

solvency issue, an abundance of caution dictates that the Board review the Fund's status next year. The Board recommended that an updated actuarial study be prepared in conjunction with the biennial report due to the Governor in 2013. In 2009, the Board asked DMRM to provide an analysis of Alternative Bonding Systems (ABS) conducted in other coal mining states. With the assistance of Pinnacle studying ABS systems in West Virginia and Kentucky, the Board believes that Ohio's ABS is at least as effective as those systems; the Board believes that a reasonable timeframe to reclaim forfeited sites is in the range of three to five years; should one of the largest five permit holders become insolvent, the Fund would likely be inadequate to allow reclamation within the 3 to 5-year range; and the Board will continue to study the model prepared by Pinnacle to refine, improve, and monitor this model of the Fund's inadequacy.

The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

### III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the submission satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Ohio program.

#### *Electronic or Written Comments*

If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent state or Federal laws or regulations, technical literature, or other relevant publications. We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

#### *Public Availability of Comments*

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may

be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments.

#### *Public Hearing*

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., local time February 29, 2012. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

#### *Public Meeting*

If there is only limited interest in participating in a public hearing, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the submission, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

### IV. Procedural Determinations

#### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

#### *Other Laws and Executive Orders Affecting Rulemaking*

When a State submits a program amendment to OSM for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the

proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

#### **List of Subjects in 30 CFR Part 935**

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 23, 2011.

**Thomas D. Shope,**

*Regional Director, Appalachian Region.*

[FR Doc. 2012-3424 Filed 2-13-12; 8:45 am]

**BILLING CODE 4310-05-P**

### **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Parts 50 and 51**

[EPA-HQ-OAR-2010-0885, FRL-9630-6]

RIN 2060-AR32

#### **Implementation of the 2008 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach, Attainment Deadlines and Revocation of the 1997 Ozone Standards for Transportation Conformity Purposes**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing thresholds for classifying nonattainment areas for the 2008 ozone National Ambient Air Quality Standards (NAAQS) (the "2008 ozone NAAQS") promulgated by the EPA on March 12, 2008. This proposal also addresses the timing of attainment dates for each classification. Finally, we are proposing to revoke the 1997 ozone NAAQS 1 year after the effective date of designations for the 2008 ozone NAAQS for transportation conformity purposes only.

**DATES:** Comments must be received on or before March 15, 2012. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2010-0885, by one of the following methods:

• [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.

• **Email:** [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov)  
 • **Mail:** Air and Radiation Docket and Information Center, Attention Docket ID No. EPA-HQ-OAR-2010-0885, Environmental Protection Agency, 1301 Constitution Ave. NW., Washington, DC 20460. Mail Code: 2822T. Please include two copies if possible. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

• **Hand Delivery:** Air and Radiation Docket and Information Center, Attention Docket ID No. EPA-HQ-OAR-2010-0885, Environmental Protection Agency in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday, Air and Radiation Docket and Information Center.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OAR-2010-0885. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or email. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should

avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in [www.regulations.gov](http://www.regulations.gov). Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket and Information Center in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

**FOR FURTHER INFORMATION CONTACT:** For further general information on this rulemaking, contact Dr. Karl Pepple, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (C539-01), Research Triangle Park, NC 27711, phone number (919) 541-2683, fax number (919) 541-0824 or by email at [pepple.karl@epa.gov](mailto:pepple.karl@epa.gov), or Mr. Butch Stackhouse, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (C539-01), Research Triangle Park, NC 27711, phone number (919) 541-5208, fax number (919) 541-0824 or by email at [stackhouse.butch@epa.gov](mailto:stackhouse.butch@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. General Information**

###### *A. Does this action apply to me?*

Entities potentially affected directly by the proposed rule for this action include state, local, and tribal governments. Entities potentially affected indirectly by the proposed rule include owners and operators of sources of emissions [volatile organic compounds (VOCs) and nitrogen oxides (NO<sub>x</sub>)] that contribute to ground-level ozone concentrations.

###### *B. What should I consider as I prepare my comments for EPA?*

1. **Submitting CBI.** Do not submit this information to the EPA through [www.regulations.gov](http://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to the EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed to be CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for Preparing Your Comments.** When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

###### *C. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this notice will be posted at <http://www.epa.gov/air/ozonepollution/actions.html#impl> under "recent actions."

###### *D. How is this notice organized?*

The information presented in this notice is organized as follows:

##### **I. General Information**

###### **A. Does this action apply to me?**

- B. What should I consider as I prepare my comments for EPA?
- C. Where can I get a copy of this document and other related information?
- D. How is this notice organized?
- II. Background for Proposal
  - A. Overview
  - B. History of Nonattainment Area Classification Systems for the Ozone NAAQS
  - C. Initial Area Designations for the 2008 Ozone NAAQS
  - D. Transportation Conformity and the 1997 Ozone NAAQS
- III. What are the proposed classification thresholds for nonattainment areas for the 2008 ozone NAAQS?
  - A. Proposed Classification Thresholds
  - B. Reclassification of Nonattainment Areas That Have Voluntarily Requested Higher Classifications
  - C. What are we proposing as the attainment deadlines for nonattainment areas in each classification of the 2008 ozone NAAQS?
- IV. What is the EPA proposing regarding revocation of the 1997 ozone NAAQS at this time?
  - A. What is the background for our proposal?
  - B. What is the rationale for our proposal?
  - C. Why is it necessary to revoke the 1997 ozone NAAQS now for transportation conformity purposes?
  - D. Is the EPA proposing to revoke the 1997 ozone NAAQS for other purposes as part of this rulemaking?
- V. What does this rulemaking not address?
- VI. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
  - G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
  - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.
  - I. National Technology Transfer and Advancement Act
  - J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
- VII. Statutory Authority

