

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[E-Docket ID No. OAR-2003-0079, FRL-7895-3]

RIN 2060-AJ99

Nonattainment Major New Source Review Implementation Under
8-Hour Ozone National Ambient Air Quality Standard:

Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of final action on reconsideration.

SUMMARY: On April 30, 2004, the EPA (we)¹ took final action on key elements of the program to implement the 8-hour ozone national ambient air quality standard (NAAQS or 8-hour standard). In that final action, we addressed certain implementation issues related to the 8-hour standard, including the nonattainment major New Source Review (NSR) program mandated by part D of title I of the Clean Air Act ("the Act" or "CAA"). Following this action, EarthJustice filed a petition on behalf of several organizations requesting reconsideration of several aspects of the final rule including implementation of the nonattainment major NSR

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In this preamble, the terms "we" and "us" refers to the EPA, and "our" refers to EPA's. All other entities are referred to by their respective names (e.g., commenter).

program, among other issues. By a letter, dated September 23, 2004, we granted reconsideration of three issues raised by the petition for reconsideration filed by Earthjustice. One of these issues relates to implementation of the major NSR program.

On April 4, 2005, in response to the request for reconsideration relating to aspects of the nonattainment major NSR program for the 8-hour standard, we proposed to retain the final rule as promulgated on April 30, 2004. (70 FR 17018). We requested comment on and provided additional information related to whether we should interpret the Act to require areas to retain major NSR requirements that apply to certain 1-hour ozone nonattainment areas in implementing the 8-hour standard. We also requested comment on whether we properly concluded that a State's request to remove 1-hour major NSR provisions from its State Implementation Plan (SIP) will not interfere with any applicable requirement within the meaning of section 110(1) of the Act.

Today, we are re-affirming our April 30, 2004 final rule. We conclude that the requirements for nonattainment major NSR under the 8-hour standard will be based on a nonattainment area's classification for the 8-hour standard, and that States may remove their 1-hour major NSR programs from their SIPs now that we have revoked the 1-hour

standard. We believe that our conclusions are consistent with the Act, including section 110(1), our anti-backsliding policy we established for the 8-hour standard, and the ability of areas to achieve reasonable further progress (RFP) and attainment.

DATES: This final action is effective on [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA docket for this action is Docket ID No. OAR-2003-0079. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air Docket, Environmental Protection Agency, EPA West, 1301 Constitution Avenue, NW, Room B-102, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by the subject rule for today's action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry Group	SIC ^a	NAICS ^b
Electric Services.....	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining.....	291	324110
Industrial Inorganic Chemicals.....	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals.....	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products.....	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids...	132	211112
Natural Gas Transport.	492	486210, 221210

Pulp and Paper Mills..	261	322110, 322121, 322122, 322130
Paper Mills.....	262	322121, 322122
Automobile Manufacturing.....	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals.....	283	325411, 325412, 325413, 325414

^aStandard Industrial Classification.

^bNorth American Industry Classification System. Entities potentially affected by the subject rule for today's action also include State, local, and Tribal governments that are delegated authority to implement these regulations.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final action will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this notice will be posted in the regulations and standards section of the our NSR home page located at <http://www.epa.gov/nsr>.

C. How is this notice organized?

The information presented in this notice is organized as follows:

I. General Information

A. Does this action apply to me?

B. Where can I get a copy of this document and other related information?

C. How is this notice organized?

II. Background

III. Today's Final Action on Reconsideration

A. Final Decision

B. Effective Date

C. Significant Comments: Summary and Response

IV. Statutory and Executive Order Reviews

A. Executive Order 12866--Regulatory Planning and Review

B. Paperwork Reduction Act

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

D. Unfunded Mandates Reform Act

E. Executive Order 13132--Federalism

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

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

H. Executive Order 13211--Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

I. National Technology Transfer and Advancement Act

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

Populations

K. Congressional Review Act

V. Statutory Authority

VI. Judicial Review

II. Background

On July 18, 1997, we revised and strengthened the ozone NAAQS to change from a standard measured over a 1-hour period (1-hour standard) to a standard measured over an 8-hour period (8-hour standard). Previously, the 1-hour standard was 0.12 parts per million (ppm). We established the new 8-hour standard at 0.08 ppm. (62 FR 38856). Following revision of the standard, we initially promulgated a rule that provided for implementation of the 8-hour standard under the general nonattainment area provisions of subpart 1 of Part D of the Act. (62 FR 38421). Subsequently, the Supreme Court ruled that our implementation approach was unreasonable because we did not provide a role for the generally more stringent ozone-specific provisions of subpart 2 of Part D of the Act in implementing the 8-hour standard. See Whitman v. Amer. Trucking Assoc., 531 U.S. 457, 471-476, 121 S.Ct. 903, 911-914 (2001). The Court remanded the rule to us to develop a reasonable approach for implementation. Id.

On June 2, 2003, we proposed various options for

transitioning from the 1-hour to the 8-hour standard, and for how the 8-hour standard would be implemented under both subpart 1 and subpart 2. (68 FR 32802). On August 6, 2003, we published a notice of availability of draft regulatory text to implement the 8-hour standard. (68 FR 46536). Among other things, this proposed rule included certain provisions for implementing major NSR.

Specifically, we proposed that major NSR would generally be implemented in accordance with an area's 8-hour ozone nonattainment classification, but we would provide an exception for areas that were designated nonattainment for the 1-hour standard at the time of designation for the 8-hour standard. If the classification for a 1-hour nonattainment area was higher than its classification under the 8-hour standard, then under the proposed rule, the major NSR requirements in effect for the 1-hour standard would have continued to apply under the 8-hour standard even after we revoked the 1-hour standard. (68 FR 32821).

On April 30, 2004, we promulgated Phase I of the new implementation rule. (69 FR 23951). In response to comments received on the proposal, we revised the implementation approach for major NSR under the 8-hour standard. Specifically, we determined that major NSR would be implemented in accordance with an area's 8-hour ozone

nonattainment classification. For those areas that we classify marginal and above, major NSR is implemented under subpart 2. We also indicated that, when we revoke the 1-hour standard, a State is no longer required to retain a nonattainment major NSR program in its SIP based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard. We further indicated that we would approve a request to remove these requirements from a State's SIP because we determined, based on section 110(1) of the Act, that such changes will not interfere with any applicable requirements of the Act, including a State's ability to reach attainment of the 8-hour standard or RFP towards that standard. (69 FR 23985). We noted that States will be required to implement a major NSR program based on the 8-hour classifications. We also emphasized that emission limitations and other requirements in major NSR permits issued under 1-hour major NSR programs will remain in effect even after we revoke the 1-hour standard. (69 FR 23986).

Following publication of the April 30, 2004 final rule, the Administrator received three petitions, pursuant to section 307(d)(7)(B) of the Act, requesting reconsideration

of certain aspects of the final rule.² On June 29, 2004, Earthjustice submitted one of the three petitions that we received. This petition seeks reconsideration of certain elements of the Phase I Ozone Implementation Rule, including elements of the major NSR provisions. With respect to major NSR, Petitioners contend that the final rules are unlawful because the rules violate section 110(1) and section 172(e) of the Act by not requiring 8-hour ozone nonattainment areas to continue to apply major NSR requirements based on the area's prior 1-hour ozone nonattainment classification. Petitioners also allege that we acted unlawfully by stating that we will approve a State's request to remove 1-hour requirements from the SIP based on our finding that such a revision would not violate section 110(1) for any State. Petitioners assert that these major NSR provisions and our rationale for them were added to the final action after the close of the public comment period. Thus, Petitioners claim, we failed to provide notice and opportunity for

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Petitioners are: (1) Earthjustice on behalf of the American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy; (2) the National Petrochemical and Refiners Association and the National Association of Manufacturers; and (3) the American Petroleum Institute, American Chemistry Council, American Iron and Steel Institute, National Association of Manufacturers and the U.S. Chamber of Commerce.

public comment concerning these provisions as required under section 307(d)(5) of the Act.

