Bob Slaughter
President

NPRA

National Petrochemical & Refiners Association

1899 L Street, NW
Suite 1000
Washington, DC
20036-3896

202.457.0480 voice
202.457.0486 fax
bslaughter@npra.org

June 29, 2004

VIA MAIL AND E-MAIL DELIVERY

The Honorable Michael O. Leavitt
Administrator
U.S. Environmental Protection Agency
Mail Code: 1101A
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460
leavitt.michael@epa.gov

Re: Petition for Reconsideration of Final Rules: "Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard-Phase I," 69 *Fed. Reg.* 23951 *et seq.* (Apr. 30, 2004), and "Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas With Deferred Effective Dates," 69 *Fed. Reg.* 23858 *et seq.* (Apr. 30, 2004)

Dear Administrator Leavitt:

The National Petrochemical & Refiners Association and the National Association of Manufacturers appreciate the opportunity to submit the attached Petition for Reconsideration of the final rules in the above-referenced matter.

Please accept the attached document for filing and confirm receipt of same. If you have any questions, do not hesitate to contact me on 202/457-0480 or our outside counsel, Chuck Knauss, on 202/424-7644 (chknauss@swidlaw.com).

Sincerely,

Robert Slaughter
President
NPRA

Attachment

cc: Attached: *Distribution List*

Distribution List:

Jeffrey R. Holmstead, USEPA, OAR (holmstead.jeff@epa.gov)
Sharon Reinders, USEPA, OAQPS (reinders.sharon@epa.gov)
Annie Nikbakht, USEPA, OAQPS (nikbakht.annie@epa.gov)
Doug Crano, USEPA, OAQPS (grano.doug@epa.gov)
John Silvasi, USEPA, OAQPS (silvasi.john@epa.gov)
Denise Gerth, USEPA, OAQPS (gerth.denise@epa.gov)

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION

NATIONAL ASSOCIATION OF MANUFACTURERS

PETITION FOR RECONSIDERATION

Final Rules to Implement the 8-Hour Ozone National Ambient Air Quality Standard - Phase 1; and Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards

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69 *Fed. Reg.* 23951 (Apr. 30, 2004)
69 *Fed.Reg.* 23858 (Apr. 30, 2004)

June 29, 2004

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In Re Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase 1	)	Docket Nos. OAR-2003-0079 OAR-2003-0083
In Re Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards	)	

PETITION FOR RECONSIDERATION

The National Petrochemical & Refiners Association ("NPRA") and the National Association of Manufacturers ("NAM") respectfully submit this Petition for Reconsideration of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase I, 69 *Fed. Reg.* 23951, Apr. 30, 2004, and the Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 *Fed. Reg.* 23858, Apr. 30, 2004, (the "Petition"). The NPRA is a trade association composed of more than 450 companies, including most U.S. refiners and petrochemical producers. NPRA members supply consumers with a wide variety of products, including gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and the chemicals that serve as "building blocks" for everything from plastics to clothing to medicine to computers. The NAM is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The manufacturing facilities operated by NPRA's members and by NAM's members will be directly affected by the EPA action that is the subject of this Petition. These facilities operate in numerous states that have been newly-designated as nonattainment under the 8-hour ozone National Ambient Air Quality Standard and will therefore be required to comply with the requirements EPA is now establishing.

I. Introduction

The U.S. Environmental Protection Agency ("EPA" or the "Agency") promulgated the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase I, *69 Fed. Reg.* 23951, Apr. 30, 2004 (the "Implementation Rule"). On that same date, EPA promulgated Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards (the "Classification Rule"), utilizing the classification criteria

contained in the Implementation Rule. The Implementation Rule implements the 8-Hour Ozone National Ambient Air Quality Standard adopted by EPA in 1997, but which was delayed as the result of Congressional actions and litigation. The litigation resulted in a decision by the United States Supreme Court in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). In that decision, the Supreme Court upheld the revised ozone NAAQS, but it held that the implementation policy adopted by the Agency was inconsistent with statutory requirements.

