a)(2)(D)(i)(I) requirements for the 2008 ozone NAAQS.

Comment: Large nonattainment area concept

Two states (0157 and 0168) commented that, for their areas to achieve attainment would require reductions in transported emissions from other states. They pointed out that the EPA has previously determined that emissions from certain upwind states are significantly impacting their state's air quality. They believe that the boundaries for the designated nonattainment areas do not reflect the scope of the problem. One Commenter (0157) believes that, a tool in the CAA that the EPA can use to assist with attaining the current and pending lower ozone standards is the ability to create large, regional nonattainment areas.

Response: The issue of appropriate nonattainment area boundaries for the 2008 ozone NAAQS or any future revised ozone NAAQS is beyond the scope of this current rulemaking. The EPA completed the initial designations for the 2008 ozone NAAQS in the spring of 2012. The basis for the nonattainment boundaries are provided in the Technical Support Documents for the areas, which are available in the docket for the designations at EPA-HQ-OAR-2008-0476. In addition,

in the RTC document for the designations, also available in that docket, the EPA provided responses to Commenters who urged the EPA to establish large nonattainment areas.

Comment: Delaware air quality

Commenter (0168) stated that, this rule will not make Delaware's air quality better, may likely make Delaware's air quality worse and will increase the burden on Delaware. The Commenter stated that, the EPA designated 474 counties as not meeting the 1997 0.08 ppm ozone standards and 232 counties as not meeting the more protective 2008 standards. This shows that air quality continues to improve across the nation as a result of successful federal, state and local pollution reduction efforts. However, this is also cause for significant concern to Delaware because 1) the control requirements of this proposed rule are being applied to a smaller area which has already been through several rounds of similar requirements and 2) this proposed rule revokes the 1997 ozone NAAQS, and proposes anti-backsliding requirements that are keyed to local air quality without consideration to impact on downwind areas like Delaware. (0168)

- Less of the states that are causing Delaware's unhealthy air will be covered by this implementation rule than by past implementation rules—this is contrary to the language of the CAA and will continue to impede progress towards its goal of healthy air quality. (0168)
- Given all non-trivial Delaware sources are currently well-controlled implementation of this rule will be a significant administrative burden on Delaware with no resultant air quality benefit. Application of the rule to a smaller upwind area that has previously been covered by similar rules is also not likely to help Delaware's air quality. (0168)
- This proposed rule revokes the 1997 ozone NAAQS, and proposes anti-backsliding requirements that appear to be keyed to local air quality only; without consideration to impact on downwind areas like Delaware. (0168)
- Delaware's main concern is that areas that were designated as nonattainment for the 1997 NAAQS may not be required to develop and be bound by maintenance plans, and may be able to relax SIP requirements under the CAA 110(l) without consideration to downwind impacts. (0168)
- Delaware's attainment of the ozone NAAQS is outside of its control due to the overwhelming impact of upwind emissions; and there appears to be no mechanism in place to mitigate these upwind emissions in the timing of the CAA and EPA proposal. (0168)

The Commenter believed Delaware is being penalized for circumstances that are beyond its control, and a voluntary or mandatory bump-up is not the answer. The EPA recognizes in the proposed rule that in many areas transport is the problem--and that the EPA’s main goals with this proposed implementation rule are to provide flexibility, increase implementation efficiency, allow the most effective pollution control programs to be implemented and identify additional ways in which the EPA can assist the states to reach attainment within the legal framework of the CAA; all without jeopardizing expeditious attainment of the public health and welfare goals. To

achieve these goals, the EPA must require the control of all of the emissions that are causing the problem.

Response: The EPA recognizes that many states are affected by transported ozone and ozone precursors from upwind states and that transported pollution may contribute significantly to air pollution that exceeds the NAAQS in those states. The CAA establishes states' responsibilities to address interstate transport through two provisions. First, section 110(a)(2)(D)(i) obligates states to include provisions in their infrastructure SIPs to prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance, of the NAAQS in another state, from interfering with required provisions preventing significant deterioration of air quality or from interfering with measures to protect visibility in another state. Second, section 126 directs states to include provisions to establish a notification process in their infrastructure SIPs through which downwind jurisdictions can be alerted to specific sources of transported pollution. The EPA issued its "Guidance on Infrastructure SIP Elements Under the CAA sections 110(a)(1) and 110(a)(2)," on September 13, 2013,[25] on the required elements of the section 110 infrastructure SIP submittal for the 2008 ozone NAAQS. This guidance does not, however, address the requirements of the CAA section 110(a)(2)(D)(i). The final rule, does not address these requirements relating to transport for purposes of the 2008 ozone NAAQS. The EPA will address the transport requirements for the 2008 ozone NAAQS in a separate action.

N. How will the section 182(f) NO_X provisions be handled?

Comment: Commenter (0163) stated, the EPA must take care to implement the CAA section 182(f) provision consistent with other related provisions; e.g., the EPA should avoid granting NO_x exemptions for nonattainment areas that use NO_x controls from other programs to demonstrate attainment and/or to address other provisions of the CAA (i.e., CAA section 110(a)(2)(D)(i)(I)).

Response: In order to request a NO_x exemption, a state must submit a SIP revision specific to the 2008 ozone NAAQS. This SIP revision must specifically address the provisions of section 182(f). The EPA will grant NO_x exemptions only through notice and comment rulemaking where Commenters will have an opportunity to address whether the SIP revision complies with the provisions of section 182(f). In granting waivers, the EPA will take into consideration existing NO_x controls in an area.

O. Emissions Reduction Benefits of Energy Efficiency/Renewable Energy Policies and Programs, Land Use Planning and Travel Efficiency

1. Energy efficiency/renewable energy policies and programs

[25] *See http://www.epa.gov/oar/urbanair/sipstatus/infrastructure.html.*

Comment: Clarify inclusion of EE/RE programs in attainment plans

Commenter (0130) stated that, the EPA should clarify how inclusion of EE/RE programs in an attainment plan is supportable by the various requirements for attainment plans in the CAA. The Commenter argued that, should this be done under the RACT or RACM requirements of the CAA? If so, how might a state calculate the cost per ton reduced of such strategies? The length of time needed to implement such strategies is significant, and many years will pass before enough EE/RE programs have reduced emissions significantly enough for air quality modeling to show a definable benefit. Therefore, such programs would not fit under either the RACT requirements, which must be implemented by January 1, 2017, or the RACM requirements, which must show that the attainment date may be advanced by 1 year. The preamble seems to indicate that EE/RE policies may be implemented to mitigate the transport of ozone precursors to downwind states. However, no analysis appears to be included in this preamble that shows how such policies might affect transport or a state's significant contribution to a downwind state.

The Commenter added that, while EE/RE policies are sound for many reasons, not the least of which is reducing dependence on foreign energy sources, the EPA should clarify how inclusion of these programs in an attainment plan is supportable by the various requirements for attainment plans in the CAA. Without further clarification in the preamble, to require or even suggest states somehow analyze whether an attainment SIP should include the implementation of additional EE/RE programs for RACT, RACM or section 110(a)(2)(D) transport initiatives will only add a paperwork burden to states developing the attainment plans.

Response: The inclusion of EE/RE policies and programs into an attainment plan is not a requirement, but rather, an optional approach that allows states to include flexible and innovative non-traditional strategies that have the potential to make small, but meaningful, contributions to attainment. EE/RE can help reduce electricity generation from fossil-fueled sources, which leads to lower emissions of NO_x and other pollutants. The reduction in emissions can benefit a particular area, and can also have a positive impact on downwind areas affected by ozone transport.

The EPA, with the EE/RE Roadmap (*http://epa.gov/airquality/eere/)*, has clarified how EE/RE policies and programs can be included into a SIP. No new regulations have been introduced. Since the application of EE/RE will be specific to a given area, we encourage states to work closely with their EPA Regional Offices should they need assistance with incorporating EE/RE into their attainment plans.

Recognizing the need for more certainty and capacity-building on EE/RE, the EPA offers additional assistance to states, tribes and local agencies, including technical assistance, energy savings information, and tools, such as AVERT, the AVoided Emissions and geneRation Tool *(www.epa.gov/avert)*, to quantify the emissions impacts of EE/RE policies and programs. The EPA is working with several states to document how specific EE/RE policies and programs could be quantified and included in SIPs, and will share these examples.

Comment: Support for Innovative and Creative Approaches

Commenters (0129 and 0158) supported the EPA's proposal to continue to allow states to integrate into their SIPs the emission reduction benefits of energy efficiency and renewable policies and programs. Commenter (0158) stated, the final rule and EE Roadmap should also recognize energy savings achieved through grid-side efficiency technology improvements/upgrades and clarify that such programs may also be considered by states for integration into their SIPs.

Response: The EPA appreciates the support expressed for innovative approaches to reducing emissions, such as EE/RE policies and programs. We note, however, that the EPA's EE/RE Roadmap focuses on the potential use of EE/RE for attainment planning purposes. Under the CAA, the RACT requirements are separate from attainment planning requirements.

The EPA by no means discourages grid-side efficiency technologies, but reminds the Commenter that, the state has the responsibility for including these types of programs in a SIP. A good first step would be to discuss these programs with the state energy and air offices.

Comment: Support for EE/RE Measures

Commenters (0159 and 0179) supported the EPA's position to encourage states to consider adopting EE/RE policies and programs to benefit nonattainment areas in their own state, as well as to reduce the impact of ozone transport on downwind states. Commenter (0179) indicated that, significant uncertainty still remains on the availability of energy models required to perform the certain SIP demonstrations and requested that the EPA approve regional models that have been submitted for such purposes. Commenter (0179) also requested that, the EPA provide assistance and resources to generate SMOKE ready output such that air quality impacts of electricity offsets in nonattainment areas and surrounding areas/states can be modeled and used appropriately in a SIP.

Response: The EPA appreciates the support expressed for EE/RE policies and programs that can benefit overall air quality. The EPA is working with several states to document how specific EE/RE policies and programs could be quantified and incorporated into SIPs.

The EPA has recognized that the most-sophisticated approach to emission quantification is energy modeling, which relies on resource-intensive energy models. Because all states do not have this capacity, the EPA has developed a free tool, AVERT *(www.epa.gov/avert)*, based on reported hourly emissions. AVERT is designed to be used by state air quality planners, and will produce SMOKE-ready outputs.

2. Land use planning

Comment: Commenter (0130) stated that, inclusion of land use planning strategies in a SIP oversteps the bounds of state authority and recommended that the EPA clarify that a state is not required to analyze land use planning strategies in any attainment plan. The Commenter stated

that, land use planning is the purview of local government jurisdictions in the Commonwealth. Inclusion of such strategies in a SIP oversteps the bounds of state authority. Additionally, land use planning offers very few opportunities for near term (2020 or sooner) emission reductions since such plans take many years to influence the commuter traffic patterns. Therefore, it is unclear under what section of an attainment plan would the EPA suggest land use planning be included. For example, such strategies would not be appropriate for inclusion in RACT or RACM analyses. The Commenter suggested that, the EPA should clarify how they expect a state to utilize the CAA to require or regulate land use planning. DEQ also recommends that the EPA should clarify that a state is not required to analyze land use planning strategies in any attainment plan. Should a state have the authority to do so, and should that state believe land use planning is a cost effective means to attaining the 2008 ozone standard by the attainment date, then they may include land use planning strategies within their SIP, perhaps as a part of some sort of voluntary bundle. The current preamble, however, indicates that all attainment plans should at least analyze this option. Requiring the analysis of land use planning in all SIPs will only add paperwork to an already paperwork-intensive process. (0130)

Commenter (0156) stated that, while land use changes might not easily fit into the time period of SIP control requirements, they appreciated the EPA efforts to allow for SIP emission credits for innovative options including land use and travel efficiencies.

Commenter (0159) agreed with measures, such as land use planning, that credit states when they work to reduce such emissions, as mobile emissions are a large contributor to the formation of ozone.

Response: States should consider all potentially available measures, including land use strategies in the RACM element of the SIP. A detailed analysis of emissions impacts of land use planning is not a requirement for determining RACM. However, due to the potential for land use policies to reduce travel activity, the EPA encourages consideration of land use planning in the RACM determination. In many cases, such as those identified by the Commenter, a simple assessment and reasoned explanation would be sufficient for eliminating land use planning from further detailed analysis. If a state provides evidence that land use planning is not economically and technologically feasible or will not advance the attainment date, the state may eliminate it as a potential emission reduction strategy. However, lack of state authority, by itself, is not sufficient grounds for failure to consider land use planning or any other potential SIP strategy. Some states do have authority for land use planning and others can explore ways to gain the authority. Alternatively, states can work cooperatively with local jurisdictions that do have authority, to include land use planning commitments in the SIP.

3. Travel efficiency

Comment: Commenter (0130) stated that, the EPA should note that conducting an analysis of this "low cost" bundle is optional for states to include in any attainment plan (78 FR 34207). The Commenter added that, the EPA does not clarify under what section of the CAA these strategies should be considered for implementation. Will these strategies be part of an area's RACM analysis? Or some sort of voluntary bundle? If the

EPA's intent is to require an evaluation of the “low cost” bundle of measures in the attainment planning process, then DEQ strongly recommends that the EPA specifically note how states should approach the implementation of these strategies. The Commenter suggested that, the EPA should note that conducting an analysis of this "low cost" bundle is optional for states to include in any attainment plan. Many of these so-called “low cost” bundles are actually quite expensive. For example, retrofitting trucks with APUs costs approximately $7,000 to $9,000 per truck retrofitted, according to readily available information. To make this an effective control strategy for NO_x, a significant number of vehicles will need to be retrofitted. Where will the money come from to fund these retrofits? Higher parking rates, taxes on free private parking, parking permits, congestion pricing and intercity tolls will all have someone paying more money, will require that jurisdictions raise taxes on its citizenry and will be quite controversial in a time when gasoline and diesel are expensive. In many ways, these are not "low cost" initiatives. Therefore, the EPA should clearly note that any consideration of the strategies in the “low cost” bundle or any other strategy within the “Moving Cooler” report is optional in the development of an area's attainment plan.

Response: States should consider all potentially available measures, including travel efficiency strategies in the RACM element of the SIP. The EPA does not require an analysis specifically of the *Moving Cooler* report’s “low cost bundle” strategies referenced in the proposed rule. However, the EPA recognizes the potential for travel efficiency policies to reduce travel activity and encourages consideration of them in the RACM determination. The EPA is suggesting that the low cost bundle may be the most appropriate for consideration among the six different bundles included in the referenced report. The strategies included in the report range greatly in stringency, cost and difficulty of implementation. The low cost bundle represents those strategies that may be easiest to achieve among them. In many cases, such as those identified by the Commenter, a simple assessment and reasoned explanation would be sufficient for eliminating some travel efficiency strategies from further detailed analysis. If a state provides evidence that a travel efficiency strategy is not economically and technologically feasible or will not advance the attainment date, the state may eliminate it

as a potential emission reduction strategy.

Comment: Land use travel efficiency

Commenter (0156) concurred with the EPA that, land use travel efficiency reduction options may not fit easily into the timelines of the CAA or the EPA's traditional expectations for SIPs (page 34180). [26]

Commenter (0156) believed the 2-5 percent emission reductions from land use and travel efficiencies mentioned on page 34207 are not achievable and would not want this to contribute to unrealistic expectations during SIP development.

> The 2-5 percent reduction is based upon forecasted emission reductions between 2010 and 2020. A more realistic time-period would be 5 years, the interval between when the

[26] "Potential Changes in Emissions Due to Improvements in Travel Efficiency - Final Report, EPA, March 2011" suggests a maximum of 2 percent in combined NO_x and VOC emission reductions could occur over a 5-year period. This EPA study discloses that the bundle of: travel demand management (TOM) + land use changes + transit fare reduction + transit service improvements + parking fees + mileage fees "bundle" may reduce CO_2 by 8.83 percent PM by 8.78 percent, NO_x by 8.65 percent and VOCs by 8.29 percent by the year 2050 (40 year reduction). On average, a 0.2 percent emission reduction per pollutant per year could be achieved if implementing all bundled measures.

SIP is due in 2015 and the EPA selected out-year of 2020. In addition, the 2-5 percent reduction was based upon some assumptions used in the Moving Cooler Report that does not produce results upon which decision-makers can rely. While Moving Cooler had some valid findings and virtually all the strategies in the report have merit at some level, many strategies were formulated beyond what can be reasonably achieved, according to comments provided by the American Association of State Highway and Transportation Officials (AASHTO), Federal Highway Administration (FHWA) and state Departments of Transportation (DOTs). Unless the nature of the strategies in the report are fully understood, this report may be relied on at face value to develop policies and programs that could have adverse and unintended consequences for our nation's transportation system, economy and quality of life. Some examples of unrealistic assumptions and questionable findings from the Moving Cooler Report include:

- $5.00/gallon gas tax (the gas tax was $0.01 during its inception in 1932, and the current gas tax is only $0.184 gallon tax, and the average state combined federal and state tax is $0.475 cents/gallon);
- Impose a toll of 5 cents per mile on the entire interstate highway system;
- Trips made by bicycle in the U.S. will increase from 0.4 percent today to 11 percent;
- 90 percent of future development will take place in urban areas, compared to 34 percent today;
- $400 residential parking permits would be required for on-street parking;
- Tolls would be charged to motorists who enter Central Business Districts for all metropolitan areas of 50,000 and above; and
- The analysis of induced demand with respect to highway-related travel was more challenging than the report indicates, and in the end the model used may not have been fully capable of addressing this issue.

Commenter (0156) stated that, while land use changes might not easily fit into the time period of SIP control requirements, they appreciated the EPA efforts to allow for SIP emission credits for innovative options including land use and travel efficiencies.

Commenter (0159) agreed with measures, such as travel efficiencies, that credit states when they work to reduce such emissions, as mobile emissions are a large contributor to the formation of ozone.

Response: States should consider all potentially available measures, including travel efficiency strategies in the RACM element of the SIP. Some states have included variations of these types of strategies in their SIPs when needed to support emission reductions necessary to meet their CAA requirements. The degree of stringency for these strategies depends on the needs specific to their air quality requirements and goals. In many cases, such as those identified by the Commenter, a simple assessment and reasoned explanation would be sufficient for eliminating some travel efficiency strategies from further analysis. If a state provides evidence that a travel

efficiency strategy is not economically and technologically feasible, or will not advance the attainment date, the state may eliminate it as a potential emission reduction strategy.

Comment: Congestion Mitigation and Air Quality (CMAQ) for 2008 ozone maintenance areas

Commenter (0130) stated that, upon revocation of the 1997 ozone NAAQS, the EPA should work with Federal Highway Administration (FHWA), to ensure that areas previously designated nonattainment or maintenance for the 1997 ozone NAAQS but attainment for the 2008 ozone NAAQS have access to CMAQ funding. The Commenter also stated that, without CMAQ funding, these important programs may need to be cut back or discontinued. The EPA, in conjunction with the FHWA, should consider the effect of the revocation of the 1997 ozone NAAQS on potential future year CMAQ fund allocations for areas that were designated nonattainment or maintenance under the 1997 ozone NAAQS but are designated attainment under the 2008 ozone NAAQS. The Commenter added that, CMAQ funding is an integral part of jurisdictions' transportation plans. This funding supports many travel demand management programs as well as multi-modal projects that provide significant emission reductions of ozone precursors. As such, DEQ believes that the EPA must work with FHWA to ensure that former nonattainment and maintenance areas continue to remain eligible to receive CMAQ funding into the future. Continued CMAQ funding is especially important to these areas since the EPA is currently re-evaluating the level of the 8-hour ozone standard and may recommend lowering it even further in the coming year. If such areas cannot continue to receive CMAQ funds, the EPA should work with FHWA to ensure that jurisdictions are eligible to receive allotments for at least 3 to 5 years into the future. This transitional period would allow metropolitan planning organizations time to determine which projects and programs must be continued and to determine alternate funding sources. These decisions will be very difficult to make. The Commenter indicated several areas in Virginia that were designated attainment for the 2008 ozone NAAQS use CMAQ funding for a variety of very successful travel demand management programs, such as Richmond Ridefinders, Greater Richmond Transit Company, and Fredericksburg's GWRideConnect. The Commenter further indicated that, CMAQ funding has also been successfully used to help jumpstart such multi-modal projects as the 64 Barge Express, which reduces truck traffic by an estimated 24,000 trips annually along the 1-64 and 1-95 corridor between the Ports of Hampton Roads and the Port of Richmond. These programs, and many others like them are highly beneficial to air quality. They improve the lives of all citizens of the Commonwealth and improve highway safety. The Commenter believed that, continued CMAQ funding is essential for the RAPCA area to maintain attainment of the 1997 ozone standard and to possibly avoid designation of nonattainment for the 2008 standard. With funding being cut annually on every front—local, state and federal, the continuation of CMAQ funding is important. (0141)

Response: The EPA recognizes the role CMAQ funding has in supporting transportation projects that reduce travel activity and their associated emissions. The CMAQ funding and eligibility requirements are specified in the Moving Ahead for Progress in the 21st Century Act (MAP-21). The CMAQ program is administered by the U.S. DOT and is not subject to this

rulemaking. Past and current program policy and flexibility has supported continued funding for formerly eligible nonattainment and maintenance areas.

Comment: CMAQ funding for $PM_{2.5}$ areas

Commenter (0130) stated that, the EPA should work with FHWA to remove requirements mandating that areas designated as nonattainment or maintenance for $PM_{2.5}$ receive additional funding from CMAQ. The Commenter stated that, this type of decision should be at a state's discretion so that CMAQ allocation processes may avoid absurd results. In Virginia, only the Northern Virginia area is designated nonattainment for $PM_{2.5}$. Northern Virginia is part of the metropolitan Washington, D.C. area, which was designated nonattainment for the 1997 $PM_{2.5}$ NAAQS. Virginia has recently submitted a redesignation request and maintenance plan to redesignate the area to attainment/maintenance. The area's annual design values for $PM_{2.5}$ using 2010-2012 data is 10.8 $\mu g/m^3$, 1.21 Jg/m^3 less than the 2012 $PM_{2.5}$ NAAQS of 12.0 $\mu g/m^3$. The area's 24-hour design value for $PM_{2.5}$ using 2010-2012 data is 27 $\mu g/m^3$, 8 $\mu g/m^3$ less than the 2006 $PM_{2.5}$ NAAQS of 35 $\mu g/m^3$. The area was designated attainment for the 2006 $PM_{2.5}$ NAAQS and is expected to be designated attainment for the 2012 $PM_{2.5}$ NAAQS. Clearly, this area is not a persistent nonattainment area for $PM_{2.5,}$ however, it is a persistent nonattainment area for ozone. Additionally, several other areas in Virginia that currently receive CMAQ funds that were designated as attainment areas for the 2008 ozone NAAQS are just under the 2008 ozone NAAQS. It makes no sense to divert CMAQ funds from these areas to metropolitan Washington D.C. based on the nonattainment status of the D.C. area for the 1997 $PM_{2.5}$ NAAQS. The Commenter believed that, it made no sense to require the D.C. area to spend a percentage of its CMAQ funds on any type of particulate reduction strategy. The citizens in this area are already experiencing healthy $PM_{2.5}$ air quality. What the area needs are NO_x reductions for ozone air quality improvement. The Commenter recommended that, the EPA should work with FHWA to review these types of requirements for CMAQ and make necessary changes so that states have the flexibility to use CMAQ money for reductions most needed for improving air quality. (0130)

Response: Any state that has a $PM_{2.5}$ nonattainment or maintenance area-including those with approved SIPs that identify on-road mobile sources as insignificant for regional transportation conformity-is required under MAP-21 to invest a portion of its CMAQ funding in projects that reduce $PM_{2.5}$ directly or its precursors. Provisions giving priority to $PM_{2.5}$ emission reductions and directing a small portion of a state's CMAQ funding to $PM_{2.5}$ nonattainment and maintenance areas are specified in the MAP-21 (MAP-21) and the Interim Program Guidance issued by DOT on November 12, 2013. The law does not require additional CMAQ funding for $PM_{2.5}$ areas, but directs a portion of the state's CMAQ funds to those areas. Existing program policy and flexibility gives states discretion to allocate the remaining CMAQ funds within the state to other eligible areas according to their priorities. The CMAQ program is administered by the U.S. DOT and is not subject to this rulemaking.