## II. Background for Proposal

### A. Overview

On March 12, 2008,<sup>1</sup> the EPA revised the primary National Ambient Air Quality Standards (NAAQS) for ozone to a level of 0.075 parts per million (ppm) (annual fourth-highest daily maximum 8-hour concentration,

averaged over 3 years).<sup>2,3</sup> On July 16, 2009, the EPA announced that it would initiate a rulemaking to reconsider the standard for various reasons, including the fact the 0.075 ppm level fell outside of the range recommended by the Clean Air Scientific Advisory Committee. Pending the outcome of that reconsideration, the EPA suspended further work on designating areas, including developing a classification approach for areas that would be designated nonattainment. In September 2011, the Office of Management and Budget (OMB) returned for further consideration the EPA's draft rulemaking to reconsider the 2008 ozone NAAQS.<sup>4</sup> The current NAAQS for ozone thus remains at 0.075 ppm, as established in 2008. The 2008 NAAQS retains the same general form and averaging time as the 0.08 ppm NAAQS set in 1997 but is set at a more stringent level.

While the 2008 NAAQS was being reconsidered, the EPA deferred initial designation of areas as attainment or nonattainment with respect to that standard until March 12, 2011.<sup>5</sup> (*See* 75 FR 2936.) Since this deadline has passed and the EPA's draft rulemaking to reconsider the 2008 ozone NAAQS has been returned by OMB for further consideration, the EPA is now proceeding with certain activities to implement the 2008 ozone NAAQS. In a separate action, the EPA will propose a rule to address the steps states will take to implement the NAAQS and the timing of those steps. In this action, we address the system for classifying nonattainment areas and a limited set of additional implementation issues.

A key first step after promulgating a new or revised NAAQS is for the EPA to issue initial area designations. Area designations establish which areas are meeting the NAAQS (attainment/unclassifiable) and which areas are not meeting the NAAQS (nonattainment), and the boundaries for those areas. Following the schedule provided in Clean Air Act (CAA) section 107(d),

<sup>2</sup> The secondary ozone standard, designed to protect public welfare, was set at the same level and with the same averaging time as the primary standard.

<sup>3</sup> For a detailed explanation of the calculation of the 3-year 8-hour average, see 40 CFR part 50, Appendix I.

<sup>4</sup> Memorandum from Cass R. Sunstein to Administrator Lisa Jackson, dated September 2, 2011.

<sup>5</sup> The 2008 ozone NAAQS was promulgated on March 12, 2008. By the 2-year designation requirement found in CAA § 107(d)(1), the deadline for designating areas was March 12, 2010. The EPA determined that due to the reconsideration there was insufficient information to designate areas, and invoked the additional year for designations as allowed under CAA § 107(d)(1)(B).

states were required to submit designation recommendations for every area of each state to the EPA by March 12, 2009, which was 1 year after the promulgation date of the 2008 ozone NAAQS. The EPA has received these recommendations and has proceeded with the designations process based on these recommendations.

In accordance with CAA section 181(a)(1), each area designated as nonattainment for the 2008 ozone NAAQS will be classified by operation of law at the same time as the area is designated by the EPA. Therefore, the EPA intends to finalize classification thresholds on or before the date that initial area designations are issued by the Administrator. The planning and emission reduction requirements as well as the maximum attainment date for each area are based on that area's classification. Areas classified as marginal are subject to the least stringent planning and control requirements and shortest attainment period and those classified as severe are subject to the most stringent requirements and longest attainment period.

Under Subpart 2 of part D of title I of the CAA, state planning and emissions control requirements for ozone are determined, in part, by a nonattainment area's classification. In 1990, Congress amended part D of title I of the CAA by adding several new subparts, including subpart 2, which specifies implementation requirements for ozone nonattainment areas. These requirements apply in addition to the general State Implementation Plan (SIP) planning requirements applicable to all nonattainment areas under subpart 1 of part D. Under subpart 2, ozone nonattainment areas are classified based on the severity of their ozone levels (as determined based on the area's "design value," which represents the most recent 3-year average of the air quality in the area).<sup>6</sup> Nonattainment areas with a "lower" classification have ozone levels that are closer to the standard than areas with a "higher" classification. The subpart 2 classification section provides an increasing amount of time from the date of designation to attain the standards for the progressively higher classifications: Marginal (3 years), Moderate (6 years), Serious (9 years), Severe-15 (15 years), Severe-17 (17 years), and Extreme (20 years).

<sup>6</sup> The air quality design value for the 8-hour O<sub>3</sub> NAAQS is the 3-year average of the annual 4th highest daily maximum 8-hour average ozone concentrations.

<sup>1</sup> See 73 FR 16436.