The Supreme Court held that the Clean Air Act was ambiguous concerning the manner in which Subpart 1 (Nonattainment Areas in General, §§ 171 *et seq.*) and Subpart 2 (Additional Provisions for Ozone Nonattainment Areas, §§ 181 *et seq.*) interact, but that EPA's policy to implement the 8-Hour Ozone NAAQS solely under Subpart 1 "went over the edge of reasonable interpretation." 531 U.S. at 485. The Court directed EPA to give effect to Subpart 2 so as not to render its carefully designed restrictions on EPA's discretion utterly nugatory. It left to the Agency the task of developing a "reasonable resolution" of the gaps that would arise from the literal application of Subpart 2 as the "exclusive, permanent means of enforcing a revised ozone standard in nonattainment areas." 531 U.S. at 484.

The "backbone" of Subpart 2 is Table 1, printed in CAA § 181(a)(1). *See* 531 U.S. at 482. That table contains "design values," associated "classifications," and attainment dates for each classification. The classifications range from "marginal," to "extreme," with attainment dates running from three years after November 15, 1990, (the date of enactment of the 1990 Amendments), to 20 years after November 15, 1990. As a result of the Supreme Court's decision, EPA was given the task of "translating" Table 1 to make it applicable and appropriate for the implementation of the 8-Hour Ozone NAAQS.

We believe that the translation of Table 1 adopted by EPA in the Implementation Rule was arbitrary and capricious, and ignored fundamental differences between the 1-Hour Ozone NAAQS and the 8-Hour Ozone NAAQS that replaces the earlier standard. Moreover, new information has become available since the close of the public comment period (including since the close of the reopened comment period on November 5, 2003; *see* 68 *Fed. Reg.* 60054 (Oct. 21, 2003)) that convincingly demonstrates the arbitrariness and illegality of the translation scheme adopted by EPA in the Implementation Rule.

It is this aspect of the Implementation Rule and the application of this aspect to the Classification Rule for which we seek the Administrator's reconsideration. The Administrator should reconsider the Implementation Rule, and adopt an alternative translation scheme for Table 1 that provides adequate time for numerous nonattainment areas to achieve attainment, and the Administrator should apply that alternative translation scheme for purposes of classifying the areas designated as nonattainment in the Classification Rule.

II. Legal Standard for Review of Petitions for Reconsideration

Section 307(d)(7)(B) of the Clean Air Act requires the Administrator to convene a proceeding to reconsider a final rule if it is demonstrated, within the time specified for judicial review, that an issue of central relevance to the outcome of the rule was impracticable to raise, or if the grounds for the objection arose after the public comment period.

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.
>
> *Id.*

Modeling placed into the EPA docket for the proposed Interstate Air Quality Rule in January, 2004, is of central relevance to the selection of the translation scheme for Table 1. As will be shown in this Petition, those data and the latest available data used by EPA for classification purposes show that there are at least 27 areas[1] where there is a difference in classification depending on whether EPA's translation scheme is used or whether the alternative classification scheme proposed in the comments docketed at OAR-2003-0079-0281. To similar, but not identical, effect, is the Alternative B classification scheme outlined by EPA in the reopened comment period, 69 *Fed. Reg.* 60054 (Oct. 21, 2003). Both alternatives are based on using 50% of the percentage differences among the various classifications. Together, these two alternative classification schemes will be referred to as the "50% Alternative."

Of those 27 areas where there is a difference in classification, EPA's recent modeling results show that 15 areas will need more time to achieve attainment than EPA's scheme provides; eight areas will not need more time; and in four areas it is impossible to tell. In other words in 65% of the areas where there is a difference between the two translation schemes and where there is a clear answer based on the modeling, more time will be needed than is allowed under EPA's translation scheme. This information, available only after the close of the public comment periods provided, contradicts the assertion in the Implementation Rule that "we are confident that under Option 2 *most areas currently exceeding the 8-hour NAAQS will be able to meet the NAAQS within the time limits provided for their classification* ...." 69 *Fed. Reg.* at 23959 (emphasis added).