P. Efforts to Encourage a Multi-Pollutant Approach When Developing 2008 Ozone SIPs

1. General support for a multi-pollutant approach

Commenters (0156, 0164, 0166 and 0169) supported having the option of a multi-pollutant approach to SIP planning requirements. Commenters (0156 and 0166) noted that, substantial efficiencies in SIP and transportation planning development could be realized by aligning NAAQS schedules, but it is unknown how that can occur considering existing statutory requirements.

Commenter (0166) stated that, perhaps the best that can be done is to allow credit for emission reductions planned under one program when implementing another program, an approach that the EPA already allows to a certain extent. Commenter (0166) encouraged the EPA to allow states to take credit for programs that may not yet have been fully implemented, but stated that, if the EPA moves forward with this proposed approach on integrated planning, it must provide sound legal justification for doing so.

Commenter (0169) stated that, a paradigm shift is necessary to move away from a pollutant-by-pollutant approach in favor of multipollutant air quality management and to account for the current rigidity in SIP deadlines that only serves to foster a sue and settle approach to policymaking. Until such time that the CAA can be revised, Commenter (0169) advised that, consistent interpretation of the CAA is vital to avoid the consequence of further promoting regulation by litigation.

Response: The EPA supports multipollutant planning where possible. Regarding the comment encouraging the EPA to allow states to take credit for programs that may not yet have been fully implemented, please *See* section III.B in the final preamble for details regarding the EPA's policy on this subject.

2. Do not support a multi-pollutant approach

Comment: Commenter (0159) stated, they preferred a single pollutant approach.

Response: Multipollutant planning is not required under this rule.

Q. How does this proposed rule apply to tribes?

Comment: The rule affects tribes

Commenter (0181) disagreed with the proposed rule's claim that, "it would 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" (page 34226). The Commenter stated that, Indian tribes whose interests and air quality levels were improperly overlooked when nonattainment designations and classifications were made, whose air quality is not accurately reflected by these older designations and classifications and whose nonattainment is due overwhelmingly (if not entirely) to transport, will be adversely affected by the rule. The Pechanga Band falls into this category. When the EPA established the new ozone NAAQS to replace the oxidants NAAQS in 1979, it designated the entire portion of Riverside County in the South Coast Air Basin, which had been designated as nonattainment for the oxidants NAAQS and which includes the Pechanga Indian Reservation, as nonattainment for the ozone NAAQS. This action was taken without consulting

Pechanga.

The Commenter argued that, under the 1990 CAA Amendments, the designation of "nonattainment" and the boundary of the Metropolitan Los Angeles Air Quality Control Region 1-hour ozone nonattainment area were carried forward by operation of law and the Los Angeles-South Coast Air Basin nonattainment area was classified as "Extreme" ozone nonattainment – again without consultation with Pechanga, in derogation of the 1984 policy announced by Administrator William D. Ruckelshaus requiring the agency to "assure that tribal concerns and interests are considered whenever the EPA's actions and/or decisions may affect reservation environments." (*See* 78 FR 34178, 34209)

The Commenter stated that, the Pechanga Indian Reservation straddles the boundary between southwestern Riverside County and San Diego County, and it is undisputed that its ozone levels and its air quality in general are far better than those of the Los Angeles - South Coast Air Basin as a whole, a fact recognized by the EPA when it announced the designation of "Moderate" nonattainment of the 2008 ground-level ozone standard for the Pechanga Band of Luiseno Indians Nonattainment Area in 2012. The Pechanga Indian Reservation, approximately 6,700 acres, is now divided into two different 8-hour ozone designations, with the portion of the Reservation located in San Diego County being in attainment of all ozone standards, and the contiguous portion located in Riverside County being in "Moderate" non-attainment of the 2008 standard and "Extreme" nonattainment of the 1-hour standard. Of course, this division has no basis in science or common sense. The Reservation has no industry, no major roadways and only one significant commercial entity located within its boundaries and historically tolerated high ozone transport from the heavily polluted Los Angeles - South Coast Air Basin.

Commenter (0181) stated that, the facts of Pechanga's predicament are:

1. Pechanga's current nonattainment designation for the 1-hour ozone standard and the 1997 8-hour standard are based entirely on data from within the South Coast Air Basin and not on data from within the Pechanga Reservation or the immediately adjacent (attainment) areas in San Diego County.

2. The South Coast Air Basin is subject to stringent federal requirements that can only result in improvements in air quality within the Pechanga reservation.

3. Due to the overwhelming contribution of emissions from the South Coast Air Basin to Pechanga's ozone levels, the only way that Pechanga could make the demonstrations required by the proposed rulemaking to eliminate the anti-backsliding requirements would be for Pechanga to rely on planning, regulations and commitments by other jurisdictions - the South Coast AQMD and the State of California-that are completely outside of Pechanga's control and which may have economic interests in conflict with or adverse to those of the Pechanga Band.

Commenter (0181) believed that, to require a geographically small entity with no industry to demonstrate that its attainment of a revoked standard is due to permanent and enforceable emission reductions when, in fact, there is virtually nothing within its jurisdiction to reduce, and

to require a demonstration that controls will remain in place when the controls affecting ozone in its territory are under a different jurisdiction, places an undue burden on a tribe whose 1-hour classification and designation were improperly, unfairly and illogically set in the first place.

Response: The tribe expresses concerns about its inclusion in the South Coast Air Quality Control Region, which is a nonattainment area. This comment is beyond the scope of this rule, which sets forth the requirements for SIPs for ozone nonattainment areas. It does not address how air quality control regions are established or designated.

The CAA section 107(d) establishes the requirement for the EPA to designate areas following promulgation of a new or revised NAAQS. Section 107(d) does not explicitly reference Indian tribes or Indian country. However, tribes are able to participate in the designations process, and the EPA encourages them to do so.

The EPA included the Pechanga Reservation in the initial one-hour ozone designation for the South Coast nonattainment area in 1978.[27] The Pechanga Reservation, in a September 13, 2012 letter from Mark Macarro, Chairman of the Pechanga Reservation, requested correction of the EPA's inclusion of the Pechanga Reservation in the initial one-hour ozone designation for the South Coast nonattainment area in 1978. The chairman asserted that including the tribe in the designation area was incorrect based on air quality considerations at the time and the failure to consult with the Tribe or to consider the Tribe's interests. The EPA recognizes that there have been long-standing issues arising from the inclusion of the reservation in the South Coast ozone nonattainment area.

The EPA has reviewed the request from the tribe and communicated to the tribe that the EPA was not inclined to pursue the error correction approach at this time. Under section 110(k)(6), the EPA must first determine that the agency's initial action promulgating the designation of the South Coast to include the Pechanga Reservation was in error, and EPA is not convinced that such action was in error. The EPA would encourage the tribe to continue to work with the EPA Region IX Air Division to resolve the tribes' concerns.

The EPA regrets any problems regarding past coordination with the tribe. We note that the agency did not have a consultation policy at the time that various actions noted by the Commenter took place. However, in order to improve the EPA's efforts to ensure adequate communication and coordination with tribes, the EPA, on May 4, 2011, released the "EPA

[27] *See* 43 FR 8962 (March 3, 1978)

Policy on Consultation and Coordination with Indian Tribes."[28] The policy is a result of the Presidential Memorandum on Tribal Consultation issued November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175.[29]

R. What are the requirements for the Ozone Transport Region (OTR)?

1. VOC controls

Comment: Commenter (0130) stated that imposition of VOC controls in areas that are NO_x-limited is burdensome to both the regulated entity as well as the state, which must determine, implement and enforce these controls. The commenter added that allowing NO_x substitution for VOC should extend beyond section 182(b)(2) RACT requirements to those required for areas within the OTR. The commenter stated that studies have shown that many areas in the OTR, including Northern Virginia, show little or no benefit to ground-level concentrations when significant reductions in anthropogenic VOC emissions are modelled. The commenter asked the question, why impose additional regulations and requirements when science indicates that ozone concentrations will not improve as a result? The commenter urged the EPA to implement this common sense approach.

Response: The EPA agrees that there are examples of modeling suggesting that ozone formation in some areas is NO_x-limited, such that changes in anthropogenic VOC emissions will have little effect on ozone concentrations. The EPA agrees that today's understanding of the role of NO_x reductions would suggest that, in some areas, it would be relatively more efficient to focus attainment planning efforts on achieving reductions in NO_x rather than VOC emissions. However, the CAA section 182(b)(1) expressly requires the 15 percent ROP plans to reduce emissions of VOC. It does not provide discretion to meet these requirements by reducing emissions of other pollutants. Where Congress intended to allow such a substitution, it specifically provided so, such as in section 182(c)(2)(C) which allows NO_x to be substituted for VOC in the 3 percent annual RFP plans for Serious and above areas.

The EPA has already developed information that may be assist the commenter. The EPA developed the *NO_x Substitution Guidance*, December 1993, which provides a procedure that can be applied to meet the section 182(c)(2)(B) RFP requirement as well as the section 182(c)(2)(C) equivalency demonstration requirements. This guidance is intended to facilitate implementation of the most effective ozone precursor control strategies, while meeting the intent of the CAA RFP provisions. This document can be accessed at the following web address:

---

[28] The "EPA Policy on Consultation and Coordination with Indian Tribes," can be accessed at the following web site: *http://www.epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf*

[29] Executive Order 13175 can be accessed at the following website: *http://www.gpo.gov/fdsys/pkg/WCPD-2000-11-13/pdf/WCPD-2000-11-13-Pg2806-2.pdf*

http://www.epa.gov/ttn/caaa/t1/memoranda/noxsubst.pdf. The EPA, on August 5, 1994, issued a memorandum titled, *Clarification of Policy for NO_x Substitution*, John S. Seitz, Director, Office of Air Quality Planning and Standards, which issues a clarification on NO_x substitution for ROP plans, specifically, what the EPA will accept as evidence that NO_x substitution for VOC reductions is a viable approach. This memorandum can be accessed at the following web address: *http://www.epa.gov/ttn/caaa/t1/memoranda/clarisub.pdf*.

2. Emission reduction credits

Comment: Commenter (0144) urged EPA to allow for emission reduction credits from certain control strategies made within the Ozone Transport Region (OTR) states that occurred between 2008 and the year of the baseline emissions inventory (2011), if 2011 is used as the baseline inventory, so that states that made early reductions in ozone precursors are not economically and environmentally disadvantaged.

Response: In the final rule, the EPA allows states to take emission reduction credits for certain control strategies implemented with the OTR if the baseline year the state selects is consistent with the timing of those reductions. However, if the state selects 2011 as its baseline year, emissions reductions occurring in the years 2008-2010 are not creditable against a 2011 baseline.

3. NO_x substitution

Comment: Commenter (0166) opposed the EPA's proposal to allow nonattainment areas in the OTR that are subject to section 182(b)(1) of the Act for the first time to substitute NO_x reductions for otherwise-required VOC reductions. [Also *See* section 2.C.2, 2008 ozone nonattainment areas where portions have a previously approved 15 percent VOC reduction plan]

Response: Several Commenters raised objections to the EPA's proposal that would allow only areas in the OTR to meet the RFP requirements by allowing NO_x substitutions. The Commenters argued that, it would be better to allow all areas to take advantage of this alternative. Attainment areas in the OTR were not required to adopt 15 percent RFP plans under section 184 of the CAA. We discussed certain VOC reduction measures in the proposal. We expected that the VOC reductions from those measures would account for a significant portion of the 15 percent requirement for areas designated nonattainment. We reasoned that since attainment areas in the OTR were required to adopt and implement many of the same measures applied in nonattainment areas, we proposed that such areas should be treated as having met the 15 percent VOC reduction requirement if they can demonstrate that they did, in fact, achieve a 15 percent reduction in VOC emissions, even though they of course would not have submitted a 15 percent plan as they were not subject to the 15 percent requirement at that time. The EPA has reconsidered its proposal and now believes it does not have authority under the CAA to allow NO_x substitution for VOC emissions reductions for the 15 percent ROP in any area, including an area located in the OTR, unless the area has previously submitted, adopted and implemented a SIP providing for a 15 percent VOC reduction in emissions from the area's baseline emissions in the 6 years following the baseline emissions inventory year consistent with the requirement in section 182(b)(1) and the prior approach for the 1997 ozone NAAQS. 40 CFR 51.910(a)(1)(i). The EPA is not

finalizing either of the proposed approaches that would have allowed areas to meet the 15 percent ROP requirement in whole or in part with NO_x reductions in lieu of VOC reductions.

4. Areas with a previously submitted 15 percent VOC reduction plan

Comment: Commenter (0163) stated that, areas within the OTR, including new nonattainment areas, that have already implemented VOC control measures, such as RACT, motor vehicle inspection and maintenance programs, and Stage II or comparable measures, in response to statutory requirements, can be assumed to have met and would not have to document meeting the 15 percent RFP requirement. [Also S*ee* section 2.C.2, 2008 ozone nonattainment areas where portions have a previously approved 15 percent VOC reduction plan]

Response: The EPA has reconsidered its proposal and now believes it does not have authority under the CAA to allow NO_x substitution for VOC emissions reductions for the 15 percent ROP in an area, including an area located in the OTR, which has never adopted and implemented a SIP providing for such VOC emission reductions. Thus, we agree with the comments that the CAA does not allow such substitution and disagree with comments suggesting that EPA allow substitution. We are finalizing that where a 2008 nonattainment area has previously met the CAA requirement for a 15 percent ROP VOC reduction plan for the entire area, the area is not required to fulfill that requirement again.

5. lnterpollutant Offset Substitution in the OTR

Comment: Commenter (0130) suggested that, the proposal clarify that this exchange may be implemented in the OTR regions as well as nonattainment areas outside the OTR. The commenter believed that permits for facilities to construct or modify in nonattainment areas need to ensure that the expansion or new facility will not hinder progress toward compliance with the NAAQS. The commenter further believed that requiring facilities to obtain offsets for pollutants that only minimally reduce ozone concentrations is overly burdensome and should be streamlined. The commenter believed that in areas where NO_x is the predominant ozone precursor, which the commenter alleged is the case in most areas on the eastern seaboard, NSR offset requirements for areas within and outside the OTR should reflect this fact. In these areas, NSR rules should not mandate that VOC offsets be acquired for major permit actions. The commenter urged the EPA to allow substitution of NO_x emissions reductions to satisfy VOC offset requirements into the final rule.

Response: The EPA has addressed interprecursor offset substitution in the discussion section I.3.b, and regulation amendment for 40 CFR 51.165(a)(11) and part 51 Appendix S IV.G.5. The changes in the regulatory as noted in the discussion did not specifically address use within the OTR regions, however the EPA does not anticipate precluding the use of interpollutant offset substitution as long as such trades are consistent with existing policy and legal requirements for such trades.6. Stage II vapor recovery

Comment:

Commenter (0143) stated that, the DEP understands that the proposed rule "would have no effect on the continuing independent CAA section 184(b)(2) requirement for OTR states to implement Stage II programs or measures capable of achieving emissions reductions comparable to those achieved by Stage II", nonetheless, DEP strongly supports the proposed revisions to the anti-backsliding rules. (0143)

Response: The EPA believes its revision to the existing anti-backsliding rules, which does not include the Stage II vapor recovery program previously required by CAA section 182(b)(3) in the list of measures that need to be retained for anti-backsliding, is consistent with the EPA's May 16 2012, Stage II action, 77 FR 28772. In that action, the EPA determined that ORVR systems are in widespread use nationally, and the EPA waived the CAA section 182(b)(3) requirement for states to adopt and submit programs for implementation of the Stage II vapor recovery system at gasoline dispensing facilities located in Serious and above ozone nonattainment areas, pursuant to authority provided in CAA section 202(b)(6). However, the Commenter is correct that, OTR states must continue with the independent CAA section 184(b)(2) requirement to implement Stage II programs or measures capable of achieving emissions reductions comparable to those achieved by Stage II, consistent with the "Guidance on Removing Stage II Gasoline Vapor Control Programs from SIPs and Assessing Comparable Measures" August 7, 2012, (EPA–457/B–12–001).

S. Are there any additional requirements related to enforcement and compliance?

The EPA did not propose any specific regulatory provisions related to compliance and enforcement. The EPA did not solicit comment on this section and none were received.

T. What are the requirements for addressing emergency episodes?

Comment: Commenter (0160) supported the proposed use of the Administrator's discretion to exempt ozone nonattainment areas from the emergency episode planning requirements originally required for the revoked 1-hour standard. Commenter (0160) stated that, modern information technology has replaced these "paper plans" with real-time data and improved public notification systems.

Response: The EPA did not propose to exempt emergency episode planning requirements but proposed to apply the existing requirements for emergency episodes (40 CFR part 51, subpart H) to the 2008 ozone NAAQS, whereby SIPs would identify areas by priority classification and contain contingency plans to prevent pollutant concentrations from reaching levels that would cause significant harm to the health of persons. We did not receive any adverse comments on this proposal, and we are finalizing this proposal without changes. The proposed rule also specified that the existing significant harm level for ozone of 0.6 ppm, 2-hour average (40 CFR 51.151) would continue to apply for purposes of developing emergency episode plans. We did not receive any adverse comments on this proposal, and we are finalizing this proposal without changes.

U. How does the ''Clean Data Policy'' apply to the 2008 ozone NAAQS?

1. Support clean data policy

Comment: Commenters (0159, 0163, 0172, 0173 and 0179) supported the EPA's proposed approach to the clean data policy.

Commenter (0159) stated that, requirements designed to bring an area into attainment should be suspended once the goal of attainment has been achieved, provided the area continues its monitoring program and continues to attain the relevant standard. Commenter (0173) stated that, not only has the Clean Data Policy been upheld in court but it is also essential to streamlining unnecessary administrative burdens for areas that are currently attaining the NAAQS. Commenter (0179) supported the policy since it reduces burdens on areas that attain the NAAQS. Commenter (0179) requested that, the EPA expeditiously redesignate and/or reclassify areas using its CAA section 107(d)(3) authority for which states have submitted "clean data" certification and redesignation/maintenance SIPs.

Response: The EPA appreciates the Commenters' support of the Clean Data Policy. As stated in the Clean Data Policy, the attainment demonstration, RFP requirements and contingency measure requirement are designed to bring an area into attainment. Once this goal has been achieved, we believe the statute no longer requires submission of plans designed to bring the area into attainment and thus it is appropriate to suspend the obligation that states submit plans to meet these goals, so long as the area continues to attain the relevant standard. The EPA Regional Offices will act on redesignating areas based on any section 175A submittals that are received in as expeditious a manner as possible.

V. What assistance programs is the EPA considering for implementation of the 2008 ozone NAAQS?

1. Ozone Advance

Comment: Commenter (0140) stated that, because areas participating in the EPA's Ozone Advance Program are undertaking significant efforts to limit emissions within their areas and stay in compliance with federal ozone standards, the EPA should ensure in this rulemaking that it

will exercise the maximum discretion available to it under the CAA in implementing the 2008 ozone NAAQS to these areas in recognition of these efforts.

Commenter (0163) stated, the EPA should assure that areas implementing ozone advance are currently still in attainment with the NAAQS and, if these areas are no longer meeting the NAAQS with the most recent data, the EPA should redesignate these areas to nonattainment and require they come into attainment as specified in subpart 2.

Commenter (0169) expressed support for the Ozone and PM Advance Programs and stated that their shared goal and focus should be attainment of the ozone NAAQS as soon as practical to provide public health protection as expeditiously as possible. Therefore, this process should reward and provide maximum flexibility to programs that can attain the standard on an accelerated basis. As the EPA is aware, 13 out of 14 areas across the nation were successful in implementing an 8-hour Ozone Early Action Compact (EAC) for the 1997 ozone NAAQS. These areas were provided the incentive of a deferred effective date of a nonattainment designation as long as requirements of the EAC were followed, including the implementation of measures earlier than required. The EACs served to help motivate local partners to implement strategies to help avoid a nonattainment designation altogether. This saved countless state, local, and business man-hours and dollars and protected public health by maintaining ozone levels below the NAAQS in participating areas. While the EPA has discontinued the EAC program and its resulting deferment of nonattainment designations, realizing the benefit of it in principal has led to the Ozone and PM Advance Program which serves to again encourage attainment. SC has signed on and been accepting into both the Ozone and PM Advance Programs and looks forward to continuing our work with stakeholders via our state-wide Coalitions.

Response: A Commenter noted that, the EPA has discretion to determine whether areas designated attainment for the 2008 ozone NAAQS but that have since violated the standard should be redesignated nonattainment. The Commenter recommends that, if an attainment area participating in the EPA's Advance Program is not meeting the 2008 standard, the EPA should not designate the area nonattainment as a result of the area's participation in Ozone Advance.

This issue is addressed in the Ozone Advance program guidance, which states that if violations of the ozone NAAQS occur despite an area's participation in Ozone Advance, the EPA would consider the factors in the CAA section 107(d)(3)(A), which include "air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate." The guidance additionally indicates that where control measures and programs are actively being implemented by an area, the EPA may allow time to determine whether such measures and programs bring the area back into attainment. This is not meant to suggest that participation in Ozone Advance can shield an area from being redesignated nonattainment if the area eventually violates the ozone NAAQS. However, it is appropriate for the EPA to consider an area's active pursuit of control measures and programs (whether via Ozone Advance or otherwise) as one factor among the set of factors it considers when determining whether to exercise its discretion to revise the area's designation to nonattainment.

Another Commenter suggested that, the EPA should redesignate Ozone Advance areas to

nonattainment if they are no longer meeting the 2008 ozone NAAQS based on the most recent data. The EPA agrees that participation in Ozone Advance is not a guarantee against a future redesignation to nonattainment. If violations of the ozone NAAQS occur despite an area's participation in Ozone Advance, the EPA would consider the factors in CAA section 107(d)(3)(A), which include "air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate." To the extent an area is actively implementing control measures and programs, the EPA may allow time to determine whether such measures and programs bring the area back into attainment.