Areas in the lower classification levels have fewer and/or less stringent mandatory air quality planning and control requirements than those in higher classifications. For instance, Marginal areas are exempt from the requirement to prepare an attainment demonstration and associated contingency measures, although such areas are required to adopt an emissions statement rule for stationary sources, submit a baseline emissions inventory, and implement a nonattainment area preconstruction permit program. A Moderate area needs to comply with the Marginal area requirements; in addition the state must submit a demonstration that the area will attain within 6 years after designation, and it must adopt (and submit for EPA approval) certain emissions control requirements, such as reasonably available control technology, a basic vehicle inspection and maintenance program if the area meets the applicable population thresholds, and provisions for increased offsets for new or modified sources under the state's new source review (NSR) program. The higher classifications similarly require additional emissions controls and stricter NSR offset requirements beyond those required for a Moderate area. In addition, under the higher classifications, smaller sources are considered "major sources" for permitting and other requirements.

#### *B. History of Nonattainment Area Classification Systems for the Ozone NAAQS*

The CAA was amended in 1990 to add specific provisions that apply to ozone nonattainment areas. These include timelines for both planning and implementation, and requirements for specific programs to reduce emissions that vary based on an area's classification. The ozone standard that was in effect at the time of the 1990 CAA amendments was a 1-hour exceedance-based standard of 0.12 ppm.<sup>7</sup> Accordingly, the classification provisions in Table 1 in section 181 of subpart 2 of the CAA (also referred to herein as the "subpart 2 classification table") are specific to that 1-hour standard. In 1997, the EPA revised both the form and level of the ozone NAAQS to a 3-year average of the 4th highest daily maximum 8-hour averages.<sup>8</sup> In a subsequent rulemaking, the EPA adapted the CAA's 1-hour classification thresholds to the new 8-hour standard<sup>9</sup>

<sup>7</sup> For additional detail on the 1-hour ozone NAAQS, see 56 FR 56694.

<sup>8</sup> See 40 CFR Appendix I.

<sup>9</sup> Referred to as the Phase 1 Rule, see 40 CFR part 51, subpart X at 51.903.

and used the new 8-hour threshold values to classify certain areas designated nonattainment for the 1997 8-hour NAAQS. This approach for translating the CAA's 1-hour threshold values to 8-hour threshold values was challenged in litigation and was upheld by the court. See *South Coast Air Quality Management District v. Environmental Protection Agency*, 472 F.3d at 896–898.

#### *C. Initial Area Designations for the 2008 Ozone NAAQS*

Under CAA § 107(d), initial area designations are required when a NAAQS is revised. The process involves interaction between the EPA and states, starting with states preparing recommendations and submitting them to the EPA for review. If the EPA intends to modify a state's recommendation, the EPA must notify the state of such modification by letter no later than 120 days ("120 day letters") prior to making a final decision.<sup>10</sup> For the 2008 ozone NAAQS, most states submitted designation recommendations to the EPA as required under section 107(d) in March 2009, 1 year after the 2008 NAAQS was promulgated. States also had the opportunity to update these recommendations in the fall of 2011, based on ambient air quality monitoring data for the years 2008–2010, which were (and still are) the most recent monitoring data available. Areas could elect to early certify their 2009–2011 data by February 29, 2012 for EPA to consider in the designation process.

The EPA plans to consider the state recommendations received in 2009 and any updates provided by the states based on current monitoring data in deciding whether to modify any recommendations. In the event that the EPA intends to modify a state's recommendation, the EPA will notify the state 120 days prior to issuing designations. The EPA's goal is to finalize designations by mid-2012.

#### *D. Transportation Conformity and the 1997 Ozone NAAQS*

In this rulemaking, the EPA is proposing to revoke the 1997 ozone NAAQS for transportation conformity purposes only.<sup>11</sup> The revocation of the

<sup>10</sup> While CAA section 107, which governs the process for initial area designations, specifically addresses states, the EPA intends to follow the same process for tribes to the extent practicable, pursuant to section 301(d) of the CAA regarding tribal authority and the Tribal Authority Rule (63 FR 7254; February 12, 1998). The EPA is working with the tribes and tribal organizations regarding their participation in the designations process.

<sup>11</sup> When EPA revises a NAAQS, the prior NAAQS is not automatically revoked. Accordingly, both the

1997 ozone standard for this limited purpose would occur 1 year after the effective date of initial area designations for the 2008 ozone NAAQS. We believe this approach is the most logical because it would result in only one ozone NAAQS—the more protective 2008 ozone NAAQS—applying for purposes of transportation conformity, after the end of the 1-year transportation conformity grace period that applies to newly designated nonattainment areas (see CAA section 176(c)(6)). If the 1997 ozone NAAQS were to remain in place after conformity applies for the 2008 ozone NAAQS, areas currently in nonattainment or maintenance for the 1997 ozone NAAQS that are designated nonattainment for the 2008 ozone NAAQS would be required to implement the transportation conformity program for both ozone NAAQS concurrently. The EPA is proposing to revoke the 1997 ozone NAAQS for purposes of transportation conformity in an attempt to avoid this overlap of NAAQS for conformity requirements. The EPA intends to discuss potential revocation of the 1997 NAAQS for all other purposes in a future, separate rulemaking.

