

appropriate circuit by January 4, 1999. Filing a petition for reconsideration by the Administrator of this final rule revising the SIP citation for Maryland's VOC provisions governing automotive and light-duty truck coating operations 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. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Dated: October 27, 1998.

**Thomas Voltaggio,**

*Acting Regional Administrator, Region III.*

40 CFR part 52 is amended as follows:

#### PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

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

#### Subpart V—Maryland

2. Section 52.1070 is amended by adding paragraphs (c)(140) to read as follows:

##### § 52.1070 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

(140) Revisions to the Maryland State Implementation Plan submitted on February 6, 1998 by the Maryland department of the Environment:

(i) Incorporation by reference.

(A) Letter of February 6, 1998 from the Maryland Department of the Environment transmitting revisions to COMAR 26.11.19, pertaining to the control of VOC emissions from automotive and light-duty truck coating operations.

(B) Revised COMAR 26.11.19.03, effective September 22, 1997.

(ii) Additional Material—Remainder of the February 6, 1998 State submittal [Revision No. 98-01].

[FR Doc. 98-29658 Filed 11-4-98; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[ID-21-7001, ID 22-7002; FRL-6185-8]

#### Designation of Areas for Air Quality Planning Purposes: State of Idaho and the Fort Hall Indian Reservation

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** In this action, the Environmental Protection Agency (EPA) is revising the designation for particulate matter with an aerodynamic diameter of less than a nominal 10 microns (PM-10) for the Power-Bannock Counties PM-10 nonattainment area, located in Idaho, by creating two distinct nonattainment areas that together cover the identical geographic area as the original nonattainment area. The revised areas are divided at the boundary between State lands and the Fort Hall Indian Reservation, with one revised area consisting of State lands and the other revised area consisting of lands within the exterior boundaries of the Fort Hall Indian Reservation. The redesignation is based upon a request from the State of Idaho, which is supported by monitoring and modeling information. Both areas retain PM-10 nonattainment designation and classification as moderate PM-10 nonattainment areas as a result of this action.

EPA recently established a new standard for particulate matter with an aerodynamic diameter equal to or less than a nominal 2.5 microns and also revised the existing PM-10 standards. This rule, however, does not address these new and revised standards.

**EFFECTIVE DATE:** December 7, 1998.

**ADDRESSES:** Information supporting this action can be found in Public Docket No. [ID-21-7001, ID 22-7002]. The docket is located at EPA, Region 10, 1200 Sixth Avenue, Seattle WA 98101. The docket may be inspected from 9:00 a.m. to 4:30 p.m. on weekdays, except for legal holidays. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Steven K. Body, EPA Region 10, Office of Air Quality (OAQ-107), EPA, Seattle, Washington, (206) 553-0782.

#### I. Background

A portion of Power and Bannock Counties in Idaho was designated nonattainment for PM-10<sup>1</sup> and

classified as moderate under sections 107(d)(4)(B) and 188(a) of the Clean Air Act upon enactment of the Clean Air Act Amendments of 1990 (Act or CAA). See 40 CFR 81.313 (PM-10 Initial Nonattainment Areas); see also 55 FR 45799 (October 31, 1990); 56 FR 11101 (March 15, 1991); 56 FR 37654 (August 8, 1991); 56 FR 56694 (November 6, 1991). For an extensive discussion of the history of the designation of the Power-Bannock Counties PM-10 nonattainment area, please refer to the discussion at 61 FR 29667, 29668-29670 (June 12, 1996).

The Power-Bannock Counties PM-10 nonattainment area covers approximately 266 square miles in south central Idaho and comprises both trust and fee lands within the exterior boundaries of the Fort Hall Indian Reservation and State lands in portions of Power and Bannock Counties. Approximately 75,000 people live in the nonattainment area, most of whom live in the cities of Pocatello and Chubbuck, which are located near the center of the nonattainment area on State lands. Approximately 15 miles northwest of downtown Pocatello is an area known as the "industrial complex," which includes the two major stationary sources of PM-10 in the nonattainment area. The boundary between the Fort Hall Indian Reservation and State lands runs through the industrial complex. One of the major stationary sources of PM-10, FMC Corporation (FMC), is located primarily on fee lands within the exterior boundaries of the Fort Hall Indian Reservation. The other major stationary source of PM-10 in the nonattainment area, J.R. Simplot Corporation (Simplot), is located on State lands immediately adjacent to the Reservation.

Pursuant to section 107(d)(3)(D) of the Act, the Governor of any State, on the Governor's own motion, is authorized to submit to the Administrator a revised designation of any area or portions thereof within the State. On April 16, 1998, the State of Idaho submitted to EPA a request to revise the designation

standard and an annual standard. See 40 CFR 50.6. EPA promulgated these NAAQS on July 1, 1987 (52 FR 24672), replacing standards for total suspended particulate with new standards applying only to particulate matter up to 10 microns in diameter (PM-10). The annual PM-10 standard is attained when the expected annual arithmetic average of the 24-hour samples for a period of one year does not exceed 50 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ). Attainment of the 24-hour PM-10 standard is determined by calculating the expected number of days in a year with PM-10 concentrations greater than 150  $\mu\text{g}/\text{m}^3$ . The 24-hour PM-10 standard is attained when the expected number of days with levels above the standard, averaged over a three-year period, is less than or equal to one. See 40 CFR 50.6 and 40 CFR part 50, appendix K.

<sup>1</sup> There are two pre-existing PM-10 National Ambient Air Quality Standards (NAAQS), a 24-hour

of the Power-Bannock Counties PM-10 nonattainment area by splitting the nonattainment area into two separate nonattainment areas at the boundary between the Fort Hall Indian Reservation and State lands. In support of its request, the State of Idaho noted that the State has the primary PM-10 planning responsibility under the Clean Air Act for State lands within the nonattainment area, whereas EPA and the Shoshone-Bannock Tribes (Tribes) have the primary PM-10 planning responsibility for the Reservation lands<sup>2</sup> within the nonattainment area. The State also noted that it has largely completed the PM-10 planning and implementation of control measures for the PM-10 sources located on State lands within the nonattainment area whereas no controls have been proposed or imposed on sources located on Reservation lands within the nonattainment area.

The State also supported its request with monitoring data which show that State monitors have not recorded any PM-10 concentrations above the level of the 24-hour PM-10 NAAQS since January 1993 and that the State lands within the nonattainment area have attained the PM-10 NAAQS. In addition, the State provided an analysis of pollution concentrations recorded on Tribal monitors as a function of wind direction which shows that exceedences of the PM-10 NAAQS on the Tribal monitors are not the result of emissions from sources located on State lands. The State also provided modeling information to support its assertion that sources on State lands are not contributing to the violations of the PM-10 NAAQS that have been recorded at the Tribal monitors.

On June 19, 1998, EPA proposed to grant the State's request to split the Power-Bannock Counties PM-10 nonattainment area into two nonattainment areas at the State-Reservation boundary. 63 FR 33597. In a concurrent notice of proposed rulemaking, EPA proposed to make a finding that the proposed PM-10 nonattainment area within the exterior boundaries of the Fort Hall Indian Reservation failed to attain the NAAQS for PM-10 by the applicable attainment date. 63 FR 33605. Based on a request from a commenter, EPA extended the public comment period on both proposals for an additional 30 days. 63 FR 41221 (August 3, 1998).