Lastly, a Commenter emphasized the benefits of flexible, expeditious approaches that can help areas achieve attainment of the ozone NAAQS. In particular, the Commenter noted the success of the Early Action Compact program for the 1997 ozone NAAQS and the current Ozone and PM Advance programs as examples of helpful, flexible approaches that encourage areas attain the NAAQS expeditiously. The EPA shares the commenter's view that expeditious attainment of the NAAQS is needed to ensure public health is protected, and that flexible attainment approaches can play an important role in helping areas to achieve air quality improvements.

W. What is the deadline for states to submit SIP revisions to address the CAA section 185 penalty fee provision for Severe and Extreme areas?

1. Support the proposed schedule

Comment: Commenter (0163) agreed with the proposed schedule for submitting CAA section 185 SIPs.

Response: The EPA thanks the Commenter for their support of the proposed schedule for developing and submitting section 185 SIPs to the EPA. Consistent with CAA section 182(d)(3), the final rule requires states with areas initially classified as Severe or Extreme for the 2008 ozone NAAQS to submit a section 185 SIP no later than 10 years after the effective date of designation and classification for the 2008 ozone NAAQS. For areas that are reclassified to Severe or Extreme at any other time, the EPA will establish an appropriate fee program SIP submission deadline as part of the reclassification action.

X. Other Comments

1. Federal control measures

Comment: Commenters (0139, 0141, 0149, 0155 and 0157) encouraged the EPA to continue to regulate mobile and stationary sources through national measures.

Commenter (0168) asserted that, emission reductions achieved by national rules will not only reduce emissions from within what the Commenter characterized as the arbitrarily small nonattainment areas that are covered by this proposal, but will also reduce emissions from the broader area that is the primary cause of nonattainment.

Commenter (0143) encouraged the EPA, when finalizing the rule, to use the EPA's existing authority to gather emissions data and update current program standards that have the potential to lower emissions.

Commenters (0139 and 0150) stated, the EPA needs to share the responsibility to attain the standards and to have the authority to impose requirements that will enable the standards to be attained. The Commenter believed that, the existing provisions of the CAA gives state and local governments the responsibility to attain the NAAQS, yet it deprives them of the ability to regulate the sources that, in California at least, contribute by far the greatest amount of emissions—mobile sources. In contrast, the EPA is given the ability to regulate mobile sources, but is not given the responsibility to actually attain the standards. We recognize that the CAA attempts to address this concern to some extent by allowing California to set emission standards for new mobile sources with a waiver or authorization from EPA, under section 209. But despite California having used these provisions to the greatest extent feasible, there is still a large gap between existing regulation and attainment needs. The EPA needs to have the authority to (1) regulate existing as well as new on-road and NONROAD sources; (2) require airlines, shippers, and railroads to route their cleanest equipment to the areas that need emission reductions the

most; and (3) regulate marine vessels flying foreign flags but doing substantial business within U.S. ports.

Commenter (0150) expressed their biggest concern with the existing provisions of the CAA is that it gives state and local governments the responsibility to attain the NAAQS, yet it deprives them of the ability to regulate the sources that, in California at least, contribute by far the greatest amount of emissions-mobile sources. The commenter explained that EPA is given the ability to regulate mobile sources, but is not given the responsibility to actually attain the standards. The commenter recognized that the CAA attempts to address this concern to some extent by allowing California to set emission standards for new mobile sources with a waiver or authorization from the EPA, under section 209. The commenter specified that in their state, despite having used these provisions to the greatest extent feasible, there is still a large gap between existing regulation and attainment needs. The commenter proposed the EPA needs to regulate "federal sources" by an amount proportionate to their contribution to the problem. To attain even the 1997 ozone standard, the South Coast needs an additional 65 percent NO_x reductions beyond what would occur in the attainment year of 2024 without further regulation. Since mobile sources contribute over 80 percent of ozone precursors, they must contribute the lions' share of the reductions. The Commenter believed that, the EPA needs to take responsibility for attaining the national standards-and it needs to have the tools to be able to do so. The commenter recommended that EPA needs to have the authority to (1) regulate existing as well as new ONROAD and nonroad sources; (2) require airlines, shippers and railroads to route their cleanest equipment to the areas that need emission reductions the most and (3) regulate marine vessels flying foreign flags but doing substantial business within U.S. ports. The commenter offered that these issues are further discussed in the testimony of Dr. Barry Wallerstein, Executive Officer of the SCAQMD, on August 2, 2012, before the House Subcommittee on Energy and Power. This testimony was included as an attachment to the SCAQMD letter of August 21, 2012, regarding RFP, which is attached to comment 0150. The commenter summarizes that, the EPA needs to share the responsibility to attain the standards and to have the authority to impose requirements that will enable the standards to be attained.

Commenter (0168) suggested that, the list of national rules that the EPA adopts be expanded to include other requirements that have been implemented in the OTR states, which include updated Architectural and Industrial Maintenance Coating (AIM), auto body coating, and others. Commenter added that, the EPA discussed in the proposal HEDD, vehicle I/M for OBD equipped vehicles and the removal of Stage II vapor recovery systems, which also may be candidates for national rules.

Response: The EPA appreciates the Commenter's affirmation that the EPA's determination of widespread use of ORVR adequately supports the EPA's waiver of requirements for Stage II vapor recovery systems. The EPA's decision to waive the Stage II gasoline vapor recovery requirement for ozone nonattainment areas was based on an analysis that was available for public review and comment in the EPA's rulemaking process. Overall, the analysis demonstrates that ozone-precursor emission control benefits of basic Stage II programs decline as older vehicles are replaced by newer ORVR-equipped vehicles, and that basic Stage II systems become increasingly less cost-effective ozone control measures. The EPA's analysis incorporated all

types of refueling events at gasoline dispensing facilities (GDFs) including: (a) ORVR vehicles at Stage II GDFs; (b) ORVR vehicles at non Stage II GDFs; (c) non-ORVR vehicles at Stage II GDFs; and (d) non-ORVR vehicles at non Stage II GDFs. The EPA calculated the emissions in these four segments but did not address storage tank emissions since our analysis concluded that these emissions would be about the same with ORVR alone or with Stage II alone. Early in the rulemaking process, we published an analysis which concluded that storage tank vent emissions would be the same or less under any refueling scenario because the GDF National Emission Standards for Hazardous Air Pollutants rule for GDFs require pressure/vent (p/v) valves. In these analyses, the EPA did not indicate that storage tank vent emissions would be zero, but that they would not increase if Stage II was removed. Furthermore, the EPA concluded that storage tank vent emissions related to ORVR/vacuum assist nozzle incompatibility would gradually increase if Stage II was retained but would be eliminated if Stage II was removed. Based on public comment on the July 15, 2011, Notice of Proposed Rulemaking (NPRM), we prepared and published an analysis which quantified this effect and we included these emissions in the assessment that supported the EPA's determination of when Stage II could be removed. Our analysis and all of the data considered in our determination was available for public review and comment during the EPA's rulemaking process. All comments received on the NPRM were considered and addressed in our Response to Comments document supporting the May 16, 2012 final rule (77 FR 28772).

Comment: Commenter (0147) agreed with the statement in the proposed rule, which highlights achievements already made by the solvents industry and downstream users in reducing VOC emissions.

Response: The EPA appreciates the Commenter's support.

2. Subpart 1 and Subpart 2

Comment: Commenter (0140) stated that, the EPA should only apply Subpart 2 requirements to ozone nonattainment areas in cases where the courts have explicitly ruled that the EPA must apply these requirements. The Commenter stated that, under the *Chevron U.S.A. v. NRDC* two-step test for determining whether to grant deference to a government agency's interpretation of a statute, the courts grant a government agency discretion in interpreting a statute if Congress has not "spoken directly to the precise question at issue," and if "the agency's answer is based on a permissible construction of the statute." In this case, the specific question at hand is whether the "Subpart 2" requirements under section 182 of Title I of the 1990 CAA Amendments must be used to implement the 2008 ozone NAAQS for areas with 8-hour ozone at or below 0.09 ppm. The Supreme Court's ruling in *Whitman v. American Trucking Assns.*, Inc. (2001), and the Appeals Court for the D.C. Circuit's ruling in *South Coast Air Quality Management District v. EPA* (2006 and 2007) both indicated that Congress did not "clearly intend Subpart 2 to be the exclusive, permanent means of enforcing a revised ozone standard in nonattainment areas," and that the EPA's implementation of the 1997 ozone standard violated the CAA "insofar as it subjects areas with 8-hour ozone in excess of 0.09 ppm to Subpart 1."

The cumulative impact of these rulings is to allow the EPA to implement an 8-hour ozone standard under Subpart 1 for areas with 8-hour ozone levels at or below 0.09 ppm, as long as such a rulemaking is based on a permissible construction of the statute. The 2007 South Coast decision only precludes the EPA from a construction of the statute that, "rel[ies] upon its preference for regulatory flexibility in setting the boundary between Subpart 1 and Subpart 2." The CACAC recommends that the EPA instead rely on the statute's explicitly stated purpose of Title I "to encourage and assist the development of regional air pollution prevention and control programs" under section 101(b)(4) and the explicitly stated goal of the statute "to encourage or otherwise promote reasonable Federal, state and local government actions, consistent with provisions of this Act, for pollution prevention" under section 101(c) as the basis for using Subpart 1 to implement the 2008 standard for areas with 8-hour ozone below 0.09 ppm. Insofar as application of Subpart 2 requirements to 8-hour ozone nonattainment areas with 8-hour ozone levels at or below 0.09 ppm act as a disincentive to states, local governments and businesses in "attainment" areas taking proactive measures to avoid nonattainment, it would be contrary to the stated Congressional intent for the statute.

Specifically, the requirements for emission reductions beyond what may be required for expeditious attainment under Subpart 2's RFP requirement create a set of regulatory requirements that would inadvertently punish an area for taking proactive emission reduction measures prior to a "baseline" year used to establish emission reduction targets. For the Austin-Round Rock MSA, for example, under the Early Action Compact (EAC) and then again under the 8-Hour Ozone Flex Program (8-O_3 Flex), the local governments and the TCEQ adopted a host of regulations and emission reduction measures that reduced the area's NO_x and VOC emissions, including a vehicle inspection and maintenance program, stage 1 vapor recovery requirements, degreasing restrictions, cutback asphalt restrictions, heavy-duty vehicle idling restrictions, power plant emission reductions, Texas Low-Emission Diesel (TxLED), and a diesel retrofit/repower/replacement program (the Emission Reduction Incentive Grants, or "ERIG," under the Texas Emission Reduction Plan, or "TERP" program). These emission reductions began in 2004 and have significantly reduced the emissions up to today, including in any baseline year that would be used for calculating RFP targets if the Austin-Round Rock MSA were to be designated nonattainment for the 2008 ozone NAAQS at some point in the future. The local governments and TCEQ were willing to pursue these and other emission reduction measures in order to maintain compliance with an ever-stricter ozone standard with the explicit agreement from the EPA that the emission reduction measures would be "creditable" to any future ozone SIP requirements (including RFP).

The Commenter stated that, it is easy to see how implementation of the 2008 ozone NAAQS using Subpart 2's requirements for an area like the Austin-Round Rock MSA could wind up "punishing" it for taking proactive measures by requiring a 15 percent VOC reduction (or 3 percent per year NO_x reductions) from an already-reduced emissions baseline. For example, if the Austin-Round Rock MSA's typical ozone season weekday VOC emissions in 2011 were 95 tons per day (tpd), but would have been 100 tpd if it not adopted proactive emission reduction measures, it's target VOC emissions level would be lower (80.75 tpd, or 85 percent of 95 tpd) than what would have been required if it had not taken those proactive measures (85 tpd, or 85 percent of 100 tpd). The extra 4.25 tpd of VOC emission reductions that an area might have to

make under this scenario would provide a powerful disincentive to it or any other area taking similar proactive measures. Similarly, if a major point source has reduced its emissions and voluntarily modified its permit to reflect the lower emissions prior to a "baseline" year, it would also be "punished" for taking this beneficial, proactive measure since these emission reductions would not be available for use as an offset if the area was designated nonattainment. Since doing so would provide disincentives for taking proactive measures to attain and maintain the 2008 ozone NAAQS, implementing it using Subpart 2 for areas that the EPA is not required to use them would be contrary to the purpose of the statute and would not serve any useful purpose in attaining and maintaining the standard.

The Commenter suggested that, the EPA could also use the definition of "RFP" under section 171(1) as the basis for waiving the section 182 RFP requirements for areas with 8-hour ozone design values of 0.09 ppm or less. Section 182(b)(a)(i) specifies that the SIP must require a 15 percent VOC reduction from a 1990 baseline and "such specific annual reductions in emissions of VOC and NO_x as necessary to attain the 2008 ozone NAAQS by the attainment date applicable under this Act." Section 171(1) states that, "The term 'RFP' means such annual incremental reduction in emissions of the relevant air pollutant as are required by this part or may be reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable NAAQS by the applicable date" (emphasis added). The specific requirements of section 182(b)(a)(i) beyond what was defined in section 171(1) were aimed at attainment the 1-hour ozone standard in effect at the time of its passage, and therefore may need to still be applied to areas with 8-hour ozone above 0.09 ppm (the 8-hour equivalent of the 1-hour standard). However, no examination of the scientific evidence for many areas, including for the Austin-Round Rock MSA, would interpret the general RFP requirements under section 171(1) and section 172(c)(2) as requiring a 15 percent VOC reduction irrespective of whether such a reduction would be effective at reducing ozone levels. For the Austin area, even a 100 percent reduction in anthropogenic VOC emissions would not likely reduce local ozone levels by any more than 0.7 parts per billion, based on modelling performed by the University of Texas at Austin.

The Commenter believed that, since implementation of the 2008 ozone NAAQS under Subpart 1 would still require RFP, the CACAC recommends that for areas with 8-hour ozone design values at or below 0.09 ppm (either 94 or 90 ppb, depending on interpretation), the RFP requirement be tied only to the amount of emission reductions required for attainment between a baseline year and an attainment year as specified in an attainment demonstration. The requirement for RFP would be simply to demonstrate that emission reductions envisioned in the attainment demonstration were being implemented at the earliest date that could reasonably be expected, given economic and technical feasibility. This could entail a simple schedule of emission reductions that would occur in the intervening years between the baseline and attainment year. For a "Moderate" area with an 8-hour ozone design value of 0.09 or less, this could entail a demonstration that half of the emission reductions would have occurred within 3 years of designation, and that all of the remaining emission reductions would occur between the date of submission of the SIP and the beginning of the ozone season for the attainment year. Such a demonstration would avoid requiring states to adopt additional VOC emission reduction measures strictly for RFP purposes, and beyond what was required to attain the standard. The

same is true of the section 182 requirements for adoption of RACT for VOC sources–if these emission reduction measures can't in any meaningful way contribute to the attainment or maintenance of the 2008 ozone NAAQS for a particular area, the EPA should not use these Subpart 2 requirements for areas where it does not need to.

Response: While the EPA did consider placing some areas only under the planning requirements of subpart 1, the EPA ultimately determined that such an approach was not its preferred approach for the 2008 ozone NAAQS. Instead, the EPA determined that classifying all areas under subpart 2 and using the Percent Above The Standard (PATS) approach to translate Table 1 in section 181(a) was the most appropriate option for addressing nonattainment for the 2008 ozone NAAQS. Under this approach, a majority of initial nonattainment areas were be classified as Marginal. The Marginal classification provides as much, if not more, flexibility for areas than would subpart 1. For example, a Marginal area is not required to submit an attainment demonstration while subpart 1 requires such a plan. For areas that are close to the standard and likely to attain within 3 years, an attainment demonstration could be a costly and likely unnecessary burden. We further note that the planning and control requirements that the Commenters believed were not flexible do not apply in Marginal areas. Further, all of the initial nonattainment areas classified as Moderate or higher for the 2008 ozone NAAQS are already subject to those requirements for purposes of the 1997 ozone NAAQS.

Furthermore, we disagree with the Commenters who suggest that areas would be able to attain the standard more expeditiously under subpart 1. As an initial matter, under both subparts, states are required to ensure that areas attain the NAAQS as expeditiously as practicable. Furthermore, the initial maximum statutory attainment date under subpart 1 is 5 years, while for Marginal areas, which will be the classification for most areas for the 2008 ozone NAAQS, it is 3 years. Regardless, under both subparts, states are required to ensure that areas attain the NAAQS as expeditiously as practicable.

For areas classified as Moderate or Serious, with a maximum attainment date under subpart 2 of 6 or 9 years respectively, again subpart 1 does not necessarily set a shorter maximum attainment date. We note that the 5 year limit under subpart 1 is only binding if the EPA determines it is consistent with expeditious attainment. Subpart 1 allows the EPA to approve attainment deadlines up to 10 years from designation based on a demonstration by the state that a deadline longer than 5 years is as expeditious as practical considering the severity of nonattainment and availability and feasibility of pollution control measures.

While it is true that subpart 1 would provide a shorter maximum attainment date for areas classified as Severe or Extreme, we note that under the court's decision in South Coast, the EPA's ability to place such areas solely under the planning provisions of subpart 1 is untested. Under the classification scheme for the 2008 ozone NAAQS, the lowest design value for an area classified as Severe is 0.113 ppm, which is well above the 0.090 level that the Court in South Coast indicated was the line between where the EPA had discretion to place areas in subpart 1

and where it did not have such discretion.[30] Subpart 2 provides areas classified Severe or Extreme more than the 10 years maximum attainment date which, may be more appropriate for these areas given the severity of their ozone nonattainment problem.

With regard to comments that classification under subpart 1 would allow for coordinated planning and/or synchronized attainment dates where there are multiple nonattainment areas in the state, we note that under subpart 1 (as under subpart 2) areas are required to attain the NAAQS as expeditiously as practicable. Thus, subpart 1 does not allow a state to synchronize the attainment date for multiple areas unless the state could show that date is as expeditiously as practicable for each individual area. That means that the state would not be able to provide a longer attainment date for an area in order to take advantage of measures that would be implemented over a longer period if there are short-term emission reductions that are practicable and would result in an earlier attainment date. Moreover, we note that subpart 2 does not prevent the state from considering synchronization. The state could request a voluntary reclassification for an area, particularly if the area cannot practicably attain by the attainment date for its initial classification. Similarly, since all areas are required to attain as expeditiously as practicable, a state should consider whether areas with a "higher" classification might be able to attain more quickly. These provisions allow a state to synchronize attainment dates to the extent the date selected for areas is "as expeditiously as practicable."

To the extent the bulleted list of points provided in the letter from Commenter 0140 is not responded to above, we note the following:

To the extent that the Commenter is urging that, areas be placed solely under subpart 1 because subpart 1 provides more flexibility, we note that the Court in South Coast rejected the EPA's approach to placing areas under subpart 1 in the Phase 1 Rule on the basis that the Act does not allow the requirements of subpart 2 "to be stripped away" on the basis that other provisions would allow attainment to be achieved more efficiently. 472 F.3d at 894.

It is true that the major source threshold is lower for areas classified under subpart 2 at the higher classifications than for those areas subject solely to subpart 1. However, for the lowest classifications of Marginal and Moderate, where the design values are less than 0.100 ppm, the major source threshold is the same as under subpart 1 – 100 tpy. It is also true that under subpart 1, the offset ratio applicable to sources subject to NNSR (1 to 1) is lower than under subpart 2. However, the offset ratio is only slightly different – 1.1 to 1 in Marginal areas and 1.15 to 1 in Moderate areas. We do not believe that difference alone is a sufficient justification for placing areas solely under the planning provisions of subpart 1, particularly in light of the court's holding in South Coast. As noted above, the EPA's ability to place areas solely under subpart 1 for areas classified as Marginal and areas classified as Moderate with a design value less than 0.090 ppm

[30] The same is true for all areas classified under the 2008 ozone NAAQS as Serious as the lowest design value for such an area is 0.0100 ppm and for many areas classified as Moderate, which includes areas with a design value no lower than 0.086 ppm and less than 0.100 ppm.

is untested.

The Commenter also raises several points regarding transport. We have addressed the issue of the relationship between transport and the nonattainment area planning provisions in section M.

3. Flexibility

Comment: Commenters (0149, 0150, 0152, 0153 and 0169) generally supported the EPA's efforts to provide flexibility to states in implementing the most recent ozone standard, while ensuring progress toward clean air.

Commenters (0163, 0167, 0169 and 0177) advised the EPA to be certain that any flexibility provided in the proposed rule is permissible under the CAA and existing case law to prevent further delay in implementing the 2008 standards.

Commenter (0146) stated that, the NESCAUM states are concerned with the inequities that would result if the EPA were to allow new ozone nonattainment areas, as well as areas that should be designated nonattainment for the ozone NAAQS but are not, to be excused from their basic CAA obligations. Commenter (0146) stated that, it would place citizens in those areas as well as in downwind areas, at a public health disadvantage and it would also provide an unwarranted economic advantage to those areas over existing nonattainment areas.

Commenter (0180) urged the EPA to abandon this latest round of attempts to avoid the specific measures provided by Congress in title I, part D, subpart 2 of the CAA, and instead to finalize implementation rules that conform to the statutory directives of the Act to address the nation's ozone problems. Commenter (0180) stated that, the EPA should strive to apply the statutory requirements to the 2008 ozone NAAQS, not replace them. Commenter (0180) stated that, the EPA must make every effort to resolve uncertainty in favor of stronger public health safeguards and cited two cases. Commenter (0180) stated that, as the SCAQMD court and others have explained, it is not permissible for the EPA to pursue interpretations of the Act in an effort to maximize its own discretion "because the clear intent of Congress in enacting the 1990 Amendments was to the contrary." *Id.* at 895.

Response: The EPA appreciates the Commenters' comments regarding flexibility. In the proposed rule, we explored several mechanisms for providing flexibility to states in implementing the 2008 ozone NAAQS and the previous revoked ozone NAAQS. In some cases, were are finalizing those approaches. We are also not finalizing other proposed approaches due to concerns the Commenters raised regarding their legality. In other cases, more time is needed to assess whether such flexibility is consistent with the CAA.

3.0 What is the EPA proposing to address anti-backsliding issues related to transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS?

A. Revocation--general

The EPA did not receive any relevant comments on this section of the proposal preamble.

B. Transition from the 1-Hour to the 1997 Ozone NAA

The EPA did not receive any relevant comments on this section of the proposal preamble.

C. Nonattainment NSR

The EPA did not receive any relevant comments on this section of the proposal preamble.

D. Section 185 Fees

The EPA did not receive any relevant comments on this section of the proposal preamble.

E. Contingency Measures Requirement

The EPA did not receive any relevant comments on this section of the proposal preamble.

F. What is the EPA proposing regarding anti-backsliding requirements for the 1-hour and 1997 ozone NAAQS?

The EPA did not receive any relevant comments on this section of the proposal preamble.

G. Timing of 1997 Ozone NAAQS Revocation and Related Anti-Backsliding Requirements

1. Support revocation of the 1997 Ozone NAAQS

Commenters (0132, 0143, 0145, 0146, 0153, 0154, 0158, 0159, 0166, 0169, 0173 and, 0179) generally supported the EPA's proposal to revoke the 1997 Ozone NAAQS.