### **III. What are the proposed classification thresholds for nonattainment areas for the 2008 ozone NAAQS?**

#### *A. Proposed Classification Thresholds*

##### *1. Background*

The subpart 2 classification table includes the classification thresholds for areas designated as nonattainment for the 1-hour ozone NAAQS. The subpart 2 classification table is based on 1-hour ozone nonattainment area design values (DVs) (i.e., beginning at a level of 0.121 ppm) because it was designed for implementation of the 0.12 ppm 1-hour standard, which was the effective ozone standard when Congress added the table to the CAA in 1990. Because the table is based on DVs for a 0.12 ppm 1-hour standard, we recognized in the rulemaking to implement the 1997 NAAQS that it did not make sense to apply the thresholds listed in the table for implementing the 1997 0.08 ppm 8-hour standard. The EPA believed that using 8-hour DVs to classify areas for the 8-hour standard would reflect the magnitude of the 8-hour ozone problem more accurately than would using the 1-hour DVs in the subpart 2 classification table. In addition, many of the areas that

1997 ozone NAAQS and the more stringent 2008 ozone NAAQS are active standards unless and until EPA takes action to revoke the previous 1997 standard.

were nonattainment for the 1997 8-hour NAAQS had 1-hour DVs less than 0.121 ppm and would not have been covered by the subpart 2 classification table at all.

We adopted by regulation a modified version of the subpart 2 classification table for the 1997 8-hour ozone standard which contains 8-hour DV thresholds for each classification, rather than the statutory 1-hour DV thresholds. We translated the classification thresholds in the subpart 2 classification table from 1-hour DVs to 8-hour DVs based on the percentage by which each classification threshold in the table exceeds the 1-hour ozone NAAQS. We noted that these percentages, as established by Congress in 1990, set the classification thresholds at certain percentages or fractions above the level of the standard.<sup>12</sup> We refer to this method as the “percent-above-the-standard” method. We are proposing to take the same approach for the 2008 ozone NAAQS. As we did for the 1997 8-hour NAAQS, we are proposing to establish by regulation a modified version of this classification table to account for the new level of 0.075 ppm as compared to the level of 0.08 ppm used to establish the classification table for the 1997 ozone NAAQS.

As we did for the 1997 NAAQS, the EPA analyzed various alternative options for establishing thresholds for classifications for the 2008 ozone

NAAQS. However, we are proposing to use the same “percent-above-the-standard” methodology as was used for the 1997 ozone standard.<sup>13</sup> Options that were evaluated other than the one we are proposing are discussed in more detail in a background information document<sup>14</sup> in the docket to this rulemaking. While the EPA believes the “percent-above-the-standard” method is appropriate for designating areas for the 2008 NAAQS, alternative methods may be appropriate to consider in developing classification thresholds for any future revisions to the ozone standards.

The percent-above-the-standard method is a simple and straightforward method for establishing classification thresholds that is based on principles inherent in the subpart 2 classification table itself. The principles include the following:

- Areas are grouped by the severity of their air quality problem as characterized by the degree of nonattainment based on their DV.
- Classification would occur “by operation of law” without relying on EPA exercising discretion for individual situations (prior to any application of the 5 percent adjustment provision under section 181(a)(4)). See section III.B of this rule for additional details on how EPA intends to address previous requests for voluntary bump-ups for the 1997 ozone NAAQS.
- Classification thresholds are derived from the structure or logic of the

CAA’s nonattainment area planning and control requirements, including the subpart 2 classification table, and consistent with the overall goal of subpart 2 of attaining the standards as expeditiously as practicable.

2. Proposed Classification Threshold Method—Percent-Above-the-Standard Method

In this section, we describe the EPA’s proposed methodology for establishing classification thresholds for purposes of classifying ozone nonattainment areas with respect to the 2008 ozone NAAQS. Using this approach for the 2008 NAAQS, the classification thresholds in the subpart 2 classification table would be translated into a corresponding set of 8-hour DVs by setting threshold DVs in the new table at the same percentages above the 2008 ozone NAAQS as the DV levels in the subpart 2 classification table are above the 1-hour ozone NAAQS. For example, the threshold separating the Marginal and Moderate classifications in the subpart 2 classification table (0.138 ppm) is 15 percent above the 1-hour ozone NAAQS (0.12 ppm). Thus, under this approach, the threshold separating the Marginal and Moderate classifications for the 2008 ozone NAAQS would be 0.075 ppm plus 15 percent, or 0.086 ppm. Table 1, below, depicts this proposed translation for classifications as it would apply for the 2008 ozone NAAQS.

TABLE 1—SUBPART 2 1-HOUR OZONE DESIGN VALUE CLASSIFICATION TABLE TRANSLATION TO 8-HOUR DESIGN VALUES FOR THE 2008 OZONE NAAQS OF 0.075 PPM

Area class		1-hour design value (ppm)	Percent above 1-hour ozone NAAQS	8-hr ozone design value (ppm)
Marginal	From	0.121	0.833	0.076
	up to <sup>1</sup>	0.138	15	0.086
Moderate	From	0.138	15	0.086
	up to <sup>1</sup>	0.160	33.333	0.100
Serious	From	0.160	33.333	0.100
	up to <sup>1</sup>	0.180	50	0.113
Severe-15	From	0.180	50	0.113
	up to <sup>1</sup>	0.190	58.333	0.119
Severe-17	From	0.190	58.333	0.119
	up to <sup>1</sup>	0.280	133.333	0.175
Extreme	equal to or above	0.280	133.333	0.175

Note 1: But not including.