<sup>2</sup> "Reservation lands" as used in this notice refers to all lands within the exterior boundaries of the Fort Hall Indian Reservation. EPA believes that this land is "Indian country" as defined under Federal law. See 18 U.S.C. § 1151.

EPA received comments from nine commenters on its proposals. Six of the commenters—the State of Idaho—Division of Environmental Quality (IDEQ), the City of Pocatello, Bannock Planning Organization, the Portneuf Environmental Council (PEC), J.R. Simplot Company, and a private citizen—supported EPA's proposal to split the Power-Bannock Counties PM-10 nonattainment area into two nonattainment areas at the State-Reservation boundary. The comments from PEC also suggest support for EPA's proposal to make a finding that the proposed PM-10 nonattainment area within the exterior boundaries of the Fort Hall Indian Reservation failed to attain the PM-10 NAAQS by the applicable attainment date.

Three commenters—the Shoshone-Bannock Tribes, FMC, and a private citizen—opposed EPA's proposal to split the existing PM-10 nonattainment area into two PM-10 nonattainment areas at the State-Reservation boundary. FMC also opposed EPA's proposal to make a finding that the proposed PM-10 nonattainment area within the exterior boundaries of the Fort Hall Indian Reservation failed to attain the PM-10 NAAQS by the applicable attainment date.

After carefully considering the public comments, EPA continues to believe it is appropriate to split the existing Power-Bannock Counties PM-10 nonattainment area into two nonattainment areas at the State-Reservation boundary, with the area comprised of State lands to be known as the "Portneuf Valley PM-10 nonattainment area" and with the area comprised of Reservation lands to be known as the "Fort Hall PM-10 nonattainment area." EPA intends to take final action on its proposal to find that the Fort Hall PM-10 nonattainment area failed to attain the PM-10 NAAQS by the applicable attainment date in a later rulemaking.

## II. Response to Comments

### A. Comments That EPA's Action is Contrary to EPA Policy and Inconsistent With Prior EPA Actions

All three adverse commenters state that an integrated planning effort is preferable and that splitting the area into two PM-10 nonattainment areas at the State-Reservation boundary could result in a less comprehensive approach to air quality planning in the area. The Tribes also assert that splitting the nonattainment area, in and of itself, does not advance any air quality improvements and that it would be a better use of resources to expedite

efforts to promulgate rules and permits for Reservation lands within the nonattainment area.

EPA agrees with the Tribes that promulgating rules to control PM-10 emissions from sources contributing to the nonattainment problem reflected on the Tribal monitors is a high priority.<sup>3</sup> EPA assures the Tribes and the public that EPA is expending considerable resources in the development of a Federal Implementation Plan (FIP) for the Fort Hall PM-10 nonattainment area, which EPA intends to propose by January 31, 1999.

EPA also agrees that the "split" in and of itself does not improve air quality. No action to designate an area as attainment or nonattainment or to determine the appropriate boundaries of an attainment or nonattainment area under section 107 of the Clean Air Act improves air quality, in and of itself. Rather, it is the planning efforts that flow from an area's designation that improves air quality. Section 107(d)(3) of the Clean Air Act, which provides the authority for the State's request and EPA's action, includes criteria in addition to air quality that may be taken into consideration in the revision of the designation of an area, such as planning and control considerations. In general, EPA agrees that integrated planning in a nonattainment area is desirable. In this situation, however, the two nonattainment areas are at very different places in the planning process and the planning responsibilities for the two areas rest with different agencies. As stated in the proposal, the State has largely completed its planning obligations and monitors on State lands show attainment of the standard. 63 FR 33599–33601. EPA believes that splitting the nonattainment area into two nonattainment areas at the State-Reservation boundary will better enable EPA, the Tribes, and the State to focus planning efforts on the areas under their respective authorities, and will therefore, in the long run, advance efforts to improve air quality. EPA does not believe that splitting the nonattainment area will result in a less comprehensive approach to PM-10 planning for the existing Power-Bannock Counties PM-10 nonattainment area as a whole. EPA, the Tribes and the State have been working together on PM-10 planning for the Power-Bannock Counties PM-10 nonattainment area since the early

<sup>3</sup> Once EPA received a request from the State of Idaho to split the nonattainment area, EPA became obligated under section 107(d)(3)(D) to act to approve or deny the State's request. EPA does not believe that denying the State's request requires any more resources than approving the State's request.

1990s. Dividing the area into two nonattainment areas in no way precludes EPA, the Tribes, and the State from continuing a coordinated planning effort. EPA fully intends to work closely with the Tribes and the State in the promulgation of a FIP and a Tribal Implementation Plan (TIP) for Reservation lands within the nonattainment area and in the revision and approval of the State's Implementation Plan (SIP). In the comments submitted by the State, the State indicated its intent to continue a coordinated planning effort with EPA and the Tribes notwithstanding the split of the area into two nonattainment areas.

On a related matter, the adverse comment received from the private citizen expresses concern that splitting the Power-Bannock Counties PM-10 nonattainment area could impair planning efforts for PM-2.5 or other pollutants. EPA emphasizes that a coordinated planning effort can be accomplished notwithstanding that there are two separate nonattainment areas. In addition, as EPA stated in the proposal, this action relates only to PM-10. If the City of Pocatello or the Fort Hall Indian Reservation is later identified as a nonattainment area for PM-2.5, EPA will consider at the time of such identification whether, based on air quality data, planning and control considerations, or other air quality-related considerations, the planning requirements for PM-2.5 are best carried out by having a single nonattainment area or having two nonattainment areas divided at the State-Reservation boundary or in some other way. 63 FR 33603. These same factors will be considered with respect to other pollutants.

Both the Tribes and FMC state that EPA's action to divide the Power-Bannock Counties PM-10 nonattainment area is inconsistent with EPA's longstanding practice and policy regarding the basis for establishing nonattainment designations (and for determining whether to redesignate nonattainment areas). The Tribes argue that, in the past, EPA has made it clear that the dimensions of a nonattainment area are not limited solely to those locations where violations have been recorded. FMC similarly claims that EPA's practice has been to "establish nonattainment areas based on the total contribution of various sources to ambient air pollution in an entire airshed and not simply on the presence or absence of exceedences at individual monitoring sites or the presence or absence of sources in a particular location." However, while these

statements (and the litigation examples cited by FMC) appear to accurately reflect prior EPA practice and policy, the commenters' assumption that the proposal to split the Power/Bannock nonattainment area is inconsistent with that practice and policy is erroneous mainly because it ignores the ambient air data cited by EPA in support of its proposed action. EPA's proposal to split the existing nonattainment area is based on the conclusions it reached after analyzing the contributions of the various sources, evidence regarding PM-10 pollution impacts, and relevant ambient air quality data. Moreover, EPA's proposed action is entirely consistent with statutory requirements.