Commenter (0153) stated it makes little sense to be concerned about a standard that has been superseded by a newer, more stringent standard. Commenter (0154) added that if the EPA is delayed, for any reason, in publishing the final SIP requirements Rule, the EPA should process the revocation separately so that states can move forward and focus resources on the current NAAQS. Commenter (0158) agreed that it makes sense to revoke outdated and duplicative requirements because a full revocation will allow the states and local areas to efficiently focus their resources on planning for attainment of the current and stricter 75-ppb standard, and facilitate a smoother transition to the new standard for states and affected sources. Commenter (0179) stated this will ensure that only one ozone NAAQS, the more protective 2008 ozone NAAQS, applies for implementation purposes.

Response: The EPA agrees that revoking the 1997 NAAQS and specifying adequate anti-backsliding provisions appropriately allows states with nonattainment areas to focus planning efforts on the current, and most health-protective, ozone NAAQS while retaining, as appropriate,

the unmet requirements for areas designated nonattainment when the previous NAAQS was revoked.

2. Do not support revocation of the 1997 Ozone NAAQS

Commenter (0180) stated that the EPA should not revoke the 1997 8-hour ozone standard. Commenter (0180) stated that, while *SCAQMD* may have affirmed the EPA's authority to revoke a NAAQS, the EPA still must provide a rational basis for doing so. Commenter (0180) stated that, for both the 1-hour ozone standard and the 1997 8-hour standard, attainment of these standards is still critical to providing the public health and welfare protections promised by the Act. Commenter (0180) stated that the EPA's suggestion that resources should be focused on attaining the 2008 standard makes no sense since attainment of the 1997 standard will advance progress toward the 2008 standard and ensures that such progress will be made sooner rather than later.

Commenter (0180) stated that the EPA's proposal is irrational because it would waive key requirements for extreme nonattainment areas under the 1997 standard before the deadline comes due. Commenter (0180) stated that the EPA's proposal unravels the CAA structure starting with the obligation to make the attainment determination required under sections 179 and 181 and the approach allows areas to avoid triggering more stringent control measures by resetting the clocks for bump ups. Commenter (0180) also stated that another generation of ozone standards is likely to be adopted in the near term and the EPA's proposal suggests that it will seek to revoke the 2008 standard just as areas are beginning to implement it. Commenter (0180) stated that this is not the course that Congress intended and cited *Whitman* at 531 U.S. at 485 (holding that Congress intended Subpart 2 to govern implementation of ozone standards "far into the future" and that Congress' plan for ozone areas "was not enacted to be abandoned the next time the EPA reviewed the ozone standards").

Commenter (0180) stated that the EPA must explain the specific problems caused by retaining the 1997 (and 1-hour) ozone standard and tailor the solutions to address those specific problems, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (holding that agency must articulate a "rational connection between the facts found and the choice made"). Commenter (0180) stated that claims regarding the need for flexibility or discretion to tailor requirements to individual areas do not provide a reasonable justification, citing *SCAQMD*, 472 F.3d at 895 (holding 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.").

Response: The EPA disagrees with the commenter's arguments that EPA should not revoke the 1997 ozone standard. The EPA also disagrees with the commenter's statement that this is not a rational approach. The commenter does not address the CAA's directive that the EPA re-evaluate the NAAQS periodically, and promulgate new NAAQS as appropriate. The promulgated 2008 NAAQS is the current approved NAAQS for ozone. CAA section 172(e) applies when a NAAQS is relaxed, but that does not mean that Congress intended to preclude the EPA from applying its principles to prevent backsliding after replacing an existing standard with a more

stringent one. In this rulemaking the anti-backsliding program that accompanies and complements revocation is consistent with that which the D.C. Circuit approved when the EPA revoked the 1-hour standard. *South Coast Air Quality Management District v. EPA*, 472 F.3d at 899. The EPA continues to make determinations for the 1997 8-hour ozone standard to the extent they are necessary to implement anti-backsliding requirements – for example for contingency measures. The EPA's record in implementing the anti-backsliding requirements after revocation of the 1-hour standard demonstrates that revocation did not result in backsliding. Moreover, now the EPA and the states must further update and strengthen requirements. Similar arguments support revocation now as when the D.C. Circuit approved the approach in the *South Coast* case. Now there exist both a new NAAQS and two prior NAAQS. Evidence shows that there has been continuous improvement in air quality, but experience also shows that more is needed. Allowing the EPA to rationalize and integrate prior requirements with new goals facilitates effective and timely planning and controls, rather than imposing burdensome intermediate requirements left over from obsolete standards. The anti-backsliding measures introduced upon revocation of the 1997 ozone NAAQS ensure the same level of protection provided by control measures established for the 1997 ozone NAAQS, while enabling areas, where possible, to focus planning efforts on meeting the more protective 2008 ozone NAAQS. This approach addresses the specific problem of duplicative efforts for different ozone NAAQS. The strong anti-backsliding provisions in 40 CFR 51.1105 will ensure that the protection provided by controls already adopted to attain the previous NAAQS will continue until an area attains the 2008 ozone NAAQS, and will also ensure that there will be no delay in attaining the 1997 ozone NAAQS. Furthermore, the provisions of section 51.1105 continue to require areas to expeditiously achieve emissions reductions for the revoked NAAQS. Since it is impossible to attain the 2008 ozone NAAQS without also attaining the 1997 ozone NAAQS, formal retention of the 1997 NAAQS would be superfluous from the standpoint of protection of health. The 2008 ozone NAAQS constitutes a significant strengthening of the 1997 NAAQS, which requires the area to achieve additional reductions as expeditiously as practicable. The EPA, in retaining for the 2008 ozone NAAQS the anti-backsliding structure that the D.C. Circuit previously endorsed for revocation of the 1-hour ozone standard, has taken into account the new and additional responsibilities placed on states, and the weight of two levels of anti-backsliding requirements.

The EPA agrees with the commenter that the adopted revocation approach means that the 1997 NAAQS would be revoked before the statutory maximum attainment date for areas classified as Severe and Extreme for the 1997 ozone NAAQS. We believe that Congress understood this possibility when it amended the CAA in 1990 to require the EPA to review each NAAQS every 5 years. Similarly, Congress also recognized that areas with more significant ozone problems would need more time to attain the standard, and gave these areas more time to attain the standard, with timeframes for attainment largely beyond the 5-year timeframe required for review of the NAAQS. The EPA does not agree with the commenter's characterization of revoking the NAAQS. The commenter's argument does not address the fact that the old standard has been supplanted by a more protective standard, and that the EPA's anti-backsliding requirements, combined with the CAA's new obligations to achieve the more stringent 2008 ozone NAAQS as expeditiously as practicable, effectively fulfill the function of the prior attainment date. In addition, the EPA notes that the attainment demonstration for the prior

standard is retained as an anti-backsliding measure. Moreover, failure to attain the new standard by the applicable attainment date for that standard will result in reclassification to a higher standard as appropriate.

For these reasons, and consistent with the anti-backsliding regime previously endorsed by the D.C. Circuit for the transition from the 1-hour to the 1997 ozone NAAQS, the EPA believes that the revocation and associated anti-backsliding measures for the 2008 ozone NAAQS provide the appropriate way to move toward attaining the more protective standards in a timely and effective manner, while ensuring that progress made under previous ozone NAAQS is not lost.

3. Comments regarding the date of revocation

Commenters (0143, 0159, 0169 and 0177) supported the revocation of the 1997 ozone NAAQS as soon as possible to eliminate duplicative SIP development efforts. Commenter (0169) stated that revocation of a standard should occur upon finalization of a new standard and at no point should states be required to juggle two (or three) standards at the same time for the same nonattainment area as this largely amounts to a paperwork exercise that is a huge resource burden without air quality benefits. Commenter (0177) asserted that the EPA's transition and anti-backsliding proposals will be more equitably applied and more protective of air quality if the effective date of the implementation rule and the revocation date of the 1997 NAAQS occur together.

Commenter (0143) stated that if the effective date of the final rule is not the date the final SIP Requirements Rule is published in the *Federal Register*, then the revocation of the 1997 ozone standard should take effect on the effective date of the final rulemaking. Commenter (0143) also agreed the anti-backsliding provisions in the CAA should be adequate to ensure areas continue to work toward attainment if not achieved prior to revocation of the 1997 ozone standard.

Commenter (0159) stated they could support the use of the date of initial designation to non-attainment nationwide. Commenter (0159) noted that using this revocation date would lead to the creation of more legacy nonattainment areas that would be subject to anti-backsliding requirement.

Commenter (0177) stated the EPA's transition and anti-backsliding proposals will be more equitably applied and more protective of air quality if the effective date of the implementation rule and the revocation date of the 1997 NAAQS occur together.

Response: We disagree with commenters that recommended that the EPA revoke the 1997 ozone NAAQS at an earlier date. We believe that revoking the 1997 ozone NAAQS prior to the establishment of clear anti-backsliding requirements would create a gap when taking action on plans submitted by states. The EPA believes and the court has endorsed that backstops to prevent backsliding from the protections provided by measures implemented for a previous NAAQS must be in place before the EPA can revoke that NAAQS. The EPA, upon considering the comment on the effective date of revocation, has clarified in the final rule that the 1997 ozone NAAQS will be revoked on the rule's effective date as set forth in the *Federal Register*. That is,

the 1997 ozone NAAQS will be revoked 30 days after publication of the final rule in the *Federal Register*.

Comment: Use of most recent monitoring data

Commenters (0143, 0146, 0163, 0167, 0170 and 0177) stated the EPA should modify the proposed rule to ensure all areas designated as attainment that are currently violating the 2008 NAAQS are subject to CAA nonattainment provisions. Commenters (0143, 0146 and 0163) stated the EPA should use 2012 monitoring data to designate nonattainment areas.

Commenter (0143) stated the EPA appears to be allowing some areas in the Midwest to be designated attainment/unclassifiable, even though if the same criteria used to designate areas in Pennsylvania nonattainment were applied to these Midwest areas, the Midwest areas would be designated nonattainment areas for the 2008 ozone NAAQS. Commenter (0143) stated EPA should designate nonattainment areas using the most recent state certified monitoring data and consistently apply the criteria for designating ozone nonattainment areas across the country, in order to improve air quality and public health and for equity.

Commenter (0146) stated that part of ensuring against backsliding for the 2008 ozone NAAQS is ensuring that areas that violate the ozone NAAQS are designated as nonattainment and are required to achieve the emissions reductions necessary to meet and maintain the NAAQS.

Commenter (0170) urged the EPA to utilize the most up-to-date and reliable air quality monitoring data in making area designations or re-designations for the 2008 ozone NAAQS and cited *Southwestern Pennsylvania Growth Alliance v. Browner*, 121F.3d106, 115-16 (3d Cir. 1997) (upholding the EPA's decision to deny re-designation based on newly-available data).

Response: These comments focus on the designation process, and are thus beyond the scope of this rulemaking. Nevertheless, EPA provides a brief response for the benefit of the commenters.

The EPA uses a five-factor analysis to designate areas and applies the same process to all areas taking into consideration the specific circumstances of each area under consideration. In the action of designating areas for the 2008 standard, the EPA set forth its analysis for each area designated nonattainment and also responded to comments suggesting that the EPA treated areas inconsistently. (77 FR 30088; May 21, 2012 and EPA-HQ-OAR-2008-0476-0675.) The EPA also replied to similar claims in responding to 29 petitions for reconsideration of the rule (http://www.epa.gov/airquality/ozonepollution/designations/2008standards/petition.htm**).**

The issue of the data EPA used to designate areas for the 2008 ozone NAAQS was fully addressed in the record for the designations, including EPA's responses to 29 petitions for reconsideration. This rulemaking is not the appropriate place to address this issue. As noted, the EPA addressed claims of inconsistency raised during the designation process at the time it issued final designations and also in responding to petitions for reconsideration.

4. Redesignation after revocation

Commenter (0169) partly agreed with the EPA's decision to not take action to designate or redesignate areas for a standard after the standard has been revoked, but believes that if a state has submitted a request for a clean data determination and/or a redesignation request for an area, the EPA is obligated to act to redesignate that area even after the standard has been revoked. The commenter further indicated that state submittals are often not acted on in a timely manner. The EPA should be applauded for the notion of not redesignating an area for a revoked NAAQS which would be designated nonattainment for a subsequent NAAQS. This proposal should reduce the burden to states and EPA. An issue arises, however, for areas which are designated nonattainment for a previous revoked NAAQS (or unclassifiable) and is designated attainment for the current NAAQS. The Department encourages the EPA to fully consider the ramifications of this decision.

Response: Where possible, the EPA will endeavor to act on any rulemaking for the 1997 ozone NAAQS that would impact the status of anti-backsliding requirements for that NAAQS prior to the revocation of that standard. It should be noted that a clean data determination (CDD) suspends only the requirement to submit attainment-related planning elements. The EPA has consistently taken the position that, after revocation of a NAAQS, the EPA cannot redesignate an area for the revoked NAAQS, nor formally change an area's legal designation for a NAAQS that no longer exists. However, the EPA can continue to determine whether the area's air quality meets the level of the prior NAAQS in order to make appropriate determinations related to anti-backsliding requirements for the revoked NAAQS.

In section IV.C of the final rule the EPA addresses the appropriate requirements for areas which are designated attainment for the current NAAQS but which were designated nonattainment for a prior NAAQS at the time of revocation of the 1997 NAAQS.

5. Continued attainment after revocation

Commenters (0163, 0167 and 0177) stated the EPA should modify the proposed rule to ensure all areas designated as attainment for the 2008 ozone NAAQS that are currently violating that standard are subject to CAA nonattainment provisions.

Commenter (0163) stated EPA should rescind the clean data determinations for certain areas and reclassify them with respect to CAA section 18l(b)(2) and subpart 2 before revoking the 1997 NAAQS. The commenter continued stating that many areas with 1997 ozone NAAQS clean data determinations have 2012 ozone data that indicates continued nonattainment. EPA should rescind the clean data determinations for these areas and reclassify them with respect to CAA section 181(b)(2) and subpart 2 before revoking the 1997 NAAQS. This approach would recognize the severity of the ozone problem in these areas and protect the public health of persons living in these areas. (0163)

Commenter (0167) indicated that the OTC states request the EPA to exercise its authority under CAA section 107(d)(3) to establish revised designations for areas now classified as "attainment",

but violating the 2008 NAAQS based on current ozone design values. The revocation of the 1997 ozone NAAQS for these areas should be linked to the date that the revised designations become effective. This will ensure that CAA nonattainment provisions apply to all areas currently violating the 2008 NAAQS and ensure the appropriate level of relief from anti-backsliding and other requirements is correctly applied to those areas that warrant such treatment.

Response: We disagree that the EPA must consider air quality data that was not available in sufficient time for the initial designations and redesignate areas based on that data for purposes of determining appropriate anti-backsliding requirements prior to revoking the 1997 ozone NAAQS.

As appropriate, the EPA will address air quality management issues relating to monitored violations of the 1997 ozone standard in separate rulemakings or other proceedings. Even after revocation of the 1997 ozone NAAQS, the EPA retains the ability to make or rescind clean data determinations (CDDs) where appropriate to implement anti-backsliding requirements. The EPA agrees that several areas with CDDs for the 1997 ozone NAAQS briefly exceeded that NAAQS. However, before the EPA could take action on those areas, their data showed them to be back in attainment with the 1997 ozone NAAQS. One area, the New York-Northern New Jersey-Long Island (NY-NJ-CT) nonattainment area, has continued to violate the 1997 ozone NAAQS after EPA had issued a CDD. Accordingly, the EPA proposed to rescind the CDD for that area on May 15, 2014 (79 FR 27830).

H. What are the applicable requirements for anti-backsliding purposes following the revocation of the 1997 ozone NAAQS?

1. General

Commenters (0172, 0179) supported the proposal regarding anti-backsliding requirements during transition to the 2008 ozone NAAQS. Other commenters, as indicated in the subsections that follow, expressed concerns about specific anti-backsliding provisions. These more specific concerns are addressed individually.

Response: EPA appreciates the comments in support of the proposal, and acknowledges the range of views expressed by commenters regarding specific anti-backsliding provisions. As a general matter the EPA has attempted to consider the circumstances of the areas subject to anti-backsliding requirements, including the timing and nature of those requirements arising from failure to attain prior standards relative to the requirements for the current standard. Factors we have taken into account include:

1) Almost a decade has passed since the EPA first adopted and implemented the anti-backsliding approach implemented when the 1-hour ozone NAAQS was revoked. The EPA first adopted anti-backsliding provisions in 2004 and revised them in accordance with the 2006 *South Coast* decision. Years later many areas have attained the 1-hour and 1997 standards and have been redesignated to attainment. Other areas are much closer to meeting the 1997 standard. We have learned from our experience with anti-

backsliding, and have attempted to coordinate old and new requirements more effectively.

2) This is the second time anti-backsliding requirements have been imposed, creating an additional layer of hold-over requirements for some areas. Areas facing these anti-backsliding requirements are identified in the appendices of the final rule. Note that progress will continue to be made while the areas are subject to a more stringent 2008 standard, with near-term implementation requirements.
3) There is a difference between the standard being revoked with this implementation rule versus the standard revoked by the implementation rule for the 1997 ozone NAAQS. The 1997 ozone NAAQS differed in both form (8-hour versus 1-hour) and level (0.08 ppm versus 0.12 ppm) from the 1-hour standard. Anti-backsliding rules developed for implementation of the 1997 ozone NAAQS had to take these differences into account. This time, the form of the standard replacing the 1997 NAAQS is the same, but at a lower level (0.075 ppm versus 0.08 ppm). Thus it is mathematically impossible to attain the 2008 ozone NAAQS without first attaining the 1997 ozone NAAQS.
4) Because of the similarity in form (8-hour average) of the standard, we have examined potential ways to integrate anti-backsliding requirements with the requirements of the current standard, such as with merging relevant attainment planning requirements for the revoked and current standards.
5) The submission dates for certain 2008 attainment plans (July 20, 2015) and attainment dates for 2008 Marginal areas (July 20, 2015) are more proximate in time to the publication of the final SIP Requirements Rule than were the Phase 1 and Phase 2 rules implementing the 1997 ozone NAAQS.
6) Both states and the EPA are facing resource shortages.
7) The 2008 ozone NAAQS does not relax ozone standards – it makes them more stringent. Accordingly, nonattainment areas for the 1997 and 1-hour standards must remain on a one-way route to attainment – we are neither relaxing standards nor requirements with each subsequent ozone NAAQS.

No system of laws and requirements can work by simply piling new requirements on top of old without effort to integrate and harmonize them.

Comment: Accountability for Previous Clean Air Act Control Programs

Commenter (0164) stated there should be better clarity on accountability for anti-backsliding requirements and revisit the onerous rules that seem to forever hold a region to a past set of emission reduction control programs. The commenter added their perception that federal emission reduction control programs are not held to the same standards as locally implemented programs. Examples include the ASM consideration in the proposal and Stage II Vapor Recovery. A region should not be held accountable for a set of emission reduction control programs that were at one time incorporated into a past SIP. The new SIP should be able to stand on its own merit and reset the list of necessary control strategies for that timeframe and set of requirements.

Response: EPA's anti-backsliding approach establishes a clear framework for ensuring continued protection for air quality while providing relief, where appropriate, from potentially onerous and unnecessary requirements arising from failure to attain revoked standards so that planning efforts can focus on attaining current, more protective standards.

The EPA disagrees with the commenter that federal emission control programs are not held to the same standard as locally implemented programs. SIP-approved control measures, whether federal programs or locally implemented measures, may not be modified unless the modification meets the requirements of CAA section 110(l) and, if applicable, section 193. For purposes of anti-backsliding, the implementation of new Stage II control programs are no longer mandatory because the EPA has determined under the statutory provisions of section 202(a)(6) that another federal program, onboard refueling vapor recovery (ORVR) technology, is in widespread use, rendering Stage II controls largely redundant. However, in an area where a Stage II control program is already adopted into the SIP, it can only be removed from the SIP if the conditions of CAA sections 110(l) and 193 are met. Therefore, this federal measure is subject to the same treatment as any locally implemented SIP-adopted control measure.

Comment: Attainment Planning Requirements

Commenter (0151) stated that no attainment planning requirements should apply once the 1997 NAAQS has been revoked (regardless of an attainment re-designation or a clean data determination). The commenter supposed that proposed §51.1118 would suspend attainment SIP planning requirements in a nonattainment area only upon a determination that the area has attained the ozone NAAQS. However, the commenter further believed that if the area has failed to attain the standard, the EPA suggests that under *South Coast*, its hands are tied and SIP planning requirements are not suspended. The commenter believed that no attainment planning requirements should apply once the 1997 NAAQS has been revoked (regardless of an attainment re-designation or a clean data determination). First, Section 172(e) applies to control requirements and not State "planning requirements." Second, commenter (0151) asserted that *South Coast's* applicability to SIP Planning Requirements can be narrowed because the Court was faced with two distinct standards whose form and stringency varied. Here, the form of the 2008 NAAQS is the same as the 1997 ozone standard, but the EPA made the standard more protective. Therefore, it would be reasonable for the EPA to determine that the SIP planning requirements are aligned under the standards and SIP planning for the 1997 standard transitions into planning for the 2008 NAAQS, in order to prevent the unnecessary additional use of federal and state resources when the EPA has modified the prior NAAQS to make it more protective. Revocation of a standard should result in State authorities and EPA moving on to new challenges instead of perpetuating SIP planning for obsolete standards. In fact the new standards are simply a more stringent health standard for the prior standard. Thus, in contrast, perhaps to the EPA's current SIP process for the one-hour NAAQS examined in the South Coast, there is no point in maintaining the SIP planning requirements for the 1997 and soon-to-be 2008 obsolete versions of that NAAQS.

Response: The EPA agrees that the transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS calls for a re-evaluation of the provisions necessary to protect against backsliding and

ensure continued progress toward achieving healthy air quality. However, we do not agree that *South Coast v. EPA* has limited application to informing appropriate anti-backsliding requirements for a revoked 1997 NAAQS simply because the 2008 NAAQS has the same form as the 1997 NAAQS. With only one exception, the seventeen "applicable requirements" that will be listed in new 40 CFR 51.1100(o) are all control requirements, consistent with the reasoning of *South Coast v. EPA*. To the extent that any of these control requirements have not been implemented in a 1997 nonattainment area by the time the 1997 NAAQS is revoked, consistent with *South Coast v. EPA* the state must ensure that measures no less protective than these controls are adopted into the SIP and implemented, if applicable. The one applicable requirement that involves both planning and control elements is the attainment demonstration requirement. Since the attainment demonstration is part of the basis for establishing that the RACM requirement (a control requirement consistent with *South Coast*) is satisfied, the EPA believes it is appropriate to retain this as an applicable anti-backsliding requirement to ensure timely progress toward attainment of the 1997 NAAQS, especially for areas classified in the highest classifications where the statutory attainment dates for the 1997 NAAQS extend well into the future (*e.g.*, 2019 for Severe and 2024 for Extreme areas). The EPA encourages states to synchronize their planning and emissions control efforts for attainment of the 2008 ozone NAAQS with any unfulfilled anti-backsliding requirements associated with the revoked 1997 ozone NAAQS. As a reminder, a clean data determination for the 1997 ozone NAAQS can suspend the associated attainment demonstration requirement for as long as the area continues to attain the 1997 NAAQS.