Based on our analysis of air quality information from 2008–2010, we estimate that approximately 52 areas

had ambient ozone concentrations exceeding the 2008 ozone NAAQS. We use these 52 “hypothetical

nonattainment areas” for purposes of the following discussion.<sup>15</sup> These

<sup>12</sup> The upper thresholds of the Marginal, Moderate, Serious, and Severe classifications are precise percentages or fractions above the level of the standard, namely 15 percent (3/20ths more than the standard), 33.33 percent (one-third more than the standard), 50 percent (one-half more than the standard), and 133.3 percent (one and one-third more than the standard).

<sup>13</sup> Background Information Document: Development of Hypothetical Nonattainment Areas for Illustrating Proposed Classification Thresholds for Areas Designated Nonattainment for the 2008 0.075 PPM 8-Hour Ozone National Ambient Air Quality Standard. January 2012.

<sup>14</sup> Background Information Document: Additional Options Considered for Classification of Nonattainment Areas under the 2008 Ozone NAAQS. January 2012.

<sup>15</sup> Background Information Document: Development of Hypothetical Nonattainment Areas for Illustrating Proposed Classification Thresholds

hypothetical areas are intended to illustrate the distribution of areas into the proposed classifications. The actual number of total nonattainment areas and the classification of each area will depend on decisions made in the separate designations process under section 107(d). If we were to use the proposed thresholds in Table 1, above, as the basis for classifying nonattainment areas with respect to the 2008 ozone NAAQS, the 52 hypothetical nonattainment areas based on 2008–2010 air quality data would be distributed in each classification as shown in Table 2.

TABLE 2—NUMBER OF HYPOTHETICAL NONATTAINMENT AREAS IN EACH CLASSIFICATION UNDER THE 2008 OZONE NAAQS: PERCENT-ABOVE-THE-STANDARD METHOD

Classification	2008 O <sub>3</sub> NAAQS (hypothetical areas)
Marginal .....	43
Moderate .....	6
Serious .....	3
Severe .....	0
Extreme .....	0
Total .....	52

The proposed classification method would result in the vast majority of nonattainment areas being classified as Marginal. It is possible that a few areas would have a later maximum statutory attainment date for their existing classification under the 1997 ozone NAAQS than they would have for their new classification under the 2008 NAAQS. For example, an area that would be classified Marginal for the more stringent 2008 ozone NAAQS (with an anticipated maximum statutory attainment date in 2015), may have been classified as Severe for the less-stringent 1997 ozone NAAQS (with a later maximum statutory attainment date in 2019).<sup>16</sup> This issue did not arise when we promulgated the classification

structure for the 1997 NAAQS. (See section III.B of this rule for additional details on how EPA intends to address previous requests for voluntary bump-ups for the 1997 ozone NAAQS.)

Many Marginal areas are expected to attain the 2008 NAAQS within 3 years of designation (e.g., in 2015) due to reductions of ozone precursors resulting from a number of federal and state emission reduction programs that have already been adopted. Such programs include more stringent emission standards for onroad and nonroad vehicles and equipment (with associated fleet turnover), regional reductions in power plant emissions to address interstate transport,<sup>17</sup> and potential future programs such as the boiler maximum achievable control technology standards. The EPA estimates that in about half of the Marginal areas, these reductions in conjunction with other ongoing state and federal controls should be sufficient to bring about attainment.<sup>18</sup> In other areas, additional control measures may be needed for timely attainment.

### 3. Other Classification Methods Considered

A number of interested parties have recommended to the EPA other options for classification of ozone nonattainment areas. The EPA evaluated many other methods but we are not proposing them or soliciting comment on them because we did not find them as compelling for application to the 2008 ozone NAAQS as the option discussed in this proposal. We have included in the docket all written recommendations we have received in recent years regarding classification approaches. Other options that we considered but are not proposing are also summarized in the docket.<sup>19</sup>

#### B. Reclassification of Nonattainment Areas that Have Voluntarily Requested Higher Classifications

The CAA provides three mechanisms for addressing nonattainment areas that may not be able to attain by the

attainment date provided for their classification. First, section 181(a)(4) provides that within 90 days of designation and classification, the Administrator may exercise discretion to reclassify an area to a higher (or lower) classification if its DV is within 5 percent of the DV range of the higher (or lower) classification.<sup>20</sup> Any state interested in taking advantage of this flexibility should submit a request to the EPA in sufficient time for the Administrator to make a determination within the 90 days provided.

The second mechanism, provided in section 181(b)(2), requires that an area be reclassified to the next higher classification (i.e., “bumped-up”) if EPA determines that the area has failed to attain the standard by the attainment date and does not qualify for the first of two possible 1-year attainment date extensions allowed under the CAA (excluding Severe to Extreme reclassification).