The Administrator is **required** to convene a proceeding to reconsider the Implementation Rule if he concludes that our objection is of central relevance to the rule. No other conclusion can be reached on the facts here, given that EPA assumed in its analysis that most areas would be able to meet the time table and relied on that assumption as a basis for the reasonableness of its translation approach. Further, the Administrator has the clear authority to reconsider the Implementation Rule even if he concludes that the standards of section 307(d)(7)(B) have not been met. Because this Petition presents clear and convincing evidence that EPA's translation of Table 1 will result in inadequate time for most of the areas where the alternative schemes differ, the Administrator should reconsider the Implementation Rule and adopt the 50% Alternative

[1] As noted in the table "EPA's Modeling and the Case for an Alternative Classification Scheme," we evaluated only those areas that would be affected by the Interstate Air Quality Rule (now known as the Clean Air Interstate Rule), because the recent attainment modeling only includes those areas. Additional areas, not affected by IAQR or CAIR, would also be classified differently depending on the translation scheme used.

translation scheme or an alternative that similarly provides for attainment dates that are achievable. Further, the Administrator should adjust the classifications to be consistent with a revised Implementation Rule.

III. Translating Table 1

In the proposal adopted by EPA in the Implementation Rule, the statutory Table 1 values are "translated" from the 1990-vintage 1-hour design values contained in the statute to current 8-hour design values. The translation is based on the percentage increase over the 1-hour standard reflected in the design value for each classification. Thus, for example, the design value for the "Serious" classification ranges from 33.333% above the 1-hour standard up to 50.000% above the 1-hour standard. Applying that same percentage increase to the 8-hour standard, results in an 8-hour design value ranging from 0.107 ppm up to 0.120 ppm for the "Serious" classification. All areas classified under Table 1 are then subject to the requirements contained in Subpart 2 for the specified classification. The attainment dates required to be met are not the specific dates listed in Table 1; rather, the dates are the date of designation and classification for the area plus the number of years from the date of enactment of the 1990 Amendments provided for the classification in Table 1. Thus, for example, the attainment date for a Serious area would be the date of designation and classification for that area plus nine years.

All those areas with a current 1-hour design value that is less than or equal to the 1-hour ozone NAAQS are not classified under the translated Table 1, but rather they are treated as "Subpart 1" areas. Subpart 1 does not carry with it all of the highly prescriptive requirements by classification listed in Subpart 2. Because approximately 72 of the 113 areas designated as nonattainment for the 8-hour ozone NAAQS (excluding the Early Action Compact areas) are currently in attainment with the 1-hour standard, those 72 areas are treated as Subpart 1 areas under the adopted proposal.

We agree with much of this scheme – specifically, the decision to regulate areas that have attained the 1-hour standard under Subpart 1, and the calculation of attainment dates as the date of designation and classification for the area plus the number of years set out in Table 1 for attainment from the date of enactment of the 1990 Amendments.

However, we believe that the setting of the classification breakpoints for the 8-Hour standard by using the percentages over the 1-Hour standard reflected by the classifications in Table 1 is arbitrary and capricious. That method fails to reflect real differences between the 1-hour and the 8-hour values, and the great difficulty many areas will face attempting to achieve compliance with the 8-hour ozone NAAQS. EPA states that the test for a classification scheme should be whether the scheme "reflects the level of control needed for areas to attain the 8-hour NAAQS [and] the time it will take the areas to attain the standard." *See* Additional Options Considered for "Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard," at p. 5. Under this test, the translation used by EPA fails.

Further, under the Supreme Court decision, EPA's exercise of its discretion must be designed to take into account the real world implications of any translation scheme adopted. We believe that EPA must take into account that under the anti-backsliding principle, practically

all the areas currently subject to Subpart 2 are already subject to stringent controls as Severe or above areas and the ability of areas to impose even more stringent requirements may be quite limited. In addition, EPA must take into account that regional and national controls already in place will have a substantial impact on air quality problems over time. EPA must endeavor to provide the time needed for those regional and national controls to work, so as not to require even more stringent and inefficient local controls to meet an attainment deadline that is not realistically obtainable anyway.