On September 23, 2004, we granted reconsideration of three issues raised in the Earthjustice Petition, including the NSR issues. In an action dated February 3, 2005, we issued a Federal Register notice addressing two of those issues: (1) The provision that section 185 fees would no longer apply for a failure to attain the 1-hour standard once we revoke the 1-hour standard; and (2) the timing for determining what is an "applicable requirement." (70 FR 5593). On May 26, 2005, we took final action on these issues. (70 FR 30592).

On April 4, 2005, as part of our reconsideration process, we requested comment on: (1) whether we must interpret the Act to require States to continue major NSR requirements under the 8-hour standard based on an area's higher classification under the 1-hour standard; and (2) whether revising a State SIP to remove 1-hour major NSR requirements is consistent with section 110(1) of the Act. However, we proposed to retain the nonattainment major NSR requirements as outlined in our April 30, 2004 final rules. (70 FR 17018).

III. Today's Final Action on Reconsideration

A. Final Decision

Today, we re-affirm our April 30, 2004 final rules. Accordingly, States must issue permits to regulate construction and major modifications of major stationary sources consistent with the major NSR requirements that apply based on that area's classification under the 8-hour standard.³ If a State currently lacks an approved NSR program that applies for the 8-hour standard, the State must submit an NSR program to EPA for our approval. The deadline for submission will be established in Phase II of the ozone implementation rule. Moreover, we find that section 110(1) does not preclude us from approving a State's request to revise its SIP to remove 1-hour nonattainment major NSR requirements.

After reviewing comments we received on the proposal, we continue to interpret the Act as not requiring States to retain major NSR requirements related to the 1-hour standard in implementing nonattainment major NSR for the 8-hour standard.⁴ Consistent with the mandates of the Supreme

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In implementing a program consistent with the major NSR requirements that apply based on that area's classification under the 8-hour standard, section 116 of the Act allows States to adopt regulations which are not less stringent than the federal minimum requirements.

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On April 18, 2005, we held a hearing to afford the public an opportunity to provide oral testimony on our reconsideration of the nonattainment major NSR provisions in the Phase I Ozone Implementation rule. One person attended the hearing

Court in Whitman v. American Trucking, we crafted a reasonable approach for implementing major NSR requirements under the 8-hour standard. 531 U.S. 457 (2001). Moreover, we interpret the requirements of section 172(e) as not applying in these circumstances, and believe that we have reasonably interpreted this provision in crafting our anti-backsliding policies for the 8-hour standard to exclude major NSR programs as a "control measure." We further believe that basing an area's major NSR requirements on that area's classification under the 8-hour standard will assure that any new emissions from the construction or modification of major stationary sources will be sufficiently mitigated to ensure that such emissions will not interfere with RFP or attainment.

B. Effective Date

In granting reconsideration of the EarthJustice petition, the Administrator elected not to stay or vacate the existing regulations. Accordingly, these requirements remained in effect following the April 30, 2004 promulgation. Several environmental, industry, and

and provided testimony supporting the concerns raised in the Earthjustice petition. Following the public hearing, we received public comment letters from approximately 20 individuals or groups. Section III. B. of this preamble contains a summary of significant comments we received and our responses to those comments.

governmental petitioners subsequently challenged the April 30, 2004 rule implementing the 8-hour ozone standard. South Coast Air Quality Management District v. U.S. EPA, No. 04-1200 (and consolidated cases) (D.C. Cir.). After we granted portions of the EarthJustice petition for reconsideration, the Court, at our request, severed the challenges to the three issues for which EPA granted reconsideration from the main consolidated cases challenging the implementation rule. However, because we committed to an expeditious determination of the three issues under reconsideration, the parties subsequently agreed that it would serve judicial economy and the parties' resources to consolidate the severed case relating to the three issues under reconsideration back into the main case challenging our April 30, 2004 implementation rule. We filed a motion seeking such consolidation. The EPA represented in that motion that it would not take final action on any SIP submittals relating to those provisions earlier than 30 days after it has signed a final action on the aspect of the reconsideration to which the SIP pertains. Accordingly, we will not take final action on a State's request to revise its SIP relative to the 1-hour and 8-hour nonattainment major NSR programs until that time.

C. Significant Comments: Summary and Response

In our April 4, 2005 proposal, we requested comment on five issues related to our reconsideration:

(1) Our determination that the Act does not require States to apply major NSR requirements under the 8-hour standard based on an area's higher classification under the 1-hour standard after we revoke the 1-hour standard;

(2) Our interpretation that the term "control" as used in section 172(e) of the Act does not include major NSR requirements;

(3) Our conclusion that a State's removal of 1-hour major NSR programs from its SIP will not interfere with any applicable requirements of the Act including attainment and RFP;

(4) Our discussion regarding State and local agency emissions projections used for RFP and attainment, including whether the statements we have made regarding those emissions projections are accurate; and

(5) Information on any instance in which a State or local agency relied on major NSR as a control measure to reduce overall base year emissions in a rate of progress (ROP) plan or attainment demonstration.

Below we consolidated the comments that we received to these questions into four main topic areas, and provide our response to those comments.

1. Does the Act require States to apply major NSR requirements under the 8-hour standard based on an area's higher classification under the 1-hour standard?

a. Comments

Several commenters supported our position that the Act does not require States to apply major NSR requirements under the 8-hour standard based on an area's higher classification under the 1-hour standard. Nonetheless, several commenters disagreed with our position, that section 172(e) is an expression of Congressional intent that States may not remove control measures in areas which are not attaining a NAAQS when we revised that standard to make it more stringent, because the plain language of section 172(e) applies only when we make a NAAQS less stringent. One commenter stressed that section 172(e) could not logically be applied to a new 8-hour standard. Moreover, many of these commenters agreed with us, that even if section 172(e) applies to the 8-hour implementation rule, we properly concluded that the major NSR program does not impose emissions reduction "controls."

One commenter indicated that we would violate equal protection laws if we established different requirements for different areas based on their attainment status under the revoked 1-hour standard when both are classified the same

under the 8-hour standard. Another commenter stated that we appropriately looked into the Congressional history of the Act to determine the underlying purpose of the major NSR program and found that its purpose is to manage growth in a manner consistent with the goals and objectives of the Act. (70 FR 17022), H.R. Rpt. 95-294 at 210 (May 12, 1977).