Section 107(d)(1)(A)(i) makes clear that an area can be designated nonattainment if the area does not meet the standard or if the area contributes to ambient air quality in a nearby area that does not meet the standard. Thus, an area could be designated as part of a nonattainment area even if the air quality in the area meets the applicable standard if sources in that area contribute to ambient air quality in a nearby area that does not meet the standard. However, that is not the case here. As demonstrated by the State's request, the State monitors show attainment of the standard on State lands and that sources on State lands are not contributing to the violations of the PM-10 standard that have been recorded on the Tribal portion of the nonattainment area. In addition, section 107(d)(3)(A), which sets forth criteria for EPA to consider when revising the designation of an area on its own motion, states that EPA may initiate such actions "on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate." EPA believes it would be unreasonable for the Agency not to consider similar criteria in determining whether to approve or deny a designation revision request submitted by the Governor of a State under the provisions of subsection 107(d)(3)(D). That is precisely what the Agency has done with respect to the air quality data submitted by Idaho in support of its request to separate the Power-Bannock area into two distinct nonattainment areas.

To support its claim that EPA is acting contrary to EPA policy and practice by splitting the nonattainment area, FMC cites three specific cases in which EPA has rejected proposals to split existing nonattainment areas into separate areas: Lorain County, Ohio, for ozone; the San Francisco Bay area for ozone; and Spokane, Washington for

carbon monoxide. The first 2 cases were the subjects of lawsuits; respectively, *State of Ohio v. Ruckelshaus*, 776 F.2d 1333 (6th Cir. 1985) and *Western Oil & Gas Ass'n v. U.S.E.P.A.*, 767 F.2d 603 (9th Cir. 1985). There are several important differences between the three cases cited by FMC and the case at hand. First, in the case of the Power-Bannock Counties PM-10 nonattainment area, ambient air quality data provided by the State specifically show that sources of pollution on State lands do not impact the violations that have been recorded on the monitors located on Tribal lands. No such showing was made in any of the three examples cited by FMC. In fact, in the case of Lorain County, Ohio, FMC acknowledges that the sources in Lorain County were found to contribute to the nonattainment problem in the greater Cleveland area even though the monitors in Lorain County showed attainment. The Ninth Circuit Court of Appeals found similar evidence with respect to the complaining sources in the case involving the San Francisco Bay area. In describing the areas where the petitioning sources were located, the Court stated: "[I]f treated separately, [these areas] would be 'attainment' areas. The reason is the prevailing winds, which blow from the west and north toward the south and east, thus carrying emissions from the parts of the Bay area in which [the plaintiffs] do business into the part of the area that is clearly 'nonattainment' and contributing to that condition." 767 F.2d at 605. And again, in the case of Spokane, in the documentation cited by FMC, EPA stated that it was not possible to divide the nonattainment area into two nonattainment areas under CAA section 107(d)(3)(A)(iv), which authorizes EPA to make revisions to boundaries, because the area sought to be eliminated from the nonattainment area in fact contributed to the nonattainment problem.<sup>4</sup>

Another important difference is that each of the three cases cited by FMC involved efforts to divide along county lines or along even smaller political boundaries areas that are all subject to the relevant State's jurisdiction. Ultimately, for example, Ohio was

<sup>4</sup> In the briefing paper cited by FMC, EPA stated: "CAA § 107(d)(4)(iv) allows boundary revisions under certain circumstances. However, it does not allow elimination of any part of a nonattainment area that would be considered part of the air shed of the nonattainment area and that contributes to the nonattainment problem." Spokane CO Briefing Report (EPA Region 10), October 14, 1997 (emphasis added). FMC's comments neglected to mention this important qualification to EPA's position. A copy of the Spokane CO Briefing Report is in the docket.

responsible for the nonattainment planning requirements for Lorain County being fulfilled, as well as it was for those for the greater Cleveland area. Under section 110(a)(2)(E)(iii) of the Act, even where a State relies on a local or regional government or agency for the implementation of elements of the State implementation plan, the State has the ultimate responsibility for ensuring adequate implementation of that plan. In the case of the Power-Bannock Counties PM-10 nonattainment area, however, the State's jurisdiction and CAA planning responsibilities extend only to the portion of the nonattainment area on State lands, while the Tribes and EPA are authorized by the CAA to exercise planning responsibilities for the portion of the nonattainment area that falls within the exterior boundaries of the Fort Hall Indian Reservation. Although evidence regarding the lack of pollution contribution is the key consideration for purposes of this action, i.e., splitting or revising the existing nonattainment area designation under section 107(d)(3)(D), this jurisdictional factor, as it relates to the appropriate authority for air quality management and planning, is (along with the air quality considerations) an important consideration in EPA's decision to divide the Power-Bannock Counties PM-10 nonattainment area into two nonattainment areas along the State-Reservation boundary. In short, EPA does not agree with the Tribes and FMC that this action is inconsistent with previous EPA policy and practice.

The Tribes also claim that EPA's action to split the nonattainment area is inconsistent with EPA policy because there are several other PM-10 nonattainment areas that include both State lands and lands within the exterior boundaries of Indian Reservations that EPA has not considered splitting. Although this claim is certainly factually true, it has simply not been an issue because EPA has never received requests in these other cases from the relevant States or Tribes to divide these nonattainment areas at the State-Reservation boundary, nor has EPA been provided with the technical air quality information that would support splitting any other such PM-10 nonattainment area at the State-Reservation boundary, as is the case here.

In a similar vein, the Tribes assert that EPA did not split the Power-Bannock Counties PM-10 nonattainment area at the State-Reservation boundary in previous years when the State monitors were recording violations of the PM-10 NAAQS, but there were no recorded violations of the PM-10 NAAQS on the

Reservation lands. Again, neither the Tribes nor the State had previously submitted a request to EPA to split the Power-Bannock Counties PM-10 nonattainment area. In addition, although there were no monitors located on Tribal lands in the late 1980s and early 1990s (and therefore no documented violations of the PM-10 NAAQS on Reservation lands), when violations were recorded on the State monitors, modeling conducted at that time predicted significant violations of the PM-10 NAAQS on Reservation lands in the vicinity of FMC. In fact, the Tribes' comments acknowledge that violations of the PM-10 NAAQS on the Reservation were predicted during the early planning stages for the Power-Bannock Counties PM-10 nonattainment area. Consequently, while there may not have been actual recorded violations of the PM-10 NAAQS on Reservation lands due to the absence of monitors when (and for some time after) the area was initially designated nonattainment for PM-10, there has always been evidence of pollution contribution from PM-10 sources on Tribal lands. Thus, it was appropriate under section 107(d)(4)(B) to include both State and Tribal lands in the area initially designated nonattainment for PM-10. In summary, EPA does not believe splitting the Power-Bannock Counties PM-10 nonattainment area at the State-Reservation boundary is inconsistent either with the CAA or previous EPA practice or policy. This is true both with respect to the treatment of the Power-Bannock Counties PM-10 nonattainment area prior to Idaho's recent request, and with respect to other PM-10 nonattainment areas, including those consisting of both State and Reservation lands.