It is clear, as EPA effectively admitted when it reopened the public comment period, 68 *Fed. Reg.* 60054 (Oct. 21, 2003), that EPA is not legally compelled to utilize the same percentage increments over the 8-hour ozone standard as reflected in the 1-hour ozone classifications. In translating from Table 1 to an analogous table applicable to the 8-hour standard, EPA could not avoid making a determination of what the cutpoints should be. Applying 100% of the differences between the classifications fails to reflect the difference between a 1-hour standard and an 8-hour standard, and the fact that achieving any given percentage reduction in a 8-hour standard (particularly when it is to be calculated on the basis of data over a 3-year period) will be far more difficult and time-consuming than achieving a similar reduction in the 1-hour standard.

The difference in the difficulty between "moving" an 8-hour average and "moving" a 1-hour average is well-illustrated by the following two graphs taken from EPA's Air Trends Report:

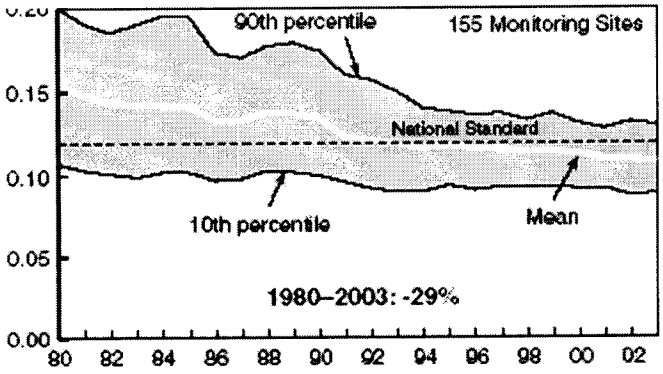

Figure 1. 1-Hour Ozone Air Quality Trend, 1980–2003, Based on Running Fourth Highest Daily Maximum 1-Hour Ozone Value over 3 Years.

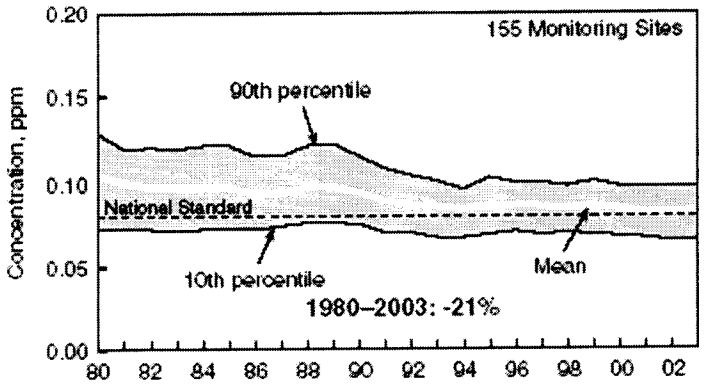

Figure 2. 8-Hour Ozone Air Quality Trend, 1980–2003, Based on 3-Year Rolling Averages of Annual Fourth Highest Daily Maximum 8-hour Ozone Concentrations.

While the overall reduction trend from 1980 through 2003 has been about 38% greater for the 1-hour average than for the 8-hour average, the difference in reduction rates is even more stark when looking at the changes over the 1990 to 2003 period. Over that period, the 1-hour average has fallen by 16%, but the 8-hour average has only fallen by 9%. That is, the 1-hour average has fallen by 77% more than has the 8-hour average. This is relatively simple mathematics and it establishes that assuming a one-for-one proportional translation from a 1-hour to an 8-hour standard in terms of attainment dates is not reasonable. As EPA noted, "Congress intended classifications to approximate the attainment needs of areas." 69 *Fed. Reg.* at 23963. This EPA did not even attempt to do.