Conversely, several commenters contend that our decision that States need not retain nonattainment major NSR requirements based on the area's classification under the 1-hour standard is contrary to the two anti-backsliding provisions in the Act, sections 172(e) and 193. 42 U.S.C. sections 7502(e) and 7515. Several commenters also alleged that in a Senate floor debate on the 1990 amendments, Senator John Chafee described the purpose of section 193 of the Act as "intended to ensure that there is no backsliding on the implementation of adopted and currently feasible measures that EPA has approved as part of a [SIP] in the past, or that EPA has added to State plans on its own initiative or pursuant to a court order or settlement." 136 Cong. Rec. S17, 232, S17, 237 (Oct 26, 1990). The commenters claim that our narrow interpretation of control measure cannot be reconciled with this broad definition. At least one commenter believes that the final rule is contrary to the provisions of the Act, because it allows major

sources in 1-hour nonattainment areas that are designated with a lower 8-hour nonattainment classification to be subject to less stringent NSR requirements by raising the tonnage threshold for defining a major source and lowering the required offset ratio.

b. Response

As stated in our April 4, 2005 notice on NSR reconsideration, after reviewing a variety of information including the statutory requirements, Congressional intent as expressed in legislative history, the history of the NSR regulatory program, and our actions on 1-hour ozone ROP plans and attainment demonstrations in general as they relate to nonattainment major NSR programs, we concluded that the Act does not require States to retain a nonattainment program in their SIPs based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard. After considering the comments received on this issue that both support and oppose our position, we continue to believe that our conclusion on this issue is correct.

We agree with commenters that section 172(e) does not apply to the requirements for the 8-hour ozone standard. Nonetheless, because the Act does not specifically address what requirements apply when we strengthen a NAAQS, we

stated that we viewed the provisions in section 172(e) as an expression of Congressional intent that States may not remove control measures in areas which are not attaining a NAAQS when EPA revises that standard to make it more stringent. (70 FR 17021). We continue to believe that Congress intended States to retain control measures in SIPs when we strengthen a NAAQS, but we do not believe that Congress intended to restrict States from amending their SIPs to adjust for future management of growth based on current day air quality needs.

We agree with the commenters that even if section 172(e) applies when we strengthen a NAAQS, it would still not preclude a State from adjusting its nonattainment major NSR requirements because major NSR is not a control within the meaning of section 172(e) of the Act. We discuss this interpretation in more detail in section III.C.2. of today's preamble. Moreover, we disagree with commenters who indicate that our final rules violate section 193 of the Act. First, as noted, we do not believe that NSR programs are "control measures" within the meaning of section 193. Secondly, section 193 applies to certain requirements that were in effect before 1990. Today's final rules address how the post-1990 requirements contained in subpart 2 of the Act will apply in 8-hour nonattainment areas.

Before 1990, the nonattainment major NSR requirements were contained in section 173 of the 1977 CAA and they did not include the higher offset ratios and lower major stationary source thresholds found in subpart 2 of the 1990 CAA. In 1990, Congress added additional requirements to section 173 and added subpart 2. Nothing in today's final rule allows any jurisdiction to adopt nonattainment NSR requirements for the 8-hour standard that do not meet the minimum requirements the State used to satisfy section 173 before 1990. Accordingly, section 193 of the Act is not implicated by our final action.

We disagree with the commenter that argues that Congress meant for section 193 of the Act to have broader application. In fact, by its terms, section 193 precludes broader application at least as it relates to subpart 2 requirements. Congress added the subpart 2 requirements at the same time it added section 193. Congress expressed an intent to exclude the new requirements it added in 1990 by limiting section 193 to pre-1990 requirements. The clear intent of this action is that Congress did not mean to use section 193 to limit the ability of States to revise SIPs relative to subpart 2 requirements. Instead, Congress added section 110(1) to the Act to guide such SIP changes. Section 110(1) allows States to make changes to a State SIP

with respect to measures not covered by section 193 if the change does not interfere with any applicable requirement concerning attainment and RFP or any other applicable requirement of the Act. We discuss how our final rule satisfies the requirements of section 110(1) of the Act in section III.C.3. of this preamble.

Viewing these two statutory changes in section 193 and section 110(1) together, Congress expressed an intent to have the pre-1990 requirements establish the foundation for the nonattainment program. However, Congress did not expressly require that States retain subpart 2 requirements, which were added by the 1990 Amendments, in all circumstances. Accordingly, we reject the alternative interpretations expressed by commenters which essentially result in sections 110(1), 172(e), and 193 of the Act as having identical meanings notwithstanding their different wording.

In Chevron v. NRDC, 467 U.S. 837 (1984), the Supreme Court considered a challenge to EPA regulations implementing the NSR program which defined the term "source." The Court concluded that neither the statutory language nor legislative history revealed Congress' intent regarding the meaning of the term, and observed that Congress had intended to accommodate competing objectives but did not do so with

specificity in its statutory language. Under these circumstances, the Court upheld EPA's regulations as a reasonable accommodation of competing interests because the agency considered the matter in a detailed and reasoned fashion, and the decision involved reconciling conflicting policies. Id. at 865. The Court concluded that EPA's regulations reasonably sought to accommodate progress in reducing air pollution with economic growth despite the fact that EPA's regulatory changes would result in fewer sources going through major NSR. Id. at 866.

Here, for the 8-hour standard, the Supreme Court directed us to develop a reasonable approach for implementing subpart 2 of Part D of the Act in implementing the 8-hour standard. Whitman v. Amer. Trucking Assoc., 531 U.S. 457, 471-76 (2001). For purposes of implementing major NSR, we considered whether States should be required to implement subpart 2 in accordance with an area's previous classification under the 1-hr standard, or with its new classification under the 8-hour standard. After determining that either approach would be consistent with the Act and Congressional intent, we selected, and now re-affirm, the latter approach. We choose to require States to implement major NSR based on an area's classification under the 8-hour standard because we believe that such a classification

better reflects the current day air quality needs of the area. Additionally, like the plantwide definition of "source" at issue in Chevron, this approach allows States to retain flexibility to better balance environmental objectives with economic growth. "When a challenge to an agency construction of a statutory provision centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." Chevron v. NRDC, 467 U.S. at 866.

2. Does the term "control" as used in section 172(e) include major NSR requirements?

a. Comments

Several commenters agree that major NSR programs are not "controls" that must be preserved in implementing the 8-hour standard. Some reasoned that major NSR does not contribute to emissions reductions below baseline levels. Others contend that "controls" and "growth measures" have distinct meanings and that "controls" are designed to target existing emissions. Others reasoned that if Congress was referring to all requirements within a SIP by using "controls" in section 172(e), then Congress simply could have said that no SIP requirements can be relaxed when a standard is relaxed. For this reason, the commenters agree with EPA that by limiting section 172(e) to control measures

Congress intended that only some SIP requirements would continue when a standard is relaxed, and major NSR is not one of these requirements. Importantly, one commenter reasoned that greater offset ratios may discourage growth altogether and that areas with slightly eased offset ratios may in fact experience more growth which would theoretically result in more offset reductions in the area than would occur if higher offset ratios were imposed.

Other commenters argued that the structure of the Act and its legislative and regulatory history clearly supports the intent that the major NSR permitting program is a "growth measure," rather than a "control measure." One commenter pointed out that our conclusion that NSR is not a "control measure" is clear in the context of section 175A of the Act maintenance plans. (68 FR 25418, 25436).

One commenter participated in the regulatory development process for Illinois' RFP and nonattainment NSR SIP programs. The commenter indicates Illinois did not intend its nonattainment NSR rules (i.e., 35 Ill. Adm. Code part 203) to be a "control measure," but rather a procedural methodology to be used under defined circumstances.

Conversely, several commenters disagreed with our assertion that the nonattainment NSR program is not a "control" requirement or measure. Some commenters reasoned

that we drew an artificial distinction between a "growth measure" and a "control measure." The commenters contend that our interpretation is too limited as they believe that NSR operates both to reduce emissions and to control emissions growth.

One commenter asserts that EPA did not provide evidence substantiating our definition of "control" and why it does not include "growth measures." The commenter further stated that we never discuss why it limits the reading of section 172(e) solely to measures that reduce emissions to assure attainment.