Comment: RACM and other control requirements

Commenter (0180) stated that several control requirements that apply to areas designated nonattainment under the 1-hour and 1997 ozone standards should be included in 40 CFR § 51.1100(o). Commenter (0180) stated that EPA's lack of listing RACM must have been an oversight since these are clearly control measures covered by the "principles" of subsection (e) of the same section. In addition, commenter (0180) stated that the following control requirements must be retained: (1) obligation to adopt "other control measures" as necessary for attainment under section 172(c)(6); (2) conformity; and (3) contingency measure requirements under section 182(e)(5) for Extreme nonattainment areas relying on a "black box". Commenter (0180) stated that the rationale for including these measures is the same as that for other contingency measures as outlined in *South Coast*. Commenter (0150) requested that the EPA clarify whether the contingency measures that are included in the anti-backsliding provisions would include the Section 182(e)(5) contingency measures

Response: The EPA agrees in part with the commenter, that it is appropriate to list both RACM and section 182(e)(5) contingency measures as "applicable requirements" in the final rule in section 51.1100(o). RACM is a component of the attainment demonstration, which the EPA did list in the proposal, and is a requirement of the CAA. The EPA reviews each SIP submission from a state to ensure that sufficient information is provided for the EPA to determine whether the state has adopted all RACM necessary for attainment as expeditiously as practicable and provided for implementation of those measures as expeditiously as practicable. For areas remaining in nonattainment for the 1997 ozone NAAQS and designated nonattainment for the

2008 ozone NAAQS, the EPA does not believe that revocation of the NAAQS should halt or delay the planned implementation of control measures. These measures, while adopted pursuant to the 1997 ozone NAAQS, will also assist the areas in attaining the 2008 ozone NAAQS.

Similarly, for Extreme areas relying on CAA section 182(e)(5), the EPA agrees that the contingency measures required for that program should be held to the same requirements as contingency measures for sections 172(c) and 182(c) of the CAA. Thus the EPA is adding 182(e)(5) contingency measures to the list of applicable requirements in 51.1100(o).

However, the EPA does not agree with the commenter that conformity needs to be retained as an applicable requirement for a revoked standard. Transportation and general conformity are retained as requirements for all areas designated nonattainment for the 2008 ozone NAAQS. For areas designated attainment for the 2008 ozone NAAQS, these areas are meeting the most stringent, health-protective NAAQS and thus have no remaining conformity requirements because they are designated attainment for the 2008 ozone NAAQS and the designations for the 1997 ozone NAAQS, which in the past triggered conformity requirements, no longer apply after the previous standard has been fully revoked. *NRDC v. EPA* (2014). Transportation and general conformity apply only in areas designated as nonattainment or redesignated to attainment with an approved CAA section 175A maintenance plan. (CAA section 176(c)(5)). Upon the effective date of the revocation of the 1997 ozone NAAQS the only relevant designation for ozone for conformity purposes will be an area's designation for the 2008 ozone NAAQS.[31] Areas that are designated attainment for the 2008 ozone NAAQS are not subject to transportation or general conformity requirements regardless of their designation for the 1997 ozone NAAQS at the time of revocation of that NAAQS. (CAA section 176(c)(5)). Similarly, "other control measures" necessary for attainment are already covered by the attainment demonstration, and cannot be removed without satisfying CAA section 110(l).

Comment: Clean Fuels Fleet Program

Commenter (0127) stated that the Clean Fuels Fleet Program (CFFP) should not be retained as an applicable requirement for anti-backsliding purposes. Commenter (0127) stated that while the program originally applied in 22 metropolitan areas, most of those jurisdictions long ago opted out of the CFFP and some of the jurisdictions that still have the CFFP in their regulations are not enforcing it because the CFFP's fleet-specific emission standards have been overtaken by more stringent national and California standards over the years. Removing the requirement would have no impact on air quality generally and implementation of the 8-hour ozone NAAQS specifically

[31] The EPA revoked the 1997 ozone NAAQS for transportation conformity purposes only on May 21, 2012. (77 FR 30160), effective on July 20, 2013. The D.C. Circuit ruled (December 23, 2014) that the EPA violated the CAA when it revoked the 1997 ozone NAAQS for purposes of transportation conformity only, while recognizing that it had previously upheld the EPA's authority to revoke a standard in full. *NRDC v. EPA* (D.C. Cir. No. 12-1321, Dec 23, 2014). In this final rule, the EPA is fully revoking the 1997 ozone NAAQS for all purposes.

because 23 years later the CFFP has become a vestigial organ of the 1990 amendments to the CAA.

Response: We disagree with the comment and we are finalizing requirements specifying the CFFP as an "applicable requirement" for anti-backsliding purposes. Under section 182(c)(4) of the Act, states may opt out of the CFF program if they provide a substitute program that results in either as much or greater long-term emissions reductions. These substitute programs are also subject to this final rule's anti-backsliding requirements. A number of areas that were included in the initial list of areas subject to the program requirements continue to be required to implement the program or a substitute measure because their classification for the 2008 ozone NAAQS is Serious or above, under section 246(a)(3) of the Act. Finally, areas not subject to the clean fuels fleet program requirements due to their classification for the 2008 ozone NAAQS can remove the program or substitute measure by meeting the applicable requirements described in section IV.D of the final rule. The specific requirement for any given area would depend on whether the area was initially designated as nonattainment or attainment for the 2008 ozone NAAQS and whether or not the area was nonattainment or maintenance for the prior 1997 or 1-hour ozone NAAQS. As a general matter, the CFF program continues to apply to existing covered fleet because these fleet are comprised of older vehicles. Finally, section 243(e) allows for replacement of CFF standards with CARB standards that the EPA determines are "in the aggregate at least as protective of public health and welfare." EPA has yet to make that determination.

Comment: Attainment Demonstration Requirement

Commenter (0150) requested that the EPA explain that its retention of the "attainment demonstration" as an anti-backsliding measure means, for states that already have an approved demonstration, that the state must continue to implement its approved attainment demonstration, not that it must submit a new attainment demonstration. Commenter (0150) also requested that the EPA clarify that where an approved attainment demonstration for an Extreme area includes Section 182(e)(5) measures, whether the state must continue to implement those Section 182(e)(5) measures as part of the anti-backsliding requirement for the attainment demonstration.

Commenter (0178) stated that developing another attainment demonstration for the outdated 1997 ozone NAAQS would be a paperwork exercise, and only divert limited Air Program resources from working toward achieving air quality benefits and attaining the more protective 2008 ozone NAAQS. Commenter (0178) stated that the Air Program made a good faith effort to meet all its planning obligations for the 1997 ozone NAAQS, including an attainment demonstration, but few of them were approved by EPA, largely due to litigation surrounding federal interstate transport rules.

Response: The term "applicable requirements" for anti-backsliding purposes refers to any outstanding requirements that have not yet been adopted or approved into the SIP, or otherwise determined by EPA to be satisfied at the time of revocation of the standard, including the requirement for an attainment demonstration under Section 182(c)(2)(A), which may also include anticipated development of new control technologies under 182(e)(5). Any requirement for which EPA has approved the relevant SIP provision or made a determination that the

requirement has been satisfied is not an applicable requirement for which a new submission must be made. This does not mean, however, that implementation of these provisions may cease. Any provisions that have already been approved into the State's SIP need not be re-submitted, but they must continue to be implemented until EPA approves a SIP revision. The final rule requires an area subject to an outstanding planning requirement to address that requirement, but would allow, as appropriate, latitude for that planning requirement to be satisfied in conjunction with satisfaction of requirements for current standards. (For example, the emissions reduction measures included in 6-year RFP plan (2012-2018) for 2008 NAAQS Moderate and above areas may be sufficient to demonstrate attainment of the 1997 NAAQS by the Severe area attainment deadline of 2019.) We believe this approach will prevent delay in achieving emissions reductions as States transition to achieving the more stringent 2008 ozone NAAQS. We encourage, where possible and appropriate, that areas with planning requirements for both the 1997 and the 2008 ozone NAAQS combine these into a single submittal.

Comment: Stage II vapor recovery

Commenters (0132, 0141, 0143, 0155, 0156 and 0157) stated that they support the exclusion of the Stage II vapor recovery program from the list of measures to be retained for anti-backsliding purposes. Commenters (0132, 0155 and 0157) stated that, given vehicle on-board refueling vapor recovery (ORVR) provides pollution reduction equivalent to Stage II control systems and the widespread use of ORVR, the use of Stage II control systems is not cost-effective and is a redundant system. Commenter (0143) stated that, although the proposed rule "would have no effect on the continuing independent CAA section 184(b)(2) requirement for OTR states to implement Stage II programs or measures capable of achieving emissions reductions comparable to those achieved by Stage II", nonetheless, the commenter supported the proposed revisions to the anti-backsliding rules.

Response: The EPA made a determination that ORVR was in widespread use which allowed the EPA to exercise its authority to waive the Stage II Vapor Recovery requirements for ozone nonattainment areas. See 77 FR 28772; May 16, 2012. Accordingly, it is no longer necessary for EPA to retain this control measure as an applicable requirement. The EPA developed guidance titled, "Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures," (August 7, 2012)[32], which provides suggestions to air quality management agencies how to exercise discretion in implementing the waiver in areas with SIP –approved Stage II programs. This guidance document provides both technical and policy guidance to the states on how to develop and submit an approvable SIP revision that requests removal/phase-out of an existing Stage II program. This guidance

[32] See "Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures," August 17, 2012. This guidance can be accessed on the web at *http://www.epa.gov/glo/pdfs/20120807guidance.pdf*.

introduces methods and equations to calculate emissions reductions to demonstrate compliance with Section 110(l) and 193.

Comment: Support alternative measures

Commenter (0173) stated that the EPA has repeatedly taken the position that the CAA allows alternative, not less stringent programs to satisfy anti-backsliding requirements in connection with transitions to newer, more stringent ozone NAAQS and cited the June 7, 2013 Brief for Respondents U.S. Environmental Protection agency et al., *Medical Advocates for Healthy Air v. EPA*, No. 12-73386 (9th Cir.) (defending EPA's authority to approve the San Joaquin Valley's not less stringent alternative to section 185 fees for the revoked 1-hour ozone NAAQS). Commenter (0173) requested that the EPA amend the proposed regulatory text to clearly allow alternatives that are not less stringent than nonattainment controls for anti-backsliding purposes and stated this change could be accomplished in at least two ways:

1. Amend the definition of "applicable requirements" at proposed 40 CFR § 51.1100(o) to define applicable requirements to include "alternative programs not less stringent than" the listed program requirements at proposed § 51.1100(o)(1)-(15).

2. Amend the provisions specifying which areas are subject to anti-backsliding requirements to allow alternatives. A sentence could be added at the end of each of proposed § 51.1105(a)(l)(i), (a)(2), (a)(3)(i), and (a)(4)(i), to state: "Instead of the applicable requirements, the area may adopt and implement alternatives that are not less stringent than the applicable requirements."

Response: We believe the application of section 172(e) principles to applicable section 185 anti-backsliding requirements is an appropriate and reasonable use of the Administrator's discretion to approve "not less stringent" controls. However, we did not propose and do not intend at this time to promulgate regulatory language to universally apply the "not less stringent" control authority to other specific applicable anti-backsliding requirements.

Comment: Do not support alternative measures

Commenter (0180) disagreed with the EPA's proposal regarding section 172(e). Commenter (0180) stated that section 172(e) only applies to the replacement of a NAAQS with one that is less stringent. Commenter (0180) stated that *South Coast Air Quality Management District (SCAQMD)* provides no support for the conclusion that Congress gave the EPA the legislative authority to rewrite the plain requirements of the Act when the EPA strengthens a national air standard. Commenter (0180) stated that the court concluded that "[a]ny area failing to achieve the equivalent of Congress's chosen level of public health must be covered by Congress's chosen prophylactic scheme." Commenter (0180) stated that the EPA's suggestion that the court in *NRDC*, 643 F.3d 311, did not prohibit the use of 172(e) to fashion equivalent alternatives (78 FR at 34213) is misleading because the court simply did not reach this legal issue.

Response: The EPA disagrees. *South Coast* upheld EPA's authority to apply the principles of Section 172(e) in developing anti-backsliding measures that are no less stringent than those that applied under a NAAQS that was revised to make it more stringent. Further, *NRDC* declined to prohibit alternative programs categorically, stating that "neither the statute nor our case law obviously precludes" an alternative program. *See NRDC v. EPA*, 643 F.3d 332 (D.C. Cir. July 2011).

Comment: Need to clarify transition requirements

Commenter (0178) stated the proposal is not clear how to develop SIP submissions that satisfy requirements for both the 1997 and 2008 ozone NAAQS especially for the case of the St. Louis area, which has requirements for RACT, RFP, an attainment demonstration, and other obligations associated with its Moderate classification for the 1997 NAAQS, yet only emissions inventory and emissions statement requirements associated with its Marginal status for the 2008 NAAQS. The commenter believed that the preamble language references the April 30, 2004 final Phase 1 rule but does not explicitly state that the options provided in that rule are acceptable for transitioning from the 1997 to the 2008 ozone NAAQS. The Air Program supports options for addressing any remaining 1997 ozone NAAQS planning obligations that take into account the agency's previous efforts and move the St. Louis area forward toward the goal of attaining the 2008 ozone NAAQS. This includes reasonable approaches such as submitting an early increment of progress plan toward the current ozone NAAQS (option 2 in the final Phase 1 rule).

Response: With the language in the proposal we meant to indicate that planning requirements for the 2008 ozone NAAQS could be used to also address any unmet requirements under the 1997 ozone NAAQS. Because the 1997 and 2008 ozone NAAQS share the same form but differ in stringency, plans developed to bring a nonattainment area into compliance with the more stringent 2008 ozone NAAQS would have the direct benefit of addressing attainment or maintenance of the 1997 ozone NAAQS in the process. However, it is also true that the fulfilment of any outstanding emissions control obligations associated with the 1997 NAAQS (such as RACT and RFP) will directly benefit attainment and maintenance of the 2008 NAAQS for areas classified Marginal, which have an attainment date of 2015.

Comment: Delayed requirements

Commenter (0180) stated that, in evaluating backsliding, the EPA must evaluate not only existing requirements in place in a SIP, but also requirements that are currently required but have not been put into place because of illegal delays on the part of states and/or EPA. Commenter (0180) stated that the EPA's revocation of the 1997 ozone standard will cause backsliding if provisions, which currently should be in place but for illegal delays, are not implemented. Commenter (0180) provided examples for the Houston-Galveston-Brazoria and the Baltimore nonattainment areas with respect to the 1997 ozone NAAQS.

Response: For areas remaining in nonattainment for the 1997 ozone NAAQS and designated nonattainment for the 2008 ozone NAAQS, the EPA does not believe that revocation of the NAAQS should halt or delay the planned implementation of control measures. These measures, while adopted pursuant to the 1997 ozone NAAQS, will also assist the areas in attaining the

2008 ozone NAAQS. All requirements remain in effect until they are addressed – either through a redesignation to attainment for the most current ozone NAAQS, or through an approved redesignation substitute showing. Under the principles of Section 172(e), backsliding does not occur where there are controls that are no less stringent than those "applicable to" an area before a standard was revoked.

2. New Source Review

Comment: Areas designated attainment for the 2008 NAAQS

Commenter (0151) stated that the proposed NSR requirement goes beyond the Court's decision in *South Coast* which does not require NSR requirements associated with a previous standard be retained in areas (other than in ozone transport areas) designated attainment for the current standard since such areas by law must then implement PSD (*South Coast*, citing *Greenbaum v. EPA*, 370 F.3d at 536). Commenter (0151) also stated that the regulations in Appendix S and Parts 51 and 52 do not require amendment to reflect this interpretation.

Commenter (0180) disagreed with the EPA's proposal to allow areas that are designated attainment for the 2008 ozone NAAQS but nonattainment for the 1997 NAAQS to request that any nonattainment NSR requirements be removed from the SIP. Commenter (0180) stated that this proposal is in direct conflict with *South Coast* and the subsequent decision in *NRDC*. Commenter (0180) stated that areas may not backslide on applicable control requirements such as NSR as long as they continue to violate the prior ozone standards and cited *NRDC*, 643 F.3d at 322. Commenter (0180) stated that the EPA's reliance on *Greenbaum* is misplaced because the waiver the EPA is inventing here is not to allow an attainment area to implement PSD in lieu of NSR, but to allow a nonattainment area, that has not attained the 1997 standard, to avoid NSR. Commenter (0180) stated that the problem is that there are areas designated attainment for the 2008 ozone NAAQS that are currently violating the 1997 ozone NAAQS.

Response: For areas designated attainment for the 2008 ozone NAAQS but nonattainment for the 1997 ozone NAAQS, the EPA proposed that after the 1997 ozone NAAQS is revoked, these areas would not be required to retain in their SIPs nonattainment NSR programs for ozone. Instead, such areas would be required to implement PSD requirements for ozone. The EPA's determination that after revocation of the 1997 ozone NAAQS nonattainment NSR requirements do not apply to areas designated attainment for the 2008 ozone NAAQS is consistent with the *Greenbaum v. EPA* decision.[33] The EPA believes that not only is this action in line with the *Greenbaum* decision, but it also makes sense due to the fact that the 1997 and the 2008 ozone NAAQS are of the same form. An area that is attainment for the 2008 ozone NAAQS is attaining the most current and health protective ozone standard. The EPA believes that Congress did not

[33] *Greenbaum v. EPA*, 370 F.3d at 536. "It would make little sense for [nonattainment NSR] to be included in the post-attainment SIP, as the Clean Air Act . . . explicitly states that attainment area SIPs must include a PSD program."

intend nonattainment NSR to apply as a minimum requirement in areas designated attainment, for a newer, more stringent standard of the same form.

EPA believes that this approach is consistent with the conclusion in *South Coast* that the EPA can revoke a standard, so long as it establishes anti-backsliding measures for areas that failed to attain the standard before revocation that impose controls that are no less stringent than the controls that applied before revocation. Nothing in *NRDC v. EPA* forecloses this approach**.** The EPA disagrees with any suggestion that an area would remain subject to NSR or section 185 fees for failure to attain a revoked standard after the area has been formally designated as an attainment area for ozone,. Areas cannot be redesignated to attainment for ozone unless they have attained all current standards and met all anti-backsliding requirements applicable for prior revoked standards. Moreover, nonattainment NSR is not a requirement in attainment areas and section 185 fees by the terms of section 185 do not apply to an area that has been designated "an attainment area for ozone."

Such areas designated attainment for the 2008 ozone NAAQS but that have failed to attain for the 1997 ozone NAAQS will be allowed to implement PSD for the 2008 ozone NAAQS once the revocation of the 1997 ozone NAAQS takes effect. The references to nonattainment designations for the 1997 ozone NAAQS in 40 CFR part 81 will remain for historical purposes and discrete purposes relevant to carrying out the anti-backsliding requirements.

Comment: Exemptions in 40 CFR 51.166(i)(2) and 52.21(i)(2) after revocation of a NAAQS

Commenters (0163, 0179) supported an amendment to 40 CFR 51.166(i)(2) and 52.21 (i)(2) for clarification as to the applicability of stationary source controls for a revoked NAAQS. Commenter (0163) added that the EPA should therefore reassess the ozone designations made last year by using 2010 to 2012 ozone data and, where this current design value exceeds the 2008 ozone NAAQS, redesignate these areas to nonattainment.

Response: Based on this feedback, the EPA developed amendments to both 40 CFR 51.166(i)(2) and 52.21(i)(2). These amendments make it clear that a nonattainment designation for a revoked NAAQS, once the revocation becomes effective in an area, would not trigger the PSD exemption in those provisions and would not prevent application of PSD requirements for that pollutant. Comments focused on the designation process are beyond the scope of this rulemaking.

3. Section 185 fees

Comment: EPA should clarify section 185 fee requirements and the redesignation provisions

Commenter (0132) stated that, while they support revocation of the 1997 eight-hour ozone standard, the EPA should continue to formally redesignate areas to attainment of the revoked standard if the state submits an approvable redesignation request and maintenance plan for that standard, since without such a redesignation, it is possible that nonattainment consequences, including the assessment of §185 fees, may continue to be imposed on an area that is no longer

monitoring nonattainment for the one-hour ozone standard and/or the 1997 eight-hour ozone standard.

Commenter (0142) stated, in the final rule the EPA should provide clarity for Section 185 fees associated with revoked standards, particularly where the EPA has determined that those areas have met the standards. The commenter recommended that the EPA provide explicit guidance to states regarding how to terminate potential Section 185 fees associated with the revoked standards. Several regions have areas that were designated Severe or Extreme non-attainment under one of the revoked NAAQS. However, particularly with regard to the long-revoked 1-hour standard, these areas have no way to formally terminate the potential obligation, even if air quality has met the standard for years. As a practical matter, sources in these areas have already spent millions of dollars for emission reduction technologies with the resultant air quality benefits while additionally being required to set aside potential Section 185 fees until the question is settled. This results in millions of dollars annually from environmental compliance budgets idled and not being used for initiatives that would actually contribute to further-improved air quality in these areas. Therefore, we request that the final ozone implementation rule provide an unambiguous pathway for states to clarify and, where appropriate, terminate Section 185 fee obligations associated with the revoked standards.

Commenter (0177) stated that the EPA should include provisions in the rule to permanently relieve states of CAA section 185 fee obligations once the EPA has issued a ruling that an area has attained the corresponding NAAQS.

Response: In the final rule, states with nonattainment areas classified as Severe or Extreme for a prior NAAQS at the time that NAAQS is revoked remain subject to the requirements of section 185 with respect to that NAAQS. This approach is consistent with the July 2011 *NRDC* court decision on the EPA's previously-issued section 185 guidance, which was vacated for procedural reasons but provided that, based on the principles of 172(e) an area can meet its 185 fee obligation using equivalent measures that are not less stringent than those that a fee program would impose. The NRDC decision held that neither the statute nor caselaw obviously precludes alternative programs and the EPA is currently defending its approval of two alternative programs. *Medical Advocates for Healthy Air v. EPA.* 9th Cir. No. 12-73386; *NRDC v. EPA*, 9th Cir. No. 13-70544. The final rule provides two methods to terminate section 185 anti-backsliding requirements for a revoked NAAQS: redesignating to attainment for the most current ozone NAAQS, and providing a redesignation substitute for the revoked NAAQS triggering the section 185 requirement.

Comment: Use of section 185 fee revenues to improve air quality

Commenter (0142) recommended that these funds be directed toward projects that will improve air quality and promote attainment with the ozone NAAQS and ultimately result in the termination of the fee. The commenter believed that consideration of the use of collected Section 185 fees is critical, particularly as the EPA intends for this implementation rule to guide implementation of the 2008 standard as well as any future revisions to the ozone NAAQS. The Section 185 fee is $5,000 per ton in 1990 dollars, adjusted for inflation; the fee is now nearly $9,000. Thus, implementation of the Section 185 fee program-- in areas that remain out of

attainment with the standards, not just without a path to terminate the obligation -- has the potential to generate significant revenues. However, the CAA does not specify how states (or appropriate authorities) may spend or allocate the fees collected under a Section 185 fee program. Therefore, states have discretion in how they use the fees. We would recommend that these funds be directed toward projects that will improve air quality and promote attainment with the ozone NAAQS and ultimately result in the termination of the fee.