Further, EPA's translation scheme simply does not allow adequate time for the effects of the implementation of existing national control strategies to be significantly reflected in 8-hour average ozone levels. EPA noted in its proposal that national rules such as the NOx SIP Call, Tier 2 mobile source standards, low-sulfur diesel rules, and new diesel engine standards will help bring many areas into attainment. 68 *Fed.Reg.* at 32825. However, the timeframes established in the classification scheme will not allow sufficient time for mobile source controls to work their way into the marketplace. While the fuels changes begin in the next few years, and will help to reduce NOx, the bulk of the benefits from these rules will come from on-road and non-road mobile source onboard controls. These controls are not retrofits to existing vehicles. Rather, these controls will be placed on new equipment, phased in for the diesel fleet, for example, beginning 2007 for on-road vehicles to as late as 2015 for larger non-road equipment. As a result, a turnover of a significant portion of the existing mobile source fleet will be required before any real benefit from these rules can be realized. The phased implementation plus the need for turnover of the mobile fleet means that the full benefit of the federal rules will not be realized for ten years or more after introduction of the new fleets or equipment.

While the effect of the NOx SIP Call is being felt now, the next step forward in the effort to control interstate transport of ozone and ozone-precursor pollution will not even begin to be felt until 2010, and only then if EPA moves forward with the promulgation of the Clean Air Interstate Rule (CAIR). The full benefits of CAIR (if it is promulgated), will not be reflected in attainment by the downwind areas until 2015 and later.

Deadlines for areas with significant 8-hour ozone nonattainment problems should at the very least allow for significant incorporation of these existing mobile source controls and incorporation of the effects of CAIR. With the short deadlines in the Implementation Rule, many areas will be forced to implement costly local controls in an effort to attain the standard in just a few years, without being able to reap the benefits of existing and forthcoming national controls.

The comments at Docket No. OAR-2003-0079-0281 and the Alternative B suggested by EPA in the notice reopening the comment period (together referred to as the "50% Alternative") suggested that the translation from the 1-hour cut points used in the statutory version of Table 1 to 8-hour cut points should be based on a fraction of the percentage difference among the various categories, such as 50%. Therefore, for example, since the design value for the "Serious" classification ranges from 33.333% above the 1-hour standard up to 50.000% above the 1-hour standard, the design value for the "Serious" classification in the 8-hour regulatory version of Table 1 could be from 16.667% above the 8-hour standard up to 25.000% above that standard.[2] This suggested alternative reflects the fact that achieving like percentage reductions in design values is substantially more difficult and time-consuming with respect to the 8-hour standard than for the 1-hour standard.

The following table shows the cut points for this 50% alternative:

50% Alternative

Classification	Cut Points
Subpart 1	1-Hour ≤ 0.121
Marginal	0.081 to <0.086
Moderate	0.086 to <0.093
Serious	0.093 to < 0.100
Severe – 15	0.100 to < 0.103
Severe – 17	0.103 to < 0.133
Extreme	0.133 and greater

In the Implementation Rule, EPA rejected the 50% Alternative, and promulgated the translation scheme using 100% of the percentage differences in Table 1 to define the cut points for the 8-Hour standard.

IV. EPA's Rejection of the 50% Alternative Classification Scheme was Arbitrary and Capricious

The arguments raised by EPA in the preamble to the Implementation Rule for rejecting the 50% Alternative classification scheme do not withstand analysis.

First, EPA never provided a meaningful justification for its decision to translate Table 1 by using 100% of the percentage differences between the 1-hour classifications in Table 1 and

[2] Alternative B suggested by EPA used 0.085 times 50% of the percentage width of the "marginal" classification to calculate cutpoints of 0.085 to <0.091. By contrast, the final Implementation Rule used 0.08 as the basis for determining the cutpoints for the marginal classification. We believe that the 50% Alternative should use 0.08 as the starting point for calculating the cutpoints.

applying that factor to the 8-Hour classifications. A 100% translation would be justifiable only if as the degree of exceedance increases, the health and compliance problems increase approximately to the same extent for the 8-hour standard as for the 1-hour standard. EPA made no such finding, and, as shown above, the rate of progress in reducing 8-hour concentrations has come at a substantially slower rate than for 1-hour concentrations. Indeed, in its discussion of the 50% Alternative in the notice reopening the public comment period, EPA stated that the 50% translation approach "would more likely result in classifications that better reflect an area's 8-hour ozone problem. 68 *Fed. Reg.* at 60058 (Oct. 21, 2003).