The Tribes also express concern that EPA is treating the Tribes as if they were a subdivision of the State and lack any independent role with respect to this action. They further state that EPA has failed to follow EPA's own guidance for acting on matters significantly or uniquely affecting Indian Tribal governments by not adequately considering the Tribes' concerns. Although EPA is fully cognizant of, and believes it has respectfully considered, the Tribes' concerns, there exist a number of legal, statutory and policy limitations—which the Agency has shared on various occasions with Tribal representatives—that constrain approaches and flexibility the Tribes would have preferred the Agency to pursue. In addition, EPA believes that a review of the 20-year planning

relationship shared by the Tribes, the State of Idaho and EPA, and cited favorably by the Tribes in its comments on this action, clearly evinces strong support from EPA with respect to assertions of sovereignty raised by the Shoshone-Bannock Tribes in actions related to this area under the Clean Air Act. For example, EPA has supported the Tribes' sovereignty on occasions when the State of Idaho has attempted to assert regulatory jurisdiction over sources located on fee lands within the exterior boundaries of the Fort Hall Indian Reservation. EPA is also actively working with the Tribes on a government-to-government basis in the regulation of sources within Reservation boundaries, including FMC. Indeed, the only major difference of opinion between the Tribes and EPA appears to be the designation revision decision, since the Tribes continue to assert, even in comments opposing this action, that they support and intend to work closely with the Agency's efforts to promulgate a Federal Implementation Plan addressing the sources located on Reservation lands. EPA relates to Indian tribes, as a matter of policy and practice, on a government-to-government basis, but in all actions required to be taken by the Agency under the CAA, whether those actions involve States or Tribes, EPA is subject to requirements and limitations imposed by that statute.

It is also a fact that the existing nonattainment area covers territory that is subject to two distinct jurisdictions and legal authorities. Although the Tribes claim that the State's designation revision request purports to assert authority over lands under Tribal control, the State is merely availing itself of a regulatory option provided by the CAA itself with respect to the lands under State jurisdiction, that is, requesting a revision of the nonattainment area boundaries under section 107(d)(3)(D). Under that section, EPA must act on such requests within a specified time, i.e., no later than 18 months after the request is submitted. The fact that EPA's action in approving the State's request has consequences that are not favored by the Tribes does not alter either the State's right to make the request nor EPA's obligation to take action on the request. EPA is approving the State's request because it meets specified CAA criteria. EPA understands that among the Tribes' concerns is that the split action, particularly, will result in unfair attributions regarding the unresolved nonattainment problems in the area that they, in fact, never had authority or responsibility to control. EPA would

suggest, however, that this designation revision action should more properly be regarded as simply one component of a combination of actions the Agency is undertaking in order to establish for the first time a comprehensive PM-10 planning and implementation program on the Tribal portion of the Power-Bannock nonattainment area. After careful consideration of the Tribes' objections to dividing the nonattainment area, both those expressed by the Tribes before the proposal and in response to the proposal, it remains EPA's continued belief that, in seeking to achieve the ultimate air quality goals of the Act, splitting the existing nonattainment area into two separate nonattainment areas is in the overall best interest of the area as a whole.

*B. Comments That the State's Request and EPA's Action Are Procedurally Defective*

The Tribes and FMC also raise several alleged procedural defects with the State's request and EPA's proposed action on the State's request. First, FMC asserts that, as an initial matter, the State's request to split the area is defective in that the State violated the requirements of Idaho law as well as Clean Air Act requirements for notice and public hearing. FMC raised these issues in a petition to the State under Idaho law and the Tribes also raised these concerns to EPA and the State prior to EPA's proposal. Because EPA received a copy of FMC's petition and a copy of a letter from the Tribes to the State raising the alleged deficiency of the State's request prior to EPA's proposal on the State's request, EPA responded to the issues raised in FMC's petition and the Tribes' letter on the validity of the State's request in the proposal. 63 FR 33602-33603. In FMC's formal comments on EPA's proposal to split the nonattainment area, FMC comments that EPA's "conclusory rejection in [the proposal] of the position of FMC and the Tribes is improper and contrary to the Administrative Procedures Act." FMC further asserts it is premature for EPA to take final action before FMC's concerns have been resolved in the State proceeding. EPA disagrees on all points.

As an initial matter, it was in no way improper or contrary to the Administrative Procedures Act for EPA to explain in the proposal to grant the State's request why EPA believed the issues raised by FMC and the Tribes to the State regarding the alleged deficiency of the State's request were without merit. EPA had before it issues relating to the legal sufficiency of the

State's request on which EPA was proposing to take action. It was clearly appropriate for EPA to explain why EPA believed the State's request was not deficient. EPA made clear in the proposal that FMC and the Tribes would have an opportunity to again raise these issues, as well as any other issues, in response to the proposal, as required by the Administrative Procedures Act.

Neither FMC nor the Tribes have provided additional information in their comments on the proposal to show why they believe the State's request to EPA is deficient as a matter of State and Federal law. Based on EPA's review of FMC's petition, the State's letter to EPA responding to FMC's petition, and EPA's review of the State regulations at issue, EPA agrees with the State that the State was not required to provide public notice and opportunity to comment on the State's request to EPA as a matter of State law. EPA also agrees with the State that the State's request to EPA to split the nonattainment area into two nonattainment areas is not subject to IDAPA 16.01.01.578 because that section is entitled "Designation of Attainment, Unclassifiable and Nonattainment Areas" and the State's request to EPA was not a request to designate an area attainment, unclassifiable, or nonattainment. Finally, as stated in the proposal, EPA does not believe that the State's request to EPA was required to go through public notice and comment before submission to EPA under sections 110(a)(2) and 110(l) of the CAA because the State's request is not a SIP or SIP revision. In short, EPA believes that FMC's petition in the State proceeding is without merit. Under such circumstances, EPA does not believe it is appropriate to defer action on the State's request until FMC's petition under Idaho law has been resolved.<sup>5</sup>

Along with the claim that the State impermissibly invoked section 107(d)(3)(D) over lands subject to Tribal jurisdiction, which EPA addressed earlier in this notice, the Tribes raise another procedural defect in their comments, asserting that EPA has ignored section 164(c) of the Clean Air Act. That section provides that "Lands within the exterior boundaries of Federally recognized Indian Tribes may

<sup>5</sup> FMC has advised Idaho that it intends to drop its challenge to Idaho's request at the State level once a final settlement of FMC's alleged violations of the Resource Conservation and Recovery Act (RCRA) has gone through public comment and been finally entered. A consent decree between FMC and EPA resolving alleged RCRA violations at the FMC facility was lodged in the United States District Court for the District of Idaho on October 16, 1998, and is currently undergoing a 30 day public comment period.

be redesignated only by the appropriate governing Indian body. . . ." In arguing against splitting the nonattainment area, the Tribes assert that EPA's action is contrary to section 164(c). Section 164, however, applies only to the redesignation of areas as Class I, Class II, or Class III for purposes of the Prevention of Significant Deterioration (PSD) program. The redesignation of an area as Class I, II, or III under section 164 determines the maximum permitted ambient impact of any new major source or modified major source constructed in an area designated as attainment or unclassifiable under section 107. It does not apply to the designation or redesignation of areas under section 107 of the Act. Moreover, EPA is not changing the designation of "lands within the exterior boundaries" of the Fort Hall Indian Reservation, but rather, separating an existing nonattainment area that includes both State and Tribal lands at the State-Reservation boundary.