The third mechanism, provided in section 181(b)(3), allows a state to voluntarily request that the EPA reclassify the area to a higher classification. The EPA has no discretion to deny such requests. Once an area is reclassified to a higher classification, it becomes subject to the associated additional planning and control requirements for that higher classification as well and must attain the standard no later than the later maximum attainment date for that classification.

There are seven areas for which states requested a voluntary reclassification with respect to the 1997 NAAQS. If these areas were classified based on 2008–2010 air quality data and pursuant to the classification structure proposed here, it is likely that they would have a lower classification and an earlier maximum attainment date for the 2008 NAAQS than such areas have for the 1997 ozone NAAQS. EPA has granted voluntary reclassification requests for six of these areas; the request for one area is still pending.<sup>21</sup>

for Areas Designated Nonattainment for the 2008 0.075 PPM 8-Hour Ozone National Ambient Air Quality Standard. January 2012. Most hypothetical nonattainment areas include multiple counties, based on the existing 1997 8-hour ozone nonattainment areas, Combined Statistical Area, or Core Based Statistical Area boundary associated with a violating monitor. Note that these areas are used for analytical purposes only. Actual nonattainment areas and boundaries will be determined through the designations process.

<sup>16</sup> As indicated elsewhere in this preamble, the EPA intends to designate areas for the 2008 standard by mid-2012. Thus, a 3-year attainment deadline would be in 2015.

<sup>17</sup> Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals. August 8, 2011; 76 FR 48208.

<sup>18</sup> Technical note to docket # EPA–HQ–OAR–2010–0885, February 2012. “The Hypothetical Nonattainment Area Projections of 2008–2010 Design Values to 2015.”

<sup>19</sup> Background Information Document: Additional Options Considered for Classification of Nonattainment Areas under the Proposed 2008 Ozone NAAQS. January 2012.

<sup>20</sup> This CAA provision also provides the same authority for reclassifying areas to a lower classification, an approach that may not be relevant where the area in question is unlikely to attain by

the attainment date for the classification it receives at the time of designation.

<sup>21</sup> Ventura County, CA was reclassified from Moderate to Serious (Approved 05/20/2008, 73 FR Page 29073, Effective: 06/19/2008). Houston-Galveston-Brazoria, TX was reclassified from Moderate to Severe-15 (Approved 10/01/2008, 73 FR Page 56983, Effective: 10/31/2008). Reclassification of the Los Angeles-South Coast, San Joaquin Valley, Riverside County, and Sacramento Metro areas (May 5, 2010, 75 FR 24409) became effective June 4, 2010. The requested voluntary reclassification of West Mojave Desert, CA from Moderate to Severe-17 is still pending with the EPA.

TABLE 3—AREAS FOR WHICH THE STATE REQUESTED A VOLUNTARY RECLASSIFICATION UNDER THE 1997 NAAQS

Nonattainment Area	State	Original 1997 NAAQS classification	Voluntary reclassification	Potential classification under 2008 NAAQS <sup>1</sup>
Los Angeles-South Coast Air Basin .....	CA .....	Severe .....	Extreme .....	Serious.
San Joaquin Valley .....	CA .....	Serious .....	Extreme .....	Serious.
Riverside County (Coachella Valley) .....	CA .....	Serious .....	Severe .....	Moderate.
Sacramento Metro .....	CA .....	Serious .....	Severe .....	Serious.
Ventura County .....	CA .....	Moderate .....	Serious .....	Moderate.
Western Mojave <sup>2</sup> .....	CA .....	Moderate .....	Severe .....	Moderate.

**Note 1:** Based on thresholds proposed in this notice and 2008–2010 design values.

**Note 2:** This request for a reclassification is still pending.

The EPA is proposing that the approved prior voluntary reclassification requests for the 1997 ozone NAAQS would also apply for the more stringent 2008 ozone NAAQS unless the state explicitly requests otherwise. The areas to which this would apply are listed in Table 3.<sup>22</sup> We believe this is an appropriate mechanism to address the limited situation where an area that was voluntarily reclassified for the 1997 ozone NAAQS would have an attainment date for the more stringent 2008 ozone NAAQS that is earlier than the area's attainment date for the less stringent 1997 NAAQS. Based on discussions with affected areas, we also believe it is reasonable to expect that the areas listed in Table 3 that requested a voluntary reclassification under the less stringent 1997 NAAQS would make the same request for the 2008 NAAQS. The EPA is proposing this approach in order to minimize burden on states and obviate the need to go through the voluntary reclassification process again.

### C. What are we proposing as the attainment deadlines for nonattainment areas in each classification of the 2008 ozone NAAQS?

#### 1. Background

The CAA provides that the primary NAAQS attainment dates for areas subject to subpart 2 must be as expeditious as practicable but no later than the deadlines provided in the subpart 2 classification table. The deadlines for attainment in the subpart 2 classification table are specified in terms of a certain number of years from the date of enactment of the 1990 Amendments to the CAA (i.e., November 15, 1990). For instance, the attainment date for Moderate areas is expressed as “6 years after November 15, 1990.” Because these time periods are clearly inappropriate for a new

standard promulgated in 2008, we must interpret the attainment deadlines in the subpart 2 classification table as they would apply to the 2008 NAAQS.