Several commenters stated that nonattainment NSR imposes "controls" through the offset requirement and that there is legislative support for this position where the NSR program is described as a "graduated control program" involving increasingly protective requirements for higher classifications. One commenter reasoned there is nothing in section 172(e) or elsewhere in the Act that limits the definition of control to programs whose benefits can be quantified and accounted for by a State in its attainment demonstration. Another commenter stated that NSR is a control measure because offsets are certain and are obtained from the same nonattainment area.

Two commenters reiterate comments raised by

Earthjustice's petition that we characterized NSR as a pollution control measure in briefs we submitted to the court. The commenters stated that an emission limitation is a "control measure" or "requirement." The commenters believe an interpretation that NSR is merely a "growth measure" is at odds with legislative history indicating that Congress sought to foster the development of control technology when it enacted Prevention of Significant Determination (PSD) and nonattainment NSR.

One commenter cited several Federal Register notices in which we analyzed changes to a State's SIP in light of section 193 requirements and argued that we would have not needed to evaluate whether a SIP change satisfies section 193 unless NSR is a "control requirement."

b. Response

As we previously stated, Section 172(e) does not apply to the requirements for the 8-hour ozone standard. In this action, we are not attempting to assign a comprehensive definition to the term "controls" as used in section 172(e) of the Act. Rather, we interpret the term solely as it relates to our anti-backsliding policy, and whether Congress would have intended States to retain the major NSR program as imposed on 1-hour ozone nonattainment areas as far back as 1990 in implementing the new, more stringent 8-hr ozone

NAAQS.

The term "controls" as used in section 172(e) of the Act is ambiguous. As we stated in our April 4, 2005 proposal, Petitioners and others present a possible interpretation of this term. Nonetheless, based on our review of Congressional history and the structure of the Act, we believe Congress' primary purpose in creating the major NSR program was to manage growth in a way that balances economic development with the air quality needs of specific nonattainment areas.

Just as the Supreme Court recognized in Chevron, Congress intended to accommodate the competing objectives of progress in reducing air quality with economic growth, but did not always reconcile both of those interests with specificity in its language. We looked at several sections of the Act for direction in interpreting the term "control" in Section 172(e). (70 FR 17018, 17022). In particular, we looked at the Section 172(a)(2) requirement that areas attain "as expeditiously as practicable." Unlike control measures, such as reasonably available control technology (RACT) and transportation control measures (TCM), we do not believe that Congress intended to link the major NSR program to the section 172(a)(2) requirement that areas attain "as expeditiously as practicable." This is evident by

Congress's recognition and acceptance that economic growth will result in "some worsening of air quality or delay in actual attainment ..." See H.R. Rpt. 95-294, 214-215 (May 12, 1977). We distinguished Sections 172(c)(1) and (c)(6) which require implementation of all reasonably available control measures as expeditiously as practicable to provide for attainment of the NAAQS from the Section 173(a)(1)(A) requirement that growth due to proposed sources be considered together with other plan provisions required under Section 172 to ensure RFP toward attainment. After carefully reviewing the statute and statement of Congressional intent, we continue to conclude that Congress did not intend to include major NSR requirements within the scope of section 172(e) of the Act.

Moreover, as explained in our April 4, 2005 proposal, unlike control measures for which emissions reductions can be quantified and relied on in a modeling demonstration to show how the measure helps an area reach attainment, the generation of offsets are uncertain and generally cannot be quantified in advance by States. (70 FR 17018, 17023). In 1990, Congress recognized that some States were not accurately predicting the growth within their attainment demonstrations. We believe it is reasonable to assume that Congress included major NSR in its "graduated control

program" in subpart 2 to provide an extra buffer for growth in areas with more severe air quality problems.⁵

We do not believe that the structure of the Act and purpose of major NSR support a conclusion that Congress included major NSR in subpart 2 for the purpose of generating emissions reductions. The Act does not support the view that Congress intended the major NSR program to generate emissions reductions in the State's base year inventory to move the area forward in attainment, nor have States implemented the program in that manner. The purpose and historical implementation of major NSR distinguish it from the other requirements that we determined in the Phase I implementation rule that nonattainment areas must retain in implementing the 8-hour standard.

5

In 1990, Congress recognized that many of the Nation's air pollution problems failed to improve or grew more serious. In assessing the reasons for these failures, Congress identified several problems that lead to this result, including inadequate inventories, deficient models, and uncertainties that exist in the assumptions used in the models. Congress noted that EPA indicated that emissions growth and inaccurate emissions inventories were predominant problems. H.R. Rpt. 101- 490(I) at 144 (May 17, 1990). In response, Congress took many steps to improve air quality, including invalidating some of the existing growth allowances and shifting the emphasis from managing growth using growth allowances to using the case-by-case offset approach. In light of the past difficulties States experienced in attainment planning, Congress established a strategy that differentiates among areas with regard to attainment dates based on the severity of the area's ozone problem, including increased offset ratios to compensate for uncertainties in predicting growth.

To the extent that a nonattainment area is currently designated with a lower classification under the more stringent 8-hour standard, it is because that area now has cleaner air than when it was designated under the 1-hour standard. This improvement demonstrates that the State has more effectively managed efforts to address its air quality problem than in the past. We believe Congress expressed an intent to allow States the flexibility to regulate economic growth in nonattainment areas consistent with efforts to address the severity of the area's air quality problem. Accordingly, we are requiring States to implement a nonattainment major NSR program in accordance with its 8-hour nonattainment classification.

We do not dispute that major NSR requires certain sources to apply control technologies to mitigate pollutant increases and that Congress intended this aspect of the program to advance pollution control technology over time. Moreover, requiring higher offset ratios could theoretically lead to emissions reductions in an area. Nonetheless, as we explained in our proposal, unlike "control measures," States are not relying on the application of these control technologies or offsets to advance the area toward attainment. There is also no guarantee that major NSR will reduce base year emissions, because it is uncertain whether

any new emissions sources will be constructed and if offsets will be obtained from the same nonattainment area. See State of New York v. U.S. Environmental Protection Agency, ___ F.3d ___, 2005 WL 1489698 (D.C. Cir.) (C.A.D.C., 2005). (Recognizing that the purpose of emission offsets is to produce no increase in overall regional emissions.)

We do not believe that the statutory framework, legislative history, or common sense require us to characterize a program that only applies when emissions increase in an area as an emissions reduction program irrespective of whether some control technologies or offset requirements are components of the program. Moreover, we agree that it is possible that higher offset ratios may discourage growth and actually result in fewer offset reductions than areas implementing a lower offset ratio, as one commenter stated.^{6,7}

6

Transcript July 19, 1994. (OAR-2001-0004-0650 to -0651). NSR Reform Subcommittee Meeting. U.S. EPA. Statement by Mr. Barr. (To require a traditional offset equivalent in attainment areas would be, in most cases, equivalent to "establishing a zone where there is a construction ban in effect.")

7

Southern California Air Quality Alliance. (OAR-2001-0004-0418). Letter to Docket. August 25, 2003. (Comment states that high offset levels in California dissuaded a facility from replacing 3 old, high emitting boilers, with new, lower emitting boilers because the cost of offsets was prohibitive. Stated that "this is but one of many actual

We disagree with the commenter who indicated that offset benefits are certain and that they must always come from the nonattainment area. The commenter provides no evidence to support this statement in light of the provisions of section 173(c) of the Act that allow sources to obtain offsets from other nonattainment areas. Under our final rule for implementing major NSR under the 8-hour standard, we retain the technology forcing aspect of the program by requiring certain sources to install control technologies, and we mandate an offset ratio commensurate with the severity of the area's nonattainment problem.