The commenter suggested that sources using this option should be required to submit a plan for approval to the state outlining the project (or projects) that they plan to implement based on their applicable fee amount. A state plan, or the EPA's approval thereof, could outline a variety of approvable project categories. Commenter (0142) listed several examples of suitable projects (not repeated here) and stated that the Clean Air Communities program in New York provides an example of how Section 185 fees might be deployed to more-effectively reduce precursor emissions.

The commenter also recommended allowing sources to invest in pollution control projects within the immediate nonattainment area, as well as adjoining upwind areas, in recognition of the fact that ozone pollution can be transported over long distances. The EPA's Office of Atmospheric Programs should have a multitude of studies available, including back trajectory analyses, which would allow the EPA and states to place reasonable geographic limitations on this option.

Response: The CAA does not specify how states may spend or allocate the fees collected under a section 185 fee program or an alternative equivalent program. Therefore, states have discretion on how to use the fees collected. The EPA believes that a beneficial approach would be to channel the fees into innovative programs as described by the commenter to provide incentives for additional ozone precursor emissions reductions from stationary or mobile sources, or for other purposes aimed at reducing ambient ozone concentrations in the affected area.

Comment: Support alternative section 185 fee programs

Commenter (0151) stated that it is both legal and economically essential to allow States to adopt under Section 172(e) alternatives to 185 fee programs as the agency has approved in several California jurisdictions. Commenter (0151) stated that applying in the future four penalty programs to a source that has the geographical misfortune to be located in an intractable ozone nonattainment area would be harmful to the economy and also to the public and would be unlikely to have any impact on an area's attainment status given that the fee is not joined to any pollution control measure. Commenter (0151) stated that Congress could not have meant to impose iterative penalty fees for each ozone standard and, at the very least, this rulemaking should ensure that at most, only one ozone 185 penalty (or its equivalent) should apply to a jurisdiction at a time until it attains that standard or the most recent ozone standard.

Response: We agree with the commenter that CAA section 172(e) allows alternative programs to substitute for the CAA section 185 fee programs that are triggered for revoked standards.

I. Application of Transition Requirements to Nonattainment and Attainment

Areas

1. Requirements for Areas Designated Attainment for the 2008 Ozone NAAQS and Maintenance for the 1997 Ozone NAAQS

Comment: Support the preferred approaches

Commenters (0130, 0137, 0139, 0141,0145, 0146, 0151, 0153, 0155, 0157, 0158, 0163, 0166 and 0179) generally supported the EPA's preferred approaches; i.e., that approved section 175A maintenance plans for the 1997 ozone NAAQS and SIP-approved PSD programs also satisfy their obligations for maintenance plans under CAA section 110(a)(1) for the 2008 ozone NAAQS.

Commenters (0130, 0155, 0157 and 0158) stated the proposed options will both protect air quality and minimize needless paperwork at the state level and at the EPA regional level.

Commenters (0139 and 0179) stated that, for the areas that have been redesignated as maintenance for the 1997 standard, the area remains subject to the nonattainment requirements already approved in their SIP and thus any revision would be subject to CAA sections 110(l) and 193, which function as anti-backsliding provisions.

Commenter (0163) stated that since the area is meeting a more stringent standard, public health protection is maintained by the existing plan and a second maintenance plan for a revoked standard would be unnecessary.

Commenters (0155 and 0157) supported these approaches as long as the EPA requires that an area still be attaining the 2008 ozone NAAQS in order to be eligible to eliminate the second 10-year maintenance plan.

Commenters (0158, 0159 and 0169) supported the EPA's preferred option to not require a further maintenance plan. Commenter (0158) stated that these areas have already developed nonattainment SIPs for the previous 1997 standard that in combination with other federal measures have produced sufficient emission reductions to achieve the current, more stringent 75-ppb standard and should not be burdened with developing a maintenance plan.

Commenter (0159) stated that the approval of the redesignation and of the Section 175A maintenance plan for the 1997 ozone NAAQS required a determination on the EPA's part that the anti-backsliding requirements of these areas for the 1-hour standard, as well as those requirements applicable for the 1997 ozone standard, had been met. As such, commenter (0159) stated that the EPA's approval of both the redesignation request and the maintenance plan for the 1997 ozone standard signifies not only that all applicable requirements for the 1997 ozone standard have been met, but also that all applicable anti-backsliding measures for the 1-hour ozone standard have been adopted and approved into the SIP.

Commenter (0169) stated that South Carolina's experience with Cherokee County, SC, which

was redesignated to attainment in December 1992, and was required to submit an initial 175A maintenance plan, a subsequent 175A maintenance plan, and a 110(a)(1) maintenance plan, shows that these requirements were and continue to be unduly burdensome on the State and have resulted in few if any emissions reductions.

Commenter (0145) agreed with the EPA's rationale that, given the succession of NAAQS of increasing stringency, the burden of developing an approvable CAA §110(a)(1) maintenance plan for the 2008 ozone NAAQS would outweigh any compensating benefit for an area that is already attaining that NAAQS and that is subject to prior nonattainment requirements which are already incorporated into the SIP.

Response: We believe that using the area's approved section 175A maintenance plan for the revoked 1997 ozone NAAQS to satisfy both its maintenance obligations under section 110(a)(1) for the 2008 ozone NAAQS and its obligation to submit a second approvable maintenance plan under section 175A for the revoked 1997 ozone NAAQS is a sound approach. We believe that this approach keeps in place the control measures used to bring the area into attainment for both the 1997 and the more stringent 2008 ozone NAAQS, and also serves to reduce the paperwork burden on states.

Comment: Clarification needed

Commenter (0169) suggested the EPA clarify what is meant by "modify a maintenance plan." at 51.1105(d)(l) to provide flexibility and efficiency. Commenter (0169) stated the rule should also reference the 1-hour ozone standard's original nonattainment designation and subsequent redesignation. Commenter (0169) stated that areas which have submitted clean data determination and/or redesignation requests should also be mentioned in this exemption.

Response: The EPA made a modification to the regulatory text to provide the requested clarification. The text in question, as modified, provides that "an area with an approved 1997 ozone AAQS maintenance plan under CAA section 175A is not required to submit a second 10-year maintenance plan for the 1997 ozone NAAQS 8 years after approval of the initial 1997 ozone NAAQS maintainance plan."

Areas that were not redesignated to attainment for the 1997 ozone NAAQS prior to the date of revocation are not covered by this section. Areas that are in attainment for the 2008 ozone NAAQS but remain in nonattainment for the 1997 ozone NAAQS are addressed in the following section. Areas that have a clean data determination (CDD) for the 1997 ozone NAAQS in place have certain planning requirements suspended, but a CDD alone does not qualify an area to the flexibilities discussed in this section.

Comment: Do not support the proposed approaches

Commenter (0168) stated that not requiring maintenance plans in all cases is ignoring the maintenance provisions of the CAA that were intended to continue indefinitely. Commenter (0180) stated this proposal violates the plain language of section 110(a)(1), which requires a maintenance plan specifically for the new 2008 standard. Commenter (0168) also disagreed with

the proposal because it is essentially using current air quality to determine the applicability of CAA section 110 maintenance plan requirements, which is contrary to the CAA.

Commenter (0180) stated that demonstrating long-term compliance with the 1997 standard, which is the function of the 175A maintenance plans, does not demonstrate continued compliance with the more protective 2008 standard. Commenter (0180) stated that sections 110(*l*) and 193 are not adequate to keep emissions from increasing and that, even without rule changes, emissions can increase with changes in activity. Commenter (0180) stated the EPA's rationale that national rules and $PM_{2.5}$ control measures will support maintenance of the 2008 standard is based on over-broad generalizations without any supporting analysis. There is nothing in these claims that can support wiping away statutory requirements in *all* 2008 attainment areas.

Commenter (0180) stated that the EPA's claim that its review of the ozone standards may come before section 110(a)(1) plans are due is factually incorrect and opens the door for the EPA to perpetually excuse compliance with section 110(a)(1). Commenter (0180) stated the CAA requires a formal SIP submittal to ensure that the NAAQS will be maintained and that such plans are enforceable; it is not enough to show that an area happened to meet the 2008 standard at the time of designations.

Commenter (0180) stated that, if the EPA means that areas that are redesignated attainment for the 1997 ozone NAAQS and designated attainment for the 2008 ozone NAAQS, do not have to submit a "Good Neighbor" SIP as required by section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS because they have a section 175A maintenance plan for the 1997 NAAQS, the EPA has rejected this approach. Commenter (0180) stated that the EPA rejected Kentucky's 2008 ozone NAAQS section 110(a)(2)(D)(i)(I) submittal because the submittal relied on CAIR, which is designed to address the 1997 ozone NAAQS, and Kentucky did not submit any analysis or regulations addressing the 2008 ozone NAAQS. Commenter (0180) stated there is the added problem that a section 175A maintenance plan is not designed or required to prevent interference with maintenance or attainment in downwind states or visibility; therefore, the EPA cannot waive the 2008 ozone section 110(a)(1) obligations for any area.

Response: The EPA disagrees with the commenters. The EPA is not ignoring the maintenance provision of section 110(a)(1), but rather evaluating what is sufficient to address that provision under the circumstances of transition to a new more stringent NAAQS for an area designated attainment for that more stringent NAAQS. With the control measures included in their SIPs and in approved section 175A maintenance plans, those areas have already achieved sufficient emissions reductions to bring the area into attainment for both the 1997 ozone NAAQS and the more stringent 2008 ozone NAAQS. These SIP control measures cannot be weakened without satisfying section 110(l) and in some cases also section 193, which effectively serve as anti-backsliding provisions. The EPA is not relieving areas designated attainment of the requirement under section 110(a)(1) to maintain the more stringent 2008 ozone NAAQS, but rather, the EPA believes the current SIP measures together with the approved PSD plan for the 2008 ozone NAAQS suffice as a maintenance showing for these areas. These are areas that already have many controls in place, including approved section 175A maintenance plans ensuring that the areas can maintain the level of the prior revoked standard.

While these approved 175A maintenance plans were established for maintenance of the 1997 ozone NAAQS, and accordingly help prevent backsliding for that revoked NAAQS, they also provide a foundation for maintenance of the 2008 ozone NAAQS, which, in combination with other active Clean Air Act requirements for the 2008 ozone NAAQS, contribute to maintenance of the new standard. The emissions reductions for one NAAQS build upon the emissions reductions from previous NAAQS. The EPA concludes that it is not necessary for the state to adopt additional measures beyond the prior 175A maintenance plans and the PSD plans for the 2008 standard to provide for maintenance in these areas. The EPA will work with states as necessary under the provisions of the Clean Air Act to address any future air quality concerns and maintenance needs for these areas.

The EPA is not attempting in this rule to relax any infrastructure SIP requirements, including the "Good Neighbor" SIP required under CAA section 110(a)(2)(D)(i). Only the 110(a)(1) maintenance plan requirements are affected by this rule. The EPA issued its "Guidance on Infrastructure State Implementation Plan Elements Under the Clean Air Act Sections 110(a)(1) and 110(a)(2)," on September 13, 2013, on the required elements of the section 110 infrastructure SIP submittal for the 2008 ozone NAAQS. This guidance is located at *http://www.epa.gov/oar/urbanair/sipstatus/infrastructure.html*.

Comment: Need to reconsider the EPA approaches

Commenters (0146 and 0163) urged the EPA to reconsider its assumptions about the relationship between the 1997 and 2008 ozone NAAQS and develop an anti-backsliding approach that properly characterizes ozone violations and nonattainment. The commenters pointed out where the EPA made the statement that "because the form of the 1997 and 2008 ozone NAAQS is the same, there is no possibility that an area attaining the 2008 ozone NAAQS could be violating the 1997 ozone NAAQS, which is unlike the relationship that existed between the 1-hour ozone NAAQS and the 1997 ozone NAAQS." The commenters believed this "impossibility" has indeed occurred. The Louisville metropolitan area (a maintenance area under the 1997 ozone NAAQS) was designated attainment under the 2008 ozone NAAQS based on 2008-2010 data. With 2010-2012 data and a design value 0.085 ppm, the area violates both the 2008 and 1997 ozone NAAQS. The commenters supposed that the EPA has indicated that it has no intention of redesignating areas based on more recent data so it appears that the Louisville area will need to invoke its contingency plan for the 1997 ozone NAAQS while the EPA considers the area attainment for the stricter 2008 NAAQS. To address this inconsistency, the commenters suggested that the EPA should redesignate areas under the 2008 NAAQS based on 2012 ozone data. This would allow the ozone problem to be properly characterized in its breadth and severity.

Commenter (0177) stated that the EPA's proposed approach only makes sense from an air quality perspective if the designations of those recently violating areas are quickly updated under CAA section 107(d)(3).

Response: We disagree that EPA must consider air quality data that was not available in sufficient time for initial designations and designate areas based on that new data for purposes of

determining appropriate anti-backsliding requirements prior to revoking the 1997 ozone NAAQS. Although not directly applicable where EPA strengthens the standard, EPA has used the anti-backsliding principles in section 172(e) as a guide for anti-backsliding for the 1997 NAAQS. Section 172(e) does not contemplate that there is an ongoing obligation to impose more stringent controls than those that were in place at the time of revocation.

2. Areas Designated Attainment for the 2008 Ozone NAAQS and Nonattainment for the 1997 Ozone NAAQS

Comment: Support PSD SIP option

Commenter (0139) stated that, for areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS category in row 2 of Table 2, an option is given for area's approved PSD SIP to satisfy the section 110(a)(1) maintenance provision. Commenter (0139) stated that they supported this option, as it would avoid an additional maintenance showing under 110(a)(1), and it is also appropriate for the category noted above and should be added as a third bullet item in row 1 of Table 2.

Commenter (0179) believes the alternative approach brings additional unnecessary resource burden to the states. Commenter (0166) stated that the second alternative lacks legal basis in the statute since maintenance plans are required for an area to be redesignated to attainment, but the EPA here is simply proposing to revoke the 1997 NAAQS.

Response: The EPA finalized the approach that an approved PSD SIP for such an area satisfies the obligation to submit an approvable maintenance plan for the 2008 ozone NAAQS under section 110(a)(1). The EPA believes that the burden of developing an approvable 110(a)(1) maintenance plan for the 2008 ozone NAAQS would outweigh any compensating benefit for an area that is already attaining that NAAQS and that is subject to prior nonattainment requirements which are already incorporated into the SIP and have been sufficient to bring the area into attainment of both the 1997 and 2008 standards.

Comment: Maintenance plan needed

Commenter (0163) stated that an RFP SIP for the 2008 ozone NAAQS for an area classified Moderate or higher would satisfy the maintenance requirement for the 1997 NAAQS as it would document required emissions reductions. Commenter (0163) stated that the EPA's proposed approach, however, does not demonstrate continued maintenance; so an area designated marginal nonattainment should prepare a maintenance plan to set conformity budgets and assure continued maintenance.

Commenter (0163) agreed with and preferred the "alternative" approach with the caveat that areas be assessed and designated according to current (2012) design values. The commenter believed that under the "preferred" approach, 1997 ozone NAAQS former nonattainment areas that did not prepare maintenance plans would not have any maintenance obligations, but former 1997 ozone NAAQS nonattainment areas that prepared maintenance plans would be subject to

the requirements in these plans. The alternative approach would remove this inequity and provide assurances for continued attainment.

Response: The EPA disagrees with the commenters. The control measures implemented by these areas and included in their SIPs have already produced sufficient emissions reductions to achieve air quality that not only attained the 1997 ozone NAAQS, but also resulted in an attainment designation for the more stringent 2008 ozone NAAQS. These control measures cannot be modified or removed without a demonstration satisfying section 110(l) and in some cases both sections 110(l) and 193. These demonstrations must address not only the 1997 ozone NAAQS but also the 2008 ozone NAAQS as well as any future NAAQS.

Comment: Do not support the proposal

Commenter (0180) stated that waiving the requirements of section 175A(b) without support is arbitrary and undermines the protections of the Act. Commenter (0180) stated that, given the ability of nonattainment areas under the 2008 standard to claim that RACM/RACT requires no additional controls beyond those already in place, to extend attainment deadlines through "bump ups," to defer implementation of any new control measures, and to allow emissions to increase even without changes in applicable control measures (e.g., through increases in population or economic activity), there is no assurance that the planning requirements for the 2008 standard will prevent ambient concentrations from increasing.

Commenter (0180) stated the EPA is not clear whether it is also proposing to waive the revision requirements of section 175A(b) for 1997 ozone standard maintenance areas if the area is attaining the 2008 standard. Commenter (0180) stated such a proposal would be even more arbitrary since the EPA is proposing to rely on the maintenance demonstrations for the 1997 standard to substitute for maintenance demonstrations under section 110(a)(1) for the 2008 standard. Commenter (0180) stated that waiving the revision requirement under section 175A(b) would mean that there is no continuing obligation to demonstrate maintenance of either the 1997 or the 2008 standard. Commenter (0180) stated that attainment of the 1997 standard is no proof that future levels will remain adequately controlled and pointed to the Washington DC-MD-VA nonattainment area which had achieved the 1997 ozone standards, but where ambient concentrations degraded over time between 2007 and 2012 and design values now exceed the 1997 standard. Commenter (0180) stated that, since some areas may experience ozone increases over time, a second round of maintenance planning under section 175A(b) would ensure areas will not backslide into violation of the 1997 standards; nothing in the 2008 planning requirements can provide that assurance.

Response: We believe that an approved PSD SIP, in conjunction with the other already-existing statutory and regulatory provisions that govern implementation of ozone standards, and the historical safeguards in place for the area adopted for prior NAAQS, are generally sufficient to prevent backsliding, and to satisfy the requirement for maintenance under section 110(a)(1). The control measures implemented by these areas and included in their SIPs have already produced sufficient emissions reductions to achieve air quality that attained the 1997 ozone NAAQS, and resulted in an attainment designation for the more stringent 2008 ozone NAAQS. These control measures cannot be modified or removed without a 110(l) showing and in some cases both a

110(l) and a 193 showing. Areas designated attainment for the 2008 standard remain subject to the attainment and maintenance requirements of that standard. These include continued implementation of the control measures that brought the area into attainment. For these areas, and for any area designated attainment for the 2008 NAAQS, the CAA's general NAAQS air quality management framework and associated regulatory provisions continue to apply, and serve as the foundation for handling any potential future issues with maintaining the 2008 NAAQS.

3. Areas Designated Nonattainment for the 2008 Ozone NAAQS and Maintenance for the 1997 Ozone NAAQS

Comment: Modify regulatory text

Commenter (0153) supported the EPA's proposed approach but stated that the proposed regulatory language at §51.1105(a)(4) states that after the 1997 standard is revoked the maintenance plan may be modified consistent with sections 110(1) and 193. However, commenter (0153) asserted the proposed regulatory language at §51.1105(a)(2) does not contain similar language to allow modification of the maintenance plan consistent with 110(1) and 193, and believed it should be added.

Response: The EPA agrees that the regulatory text regarding areas designated maintenance for the 1997 ozone NAAQS should be amended to include language consistent with the proposed and final approach. The regulatory text has been adjusted to reflect that maintenance plans can be modified pursuant to CAA sections 110(l) and 193.

Comment: A second maintenance plan is needed

Commenter (0163) stated that there needs to be a showing that emissions will not increase in the area and that maintenance is assured. The commenter suggested that this can be accomplished by preparing either a maintenance plan or an RFP SIP. In the case of areas in the OTR, nonattainment NSR is required as well as a number of other mandated measures. However, without a maintenance plan, mobile source emissions do not have commensurate checks on emissions growth. OTR areas should be given the option of demonstrating that projected mobile source emissions do not exceed the base year for a 10-year period. The commenter stated that an area designated nonattainment for the 2008 ozone NAAQS should prepare a second maintenance plan to assure maintenance and set conformity budgets.

Another commenter opposed the proposal because the CAA clearly requires two 10-year maintenance plans. The fact that the area is designated nonattainment under the 2008 ozone NAAQS is no guarantee that there will be no increase in ozone violations. The commenter suggested that the EPA review the record for areas violating a NAAQS for which it had been redesignated to attainment with an approved maintenance plan. Waiving the requirements of a second 10-year maintenance plan as described in CAA section 175A(b) without support is arbitrary and undermines the protections of the Act.

Response: The EPA recognizes that the approved 175A maintenance plan for the 1997 ozone NAAQS can only be modified via a section 110(l) and, where appropriate, a section 193 showing. These analyses would have to demonstrate that any revisions to the maintenance plan would not interfere with the ability to demonstrate timely attainment for the new standard. The final rule has not established a requirement for the second 10-year plan for maintenance of a revoked, less stringent standard that the areas previously attained. This allows states to focus planning and control efforts on attaining and maintaining the more stringent and currently applicable 2008 ozone NAAQS in these areas, rather than continued focus on the already attained 1997 ozone NAAQS. The areas will remain subject to the MVEBs established in the approved 175A maintenance plan until such time that MVEBs for the more stringent 2008 ozone NAAQS are submitted and are found adequate or are approved. These MVEBs must be used for transportation conformity determinations under the 2008 ozone NAAQS pursuant to the conformity regulations.

4. 2008 Nonattainment Areas Also Designated Nonattainment for a Prior Revoked Ozone NAAQS

Comment: Clarification

Commenter (0132) requested clarification of the interpretation of Table 2: 2008 Ozone NAAQS Transition Obligations and Section (IV)(I)(4)(a)(ii). The commenter supposed that the EPA stated that it is proposing that "areas designated nonattainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS will be obligated to implement the applicable requirements set forth in 51.1100(o) for the 1997 ozone NAAQS and ... must also continue addressing those applicable 1-hour ozone NAAQS requirements for that area." It continues to state that the area must apply nonattainment NSR in "accordance with their highest nonattainment classification under any ozone standard for which they are (or were at the time of revocation) designated nonattainment, as well as any section 185 requirements for areas classified Severe or Extreme at the time of revocation for a prior standard." This statement implies that an area that is in Severe (or Extreme) nonattainment status for both the 1-hour and a later ozone NAAQS standard would be subject to §185 fees for both standards. It is requested that the EPA clarify what requirements would satisfy a §185 fee for both standards. Would assessment of two separate fees with two different baseline amounts and years be required or would the §185 fee requirement be satisfied for both unmet standards if the higher of the two fees were assessed on major sources? It is noted that the higher of the two classifications is used for NSR purposes and assessing only the higher of the two fees could be consistent with NSR. Additionally, payment of a higher fee would fulfill the obligation of the smaller fee.

Response: Section 185 provides that states establish fee programs for Extreme and Severe ozone areas to be implemented if the area fails to attain by the attainment date. The *South Coast* decision determined that a section 185 fee program is a control that is needed to meet anti-backsliding obligations. The EPA has concluded that, under the principles of section 172(e), a district can meet its section 185 fee anti-backsliding obligation by developing equivalent alternative measures to a section 185 fee program that are not less stringent than a fee program would be and has approved two such programs. The Ninth Circuit is currently considering

challenges to EPA's approval of those programs. The commenter raises a hypothetical issue regarding implementation of the section 185 fee program that is beyond the scope of both the proposed and final rules. The EPA will consider the issues raised by the commenter if and when they arise in the context of a specific SIP submittal containing either a 185 fee program or an equivalent alternative program.