Second, while recognizing that "some 8-hour nonattainment areas in the Eastern U.S. that are classified moderate using 2001-2003 air quality data will have difficulty attaining the NAAQS by the attainment date of 2010," 69 *Fed. Reg.* at 23959, EPA concluded that "we are confident that ... most areas currently exceeding the 8-hour NAAQS will be able to meet the NAAQS with the time limits provided for their classification ...." *Id.* Recently available modeling entered into the docket for the proposed Interstate Air Quality Rule shows that any such confidence is misplaced. In the following Table, based on the Technical Support Document for the Interstate Air Quality Rule – Air Quality Modeling Analyses (Jan. 2004) and on the 2001-2003 design values contained in the Technical Support Document for State and Tribal Air Quality Designations and Classifications (Apr. 2004), we compare the classifications and attainment dates for all those areas that would be differently classified under the Implementation Rule and under the 50% Alternative classification scheme. We then compare those attainment dates with EPA's most recent modeling of when the areas are expected to achieve attainment. As shown in the following Table, there are 27 areas that would have different classifications than they have now if EPA had adopted the 50% Alternative classification scheme. Of these 27 areas, the EPA modeling shows that 15 will need more time to achieve attainment than the EPA classification will provide; eight will not need more time; and for four areas it is indeterminate.

EPA's Modeling and the Case for an Alternative Classification Scheme[3]

Area	EPA Class/Yr[4]	50% AlternativeClassification/Yr[5]	EPA Modeling[6]	Extra Time Needed[7]
Greater Connecticut	Moderate/2010	Serious/2013	by 2010	No
NY-N. NJ-L.I., NY-NJ-CT	Moderate/2010	Severe15/2019	>2015	Yes
Philadelphia-Wilmington-Atlantic City	Moderate/2010	Severe17/2021	>2015	Yes
Washington, DC-MD-VA	Moderate/2010	Serious/2013	>2015	Yes
Atlanta, GA	Marginal/2007	Moderate/2010	>2010	Yes
Chicago-Gary-Lake County	Moderate/2010 (looks like should be marginal)	Moderate/2010	>2015 (though in attainment in 2010)	---
La Porte County, IN	Moderate/2010	Serious/2013	by 2010	No
Baton Rouge	Marginal/2007	Moderate/2010	by 2010	??[8]
Portland, ME	Marginal/2007	Moderate/2010	by 2010	??

[3] This table excludes all areas that would have the same classification, whether the EPA or the 50% Alternative classification scheme was used. The table also excludes areas that would be unaffected by the IAQR (because we lack the modeling results).

[4] The EPA classification for each area is taken from EPA's final classification rule, 69 *Fed. Reg.* 23858 (Apr. 30, 2004).

[5] The 50% Alternative classification for each area is based on the cut-points proposed in the comments at Docket No. OAR-2003-0079-0281, and on the 8-hour design values contained in EPA, Technical Support for State and Tribal Air Quality Designations and Classifications (April 2004). Chapter 2 of that document contains the design values for each 8-hour ozone nonattainment area, based on 2001-2003 data. The only data available on design values during the comment period was data for the period 2000-2002.

[6] The EPA modeling information is contained in EPA, Technical Support Document for the Interstate Air Quality Rule – Air Quality Modeling Analyses (Jan. 2004). As the title of the document makes clear, this document was prepared in support of the proposed Interstate Air Quality Rule, and it did not become available until sometime after January, 2004. For preparation of this column of the table, I used Table V-1, "Counties Projected to be Nonattainment for the 8-Hour Ozone NAAQS in the 2010 and 2015 Base Cases," on pages 18-19 of the Technical Support Document. That table lists the counties in the various states subject to the proposed rule (in other words, it did not include California and other western states) that are projected to continue to be nonattainment as of 2010, and as of 2015.