Even assuming *arguendo* that the term "controls" in section 172(e) of the Act includes the major NSR program, the language in section 172(e) does not resolve which elements of major NSR we must require States to apply in a given nonattainment area. Section 172(e) only requires that when EPA relaxes a NAAQS, it must promulgate regulations requiring the controls that are not less stringent than the controls applicable to areas designated nonattainment before such designation. While section 172(e) provides EPA with the authority to impose requirements for each nonattainment area after it changes a NAAQS standard that are not less

examples of "stringency" interfering with the emission reductions.")

stringent than the controls that existed prior to the NAAQS change, section 172(e) does not mandate that EPA's regulations require nonattainment areas to continue to comply with each and every requirement that applied under the previous standard.

Accordingly, it is reasonable to interpret section 172(e) as requiring that, at a minimum, we regulate nonattainment areas under the new standard in a manner consistent with, and not less stringent than, the way similarly-designated nonattainment areas were regulated under the old standard. We satisfy this minimum standard by requiring areas to apply a nonattainment major NSR program consistent with the area's 8-hour classification. That is, all nonattainment areas remain subject to the technology forcing requirements to impose LAER controls but areas need only impose the major source thresholds and offset ratios appropriate for the 8-hour classification.

We concur with the commenter who indicates that it is also clear in the context of section 175A maintenance plans that we should not interpret major NSR as a "control measure." In Greenbaum v. EPA, the Court held that our interpretation of the term "measure" in section 175A was reasonable, and that we appropriately considered the statutory structure in section 110 in determining that the

term as used in section 175A did not include major NSR. Moreover, the Court found persuasive EPA's argument that the very nature of the NSR permit program supports its interpretation that it is not intended to be a contingency pursuant to section 175A(d). The Court noted that contingency measures (like control measures) require immediate emissions reductions on emissions sources. In contrast the Court observed that "[t]he NSR program would have no immediate effect on emissions." 370 F.3d at 537-38. We believe that the structure and purpose of the Act similarly supports our view that major NSR requirements are not "controls" as that term is used in section 172(e).

We disagree with commenters who argue that section 193 of the Act compels us to require nonattainment areas to retain the NSR requirements that apply based on their 1-hour classifications. We previously explained in section III.C.1 of this preamble that section 193 is not applicable since it applies to certain requirements that were in effect before 1990. In evaluating changes to State NSR SIPs, we have stated that section 193 of the Act does not clearly apply to revisions in the NSR programs, but we have nonetheless proceeded to analyze the change under an assumption that it may. (69 FR 31056, 31063). Even proceeding on this assumption, we have relied on a holistic, qualitative

assessment of all elements of the SIP to determine if a given action related to NSR complies with section 193 of the Act. We have found that no assessment can be made as to the number of sources affected by the revisions, and in some instances the number of sources regulated by major NSR in a State are so few that reducing the number of sources that might have to comply with the program in the future would result in an insignificant increase in emissions. (64 FR 29563, 29564). Moreover, we have stated that although section 193 uses the phrase "equivalent or greater emissions reductions," in the context of NSR, which does not produce emissions reductions, we evaluate SIP changes to see whether the program as a whole provides equivalent or greater mitigation of new source growth. (69 FR 54006, 54012).

We note that the language used by Congress in section 193 of the Act is different from the language used in section 172(e) of the Act. Rather than use the term "controls" as found in section 172(e), Congress begins section 193 by stating that, "[e]ach regulation, standard, rule, notice, order, and guidance promulgated or issued...shall remain in effect...." Congress goes on to require that "[no] control requirement in effect...may be modified...unless the modification insures equivalent or greater emissions reductions of such air pollutant."

Arguably, the language in section 193 is more-inclusive than section 172(e). On the other hand, the use of the phrase "in effect" in section 193 arguably encompasses only those permits currently issued and does not affect the ability of a State to change who would be required to obtain a permit in the future.

Given the ambiguity in section 193 of the Act, we have chosen a conservative approach in our review of NSR SIP changes. Our past option to review changes for consistency with section 193 is not conclusive of the scope of section 193. Moreover, it holds no precedential value in evaluating Congress' purpose in using the different term "controls" in section 172(e). The Act, "is too complex a compromise, and has been amended too many times, to indulge the assumption that all of its words must be used consistently in all of its subsections." Sierra Club v. EPA, 375 F.3d 537 (7th Cir. 2004). (Holding that the word "applicable" did not have the same meaning when used in different parts of the Act.)

In sum, we do not believe that by its terms, section 172(e), which imposes requirements on EPA if it relaxes a NAAQS, applies to our final action. However, we view this provision as an expression of Congressional intent that States may not remove control measures in areas which are

not attaining a NAAQS when EPA revises a standard to make it more stringent, and we rely on the principles of section 172(e) in crafting our anti-backsliding policy under the 8-hour standard.

Moreover, we believe that Congress created the major NSR program as a measure to mitigate emissions growth rather than a measure to generate emissions reductions from existing sources to reduce the base year emissions inventory in a given nonattainment area. To the extent that subpart 2 requires higher offset ratios and lower major stationary source thresholds, Congress included these requirements not to specifically generate emissions reductions but to provide a buffer to compensate for under projections of growth in state planning. Even if Congress broadly intended major NSR to be included within section 172(e), section 172(e) only requires that we impose the subpart 2 major NSR requirements on similarly-designated nonattainment areas and does not mandate that we retain each and every element of the NSR program under the 1-hour standard in each and every previous nonattainment area, specifically those portions of the NSR program that do not impose control requirements.

3. Will a State's removal of 1-hour major NSR programs from its SIP interfere with any applicable requirements of the Act including attainment and RFP?

a. Comments

Several commenters concurred with our finding that applying major NSR requirements based on an area's 8-hour nonattainment classification will not interfere with RFP and attainment or any other applicable requirement of the Act. One commenter noted that section 110(1) of the Act is not an anti-backsliding provision, but merely a requirement to assure that a State continues to meet RFP and attainment despite changes in the SIP. Another commenter indicated that section 110(1) could not be interpreted to require a State to maintain requirements for a standard that we revoked. The commenter argues that such an interpretation of section 110(1) would act to freeze all State rules in the SIP regardless of whether they make economical sense or are necessary for air quality. Many commenters agreed that States do not rely on emissions reductions from major NSR within their attainment demonstrations. Nonetheless, one commenter noted that the fact that States do not include reductions from major NSR in its attainment demonstrations does not mean that major NSR is not an important tool for achieving attainment. Several commenters noted that States use a conservative approach to planning by not including reduction credits from NSR in its attainment demonstration or ROP plan.

Several commenters noted that our own policy indicates that section 110(1) requires a case-by-case, fact-specific review in each circumstance to determine whether the requirements are being met. One commenter indicated that EPA cannot evaluate the effect of major NSR changes on the SIP until it knows the full complement of control measures that States will use to reach attainment of the 8-hour standard. Another commenter argued that higher major source thresholds that will apply in nonattainment areas given a lower nonattainment designation under the 8-hour standard will result in additional unmitigated emissions increases. The commenter asserts that by definition, the change will interfere with the ability of such areas to achieve attainment, and is inconsistent with section 110(1) of the Act. One commenter proposed that a State can only remove NSR requirements if the continued implementation of the program would interfere with progress or timely attainment, or if the State demonstrates that it is no longer feasible to implement the program.

b. Response

Many comments received on our proposal support our understanding of how States account for growth within attainment demonstrations. We address comments related to specific SIP demonstrations in section III.C.4. of today's

preamble.