FMC comments that EPA should take into consideration the redesignation requirements of section 107(d)(3)(E) in deciding whether to split the Power-Bannock Counties PM-10 nonattainment area into two separate nonattainment areas. As EPA stated in the proposal, section 107(d)(3)(E), by its terms, applies only to requests to redesignate an area from nonattainment to attainment. 63 FR 33603. The State has not requested that the Portneuf Valley PM-10 nonattainment area, as defined in this notice, be redesignated from nonattainment to attainment, and the area will retain its classification as a moderate PM-10 nonattainment area as a result of this action. EPA did state in the proposal, as FMC notes, that the State of Idaho is demonstrating attainment of the PM-10 standard on State lands. FMC does not show or even suggest that any portion of the Portneuf Valley PM-10 nonattainment area is currently violating the PM-10 standards. There are many areas in the country that are in the same position that the Portneuf Valley PM-10 nonattainment area will be in as a result of this action: many other areas have attained the standard—which is a factual determination based on air quality data—but have not yet been redesignated as "attainment" for PM-10 under section 107(d)(3)(E) because they have either not yet requested redesignation or not yet completed the planning requirements of section 107(d)(3)(E). EPA does not believe it is appropriate to hold the Portneuf Valley PM-10 nonattainment area to the requirements of section 107(d)(3)(E) when it is simply requesting that the

current nonattainment area be split and is not requesting that the nonattainment area be redesignated as attainment for PM-10.

FMC also argues that because the split will result in different treatment for the two nonattainment areas under EPA's transition policy for PM-2.5, see 63 FR 33604, the State's request to split the nonattainment area is, in essence, a SIP, and, as FMC argued in its petition in the State proceeding, should have gone through notice and public comment under section 110(a)(2) and 110(l) of the Act. There is simply no basis to argue that the State's request to split the nonattainment area is a SIP or a SIP revision. The State's request does not contain and was not intended to impose any control measures and does not include any other elements of a SIP, such as an emission inventory or an attainment demonstration. The State submitted a PM-10 nonattainment SIP for the portion of the Power-Bannock Counties PM-10 nonattainment area on State lands in 1993, on which EPA has not yet taken action. The State's 1993 SIP went through public notice and comment at the State level. Idaho has advised EPA in its request to split the nonattainment area that it intends to submit a revision to the 1993 SIP this year. That SIP revision will also be required to meet the notice and public comment requirements of section 110(a)(2) and 110(l) of the Act.

### *C. Comments Relating to the Technical Basis for EPA's Action*

The Tribes and the private citizen who submitted adverse comments contend that the existing Power-Bannock Counties PM-10 nonattainment area was delineated on the basis of natural topographical and meteorological characteristics of the air shed, and that there is no topographical or meteorological basis for splitting the nonattainment area. The individual commenter further states that the split is therefore not based on scientific considerations. As stated in the proposal and in earlier responses to comments, in determining whether to approve or deny a State's request for a revision to the designation of an area under section 107(d)(3)(D), EPA believes it is appropriate to consider the same factors Congress directed EPA to consider when EPA initiates a revision to a designation of an area on its own motion under section 107(d)(3)(A). 63 FR 33599. These factors include "air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate." Thus, although technical and scientific considerations

are factors in determining the designation of an area, they are not the sole factors.

At the time the Power-Bannock Counties PM-10 nonattainment area was delineated, a State monitor at the sewage treatment plant (STP), located downwind of the industrial complex and near the Reservation boundary, recorded violations of the PM-10 standard. There was little other technical or scientific information upon which to base the boundary other than best professional judgement. Therefore, the topographical and general meteorological characteristics of the area were strong considerations in drawing the boundary. Although there were no monitors located on Reservation lands at the time the PM-10 nonattainment area was originally established, the Tribes and the State of Idaho provided comments to EPA requesting that the nonattainment area be established to include the major sources of particulate matter that were thought to contribute to the PM-10 exceedences, including FMC and Simplot at the industrial complex. 61 FR 29667, 29668 (June 12, 1996); 56 FR 37654, 37658 (August 8, 1991). In short, the boundary was determined based on considerations of where air quality did not meet or was not believed to meet the PM-10 standard and the location of sources thought to contribute to air quality that did not meet the standard or was not believed to meet the standard. Neither the State nor the Tribes requested at the time the Power-Bannock Counties PM-10 nonattainment area was first delineated that the nonattainment area be divided at the State-Reservation boundary. 61 FR 29668; 56 FR 37658. In fact, at the time the boundary deliberations were ongoing, the State was regulating FMC, which was located on fee lands within the Reservation, under a Memorandum of Agreement with the Tribes. Therefore, EPA did not consider then whether, apart from technical air quality considerations, jurisdictional considerations should play a role in establishing the boundary of the nonattainment area.

Several important factors have changed since that time. First, the State monitors now show attainment of the standard and the Tribal monitors, which were installed in 1995 and 1996 in areas where modeling had predicted maximum PM-10 concentrations, have recorded violations of the PM-10 standard. Second, the technical and scientific understanding of the sources and their contribution to PM-10 violations in the area has increased significantly. EPA has a better

understanding of meteorology in the area and how it affects the continuing violations of the PM-10 standard that have been recorded on the Tribal monitors. Based on information available to EPA, it appears that, due to the predominant wind direction, PM-10 emissions from FMC, located on the Reservation, are the primary, if not sole, cause of the continuing violations that have been recorded. Finally, the State has largely completed the PM-10 planning and control process for the sources under its authority, whereas the planning and control process for the sources on Reservation lands is still under development. All these factors support EPA's decision to grant the State's request to split the nonattainment area into two nonattainment areas. Although EPA agrees that the decision to split the area is not based on topographical features of the area, EPA disagrees that the decision to split the area is not based on scientific or meteorological considerations. The air quality data recorded on the State and Tribal monitors as well as the pollution windroses showing that State sources do not cause the violations of the standard on the Tribal monitors constitute the scientific and meteorological considerations underlying EPA's action. Also relevant is the fact (which the State acknowledges) that the two areas are subject to differing jurisdictions, an important planning and control consideration that EPA believes is an appropriate factor to consider under the Act.

FMC asserts that the Tribal monitors do not document a violation of the 24-hour PM-10 NAAQS because the Tribal monitors had collected less than three years of data as of the attainment date of December 31, 1996, and because the existing data does not "unambiguously show nonattainment," a condition for reliance on less than three years of data. In support of its argument that the Tribal monitors do not "unambiguously show nonattainment" of the 24-hour PM-10 standard, FMC asserts that the placement of the Tribal monitors raises several technical and legal issues regarding the siting and reliability of the data relied on by EPA in the proposal. Although FMC provides few specifics to support this charge, the company argues that one of the Tribal monitors is on a highway right-of-way, and thus subject to undue influence from vehicle traffic, and that another Tribal monitor is located on FMC land which is subject to institutional restrictions on development and public use.