In the Phase 1 rule for implementation of the 1997 ozone NAAQS,<sup>23</sup> we interpreted these timeframes to run from the date that area designations and nonattainment classifications (by operation of law) became effective. We explained in the proposed and final rules for implementation of the 1997 ozone NAAQS that it was reasonable for these dates to run from the date of designation because other provisions of the CAA established the attainment date as a set period of time after designation. *See* 69 FR 23966–67; 68 FR 32817. As discussed below, we are proposing this same approach for the 2008 NAAQS and also proposing an alternate approach where the attainment dates would be at the end of the calendar year. We are proposing an alternate approach because we anticipate that designations for the 2008 NAAQS will be effective some time after the start of the 2012 ozone season<sup>24</sup> for most areas and possibly well into the summer. As explained in more detail below, the alternative approach would allow Marginal areas 3 full years to attain, Moderate areas 6 full years to attain, etc.

#### 2. Proposal

The EPA is proposing two options for establishing the maximum attainment dates for areas in each nonattainment classification. Under the first option, the attainment dates would be the precise number of years specified in Table 1 with such time period running from the effective date of designation. Under the second option, the attainment dates would be December 31 of the year that is the specified number of years in Table 1 after designation. In order to fully evaluate the two options, we note that

the EPA intends to complete initial area designations for the 2008 ozone NAAQS no later than May 31, 2012. We anticipate the designations will be effective 60 days following publication in the **Federal Register** and that it will take approximately 2 weeks for the designations notice to be published. Under this scenario, designations would be effective by approximately mid-August 2012.

For the first option, we are proposing that the deadlines in the subpart 2 classification table would be specified in terms of a certain number of years from the effective date of designation for the 2008 standard. This is the same approach we took for the 1997 NAAQS. In this case, we would interpret “year” in the subpart 2 classification table to mean consecutive 365-day periods,<sup>25</sup> and we would substitute “after the effective date of designation” for the CAA’s “after November 15, 1990” language in the subpart 2 classification table. Under this approach the attainment deadline would fall a precise number of years after the effective date of designation. As an example, if the Administrator issued designations for the 2008 NAAQS on May 31, 2012, and the designations became effective on August 15, 2012, the attainment dates would run from August 15, 2012, such that a Marginal area would be required to attain the 2008 ozone standard by August 15, 2015.

For the second and the EPA’s preferred option, the attainment date would be specified as a certain number of years from the end of the calendar year in which an area’s nonattainment designation is effective. In other words, if the effective date of designations for the 2008 ozone NAAQS is August 15, 2012, the 3-year attainment deadline for Marginal areas would be December 31, 2015.

We are proposing this option as our preferred option for the 2008 ozone NAAQS because, as explained above, we believe it is likely that designations

<sup>22</sup> Texas also requested voluntary reclassification for the Houston-Galveston-Brazoria nonattainment area for the 1997 ozone NAAQS. Texas has already indicated that they do not wish for that request to apply to the 2008 ozone NAAQS.

<sup>23</sup> 69 FR 23951.

<sup>24</sup> The ozone season for each state is defined in 40 CFR part 58, Appendix D, and, for most areas, runs from April to October. *See* also the July 16, 2009, Proposed Monitoring Rule (74 FR 34525).

<sup>25</sup> Except in the case of a leap year, where the year would be a rolling 366 day period.

will be effective in August 2012, which is late in the ozone season. Where the designation is effective late in the ozone season, under the first option a Marginal area effectively would have only two ozone seasons following designation to improve its air quality in order to attain by its attainment date. This is because compliance with the standard is based on air quality during the most recent three full consecutive ozone seasons, and the most recent 3 full ozone seasons preceding the attainment deadline in this case would run through the end of the previous year's ozone season. Because attainment is based on three full ozone seasons of air quality data, in order to attain "by" its attainment date, the area could not consider air quality for an ozone season during which the attainment date falls. For example, in the case of the 1997 ozone NAAQS, designations became effective on June 15, 2004, and areas had an attainment date of June 15 of the year falling 3, 6, etc. years after designation. Thus, in order for a Marginal area to attain by June 15, 2007, it could not consider air quality data from the 2007 ozone season, but instead was required to

demonstrate attainment based on the 3 years of air quality data from 2004–2006. In this situation, the area's attainment date effectively was December 31, 2006.

Because we anticipate designations will be effective late in the ozone season for the 2008 NAAQS, we are concerned that if a Marginal area is required to attain in August 2015, the area would effectively have only two ozone seasons (the 2013 and 2014 ozone seasons) from the date of designation to improve its air quality for the purpose of showing attainment. Accordingly, the state would need to both plan for and achieve all emission reductions necessary for the area to attain by the beginning of the 2014 ozone season, so that those reductions would be reflected in the air quality data considered for determining whether the area attained by its attainment date (i.e., attainment would be based on air quality data from 2012–2014). Similarly, a Moderate area would need to implement measures to attain by the beginning of the 2017 ozone season in order for those reductions to be reflected in the air quality data considered for purposes of determining

whether the area attained (data from 2015–2017) by August 2018.