As explained in detail in our April 4, 2004 proposal (70 FR 17023-17025), we conclude that States are not relying on major NSR to generate emissions reductions in the State's attainment modeling. The growth projection methods used in preparing attainment demonstrations and the 8-hour major NSR program requirements will provide overlapping assurances that removing the 1-hour major NSR program from the SIP, will not interfere with RFP or attainment in any 8-hour nonattainment area. Basing an area's major NSR program requirements on its classification under the 8-hour standard assures that emissions increases from major stationary sources are mitigated and provide an ample margin of safety against poor State planning in areas with more severe air quality problems. Accordingly, we find that removing major NSR program requirements from the SIP based on an area's previous classification under the 1-hour standard will not violate section 110(1) of the Act.

We disagree with commenters that our own policy requires a case-by-case, fact-specific review in each circumstance to determine whether the requirements of section 110(1) of the Act are met. Although we have generally conducted case-by-case reviews of SIP changes, we have not always required a detailed analysis for every

element within the requested change. For example, when we approved revisions to the Illinois SIP, commenters objected to Illinois' removal of lowest achievable emission rate (LAER) and offset requirements, and NOx RACT requirements as a relaxation of the SIP. Commenters based their objections on the fact that neither Illinois or the EPA conducted a modeling demonstration showing that these requirements were not needed for attainment. We concluded that modeling was not needed to show that these measures were not needed for attainment because Illinois did not rely on NOx reasonably available control technology (RACT) to attain the ozone standard, and all sources already implementing major NSR requirements were required to retain these controls. (68 FR 25458-9). Where the record supports generalized determinations on compliance with section 110(1), we conclude that it is appropriate for us to make them.

Moreover, our actions today are consistent with the guidance we issued for approving State SIP changes to remove the dual source definition from State SIPs. In 1981, we revised the major NSR regulations to allow a State to adopt a plantwide definition of stationary source in its nonattainment NSR program. (46 FR 50766). Previously, our regulations required a dual definition of stationary source (including both the entire plant and individual emissions

units). We predicted that use of a plantwide definition would bring fewer plant modifications into the nonattainment permitting process, but emphasized that this change would not interfere with RFP and timely attainment because States remained under an independent obligation to demonstrate attainment and maintenance of the NAAQS. (46 FR 50767).

We determined that our action was consistent with Congress' intent that States are to play the primary role in pollution control and Congress' desire that States retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. Although section 110(1) was added to the Act in 1990, prior to that date EPA required States, pursuant to section 110(a)(3)(A), to demonstrate that revisions to an implementation plan would not interfere with the ability of an area to attain the NAAQS. See Navistar Int'l Transp. Corp. v. EPA, 941 F .2d 1339, 1342 (6th Cir. 1991). When we revised our regulations to allow States to adopt the plantwide definition of stationary source, we determined that States that adopt the less inclusive stationary source definition, would have to demonstrate that their plans continue to demonstrate RFP and attainment only if the State relied on emissions reductions that it projected would result from the dual source definition in

its attainment planning. (46 FR 50767; Memorandum from J. Craig Potter, Assistant Administrator for Air and Radiation to Director, Air Management Division Regions I, III, V and IX, et al., "Plantwide Definition of Major Stationary Sources of Air Pollution," February 27, 1987).

Today, we have determined that with the exception of one jurisdiction,⁸ discussed below, no State or local entity has accounted in the past for any emissions reductions relating to the higher offset ratios and lower major source thresholds under the NSR program within their attainment demonstrations. Accordingly, consistent with our policy for demonstrating RFP and attainment established in 1981, no State need submit an individual demonstration to satisfy the requirements of section 110(1) related to RFP and attainment.

We also disagree that EPA cannot know whether removing the 1-hour major NSR program from SIPs will be a relaxation until we know the full complement of control measures that

8

We are referring to South Coast Air Quality Management District. There are several other State and local agencies, including some in California, in which the classification under the 8-hour standard is lower than that under the 1-hour standard. We are not aware of any of these agencies relying on the major stationary source thresholds or the offset ratios under the 1-hour classification to assure RFP or attain the 1-hour standard.

each State will use to reach attainment of the 8-hour standard. We believe that a major NSR program based on the 8-hour classifications will provide a sufficient margin of safety to address major source growth in nonattainment areas, because it will ensure that any growth in major stationary source emissions will be offset in at least a one to one ratio. Moreover, States have other mechanisms to control growth of sources not subject to major NSR through minor NSR programs. Further, under our interpretation of section 110(1), areas need not wait for development of full attainment demonstrations to make SIP changes, provided they can demonstrate no increase in emissions or impediment to achieving NAAQS. Since major NSR at the levels required by the 8-hour classifications will still provide at least 1 for 1 offsets, such major NSR programs will not increase emissions or result in an impediment to achieving NAAQS, and thus will satisfy section 110(1) until States submit a full attainment demonstration.

Notwithstanding the ability of the 8-hour nonattainment major NSR program to ensure that new emissions do not interfere with RFP or attainment, States have every incentive to include adequate control measures in a SIP to move an area as expeditiously as practicable to attainment. If a State predicts that growth will interfere with the

ability of existing control measures to bring the area into attainment, it would need to impose additional measures to mitigate growth. If the State fails to plan adequately, "and as a result slips out of compliance as its population or industry changes, then it must pay a steep price for backsliding. It is sensible for the federal agency to give localities that must pay the piper some opportunity to call the tune." See Sierra Club, 357 F.3d at 540.

We also disagree that any changes to the major NSR program may result in unmitigated emissions increases, and that by definition, the change interferes with the area's ability to achieve attainment, and is inconsistent with section 110(l). First, no unmitigated growth should occur in any nonattainment area. Every State must develop an attainment demonstration that accounts for growth within its attainment plan. Accordingly, States would need to mitigate all growth projected within the attainment plan through control measures within the SIP to develop an approvable attainment plan. The major NSR program provides an extra measure of benefit on top of the control measures already contained in the SIP to address any further unanticipated future growth.

Moreover, we disagree with the assumption of some commenters that any change in a SIP requirement is

necessarily subject to review under section 110(1) of the Act. The Supreme Court upheld our plantwide stationary source definition as a reasonable balance between reducing air pollution and economic growth even though this change allowed fewer sources to go through major NSR permitting. See Chevron, 467 U.S. at 866. The Act allows us to approve SIP revisions if the State shows that the revision does not interfere with any requirement concerning attainment and RFP. We conclude that this will be the case in all areas removing 1-hour NSR programs as 8-hour NSR will still be required and thus no emissions increases will result.

We also disagree with the commenter who indicates that revisions under section 110(1) of the Act may not be approved unless a State shows that maintaining the requirement would interfere with progress toward attainment or that the requirement is not feasible. We do not believe that such an overly restrictive interpretation of section 110(1) is consistent with Congress' intent that States retain flexibility in carrying out their responsibilities for pollution control. We conclude that the words of section 110(1) simply do not provide for such a strict interpretation.