As an initial matter, EPA is not, in this notice, making a determination of

whether or not the Fort Hall PM-10 nonattainment area is in violation of the PM-10 NAAQS. For purposes of EPA's decision to split the nonattainment area, there is no legal requirement that the air quality data considered by EPA establish a violation of the PM-10 NAAQS. The difference in air quality between the Reservation and State lands was one factor considered by EPA, not the sole factor. EPA nonetheless disagrees with FMC's suggestion that the siting of the Tribal monitors is improper and that the data are unreliable. With respect to FMC's assertion that one Tribal monitor is located on a highway right-of-way and is subject to undue influence from vehicle traffic, it is important to note that FMC does not argue that the monitor does not meet the EPA siting criteria of 40 CFR part 58, appendix E. EPA disagrees that this monitor (referred to as the "Sho-Ban site") is unduly influenced by vehicle traffic. The magnitude of emissions from paved highways is a function of several factors including vehicle speed, vehicle weight, silt loading on the roadway, number of vehicles, and emissions from the vehicles themselves. This is not a major roadway, but rather a frontage road. Thus, there are relatively few vehicles passing along this section of roadway and vehicle speeds are low. EPA believes that vehicular emissions from this section of road are minimal and do not unduly influence ambient levels of PM-10. In addition, another Tribal monitor (referred to as the "primary site") that has recorded numerous exceedences of the PM-10 standard is located in a similar orientation vis-a-vis the frontage road as the Sho-Ban site (across the frontage road from FMC and near the road). If, as FMC asserts, the Sho-Ban monitor is unduly influenced by road dust, one would also expect to see exceedences on the same day and of similar magnitude at the primary site. This is not the case. On only a few occasions have exceedences been recorded at the primary site and the Sho-Ban site on the same days. Instead, exceedences on both of these monitors, as well as on the third Tribal monitor, are closely correlated with the wind direction blowing from FMC sources toward the monitors.

With respect to FMC's assertion that the primary site is located "on lands owned and controlled by FMC which are subject to specific restrictions on development and public use, although it is not clear from FMC's comment, FMC may be implying that the monitor does not measure ambient air. "Ambient air" for NAAQS purposes is defined as "that

portion of the atmosphere, external to buildings, to which the general public has access." 40 CFR 50.1(e). EPA notes that, at the time the monitor was established and to this day, access to the vicinity of the monitor has been in no way restricted by a fence.<sup>6</sup> The primary site is located in an area external to buildings, to which the general public has access. That FMC has the legal right to restrict access to the location of the monitor is irrelevant. In short, there is no basis for FMC's suggestion that the monitors or data are invalid.

FMC argues that the attainment status of all or part of the Power-Bannock Counties PM-10 nonattainment area is moot because FMC intends to install additional controls on its facility. FMC notes that EPA and FMC are in the process of negotiating a settlement to resolve violations of the Resource Conservation and Recovery Act and that, as part of those discussions, FMC has committed to installing new emission controls and reconfiguring various processes to achieve significant PM-10 emission reductions at the facility. In fact, since FMC submitted its comments, a consent decree between FMC and EPA resolving alleged RCRA violations at the FMC facility was lodged in the United States District Court for the District of Idaho on October 16, 1998, and is currently undergoing a 30 day public review and comment period. The RCRA consent decree, once entered by the Court, will require FMC to pay a civil penalty of \$11,864,800 million for the alleged RCRA violations and take measures to bring the FMC facility into compliance with RCRA. The RCRA consent decree also includes 13 "supplemental environmental projects" (referred to as SEPs) designed to reduce PM-10 emissions at the FMC facility.<sup>7</sup> FMC states in its comments on EPA's proposal to split the nonattainment area that the attainment status of the area is moot because FMC believes the Reservation will be able to attain the PM-10 standard once it has completed installation and implementation of the SEPs under the RCRA consent decree. EPA certainly supports any PM-10 emission reductions by FMC, whether voluntary or as part of an enforceable settlement agreement. That the area may attain the PM-10 NAAQS several years

<sup>6</sup> Access to the monitor itself is, of course, restricted by a 15 by 10 foot chain-link fence to guard against vandalism and tampering.

<sup>7</sup> The RCRA consent decree also includes a SEP whereby FMC commits \$1,650,000 to fund a study of the potential health effects on residents of the Fort Hall Indian Reservation that may have resulted from releases of hazardous substances at the FMC facility.

from now after FMC installs completes the SEPs, however, does not render the attainment status of the area at the present time a moot issue. In any event, the attainment status of the State monitors versus the Tribal monitors is only one of the many factors considered by EPA in deciding to split the nonattainment area.

FMC also contends that the State's technical analysis, where it looked at the "urban complex" (the Cities of Pocatello and Chubbuck and the surrounding urban areas) and the "industrial complex" (FMC and J.R. Simplot) is flawed. FMC asserts that the State's analysis might support splitting the nonattainment area between the urban complex and the industrial complex, but not splitting the area within the industrial complex. FMC misunderstands the two-step analysis conducted by the State. The State first presented information to demonstrate that these two separate areas have separate air quality impacts and sources. Specifically, the modeling information presented by the State shows that the urban complex and the industrial complex have different sources contributing to the high PM-10 levels that have been recorded in each area and that there is no evidence of significant mixing of emissions between the urban complex and the industrial complex. Had the State stopped here in its analysis, FMC would be correct in its assertion that there is no basis for splitting the existing nonattainment area at the State-Reservation boundary. The State went on to show, however, that sources on State lands within the industrial complex, namely, Simplot, are effectively controlled and do not contribute to violations of the PM-10 NAAQS on State or Tribal lands. EPA agrees with the State that this information supports splitting the existing nonattainment area at the State-Reservation boundary.

#### *D. Comments Relating to the Location of the Boundary*

In the State's April 16, 1997, request, the State requested that the Power-Bannock Counties PM-10 nonattainment area be divided at the boundary between State lands and the Fort Hall Indian Reservation. As discussed in the proposal, EPA learned after submission of the State's request that a small portion of the FMC facility is located on State lands. See 63 FR 3360. In the proposal, EPA considered the fact that the FMC sources located within the Power-Bannock Counties PM-10 nonattainment area but outside the exterior boundaries of the Fort Hall Indian Reservation on State lands

accounted for less than 1% of all of FMC's PM-10 emissions and did not appear to contribute to the violations that have been recorded on the Tribal monitors. EPA stated it believed it was appropriate to split the nonattainment area at the State-Reservation boundary despite this new information. EPA specifically requested comment, however, on whether it would be preferable to split the current Power-Bannock Counties PM-10 nonattainment area at the State-Reservation boundary, except to include in the Fort Hall PM-10 nonattainment area that portion of the FMC facility located on State lands.

Both the State and FMC commented on this issue. The State advised EPA it would be comfortable with either approach. FMC stated that it was equally unhappy with either approach. FMC went on to state that either approach would necessitate two implementation plans (i.e., a SIP and a FIP/TIP). EPA disagrees that splitting the nonattainment area, either along the State-Reservation boundary or including all of the FMC facility in the Fort Hall nonattainment area, will result in any more implementation plans than if the area remains as one nonattainment area. In all events, the State must submit a SIP revision to address the previous deficiencies in the State's 1993 PM-10 SIP covering State lands. The State's plan must address that portion of the FMC facility on State lands, regardless of whether that portion of the FMC facility is located in the Power-Bannock Counties PM-10 nonattainment area, the Fort Hall PM-10 nonattainment area, or the Portneuf Valley PM-10 nonattainment area. EPA and the Tribes will promulgate Federal Implementation Plans and Tribal Implementation Plans covering lands within the exterior boundaries of the Fort Hall Indian Reservation.