5. Table 2 requirements--clarifications

Comment: Clarification regarding 110(a)(1) plan

Commenter (0139) stated there may be cases for areas initially designated attainment for the 1997 8-hr NAAQS in which a section 110(a)(1) maintenance plan was prepared, and not a Section 175 maintenance plan; therefore, for the Attainment (2008); Attainment /Maintenance (1997) category in row 1 of table 2 on page 34218, the following clarifying text should be added to address cases in which a 110(a)(1) plan was prepared:

> "Section 175 A maintenance plan or section 110(a)(1) maintenance plan for the 1997 8-hr NAAQS satisfies maintenance requirement under section 110(a)(1)"

Response: The requested modification was not made because it is unnecessary. In the circumstance the commenter describes, an area has been designated attainment and prepared a 110(a)(1) plan for the 1997 ozone NAAQS and not a 175 maintenance plan the area faces no anti-backsliding requirements for the 1997 ozone NAAQS under this final rule.

J. Satisfaction of Anti-Backsliding Requirements for an Area

1. Formal redesignation satisfies anti-backsliding requirements

Commenters (0132, 0159, 0166, 0173 and 0179) generally supported the EPA's proposal that formal redesignation satisfies anti-backsliding requirements for revoked standards.

Commenters (0132 and 0173) agreed that formal redesignation to attainment for the 2008 eight-hour ozone NAAQS and approval of a maintenance plan demonstrates that an area has satisfied its obligations to adopt anti-backsliding requirements, including section 185 penalty fees. Commenter (0179) supported a formal redesignation approach and stated this would lift the nonattainment NSR requirements.

Commenters (0132 and 0173) requested that the EPA preserve the statutory mechanism to redesignate areas to attainment for the 1997 NAAQS. Commenter (0132) stated that without such a redesignation, it is possible that nonattainment consequences, including the assessment of §185 fees, may continue to be imposed on an area that is no longer monitoring nonattainment for the one-hour ozone standard and/or the 1997 eight-hour ozone standard. Commenter (0132) stated that this is a particularly egregious type of punishment for areas that have not yet missed the applicable attainment date for a particular standard. Commenter (0173) stated that because the EPA's more streamlined options to eliminate anti-backsliding obligations for the 1997

NAAQS have not yet been tested in the courts, retaining the statutory redesignation mechanism for the revoked NAAQS will ensure that a procedure exists to allow 1997 NAAQS nonattainment areas to remove anti-backsliding obligations where circumstances warrant.

Commenter (0181) opposed the other demonstrations required for formal redesignation (demonstration that air quality improvements were due to permanent and enforceable measures, and that the area will continue to maintain the standard over the next 10 years) and stated they are neither necessary nor appropriate. Commenter (0181) stated that the criterion for applicability of anti-backsliding requirements is nonattainment, not attainment designation. Commenter (0181) stated Congress intended this distinction, as demonstrated by its use of the phrase "designated nonattainment"; that is, Congress was aware of how to make a requirement effective based on an attainment designation, as distinguished from attainment. Commenter (0181) stated the EPA should allow an area to remove anti-backsliding requirements related to the one-hour ozone standard and 1997 eight-hour ozone standard upon attaining those standards (i.e., a "clean data determination") - particularly for areas - such as Pechanga's Tribal Lands - where the original nonattainment designation was influenced by overwhelming transport from upwind areas. Commenter (0181) suggested that a State would need (1) to demonstrate that the NAAQS had been attained, and (2) to submit a revision to their SIP, proposing to remove the affected anti-backsliding requirements. Commenter (0181) stated this SIP revision would be subject to the provisions of 110(1) which prohibit approval of revisions that would interfere with attainment or reasonable further progress.

Response: Approval of a redesignation to attainment for the 2008 ozone NAAQS signifies that the state has satisfied its obligations to adopt anti-backsliding requirements for the current and revoked standards for that area. This same approach was used in the Phase 1 Rule in requiring redesignations for the 1997 ozone NAAQS to address anti-backsliding requirements for the revoked 1-hour standard. Approval of the section 175A maintenance plan for the 2008 ozone NAAQS assures that the area's SIP includes the provisions necessary for maintenance of the 2008 ozone NAAQS, which is the most stringent of the NAAQS. Therefore, upon redesignation to attainment and approval of its plan for maintenance of the 2008 ozone NAAQS, an area will have satisfied its obligations to adopt anti-backsliding requirements. All of the anti-backsliding measures that have been approved into the SIP must continue to be implemented unless or until the state can show that such implementation is not necessary for maintenance, consistent with section 110(l) and section 193 if applicable.

The EPA does not agree that it has authority to take action to reclassify or redesignate areas to attainment for a former standard that has been revoked, such as the 1997 ozone NAAQS after that NAAQS has been revoked. Revocation of the standard removes the designations for the revoked standard, as well as the classifications, except to the extent necessary to implement applicable anti-backsliding requirements. The EPA believes the two mechanisms provided in the final rule for removing obligations arising from a revoked standard accomplish the goals of 42 U.S.C 7407(d)(3) [CAA section 107(d)(3)] in a manner consistent with anti-backsliding principles and appropriate for the circumstance where a more stringent NAAQS with the same form and averaging time exists and is being actively implemented. Thus, we agree with the commenters that there should be a mechanism for removing certain obligations, such as section

185 fee programs based on failure to attain a former standard that has since been revoked after the state has attained that revoked NAAQS that can serve the same function as a formal redesignation to attainment. This is precisely the reason we developed the redesignation substitute. While the redesignation substitute has not been judicially reviewed, we believe that our approach is legally defensible.

The EPA does not believe that a clean data determination is sufficient to suspend anti-backsliding requirements. We believe that the redesignation and redesignation substitute mechanisms represent the minimum set of requirements sufficient to demonstrate satisfaction of anti-backsliding requirements under the EPA's application of the principles of section 172(e). These mechanisms provide a way for states to demonstrate that they have attained these standards, and have essentially met all the requirements for redesignations, and thus should no longer need to fulfill any additional anti-backsliding requirements beyond those already approved in their SIPs. A clean data determination only suspends planning requirements associated with the NAAQS for which the determination was granted.

CAA section 172(e), which addresses relaxations of a NAAQS, requires protections for areas that have not attained a NAAQS prior to a relaxation, by requiring controls that are "not less stringent" than the controls applicable in nonattainment areas prior to any such relaxation. The EPA applied these principles in developing previous guidance on satisfying the anti-backsliding approach for CAA section 185 requirements. As stated in previous EPA guidance, we interpret the principles of 172(e) as authorizing, but not requiring, the Administrator to approve on a case-by-case basis "not less stringent" alternatives to the applicable section 185 fee program requirements associated with a revoked ozone NAAQS.[34] The NRDC challenged this guidance in 2010. Although the court vacated the 2010 guidance memorandum on procedural grounds, it did not prohibit alternative programs, stating that "neither the statute nor our case law obviously precludes that alternative." *See NRDC v. EPA*, 643 F.3d 332 (D.C. Cir. July 2011). We believe the application of section 172(e) principles to applicable section 185 anti-backsliding requirements is an appropriate and reasonable use of the Administrator's discretion to approve "not less stringent" controls. However, we did not propose and do not intend at this time to promulgate regulatory language to apply principles of section 172(e) to other anti-backsliding requirements.

Comment: Redesignation does not satisfy anti-backsliding requirements

Commenter (0180) stated redesignation (or initial designation) to attainment for the 2008 standard cannot be used to turn off obligations triggered under the 1-hour or 1997 standards. Commenter (0180) stated that these obligations can only be turned off by meeting those standards. Commenter (0180) cited *Chevron* step 1 in *NRDC*, 643 F.3d at 322 (rejecting EPA

[34] Memo from Stephen D. Page to Regional Air Division Directors, Jan. 5, 2010, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-Hour Ozone NAAQS."

policy that would have allowed an area to use attainment of the 1997 8-hour ozone standard to terminate 185 fees triggered by noncompliance with the 1-hour ozone standard). Commenter (0180) also stated the court explained "the Act creates a one-way ratchet, 'plac[ing] states onto a one-way street whose only outlet is attainment' of the NAAQS – even NAAQS EPA has subsequently replaced." *Id.* (quoting *SCAQMD*, 472 F.3d at 900).

Commenter (0180) stated this is particularly important because the data EPA used to make designations for the 2008 ozone NAAQS were low due to the Great Recession and/or cool weather and, as such, do not indicate that serious, severe or extreme 1997 ozone NAAQS nonattainment areas will attain by their attainment date. Commenter (0180) stated that, if the EPA believes that attainment of the 2008 NAAQS will necessarily mean attainment of the earlier standards, then there is no reason for this option because areas meeting the 2008 standard should also be able to demonstrate attainment with the prior standards and go through the statutorily provided redesignation process.

Response: The EPA disagrees with the commenter. When the EPA approves a redesignation request for the current 2008 ozone NAAQS, we assess whether the area is in attainment for the current and previous NAAQS. The maintenance plan submitted by the state demonstrates that the area being considered for redesignation will continue for the next 10 years to attain the standard that is requisite to protect public health, and that attainment is due to permanent and enforceable emissions reductions. A redesignation to attainment signifies that the area has met the requirements of the 2008, as well as any revoked, NAAQS. CAA section 185 specifically identifies redesignation "as an attainment area for ozone" as a basis for terminating fee requirements. Also, redesignation to attainment historically has terminated nonattainment NSR requirements, which are not required to be kept in the SIP as contingency measures. *See Greenbaum v. EPA* (370 F.3d at 536). Moreover, redesignation for the current standard was the unchallenged basis for demonstrating satisfaction of anti-backsliding requirements in the EPA's previous Phase 1 anti-backsliding regime (69 FR 23951). We believe the application of the same principle when transitioning from the 1997 to the 2008 ozone NAAQS is an even better fit: it is impossible to attain the 2008 ozone NAAQS without first achieving air quality that would attain the 1997 ozone NAAQS due to the identical form of the two standards.

2. Redesignation Substitute satisfies anti-backsliding requirements

Comment: Support redesignation substitute

Commenters (0130, 0136, 0139, 0145, 0151, 0153, 0158, 0159, 0160, 0163, 0166, 0177, 0178 and 0179) generally supported the EPA's proposal to provide a redesignation substitute to satisfy anti-backsliding requirements for revoked standards.

Commenter (0130) stated that inventories and modeling needed for the redesignation substitute should rely heavily on existing data, since new inventories and analyses would generate a great deal of work for a standard that may have been met for many years. Commenter (0130) stated that the EPA should also allow states to supply inventories in terms of tons/year rather than ozone season tons/day.

Commenters (0139 and 0150) supported the concept of a "redesignation substitute" in the sense that there needs to be a clear path for the states to follow in order to eliminate the anti-backsliding requirements attendant on failure to attain a revoked standard.

Commenter (0130) stated that the EPA should clarify that mobile vehicle emissions budgets are not required for a redesignation substitute since such budgets by necessity must be SIP submissions and must at a minimum be deemed adequate by the EPA.

Commenter (0130) stated that, since this is not a maintenance plan under Section 175A, the EPA should consider allowing states flexibility in creating this document.

Commenter (0132) recommended that the "substitute redesignation procedure be streamlined so that two steps, notification and the attainment/maintenance demonstration that would currently be required are rolled into one submission. Commenter (0132) stated this process could result in significant delays while the state waits for EPA action on the initial redesignation showing; rather, as is done with formal redesignation requests that are submitted concurrently with maintenance plans, a redesignation substitute could be submitted concurrently with the necessary SIP revisions to remove nonattainment SIP requirements. Commenter (0162) supported a streamlined process to minimize the burdens on state and industry as they attempt to comply with implementation requirements associated with multiple iterations of the ozone NAAQS—1997, 2008, and projected 2014/15 standards.

Commenter (0151) stated the proposed rule should be modified so that when the State notifies the EPA that it will be submitting its Clean Data demonstration and maintenance plan, all SIP-planning activities under the 1997 ozone standard are suspended unless and until the EPA determines through the contemplated notice and comment "substitution procedure" that the State has failed to show that it is able to attain and/or maintain the former ozone standard. Commenter (0151) stated that it seems pointless to insist that 1997 ozone planning continue.

Commenter (0153) supported this concept, but believed the EPA should specify that a maintenance plan submitted prior to revocation of the 1997 standard satisfies a states need to provide a showing that addresses the substance of the redesignation criteria, provided that the maintenance plan that was submitted meets the requirement of section 107(d)(3)(E).

Commenter (0158) stated the EPA should move expeditiously to address and finalize any outstanding state redesignation or clean data requests with respect to the 1997 8-hour ozone standard so that formal, official redesignations or clean data determinations can be finalized prior to the revocation of the 1997 8-hour standard.

Commenters (0159 and 0177) stated that the EPA's alternative approach prevents such areas from being treated more harshly than those areas that achieved the 1997 ozone standard prior to its revocation.

Commenter (0163) supported this approach, stating it is reasonable in that it does not include all of the provisions required for redesignation, but eliminates the discrepancies created under the earlier approach that only required a showing of attainment.

Commenter (0179) supported both proposed options for addressing nonattainment NSR requirements for any prior ozone standard for which an area remains designated nonattainment.

Response: The EPA recognizes that a clean data determination alone is less burdensome for states than a section 107(d)(3) redesignation or a redesignation substitute. But a clean data determination only suspends planning requirements associated with the NAAQS for which the determination was granted. We believe that the formal redesignation and redesignation substitute mechanisms represent the minimum set of requirements sufficient to demonstrate satisfaction of anti-backsliding requirements under the EPA's application of the principles of section 172(e). These mechanisms provide a way for states to demonstrate that they have attained these standards, they have met all the requirements for redesignations, and thus no longer need any anti-backsliding requirements beyond those already approved in their SIPs. The EPA believes the redesignation and redesignation substitute mechanisms, and their associated requirements reasonably address backsliding requirements in a manner that can be legally supported.

The EPA intends to act as quickly as possible on all redesignation requests received from states prior to revocation of the 1997 ozone NAAQS. While we believe that we cannot redesignate areas to attainment for a revoked NAAQS, we can issue clean data determinations and determinations of attainment to areas for that revoked NAAQS.

Comment: Oppose redesignation substitute

Commenter (0152) believed that, although the proposed "redesignation substitute" process would not be a formal SIP process, it would be subject to notice and comment, would be resource intensive, and would be unnecessary, especially given that the EPA does not even have the authority to redesignate an area to attainment for a revoked standard. Commenter (0152) stated the Phase 1 Rule process should continue; i.e., when an area attains under the revoked 1-hour ozone standard, a state merely needs to show attainment and the EPA makes a determination of attainment.

Response: The EPA believes that the redesignations substitute mechanism represents the minimum set of requirements sufficient to demonstrate satisfaction of anti-backsliding requirements for a revoked NAAQS under the EPA's application of the principles of section 172(e). The only other route to demonstrate the satisfaction of anti-backsliding requirements is a redesignation to attainment for the most current ozone NAAQS. A clean data determination only suspends planning requirements for a specific NAAQS, and a determination of attainment only serves to note that the area attained by the assigned attainment date.

Comment: More extensive showing

Commenters (0139, 0150, 0166 and 0173) questioned why the EPA considers this more extensive showing necessary, since when the EPA revokes a standard, it does so because it

believes it is no longer needed. Commenters (0166 and 0173) questioned whether it is necessary for the redesignation substitute to include a maintenance demonstration. Since the state must prepare a SIP for the area to bring it into compliance with the more-stringent 2008 standard, commenter (0166) stated it seems an unnecessary burden to require that the state also prepare a demonstration that air quality will not degrade such that the earlier standards are no longer met. Commenter (0173) stated that the EPA terminated anti-backsliding obligations in the Baton Rouge and Beaumont-Port Arthur areas without requiring such a maintenance demonstration for the 1-hour ozone NAAQS and noted that many areas seeking such a redesignation substitute will likely also be subject to rate-of-progress requirements or maintenance plans for other ozone NAAQS, that will in practice continue to assure emission reductions consistent with air quality maintenance.

Response: We believe that the redesignation substitute mechanism represents the minimum set of requirements sufficient to demonstrate satisfaction of anti-backsliding requirements under the EPA's application of the principles of section 172(e) and the requirements of 107(d)(3)(E). A redesignation substitute showing would include: attainment of the relevant revoked 1-hour and/or 1997 ozone NAAQS; a showing that attainment was due to permanent and enforceable emissions reductions; and a demonstration that the area can continue to maintain the standard over the next 10 years.

The EPA recognizes that areas designated nonattainment for the 2008 ozone NAAQS that also remain nonattainment for a revoked NAAQS are likely designated at a lower classification for the 2008 ozone NAAQS as a result of the implementation of control measures for the 1997 ozone NAAQS. Air quality improvements for the 2008 ozone NAAQS are built upon progress made for the previous ozone NAAQS. The EPA is not providing the redesignation substitute mechanism for the purpose of allowing states to relax or avoid air quality control measures that are needed for attainment and maintenance of the 2008 ozone NAAQS.

We terminated the 1-hour ozone NAAQS anti-backsliding obligations for the Baton Rouge and Beaumont-Port Arthur areas, with the exception of the CAA 185 fee obligation for the Baton Rouge area, in conjunction with approval of a maintenance plan for the more stringent 1997 ozone NAAQS (76 FR 74000, November 30, 2011 and 75 FR 64675,October 20, 2010, respectively).[35] In addition to the option of demonstrating maintenance for a more stringent NAAQS, our final rule is reasonable in that it allows an alternative demonstration for the revoked NAAQS adequate to fulfill anti-backsliding requirements.

[35] For the Baton Rouge area we terminated the CAA section 185 fee obligation for the 1-hour ozone NAAQS in a separate rulemaking (July 7, 2011, 76 FR 39775). This rulemaking relied on our January 5, 2010 memorandum "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS." On July 1, 2011, the District of Columbia Circuit Court of Appeals vacated our 185 fee guidance. *NRDC v. EPA,* 643 F.3d 311 (D.C. Cir. 2011).

Comment: NSR requirements

Commenter (0130) stated that a mechanism must be supplied to states to alleviate the overly burdensome requirements for NSR thresholds to which areas are subject, solely due to their status as a nonattainment area under the 1-hour ozone standard. Commenter (0130) stated that applying the NSR thresholds for 1-hour severe areas with no opportunity to alleviate those burdens does not provide a level playing field. For instance, any other area in the OTR designated marginal or moderate nonattainment for the 2008 ozone NAAQS should have NSR thresholds of 50 tpy VOC and 100 tpy of NO_x as well as offset ratios of 1.15 to 1. The Northern Virginia area, under the EPA's current interpretation of anti-backsliding requirements, would have NSR thresholds of 25 tpy VOC and NO_x as well as offset ratios of 1.3 to 1. Without some way to alleviate the requirements for the 1991 ozone standard, Northern Virginia, a marginal nonattainment area for a much more protective standard, would have much stricter NSR requirements than most other marginal and moderate areas in the OTR. The CAA clearly does not contemplate this situation.

Commenter (0132) stated that if a "redesignation substitute" approach is taken, the TCEQ would recommend the removal of nonattainment NSR requirements and their replacement with PSD requirements for the 2008 ozone NAAQS and all previous standards once an area has met its attainment obligations for those previous standards. The commenter believed that the requirements for a more stringent classification would no longer be in place once an area has attained the previous standards. This would allow a state to conduct air permit applicability determinations using the classifications associated with the 2008 standard, rather than the most stringent classification for areas that did not attain the one-hour and 1997 eight-hour standard before the standards were revoked, once those areas reach attainment. This process would be consistent with the recommendation that the EPA formally redesignate areas that were nonattainment for the previous ozone standards at the time they were revoked, once those areas reach attainment for the previous standards. Neither the environment nor the economy benefits by retaining classifications and basing permit requirements related to revoked standards, particularly once an area has met its obligations for attainment under those standards.

Response: Addressing NSR requirements associated with a revoked ozone NAAQS is a key benefit of the flexibility provided by a redesignation substitute mechanism. An area that is nonattainment for the 2008 ozone NAAQS that retained anti-backsliding requirements for one (or more) revoked ozone NAAQS, whose NSR threshold is set by a revoked NAAQS, can address that via the redesignation substitute mechanism. Nonattainment NSR applies in these areas in accordance with their highest nonattainment classification under any ozone standard for which they are (or were at the time of revocation) designated nonattainment. The redesignation substitute mechanism allows a state to demonstrate that the revoked NAAQS which determines the threshold level has been attained. Following a successful redesignation substitute showing for that NAAQS, the NSR level would then be set by the next higher classification that applies to that area. It should be noted that states in the OTR are required to implement, at a minimum, the nonattainment NSR requirements associated with a Moderate area.

Once a state develops successful redesignation substitute showings to address anti-backsliding requirements for the revoked NAAQS, the nonattainment NSR level remaining is that for the

current ozone NAAQS. The only way to remove nonattainment NSR requirements for the current ozone NAAQS is through the standard 107(d)(3)(E) process. Once that is successful, the state may shift to implementing PSD in that area.

Comment: Section 185 requirements

Commenter (0132) recommended that this redesignation substitute should also terminate §185 obligations. Commenter (0151) suggested that if the only planning activity that the EPA feels is necessary to preserve is activation of Section 185 penalties for a legacy nonattainment area that missed the prior attainment dates, the agency can address that issue without requiring further planning and/or a lengthy demonstration of maintenance of the old standard once it is achieved. Commenter (0160) supported the proposed approach to remove Section 185 fee program obligations if the area has met the 1997 standard and submits a 10-year maintenance showing.

Response: Terminating section 185 fees associated with a revoked ozone NAAQS is a key benefit of the flexibility provided by a redesignation substitute mechanism. The EPA believes that an approved redesignation substitute showing is sufficient to terminate these fees, whereas a clean data determination or determination of attainment are not. Because an area pursuing the redesignation substitute is not redesignating to attainment for the most current NAAQS, the EPA believes that a showing that the area can attain the revoked NAAQS for 10 years is a necessary part of the successful showing. This complete showing is necessary to demonstrate the area will not backslide.

Comment: Streamlined process for removing obligations under prior ozone standards

Commenter (0151) recommended the EPA provide public notice that the EPA made a clean data determination in the *Federal Register*, or even better, maintain a record of such decisions on an EPA website in the Ozone NAAQS area. Commenter (0151) recommended that subsequently the state should be allowed to petition the EPA to remove former NSR requirements (for formerly applicable major source thresholds, offsets, and internal netting) and shift other obligations to its contingency plan provided that doing so does not jeopardize progress toward the currently applicable NAAQS under Section 110(l). Commenter (0151) stated that additional notice and comment activities are not needed; judicial review for such determinations is not warranted; and a maintenance demonstration for the former standard for 10 years seems unnecessary, if the area has become subject to the 2008 (or a future NAAQS).

Commenter (0162) supported a streamlined process to minimize the burdens on state and industry as they attempt to comply with implementation requirements associated with multiple iterations of the ozone NAAQS—1997, 2008, and projected 2014/15 standards.

Response: The EPA publishes all actions in the *Federal Register*. A list of actions for each nonattainment area and their associated FR postings can be found on the EPA's Green Book (*http://www.epa.gov/airquality/greenbook/*).