4. Has any individual State or local agency relied on major NSR as a "control measure" to reduce overall base year

emissions in a rate of progress plan or attainment demonstration?

a. Comment and Response - A

Comment. One commenter argued that our assumption that "(S)tates do not rely on Major NSR to achieve emissions reductions and reach attainment," is erroneous. According to the commenter, the South Coast Air Quality Management District's (SCAQMD's) NSR program was an important element of its attainment demonstration. Their 1989 Air Quality Management Plan (AQMP) contained Control Measure F-8, which, as adopted in final form in 1990 was estimated to result in emissions reductions of 44 tons per day (TPD) of ROG, 33 TPD of NO_x, 4 TPD of SO_x, 21 TPD of CO, and 29 TPD of PM₁₀. The commenter argued that while the NSR program no longer appears as a control strategy in SCAQD's latest AQMP because the rule has been adopted, the reductions from this measure are contained in the current SIP revision in the baseline and are still being relied upon to demonstrate attainment. According to the commenter, they do not understand how any area could not rely on NSR as part of its attainment demonstration, at least by including NSR reductions in the baseline.

Response. We agree that emissions from sources already subject to major NSR permits are part of the States'

baseline emissions. For this reason, our final rule requires all States to maintain requirements imposed on major sources through permits they issued under the 1-hour major NSR program before June 15, 2005. However, the comment does not indicate that any areas rely on further reductions from 1-hour major NSR programs to make further progress toward attainment.

b. Comment and Response - B

Comment. One commenter stated that we concede that the SCAQMD does assume a LAER level of control in projecting emissions. (70 FR 17024). They contend, however, that we fail to explain why the District's SIP-approved NSR rule would not be relaxed if we must automatically approve a SIP revision that would result in a relaxation of SCAQMD's requirements.

Response. The SCAQMD's major NSR program contains many requirements that are beyond the federal minimum requirements for either the 1-hour or 8-hour standard. In light of this, there is no reason to believe that SCAQMD would make revisions to its major NSR program even given the opportunity provided under today's final action.

c. Comment and Response - C

Comment. One commenter contended that on March 2, 1995, we issued a policy establishing an alternative

attainment process whereby States could commit to a two-phase approach for meeting CAA statutory requirements. The Phase I requirements include adoption of specific control strategies necessary to meet the post 1996 ROP plan through 1999. The Phase II requirements include participation in a two-year regional consultative process with other States in the eastern U.S. and with EPA to identify and commit to additional emissions reductions necessary to attain health-based ozone standards by the CAA deadlines. The commenter stated that under this policy Pennsylvania (PA) submitted the Phase I portion which includes a 1999 24 percent reduction milestone. In addition, Pennsylvania identified its NSR program as a "control measure" put in place to reduce emissions through their offset requirements and through the installation of LAER control equipments. On October 26, 2001, the commenter asserted that the EPA approved these plans as meeting the requirements of section 182(c)(2) and (d) of the Act, 42 U.S.C. section 7511a(c)(2) and (d). (66 FR 54143).

Response. We reviewed the information related to Pennsylvania's ROP plans. The reductions the commenter claims are related to Pennsylvania's major NSR program originated from retrospective, source/process shutdowns which occurred after January 1, 1991 but before the ROP

milestone date and before the date the ROP plan was prepared.⁹ Importantly, before we approved Pennsylvania's ROP these shutdowns were not available as offsets.¹⁰ Moreover, the emissions reductions were not necessarily generated to meet any need to create an offset because a new source was being constructed. Pennsylvania requires sources to register ERCs for future use as offsets or for contemporaneous netting. Although, Pennsylvania claims that its regulations limit any source in the Philadelphia area to using only 77% of each ERC that is registered (banked) in a timely manner, we are unable to identify such a requirement within Pennsylvania's major NSR regulations. See 25 Pa. Code Chapter 127, Subchapter E. Nonetheless, it appears

9

In our review of Pennsylvania's ROP plans we determined that some of the shutdowns used by Pennsylvania in their plans were not discounted as the Pennsylvania Department of Environmental Protection (DEP) stated in its May 4, 2005 comment letter because the sources did not register the emissions reduction credits (ERCs) as required by 25 Pa. Code subchapter E. Instead of using 23% of the shutdowns registered as ERCs in the ROP plan, the PA Department of Environmental Protection (DEP) used 100% of the past unregistered shutdown reductions to meet the ROP requirements.

10

See 40 CFR part 51.165(a)(ii)(C) as of October 26, 2001. We reiterated this requirement in our October 26, 2001 final rule (66 FR at 54148) approving Pennsylvania's ROP plan and attainment demonstration. We also identified this issue in the preambles to pertinent proposed and final rulemaking notices on the PA NSR SIP. (62 FR 25060, 62 FR 64722).

that Pennsylvania's ROP plan may confiscate a portion of the emissions reduction credits contained in the bank and prevent their future use as offsets. However, our guidance for ROP plans does not allow credit for prospective reductions from offsets due to the inherent uncertainty in projecting new source growth, and in determining the amount of the emissions reductions from offsets that will be needed to offset minor source growth. See section 2.2 Emissions Offsets of "Guidance on the Relationship Between the 15 Percent Rate-of-Progress Plans and Other Provisions of the Clean Air Act," (EPA-452/R-93-007), May 1993 and "Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration" (EPA-452/R-93-015) Corrected version of February 18, 1994.¹¹

In the proposed rulemaking notice to approve Pennsylvania's ROP plan, we identified this measure as "Shutdowns." (66 FR 44570). We did not relate these shutdowns to offsets, LAER requirements, or any other requirement in Pennsylvania's major NSR program. Likewise, in the final rulemaking notice approving the attainment demonstration and ROP plans for the Philadelphia area we

11

Although these guidance documents indicate that offsets after 1990 could be used in a milestone compliance demonstration, no State has actually submitted a milestone compliance demonstration including these offsets.

again identified this measure as "Shutdowns." (66 FR 54146). We discussed the status of Pennsylvania's NSR regulation for the Philadelphia area, but only in context of the issue concerning the relationship between the use of shutdowns as offsets only after we approve the attainment demonstration. (66 FR 54148).

Likewise, the Pennsylvania DEP did not identify NSR as a "control measure" in its Phase II plan. Instead it identified the measures as "shutdowns." Tables 4a and 4b to "State Implementation Plan (SIP) Revision for the Philadelphia Interstate Ozone Nonattainment Area, Meeting the Requirements of the Alternative Ozone Attainment Demonstration Policy, Phase II," dated April 1998. (This was submitted with an April 30, 1998 letter from James Seif, Secretary, Pennsylvania Department of Environmental Protection, to Judy Katz, Director, Air, Radiation, and Toxics Division, EPA Region III.)

Based on this information, we conclude that Pennsylvania did not rely on major NSR offsets or LAER requirements to generate emissions reductions for Pennsylvania's ROP plan, but instead confiscated shutdown ERC credits (some of which were never creditable as offsets, and others which may have been creditable as offsets) and prevented such credits from being used as offsets. If

Pennsylvania disagrees with our conclusions and continues to believe the State relies on higher offsets ratios and lower major stationary source requirements to achieve attainment, then Pennsylvania should include these requirements in its nonattainment major NSR program for the 8-hour standard. Further, Pennsylvania is free to retain 1-hour NSR offset ratios and major source sizes should it choose to do so as part of its 8-hour SIP.

d. Comment and Response - D

Comment. One commenter raised concerns regarding several areas (i.e., Houston-Galveston-Brazoria area, Chicago-Gary Lake County area) where the commenter asserted that relaxation in affected areas would result in emissions increases, whereby any SIP revision would interfere with timely progress and timely attainment. The commenter asserted that the risk of increased emissions in such areas is compounded by the allowance of totally new facilities being able to locate and emit increased pollution in these and other nonattainment areas without obtaining offsets and without installing LAER as would have been required under their 1-hour classifications. The commenter provided data on the number of sources in the area who could potentially increase emissions without undergoing major NSR review.