After considering the comments of the State and FMC on this issue, EPA continues to believe it is preferable to split the nonattainment area along the State-Reservation boundary. Apart from the technical air quality information, the fact that the existing Power-Bannock Counties PM-10 nonattainment area encompasses two regulatory jurisdictions is a major additional reason why EPA has decided to grant the State's request to split the nonattainment area. EPA therefore believes it is more appropriate to split the nonattainment areas in a manner that respects this jurisdictional distinction.

### III. Final Action

By this action, the existing Power-Bannock Counties PM-10 nonattainment area is divided into two nonattainment areas that together cover the identical geographic area of the existing nonattainment area. The revised areas will be divided at the boundary between State lands and the Fort Hall Indian Reservation, with one revised area, referred to as the "Portneuf Valley PM-10 nonattainment area," consisting of State lands, and the other revised area, referred to as the "Fort Hall PM-10 nonattainment area," consisting of lands within the exterior boundaries of the Fort Hall Indian Reservation. Both the Portneuf Valley PM-10 nonattainment area and the Fort Hall PM-10 nonattainment area will retain designations as PM-10 nonattainment areas and a classification of moderate as a result of this action.

### IV. Administrative Requirements

#### A. Executive Order (E.O.) 12866

Under Executive Order 12866, 58 FR 51735 (October 4, 1993), 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.

The OMB has exempted this action from review under E.O. 12866. In addition, the Agency has determined that an action revising the designation of an area by creating two separate nonattainment areas under section 107(d)(3) of the CAA results in none of the effects identified in E.O. 12866 as constituting a significant regulatory action. The revised designations together cover the same geographic area and the same sources as the original designation and the classification of the areas remains unchanged by this action.

#### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities unless EPA certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000. A regulatory flexibility screening of this action revealed that it would not have a significant adverse economic impact on a substantial number of small entities. An action revising the designation of an area by creating two separate nonattainment areas under section 107(d)(3) of the CAA is an action affects only the boundary of the geographic area. The revised designations together cover the same geographic area and the same sources as the original designation and the classification of the areas remains unchanged by this action. Therefore, this action does not impose any new requirements on small entities. See *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) (agency's certification need only consider rule's impact on entities subject to the requirements of the rule). To the extent that a State, Tribe or EPA must adopt new regulations, based on an area's nonattainment status, EPA will review the effect those actions have on small entities at the time EPA takes action on those regulations. Therefore, pursuant to 5 U.S.C. 605(b), EPA certifies that today's action does not have a significant economic impact on a substantial number of small entities within the meaning of those terms for RFA purposes.

#### C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 04-4, 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 UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, when EPA promulgates "any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more" in any one year. A "Federal mandate" is defined, under section 101 of UMRA,

as a provision that "would impose an enforceable duty" upon the private sector or State, local, or Tribal governments," with certain exceptions not here relevant. Under section 203 of UMRA, EPA must develop a small government agency plan before EPA "establish[es] any regulatory requirements that might significantly or uniquely affect small governments." Under section 204 of UMRA, EPA is required to develop a process to facilitate input by elected officers of State, local, and Tribal governments for EPA's "regulatory proposals" that contain significant Federal intergovernmental mandates. Under section 205 of UMRA, before EPA promulgates "any rule for which a written statement is required under [UMRA section] 202," EPA must identify and consider a reasonable number of regulatory alternatives and either adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, or explain why a different alternative was selected.

EPA has determined that this action does not include a Federal mandate that may result in the expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. An action revising the designation of an area by creating two separate nonattainment areas under section 107(d)(3) of the CAA is an action affects only the boundary of the geographic area. The revised designations together cover the same geographic area and the same sources as the original designation and the classification of the areas remains unchanged by this action. Therefore, this action does not impose any new requirements on the State of Idaho, the Shoshone-Bannock Tribes, or the private sector. Accordingly, EPA has determined that this action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or Tribal governments in the aggregate, or to the private sector. Consequently, sections 202, 204, and 205 of UMRA do not apply to today's action, and EPA is therefore not required to and has not taken any actions to meet the requirements of these sections of UMRA. With respect to section 203 of UMRA, EPA has concluded that this action includes no regulatory requirements that will significantly or uniquely affect small governments, because it imposes no requirements on them. Nevertheless, during the development of the proposal for this action, EPA held several meetings with

representatives of the Shoshone-Bannock Tribes to discuss the requirements of, and receive input regarding, this action.

#### *D. Submission to Congress and the General Accounting Office*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### *E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045, 62 FR 19885 (April 23, 1997) applies to any rule that (1) is determined to be "economically significant" as that term is defined in E.O. 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 is not subject to E.O. 13045 because it is not an economically significant rule as defined by E.O. 12866. In addition, it does not involve decisions based on environmental health or safety risks because these decisions were made at the time EPA promulgated the PM-10 NAAQS. Today's action does not change the health standard set by the NAAQS.

#### *F. Executive Order 12875: Enhancing the Intergovernmental Partnership*

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to

the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's action does not create a mandate on State, local or tribal governments and does not impose any enforceable duties on these entities. An action revising the designation of an area by creating two separate nonattainment areas under section 107(d)(3) of the CAA is an action affects only the boundary of the geographic area and does not impose any regulatory requirements. The revised designations together cover the same geographic area and the same sources as the original designation and the classification of the areas remains unchanged by this action. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

#### *G. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments*

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's action does not impose substantial direct compliance costs on the communities of Indian tribal governments. An action revising the designation of an area by creating two separate nonattainment areas under section 107(d)(3) of the CAA is an action affects only the boundary of the geographic area and does not impose any regulatory requirements. The revised designations together cover the same geographic area and the same sources as the original designation and the classification of the areas remains unchanged by this action. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule. In taking this action, EPA consulted with representatives of the Shoshone-Bannock Tribes to permit them to have meaningful and timely input into its development. Prior to issuing the proposal to split the Power-Bannock Counties PM-10 nonattainment area, EPA met on three occasions with representatives of the Shoshone-Bannock Tribes to discuss the basis for and consequences of splitting the nonattainment area and to hear the Tribe's concerns with splitting the nonattainment area. EPA also had several telephone conferences with representatives of the Shoshone-Bannock Tribes to learn of the Tribes' concerns prior to the proposal. In addition, EPA provided public notice and an opportunity for comment on

EPA's proposal to split the Power-Bannock Counties PM-10 nonattainment area a 30 day prior to this action. The Tribes' concerns and EPA's response to those concerns are discussed in the proposal, 63 FR 33602-33603, and in Section II of this notice.

*H. National Technology Transfer and Advancement Act of 1995 (NTTAA)*

Section 12(d) of NTTAA, Pub. L. No. 104-113, Section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, 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 standards.

An action revising the designation of an area by creating two separate nonattainment areas under section 107(d)(3) of the CAA does not establish technical standards. Therefore, this action is not subject to the NTTAA.