Once the EPA approves a redesignation substitute showing for the revoked NAAQS, the state can modify the SIP per the usual requirements of section 110(l) and, where appropriate, section 193. A state that has successfully redesignated from nonattainment to attainment for the current ozone NAAQS may shift its preconstruction review permit program from nonattainment NSR to PSD.

K. How will the EPA's determination of attainment (''Clean Data'') regulation apply for purposes of the anti-backsliding requirements?

1. General

Commenter (0166) stated that a determination that an area has "clean data" for the more-stringent 2008 NAAQS should be sufficient to lift anti-backsliding requirements for the earlier NAAQS. Commenter (0179) supported the proposal to apply the same approach finalized in the Phase 1 Rule for the 1997 ozone NAAQS.

Commenter (0181) stated that the legal basis for removal of attainment demonstration requirements under the "clean data policy" is equally applicable to anti-backsliding requirements for revoked standards and that there is no reason why it should not be applied with respect to elimination of anti-backsliding requirements for revoked standards. The commenter believed that under the clean data policy, an area that attains the standard is not subject to requirements specifically linked with demonstration of attainment and reasonable further progress toward an already attained standard. In the Seitz memo, the EPA emphasizes that "this interpretation does not extend to requirements of subpart 2 that are not linked by the language of the Act with the attainment demonstration and RFP requirements." Requirements such as VOC RACT, which are required in designated nonattainment areas without the possibility of exemption through a demonstrated lack of need (in contrast with the NO_x RACT requirement) are not subject to the clean data policy. Because the anti-backsliding requirement is linked by the language of the act with the attainment demonstration (and not the attainment designation) it lies within the ambit of the clean data policy. The clean data policy has been applied by EPA for decades and has withstood court challenges.

Response: The EPA agrees in part with the commenters. A clean data determination for a specific ozone NAAQS only suspends planning requirements associated with that specific NAAQS, such as attainment demonstration SIPs. It does not suspend mandatory control requirements, which could include, as applicable, anti-backsliding requirements associated with the revoked NAAQS. As explained in the previous section, the EPA believes that an approved redesignation to attainment or a redesignation substitute is necessary to lift anti-backsliding requirements associated with a revoked NAAQS. Section 51.1118 clarifies that a clean data determination for the 2008 NAAQS acts to suspend planning requirements associated with the

2008 and less stringent 1997 ozone NAAQS, which have an identical form.

2. Section 51.1118

Commenter (0132) stated that the language in proposed §51.1118 requires clarification about which ozone standard must be attained in order to suspend SIP planning requirements. The commenter believed that this section applies to an area designated nonattainment for the 2008 ozone NAAQS or for any prior ozone NAAQS, so this section must also specifically indicate which ozone NAAQS must be attained in order to suspend planning requirements. According to the EPA's proposal, it will no longer redesignate areas to attainment for prior ozone NAAQS upon revocation of those NAAQS, so it appears that the attainment requirement in §51.1118 is meant to be interpreted as attainment of the 2008 NAAQS. However, this language is unclear and only states "has attained the standard" rather than more specifically stating "attained the 2008 ozone NAAQS." If §51.1118 is instead meant to be applied more generally to all ozone NAAQS, it should be made clearer.

Response: Given the request for further clarity about which ozone standard §51.1118 applies to, the EPA has revised the language in 51.1118 to make it clear that a clean data determination for the 2008 NAAQS acts to suspend planning requirements associated with the 2008 and the less stringent 1997 ozone NAAQS, which both have the same form.

L. What is the relationship between implementation of the 2008 ozone NAAQS and the CAA Title V permits program?

1. Support for first approach for Title V permitting threshold

Commenters (0132, 0163, 0179 and 180) supported the first option, which sets major source Title V thresholds to those applied for RACT and NSR. Commenter (0163) supported option 1 with the minor conforming amendments to the definition of major source in 40 CFR 70.2 and 71.2 as detailed on Page 34225.

Commenter (0132) stated that this approach would provide applicants with clarity and uniformity regarding applicable major source thresholds. Commenter (0163) stated that this approach maintains the consistency which will ultimately simplify permitting and enforcement. Commenter (0163) stated that Option 1 is supported by the fact that these thresholds emanate from the same provisions of the CAA (Part D of Title I), therefore, the intent of the CAA was to keep the thresholds the same. Commenter (0180) urged the EPA to adopt the first approach, because it is consistent with past precedent and compelled by the Act’s anti-backsliding requirements as well as court precedent.

Response: The EPA agrees with these commenters that the major source threshold for title V should be the same as the major source threshold for NSR and RACT, and the EPA is finalizing the proposed revisions to parts 70 and 71 to make that clear. Following revocation of the 1997

ozone NAAQS, major source thresholds for title V will be the same as the major source thresholds applicable for purposes of other requirements, such as RACT and NSR (*i.e.*, the major source threshold associated with the more stringent of the area's classification for the 2008, 1997 and/or 1-hour ozone NAAQS will be the applicable threshold for title V purposes, to the extent that anti-backsliding requirements for the 1997 and/or 1-hour ozone NAAQS apply in the area).

Maintaining consistency between the NSR and title V thresholds in this regard will promote compliance with CAA requirements by providing certainty, consistency and a simpler permitting regime, ensuring that sources subject to major source NSR understand they are also subject to title V, and enabling permitting authorities to identify sources that are potentially subject to major source NSR. The EPA believes a contrary approach would introduce not only complexity, but anomalies, into the permitting program that would be contrary to the purposes and requirements of the Act. To promote effective program implementation and ensure consistency with the CAA, this final rule will amend the relevant provisions of parts 70 and 71 related to application of title V thresholds.

2. Support for the second approach for Title V permitting threshold

Commenters (0130, 0145, 0152, 0158, 0159 and 0166) supported the second approach, in which the major source thresholds for Title V permitting are based solely on an area's classification for the 2008 ozone NAAQS.

Commenter (0159) stated that the second approach would provide relief to small operators and would adequately reflect the classification under the current ozone NAAQS. Commenter (0130) stated that, in this time of resource constraints on both government and private industry, setting the Title V permitting thresholds equivalent to thresholds supported by the area's current classification for the 2008 ozone NAAQS makes good sense. The commenter believed that Title V permits were meant to be a catalogue of all federal requirements that apply to any particular facility. Basing the threshold on the classification for a revoked NAAQS, however, would be unduly harsh and unnecessary, especially in areas where air quality has met the revoked NAAQS for many years. Facilities would need to spend money on the creation of Title V permit applications, would need to pay permit fees and emissions fees, and would need to begin semi-annual compliance certification reporting. In Virginia, the reduction of the Title V thresholds to 1-hour severe NSR thresholds would mean at least an additional 40 Title V facilities. These are mainly small facilities, and the requirements of Title V would be quite burdensome. Additionally, requiring these facilities to comply with Title V mandates would most likely not reduce emissions from the units at these facilities.

Commenter (0145) stated that facilities need to renew Title V permits every five years, and by the time all facilities have updated their permits to reflect the 2008 ozone NAAQS, it is very likely that another ozone NAAQS will have been finalized and permits will again need to be modified to reflect this change.

Commenter (0145) also stated that facilities should not have to include a standard that no longer exists due to revocation in their Title V operating permits. Commenter (0158) stated that once EPA revokes the 1997 ozone standard, and given that the 1-hour standard has already been revoked, the major source thresholds for the current standard designations and classifications should be the relevant factors for determining whether a source is major for ozone precursors for purposes of Title V.

Commenter (0152) stated that the D.C. Circuit's ruling applied only to RACT and NSR and, therefore, should not be of concern in this situation, and anti-backsliding provisions should not be extended to the Title V program. Commenter (0152) stated that, although the EPA's concern is that the D.C. Circuit's ruling stated that the EPA erred in its approach to anti-backsliding by not requiring states to retain, as applicable requirements, all control measures that applied for the 1-hour ozone NAAQS, the Title V program does not create new applicable requirements but simply is a permit to consolidate all existing applicable requirements.

Commenter (0166) stated that the major source thresholds that are redefined due to transition to the 2008 NAAQS are for purposes of NSR, not for Title V purposes.

Response: The EPA recognizes that the approach being adopted does not solely rely on the area's current classification for purposes of determining major source thresholds for title V. The EPA believes there is ambiguity in the intersection between title V and part D as to whether title V should apply the major source threshold of the area's current classification, or the area's classification for purposes of nonattainment NSR and other underlying applicable requirements, when that threshold would be lower. As discussed previously, the EPA believes that it is appropriate under the CAA, and consistent with the EPA's longstanding approach to these programs, for a source which is considered to be "major" for purposes of nonattainment NSR to also be considered "major" for purposes of title V. For the reasons stated previously, the EPA believes maintaining consistency in the major source applicability of the two programs in the context of today's rulemaking, is the best approach to promote consistency and compliance with the purposes and requirements of the CAA.

The EPA is not persuaded by the comments suggesting that the problems with the first approach make it necessary to adopt the second approach. The EPA believes this second approach would introduce not only complexity, but anomalies, into the permitting program that would be contrary to the purposes and requirements of the Act. Areas designated nonattainment for the 2008 ozone NAAQS and the 1997 ozone NAAQS upon the date the 1997 NAAQS is revoked retain anti-backsliding requirements associated with the 1997 ozone NAAQS. Allowing NSR levels to rest upon the classification level of the most recent NAAQS does not accurately address the requirements from the revoked NAAQS that do not go away with revocation of that NAAQS. Areas subject to anti-backsliding requirements for the revoked 1997 ozone NAAQS now have two ways to address their thresholds: either formal redesignation to attainment for the 2008 ozone NAAQS, or the use of a redesignation substitute for the revoked NAAQS. Formal redesignation to attainment for the 2008 ozone NAAQS would transition the area from nonattainment NSR to PSD. Use of a redesignation substitute to demonstrate that the area has attained the revoked NAAQS allows the area to transition NSR levels to the next most stringent

level of NSR – whether those levels are set by the current ozone NAAQS or from another revoked ozone NAAQS. The EPA believes that this approach prevents backsliding in the area. Where the EPA is at in the review of the current ozone NAAQS does not impact this program.

3. Whether or not Title V is a "control" within the meaning of §172(e)

Comment: Support that Title V is a "control" within the meaning of §172(e)

Commenter (0180) stated that Title V permits represent "controls" for purposes of the Act's anti-backsliding requirements and, as such, the EPA should abide by *SCAQMD* and use the same major source thresholds for administering the Title V permit program as the agency proposes to for the NSR and RACT programs. Commenter (0180) stated that Title V permits serve as independently enforceable compliance assurance mechanisms that constrain emissions by sources and accordingly should be seen as control measures. Commenter (0180) stated that since Title V permits collect multiple control requirements in one document, there is no reason for the agency to depart from *SCAQMD* and treat Title V permitting classifications differently than, for example, NSR or RACT permitting. Commenter (0180) cited *SCAQMD* and suggested that Title V should be considered a control measure because it is highly improbable that if Title V were not present there would be no effect on ozone levels. Commenter (0180) also stated that since both NSR and Title V restrictions increase as the nonattainment classification worsen, these identical structures underscore the importance of treating Title V as a control for purposes of the Act's anti-backsliding requirements.

Comment: Support that Title V is not a "control" within the meaning of §172(e)

Commenters (0132, 0145, 0151, 0152, 0159, and 0179) stated the Title V program is not a control in and of itself. Commenter (0132) stated that the EPA has consistently stated that Title V is a separate program when compared to the requirements of Title I. Commenter (0152) stated that the history of Title V rulemaking is clear on this point. Commenter (0179) stated that Title V is not a control since the EPA has stated repeatedly that no substantive controls are imposed simply by having a Title V permit. Commenter (0145) stated that Title V should not be considered a "control" in light of the fact that Title V is not intended to impose new substantive air quality control requirements but is instead intended to assure compliance with all existing applicable requirements. Commenter (0151) stated that the legislative history of the 1990 CAA Amendments is clear that Title V is an administrative means of collecting substantive applicable control requirements under the CAA in a single document; therefore, the requirement for a Title V permit is not itself a "control requirement."

Response: It is not necessary to resolve this question at this time, because the purposes and requirements of the CAA Section 172(e) are fulfilled by establishing title V permitting thresholds to be the same as the permitting thresholds for underlying applicable requirements, particularly NSR. Since the EPA is taking final action adopting the interpretation that major source definitions should be the same for both programs, the above-described issue does not need to be resolved at this time.

4.0 Statutory and Executive Order Reviews

A. Environmental Justice

Comment: Commenter (0180) cited Executive Order 12898 and stated the EPA's analysis does not look at the relevant question: whether this rule disproportionately affects minority and low-income populations. Commenter (0180) stated that, if ozone nonattainment areas cover disproportionately large minority and low-income populations, it is irrelevant that NAAQS are designed to protect all segments of the population, it is the *effects*, not the intent, that matters. Commenter (0180) referenced two EPA studies and stated that greater percentages of racial minorities than of white populations lived in ozone nonattainment areas in the early 1990s and that there is evidence of an increase in risk of O_3-related health effects for Blacks and Hispanics and people with lower socioeconomic status. Commenter (0180) objected to the lack of analysis as to what the policy decisions in the rule mean for prompt attainment of the ozone standards.

Response: The EPA conducted a proximity analysis, as part of the NAAQS review, that examined socio-demographic attributes of populations in counties currently exceeding the proposed ozone standards (2011 – 2013 design value). Results show that the percent of minority, Hispanic, and low income populations in counties most likely to benefit from reductions in ozone concentrations is similar to national averages. However, because we do not know the distribution of emissions following the rule we are unable to provide an analysis of changes in the distribution of outcomes following the implementation of the rule.

The following two tables are from the RIA[36] for the ozone NAAQS review.

[36] Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone, November 2014, available at *http://www.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf*

Table 9-1. Summary of Population Totals and Demographic Categories for Areas of Interest and National Perspective

Demographic Summary	Population	White	African American	Native American	Other or Multiracial[1]	Minority/Non-White Hispanic[a]
Area of Interest Total						
65 ppb	221,431,286	153,706,027	30,429,108	1,726,110	35,570,041	67,725,259
70 ppb	193,316,836	132,112,738	27,193,155	1,488,364	32,522,579	61,204,098
% of Area of Interest Total						
65 ppb		69%	14%	1%	16%	31%
70 ppb		68%	14%	1%	17%	32%
National Total	312,861,256	226,405,205	39,475,216	2,952,087	44,028,748	86,456,051
% of National Total		72%	13%	1%	14%	28%

[a] The race *Minority/Non-White Hispanic* field is computed by subtracting the white population from the total population.

Table 9-2. Summary of Population Totals and Demographic Categories for Areas of Interest and National Perspective

Demographic Summary	Linguistically Isolated	Age 0 – 4	Age 0 - 17	Age 65+	Without a HS Diploma	Low Income[2]
Area of Interest Total						
65 ppb	13,072,109	14,695,948	54,008,810	27,163,990	20,914,891	67,027,700
70 ppb	12,179,896	12,849,637	47,296,147	23,518,071	18,495,474	58,296,224
% of Area of Interest Total						
65 ppb	6%	7%	24%	12%	14%	30%
70 ppb	6%	7%	24%	12%	15%	30%
National Total	19,196,507	20,465,065	75,217,176	40,830,262	30,952,789	101,429,436
% of National Total	6%	7%	24%	13%	15%	32%

[1] Appendix 9A clarifies that "other or multiracial" is derived from individual reporting on Census forms and includes citations to the specific 2010 Census data used in this analysis.

[2] Appendix 9A clarifies that "low income" in this analysis is defined as income two times the poverty line or less.

5.0 Other Comments

A. General

1. Improving the CAA

Comment: Commenter (0119) questioned whether the final rule should discuss the possibility of improving the CAA to create a mechanism to more simply, efficiently, and effectively achieve the new standard.

Response: Since the CAA was put into place more than 40 years ago the CAA has experienced many accomplishments such as: cut pollution as the US economy has grown, environmental damage from air pollution has been reduced; Americans breathe less pollution and face lower risk of premature death and other Serious health effects; and environmental damage from air pollution is reduced. The EPA is aware that since the CAA was last amended in 1990s there has been discussion over the years in Congress about amending the CAA. The EPA also recognizes that the knowledge of air pollution has evolved over the years.

2. Most proposed rule elements are unnecessary

Comment: Commenter (0151) stated that most of the elements of the proposed rule are unnecessary because the 2008 ozone NAAQS is the same as the 1997 standard, just more stringent. Commenter (0151) stated that the EPA's principal concern should be preventing backsliding (i.e., removal of SIP requirements adopted under section 182(b) which have been approved), rather than requiring states to replicate planning and maintenance activities for the 1997 ozone standard, which should logically be directed at planning for attainment of the 2008 (and then, the expected 2014) ozone NAAQS.

Response: The EPA is considering ways rules are written so that the reading experience is improved. One way to accomplish this goal is to highlight rule elements that change only and keep the historical and background information stagnant. Another way this could be accomplished it so provide a summary of areas we are seeking comment on with associated page number.

3. Menu of Control Measures

Comment: Commenter (0152) stated that the EPA references an updated 2012 "Menu of Control Measures" available at *http://www.epa.gov/airquality/ozonepollution/SIPToolkit/*, but they are unable to locate this document at the referenced website.

Response: The EPA appreciates the commenter pointing out this error. In the final rule, the "Menu of Control Measures for NAAQS Implementation" web address will be indicated as: *http://www.epa.gov/air/criteria.html*

B. Support for other commenters

Commenter (0174) supports the comments submitted by commenters (0151).

Commenter (0162) supports the comments submitted by commenters (0122 and 0166)

C. Codification error

Comment: Page 34238

Commenter (0169) noted a codification error on page 34238 of the proposed SIP Requirements Rule:

> "(a) Baseline emissions inventory for RFP plans," should be codified as 51.1110(b). Currently codified items 51.1110(b) through 51.1110(d) should be recodified as 51.1110(c) through 51.1110(e). Item 51.1110(e) is even referenced in 51.1110(a)(5), but no 51.l110(e) currently exists in the proposed rule text.

Commenter (0166) similarly stated that the subsections of § 51.1110 are mis-numbered, with two subsections enumerated "(a)."

Response: The EPA has reviewed the language in the proposal and has discovered numbering errors. Corrected numbering of the section will appear in the final rule.

Comment: RFP requirements

Commenter (0166) stated that the proposed regulatory language on RFP requirements conflicts internally and explained as follows: If the EPA decides to retain the language of proposed 40 CFR § 51.1110, it will need to reconcile the provisions of the first subsection (a), which states that "[t]he RFP requirements specified in CAA section 182 for that area's classification shall apply," with subsection (a)(2), which indicates that those section 182 requirements do not in fact apply to Moderate and above nonattainment areas that have an approved VOC RFP plan for a prior ozone NAAQS (or have a determination of attainment).

Response: The EPA appreciates the commenter's suggestion and has reviewed the language and believes the reference to be correct. CAA section 182 provides requirements for nonattainment areas of all classifications and is therefore appropriate.

D. Los Angeles-South Coast Air Basin

Commenter (0176) made the following suggestions:

The Challenge to Ozone Implementation is a challenge to the built urban environment. Los Angeles-South Coast Air Basin Area is EXTREME.

How do we control air quality when land use planning is not a federal issue. Instead, Transit Oriented Development with bus and rail were developed as an answer.

Your concentration on vehicles dissuades you from approaching those conditions of density. We are now faced with more density, more vehicles and a poor transit class.

Transportation patterns with jobs and housing were never identified. It is near impossible in the second largest city in the country-the City of Los Angeles.

Throw out Transportation Plans when you have no basis in reality for them.

Approach Land Use designations with as much intensity as vehicles. Air rights are an issue as they allow Signage and especially digital signage. The contributors to ozone need proper identification.

Oil and gas fields, whether currently drilled or capped is an issue. In the City of Los Angeles, where the old oil fields were never identified and we cannot rely on any paperwork to show proper capping, outgassing is an issue. With the flir cameras, that can be identified. It is not required even when levels are near explosive.

What is the effect of fracking aka hydraulic fracturing.

Are landfills accepting hazardous (medical) waste.

Measure the air around these concentrated areas.

Few monitoring stations exist. Source points are not identified. It is just assumed that the vehicle is the culprit.

Look at the railroads and their rules for maintenance. You may need to work cooperatively with the FRA Federal Railroad Administration on their rules over engines.

We have that problem with the Metrolink Maintenance Yard near Downtown Los Angeles. There is no state jurisdiction over their Air Quality and no SIP can be implemented

Analyze weather patterns. We see no discussion on that aspect of air movement.

Any modeling needs to be regionally specific.

We do not find that the Regional Air Quality Management Districts' outreach to the

public sufficiently or engage elected officials to understand the requirements of the CAA. In other words, what financial effect is assigned to non-attainment.

Credit reductions are a financial instrument as is FAR Floor Area Ratio rights.

Offset Credits from any outside area does not change the health effects on persons, animals, wildlife, birds, plants and property.

The financial game is not the way to approach attainment.

Response: The EPA neither agrees nor disagrees with this commenter's comments. We do not see any comments that are relevant to the rulemaking under consideration, for example, the suggestion to "throw out" transportation plans.

Also, the EPA cannot decipher what the commenter means in several instances, for example, regarding signage, digital signage, and land use designations, nor how that might relate to what the commenter refers to as air rights.
Further, the EPA believes that the commenter is working under the mistaken understanding that the rulemaking under consideration contains an air quality plan. It does not. On the contrary, this rulemaking sets requirements for air quality planning that will be done at the state and local level, with multiple opportunities for public input. Comments about pollutant emissions from specific industrial sources, such as oil and gas fields or railroads, as well as modeling and monitoring of air pollutants and the weather patterns in a particular nonattainment area, would more appropriately be directed to the relevant state or local agency in the context of the air quality planning for that area, or in the context of any air permitting process that specific sources need to undergo.

The commenter's concerns regarding the extent to which local air districts engage the public or elected officials is not germane to this current rulemaking. However, when the state and local air agencies prepare air quality plans for a particular nonattainment area, as required under this rulemaking, they are required to follow certain minimum requirements regarding public outreach. Proof that this obligation has been met must also accompany any air quality plans submitted to the EPA. Furthermore, when the EPA proposes to take action on such plan submittals, the EPA follows federal requirements for public outreach.

The EPA believes that the commenter has misunderstood several phrases in the rule proposal. What the commenter refers to as "credit reductions" and seems to interpret as a reference to financial terminology seems to be actually a reference to creditable pollution emission reductions. Likewise, the commenter uses the phrase "offset credits from any outside area," and apparently concludes that such a financial activity does not improve human health and the environment. However, the EPA believes that the phrase the commenter is responding to is actually a reference to the EPA's proposal to require that the pollutant emissions reductions required by the CAA in a nonattainment area must occur within that area and cannot be credited from an outside area. The EPA anticipates that, had the commenter understood this aspect of the proposal, the commenter would not have raised objections to what the commenter perceived as

some form of financial regulation.

Regardless of any possible misunderstanding on the part of the commenter between pollution credits and credit in the financial sense, the EPA nonetheless wants to clarify for the commenter that the costs of responding to a nonattainment designation is largely dependent upon methods that the state and local air agencies determine are best to address the air quality problem in the area.