Another commenter reported that the way in which the

EPA has chosen to implement the 8-hour ozone NAAQS will interfere with Delaware's ability to solve their air quality problems related to construction and modification of major stationary sources and will result in backsliding. The commenter asserted that relaxation of emissions control and offset requirements will inhibit Delaware's attempts to control emissions, because more sources will be exempt from compliance with regulatory requirements.

Response. The commenter provided no specific information indicating how these areas rely on major NSR for attainment purposes or how changes to the major NSR requirements will interfere with the areas' ability to reach attainment. Although the commenter supplied data on the number of sources which could potentially increase emissions, the commenter did not correlate this information with an estimate of the number of these sources that are likely to undertake modifications. Moreover, States remain under an independent statutory requirement to assure that emissions from the construction and modification of stationary sources do not interfere with attaining or maintaining the NAAQS. The EPA continues to believe that areas will be able to demonstrate timely attainment through controls on existing sources in conjunction with appropriate 8-hour NSR on new major sources.

e. Comment and Response - E

Comment. One commenter stated we cited NSR among the "control measures" that provide reductions toward attainment and that New Hampshire relied on in the modeled 1-hour attainment demonstration for ozone. (67 FR 64582, 64586).

Response. We reviewed the cited Federal Register notice. References to NSR appear in two tables within Section A. "CAA Measures and Measures Relied on in the Modeled Attainment Demonstration SIP." The tables are entitled "CAA Requirements for Serious Areas" and "Control Measures in the One-Hour Ozone Attainment Plan for the New Hampshire Portion of the Boston-Lawrence-Worcester, MA-NH Serious Ozone Nonattainment Area." We listed NSR in these tables to illustrate that New Hampshire had an approved NSR SIP as required by the Act. However, the attainment modeling that was performed to support the New Hampshire attainment demonstration did not account for any emissions reductions from NSR. Accordingly, we conclude that New Hampshire did not rely on any reductions from NSR to reach attainment.¹²

¹²

See EPA docket entry number OAR-2001-0004-0817, Memorandum from Richard Burkhart, Environmental Scientist, U.S. EPA to David Conroy, Manager Air Quality Planning Unit, "Additional Information regarding the Approval of the New Hampshire One-Hour Ozone Attainment Demonstration," (June 10, 2005).

IV. Statutory and Executive Order Reviews

A. Executive Order 12866--Regulatory Planning and Review

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

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this final action is not a "significant regulatory action" within the meaning of the Executive

Order. Today's reconsideration notice merely proposes to retain the position we adopted in the final Phase I rule.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. This rule only interprets the requirements to develop State or tribal implementation plans to satisfy the statutory requirements for major NSR. This action will not impose any new paperwork requirements. However, OMB previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act. A copy of the OMB-approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW., Washington, DC 20460, or by calling (202) 566-1672. Please refer to OMB control number 2060-0003, EPA ICR number 1230.17 when making your request.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize

technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously-applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare an RFA of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's final action on

small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (See 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final action on reconsideration on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final action on reconsideration will not impose any requirements on small entities. This reconsideration notice reaffirms our April 4, 2005 rule and the statutory obligations for States and Tribes to implement the major NSR program for the 8-hour ozone NAAQS.

D. Unfunded Mandates Reform Act

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

including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan.

The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

In promulgating the Phase I Rule, we determined that this final action on reconsideration does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Therefore, we concluded that the Phase I Rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons we stated when we promulgated the Phase I Rule, we conclude that the issues addressed in this final action on reconsideration are not subject to the UMRA. The EPA also determined that this final action contains no regulatory requirements that might significantly or uniquely affect small governments, including tribal governments.

E. Executive Order 13132--Federalism

Executive Order 13132, entitled "Federalism" (64 FR

43255), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This final action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The action specifies the statutory obligations of States and Tribes in implementing the major NSR program in 8-hour ozone nonattainment areas. The Act establishes the scheme whereby States take the lead in developing plans for EPA to approve into the State plan for implementing the major NSR program. This final action would not modify the relationship of the States and EPA for purposes of developing programs to implement major NSR. Thus, Executive Order 13132 does not apply to this action. Nonetheless, in the spirit of

Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, we specifically solicited comment on aspects of the final rule being reconsidered from State and local officials. We received 6 comment letters from State and local district representatives and 1 comment letter from the Baton Rouge Chamber of Commerce. Section III.C. of this preamble presents a summary of their significant comments and our response to them.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This final action on reconsideration does not have "tribal implications," as specified in Executive Order 13175.

The purpose of this final action on reconsideration is to present EPA's conclusions based on the reconsideration process which allowed for public testimony and comment on the reconsidered aspects of the Phase I 8-hour ozone rule. The tribal authority rule (TAR) gives Tribes the opportunity

to develop and implement Act programs such as the major NSR program, but it leaves to the discretion of the Tribe whether to develop these programs and which programs, or appropriate elements of a program, they will adopt. For the same reasons that we stated in the Phase I Rule, we conclude that this final action does not have Tribal implications as defined by Executive Order 13175. To date, no Tribe has chosen to implement a major NSR program. Moreover, this final action does not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

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

Executive Order 13045: "Protection of Children from Environmental health Risks and Safety Risks" (62 FR 19885) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is

preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This final action relates to reconsideration of one aspect of the Phase I Rule to implement the 8-hour ozone NAAQS. For the same reasons stated with respect to the Phase I Rule, we do not believe the Rule, or this final action on reconsideration, is subject to Executive Order 13045. The Phase I Rule implements a previously-promulgated health-based Federal standard, the 8-hour ozone NAAQS. Nonetheless, we have evaluated the environmental health or safety effects of the 8-hour ozone NAAQS on children. The results of this evaluation are contained in 40 CFR Part 50, National Ambient Air Quality Standards for Ozone, Final Rule (62 FR 38855-38896; specifically, 62 FR 38855, 62 FR 38860 and 62 FR 38865).

H. Executive Order 13211--Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

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

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

I. National Technology Transfer and Advancement Act

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

Therefore, EPA is not considering the use of any voluntary consensus standards.

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

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionate high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The EPA concluded that the Phase I Rule should not raise any environmental justice issues; for the same reasons, the issues raised in this reconsideration notice should not raise any environmental justice issues. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS. The level is designed to be protective with an adequate margin of safety. The final reconsidered action provides a framework for improving environmental quality and reducing health risks for areas that may be designated nonattainment.

K. Congressional Review Act

The Congressional Review Act, section 5 U.S.C. 801, et seq., as added by the Small Business Regulatory Enforcement

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this final action on reconsideration and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General for the United States prior to publication of the final action in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S. C. § 804(2). Therefore, this action will be effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION OF THE FINAL ACTION IN THE FEDERAL REGISTER].

V. Statutory Authority

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the Act as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This notice is also subject to section 307(d) of the Act (42 U.S.C. 7407(d)).

VI. Judicial Review

Under section 307(b)(1) of the Act, the opportunity to file a petition for judicial review of the April 30, 2004

final rule has passed. Judicial review of today's final action is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Filing a petition for review by the Administrator of this final action does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

List of Subjects in 40 CFR Part 51

Administrative practice and procedure, Air pollution control, Environmental protection, Intergovernmental relations, NAAQS, Nitrogen oxides, Ozone, SIP, Volatile organic compounds.

Dated:

Stephen L. Johnson,

Administrator.