*I. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of

this action must be filed in the United States Court of Appeals for the appropriate circuit by January 4, 1999. Filing a petition for reconsideration by the Administrator of this final rule 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. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 81**

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: October 30, 1998.

**Chuck Clarke,**  
*Regional Administrator, Region 10.*

**PART 81—[AMENDED]**

1. The authority citation for part 81 continues to read as follows:

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

2. In § 81.313, the table entitled "Idaho—PM-10" is amended by revising the entry for "Power-Bannock Counties, part of: (Pocatello)" to read as follows:

**§ 81.313 Idaho.**  
\* \* \* \* \*

IDAHO—PM-10

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * *				
Power-Bannock Counties, part of: (Pocatello): State Lands				
Portneuf Valley Area .....	11/15/90	Nonattainment .....	11/15/90	Moderate.
T.5S, R.34E Sections 25-36.				
T.5S, R.35E Section 31.				
T.6S, R.34E Sections 1-36.				
T.6S, R.35E Sections 5-9, 16-21, 28-33.				
Plus the West 1/2 of Sections 10, 15, 22, 27, 34.				
T.7S, R.34E Sections 1-4, 10-14, and 24.				
T.7S, R.35E Sections 4-9, 16-21, 28-33.				
Plus the West 1/2 of Sections 3, 10, 15, 22, 27, 34.				
T.8S, R.35E Section 4.				
Plus the West 1/2 of Section 3.				
Power-Bannock Counties, part of: (Pocatello): Fort Hall Indian Reservation .....	11/15/90	Nonattainment .....	11/15/90	Moderate.
T.5S, R.34E Sections 15-23.				
T.5S, R.33E Sections 13-36.				
T.6S, R.33E Sections 1-36.				
T.7S, R.33E Sections 4, 5, 6.				
T.7S, R.34E Section 8.				
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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 571

[Docket No. NHTSA-98-4662]

RIN 2127-AC19

### Federal Motor Vehicle Safety Standards; School Bus Body Joint Strength

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Final rule.

**SUMMARY:** This rule amends Federal Motor Vehicle Safety Standard No. 221, *School Bus Body Joint Strength* (49 CFR 571.221), which requires school bus body panel joints to be capable of holding the body panel to the member to which it is joined when subjected to a force of 60 percent of the tensile strength of the weakest joined body panel. Currently, the standard applies only to school buses with a gross vehicle weight rating (GVWR) greater than 10,000 pounds. This rule extends the applicability of the standard to school buses with a GVWR of 10,000 pounds or less, narrows an exclusion of maintenance access panels from the requirements of the standard, and revises testing requirements.

This rule ensures that children are provided equivalent levels of protection against joint separation in small as well as large school buses. Since a larger proportion of small school buses than of large school buses are lift-equipped to transport mobility impaired students compared to large buses, this rule particularly enhances the safety of mobility impaired children.

**DATES:** This rule is effective May 5, 2000. Optional early compliance with the changes made in this final rule is permitted beginning November 5, 1998. Any petitions for reconsideration of this final rule must be received by NHTSA not later than December 21, 1998.

**ADDRESSES:** Petitions for reconsideration should refer to the docket number for this action and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, DC 20590. Copies of the Final Regulatory Evaluation for this rule can be obtained from: Docket Management, Room PL-401, 400 Seventh Street, SW,

Washington, DC, 20590, telephone: (202) 366-9324. Docket hours are 10 a.m. to 5 p.m., Monday through Friday. **FOR FURTHER INFORMATION CONTACT:** Mr. Charles R. Hott, Office of Crashworthiness Standards, National Highway Traffic Safety Administration, 400 Seventh Street SW, Washington, DC 20590, (202) 366-0247.

#### SUPPLEMENTARY INFORMATION:

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#### I. Summary of the Final Rule

This rule is intended to enhance the applicability and objectivity of Standard No. 221's school bus joint strength requirements. The standard currently applies only to large school buses (GVWR greater than 10,000 pounds). The standard specifies strength requirements for each "body panel joint," which is currently defined as the area of contact or close proximity between the edges of a body panel and another body component, excluding spaces designed for ventilation or another functional purpose, and excluding doors, windows, and maintenance access panels (MAPs).

This rule extends the applicability of Standard No. 221 to small school buses (GVWR of 10,000 pounds or less) and narrows the present exclusion of MAPs from the joint strength requirements. Except as noted below, the rule requires panels to be attached at least at every 8 inches (203 millimeters (mm)), and requires body panel joints to withstand a tensile strength of 60 percent of the tensile strength of the weakest joined body panel. Excluded from these requirements are MAPs outside of the passenger area, and MAPs, smaller than a specified size, inside the passenger area. Joints from which a test sample cannot be obtained because of the joint's size or the curvature of the panels comprising the joint, are excluded from the tensile strength requirements.

Some of the definitions adopted by this rule differ from the NPRM. For example, the rule simplifies the definition of "maintenance access panel," and adopts a definition of

"passenger compartment" based on the definition in Standard No. 217, *Bus Emergency Exits and Window Retention and Release* (49 CFR 571.217). The proposal for deleting the "hourglass" shape of the test specimen has not been adopted.

#### II. Background

NHTSA is authorized by 49 U.S.C. 30101, *et seq.*, to issue Federal motor vehicle safety standards for new motor vehicles, including school buses.<sup>1</sup> In 1974, Congress enacted the Motor Vehicle and Schoolbus Safety Amendments (Pub. L. 93-492), which directed NHTSA to issue Federal motor vehicle safety standards for various aspects of school bus safety, including interior protection for occupants, floor strength, and crashworthiness of body and frame. In response to that Congressional mandate, NHTSA issued Standard No. 221, *School Bus Body Joint Strength*.

Standard No. 221 requires the strengthening of school bus body panel joints to prevent these joints from separating during a crash and becoming cutting edges that could cause serious injuries or allowing passenger ejection through openings created by such panel separations. The standard currently provides that each school bus body panel joint must be capable of holding the body panel to the member to which it is joined when subjected to a force of 60 percent of the tensile strength of the weakest joined body panel. Excluded from this requirement are doors, windows, spaces designed for ventilation or another functional purpose, and MAPs. MAPs were excluded because they involve areas on the vehicle requiring frequent maintenance and need to have unrestricted accessibility. Although MAPs were not defined in the standard, it was NHTSA's intent that manufacturers would limit MAPs to panels providing access to areas requiring routine maintenance.

*Maintenance access panels (MAPs).* The exception of MAPs from Standard No. 221 has been an issue of concern to NHTSA, the National Transportation Safety Board (NTSB), and school bus

<sup>1</sup> 49 U.S.C. 30125(a)(1) defines a *schoolbus* as a passenger motor vehicle designed to carry a driver and more than ten passengers that the Secretary of Transportation determines "is likely to be used significantly to transport preprimary, primary, and secondary school students to or from school or an event related to school." NHTSA further defines a school bus as a bus that is sold or introduced in interstate commerce for purposes that include carrying students to and from school and related events, but does not include a bus that is designed and sold for operation as a common carrier in urban transportation. 49 CFR 571.3.