[7] The need for extra time is based on a simple comparison between the attainment date for area given the classification in the Implementation Rule, with EPA's modeling of when attainment is likely to be achieved.

[8] The double question marks indicate that it is impossible to tell whether the extra time provided by the 50% Alternative classification scheme is needed or not. For example, the EPA classification for Baton Rouge is "moderate", with an attainment date of 2007. EPA's modeling results indicate that Baton Rouge will be in attainment by 2010, but we do not know whether Baton Rouge will achieve attainment by 2007 or later.

Area	EPA Class/Yr[4]	50% AlternativeClassification/Yr[5]	EPA Modeling[6]	Extra Time Needed[7]
Baltimore, MD	Moderate/2010	Severe17/2021	>2015	Yes
Kent & Queen Anne's, MD	Moderate/2010	Serious/2013	>2010	Yes
Boston-Lawrence-Worcester, MA	Moderate/2010	Serious/2013	by 2010	No
Springfield, MA	Moderate/2010	Serious/2013	by 2010	No
Cass County, MI	Moderate/2010	Serious/2013	by 2010	No
Detroit – Ann Arbor, MI	Moderate/2010	Serious/2013	>2015	Yes
Muskegon, MI	Moderate/2010	Serious/2013	by 2010	No
Jefferson County, NY	Moderate/2010	Serious/2013	by 2010	No
Poughkeepsie, NY	Moderate/2010	Serious/2013	>2010	Yes
Charlotte-Gastonia-Rock Hill, NC – SC	Moderate/2010	Severe15/2019	>2010	Yes
Greensboro-Winston-Salem-High Point, NC	Moderate/2010	Serious/2013	by 2010	No
Cleveland-Akron-Lorain, OH	Moderate/2010	Severe17/2021	>2015	Yes
Providence, RI	Moderate/2010	Serious/2013	>2015	Yes
Beaumont/Port Arthur, TX	Marginal/2007	Moderate/2010	by 2010	??
Dallas – Fort Worth, TX	Moderate/2010	Severe15/2019	>2010	Yes
Houston-Galveston-Brazoria, TX	Moderate/2010	Severe15/2019	>2015	Yes
Norfolk-Virginia Beach – Newport News, VA	Marginal/2007	Moderate/2010	by 2010	??
Milwaukee-Racine, WI	Moderate/2010	Severe15/2019	>2015	Yes
Sheboygan, WI	Moderate/2010	Severe15/2019	>2015	Yes

Third, EPA expressed concern with the "additional statutorily-mandated requirements" that accompany higher classifications. 69 *Fed. Reg.* at 23959. EPA acknowledged that "the additional requirements might be appropriate for areas that truly need the long period to attain," but it went on to argue that "it is likely that a number of areas that do not need a longer period to attain would also be placed in a higher classification ...." As the above table shows, adoption of the 50% Alternative classification scheme would result in only 27 areas being assigned a higher classification, and of those 27 areas 15 would clearly need the extra time; and along with the extra time the Congressional bargain dictates the additional statutorily-mandated requirements. While this appears to suggest that there will be areas that will be subject to statutorily-mandated requirements that are more stringent than justified by the time they need to achieve compliance, this suggestion ignores the extensive anti-backsliding requirements adopted as part of the Implementation Rule. The more stringent requirements EPA seeks to avoid having to be imposed on areas due to the higher classifications that would follow from adoption of the 50% Alternative are already required by EPA's anti-backsliding provisions. Obviously, EPA's rationale for rejecting the 50% Alternative on the grounds that doing so avoids the imposition of requirements that under EPA's rule are already applicable makes no sense.

Fourth, EPA asserts that even though there will be areas that do need the additional time that the 50% Alternative translation method would provide, those areas could voluntarily "bump up" to a higher classification pursuant to CAA § 181(b)(3). *See* 69 *Fed. Reg.* at 23959-60. For this reason, EPA argues, it is better to "use a scheme that may classify areas too low and areas that need more time to attain can use the voluntary reclassification provision of the CAA to obtain the appropriate classification." *Id.* at 23960. This approach stands the Clean Air Act on its head. What EPA does here is to eschew any attempt to translate Table 1 in a manner that reflects the differences between the 1-hour and the 8-hour standards. Instead, it has adopted the method of translation that substitutes for the Congressional scheme the Agency's wish to retain the maximum possible discretion. As noted by the Supreme Court, Subpart 2 contains "carefully designed restrictions on EPA discretion" that cannot be "rendered utterly nugatory once a new standard has been promulgated." EPA's reliance on the "bump up" option ignores that Congress only intended this option as a "safety valve" for areas that might need more time than their classifications would allow, but that this safety valve was intended to be used as an exception and not the rule. Congress intended Table 1 to be the rule; it was intended to be adequate and appropriate for the great bulk of nonattainment areas. In the 8-hour classification rule, EPA has turned the exception into the rule, and made the translated Table 1 largely irrelevant. Congress through Table 1 created rules that were to be outside the give and take of the local political process, but EPA's translation of Table 1 has in effect thrown the issue right back to that local process. EPA is simply not at liberty to throw up its hands and adopt a scheme with the lowest possible classifications, relying on the States' authority to seek voluntary bump-ups to make the scheme work.

Fifth, to the extent there is an implication that a few areas would receive more time than they need to achieve attainment as a result of the alternative translation method, this ignores the statutory requirement that the "primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1." CAA § 181(a)(1). The Table 1 attainment dates accompanying the various classifications are **outside** limits, and if

that amount of time is not needed then the state implementation plan is to provide for an earlier date. Thus, for that minority of areas that would obtain a higher classification than they need time to reach attainment, EPA should ensure that their SIPs follow the law, and provide for attainment "as expeditiously as practicable."

Sixth, Congress was well aware that the cut points it selected would result in a pyramid-like distribution of ozone non-attainment areas among the classifications with fewer areas the higher the classification. This is reflected in the following table, under the heading "House Report," which is taken from House Report 101-490, pp. 230-31. That distribution should be compared to the distribution under the Implementation Rule, and the more faithful distribution under the 50% Alternative classification scheme:

Classification	House Report	Implementation Rule	50% Alternative
Subpart 1	--	72	72
Marginal	41	7	1
Moderate	32	30	14
Serious	18	3	16
Severe-15	8	0	6
Severe-17		1	4
Extreme	1	0	0

Seventh, it is a fair question to ask what the practical harm is of relying on the States to seek voluntary bump ups. In addition to all the reasons why that reliance is inconsistent with the statutory scheme and arbitrary, the NPRA and the NAM are seeking reconsideration because EPA's approach puts too much burden on the States. As explained in our fourth point above, Congress created a nonattainment classification scheme with specific deadlines to create a nationally consistent approach to attainment planning that reflected the real challenges areas would face. This approach was developed against a backdrop of 10 years of local government inability to impose more stringent control measures "voluntarily" to achieve air quality standards. Congress well understood the political pressures associated with a state's voluntarily putting more stringent requirements on its businesses by admitting that additional requirements were necessary to bring local air quality into attainment with health standards. Indeed, the history since the 1990 Act confirms that voluntary bump ups will be sought only rarely. Over that 14 year period, we are aware of only two cases where voluntary bump ups have been sought.

V. Conclusion

Based on the foregoing, NPRA and NAM respectfully request the Administrator to grant this petition for reconsideration and to convene a proceeding to conduct such reconsideration expeditiously. EPA has a responsibility to translate Table 1 in a manner that is consistent with Congressional intent, allowing areas the appropriate time and requiring the appropriate measures to achieve attainment. The translation contained in EPA's final rule fails to meet this requirement and therefore must be changed. Further, once the Implementation Rule is changed, the classifications assigned to the nonattainment areas must be adjusted as necessary to conform.