We believe this second option is consistent with the time periods provided for attainment of the 1-hour ozone NAAQS at the time the CAA was amended. The CAA Amendments were enacted on November 15, 1990, after the end of the ozone season for virtually all areas, and for the few areas that had year-round ozone seasons, EPA interpreted the Act to allow consideration of air quality in the attainment year even though the attainment date fell on November 15. Thus, when the CAA was amended in mid-November 1990, 1-hour Marginal areas had three full ozone seasons to achieve any reductions necessary for attainment, and Moderate areas had six full ozone seasons, because the attainment deadline was the anniversary of the enactment of the 1990 CAA (November 15). Table 4 summarizes for each proposed option how we would interpret the maximum attainment dates for areas in each classification under the 2008 NAAQS, using an example where the effective date of designations is August 15, 2012.

TABLE 4—EXAMPLE OF PROPOSED ATTAINMENT DATES FOR THE 2008 STANDARD IF NONATTAINMENT DESIGNATIONS ARE EFFECTIVE AUGUST 15, 2012

Classification	Option 1	Option 2
Marginal .....	August 15, 2015 .....	December 31, 2015.
Moderate .....	August 15, 2018 .....	December 31, 2018.
Serious .....	August 15, 2021 .....	December 31, 2021.
Severe .....	August 15, 2027 or 2029 .....	December 31, 2027 or 2029.
Extreme .....	August 15, 2032 .....	December 31, 2032.

**IV. What is the EPA proposing regarding revocation of the 1997 ozone NAAQS at this time?**

At this time, the EPA is proposing to revoke the 1997 ozone NAAQS 1 year after the effective date of designations for the 2008 ozone NAAQS for transportation conformity purposes only.<sup>26</sup> Revoking the 1997 ozone NAAQS for transportation conformity purposes, as described below, will bring certainty to the transportation planning

process in ozone nonattainment and maintenance areas. It will also ensure that backsliding does not occur for purposes of transportation conformity as areas designated nonattainment for the 2008 ozone NAAQS will be required to use adequate or approved SIP motor vehicle emissions budgets for the 1997 ozone NAAQS or 1-hour ozone NAAQS, if the area has such SIP budgets for one of these ozone NAAQS, until SIP budgets are found adequate or are approved for the 2008 ozone NAAQS as required by recent court decisions discussed below and as required by CAA 176(c)(1).<sup>27</sup> Specifically, CAA section 176(c)(1) states, in part, "No

metropolitan planning organization designated under section 134 of Title 23 shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title." In other words, adequate or approved motor vehicle emissions budgets for a prior NAAQS must be used in transportation conformity determinations for a revised NAAQS until such time that budgets for the revised NAAQS are either found adequate or are approved. The EPA is proposing this limited revocation of the 1997 ozone NAAQS at this time to provide certainty to the transportation planning process. In a subsequent rulemaking, the EPA will consider whether to also revoke the 1997 NAAQS for other purposes.

<sup>26</sup> Transportation conformity is required under CAA section 176(c) to ensure that transportation plans, transportation improvement programs (TIPs) and federally supported highway and transit projects are consistent with ("conform to") the purpose of the SIP. Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant NAAQS or interim reductions and milestones. The EPA's Transportation Conformity Rule (40 CFR 51.390 and Part 93, subpart A) establishes the criteria and procedures for determining whether transportation activities conform to the SIP.

<sup>27</sup> A motor vehicle emissions budget is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

*A. What is the background for our proposal?*

At the time the EPA promulgated the 2008 NAAQS, the Administrator

determined that the 1997 ozone NAAQS was no longer sufficient to protect public health and the environment with an adequate margin of safety and that it was therefore necessary to establish a more stringent standard. 73 FR 16436 (Mar. 27, 2008). In determining how to transition from the 1997 NAAQS to the more stringent 2008 NAAQS, the EPA is now presented with the same situation that we faced with the transition from the 1-hour ozone NAAQS to the more stringent 1997 ozone NAAQS. For that transition, our Phase 1 implementation rule for the 1997 ozone NAAQS revoked the 1-hour ozone NAAQS for all purposes 1 year after the effective date of the initial area designations for the 1997 ozone NAAQS. (See 69 FR 23954). The Phase 1 rule also established comprehensive anti-backsliding provisions to ensure that requirements for the 1-hour ozone NAAQS would continue in place as areas transitioned to implementing the more stringent 1997 ozone standard.

The revocation of the 1-hour standard and the associated anti-backsliding provisions were the subject of litigation. In its December 2006 decision on that challenge, as modified following rehearing, the Court held with respect to the anti-backsliding approach for transportation conformity that 1-hour motor vehicle emissions budgets must be used where such budgets have been found adequate or approved, as part of 8-hour conformity determinations until 8-hour motor vehicle emissions budgets are available. (*South Coast Air Quality Management District v. EPA*, 472 F.3d at 882). In addition, the Court affirmed more broadly that in order for transportation conformity determinations to fulfill the requirements of CAA section 176(c)(1), motor vehicle emissions budgets for a prior NAAQS must be used in transportation conformity determinations under a revised NAAQS until emissions budgets for the revised NAAQS are either found adequate or approved. Therefore, areas designated nonattainment for the 2008 ozone NAAQS that have adequate or approved SIP budgets for either the 1997 ozone NAAQS or the 1-hour ozone NAAQS must continue to use such budgets in transportation conformity determinations until budgets for the 2008 ozone NAAQS are found adequate or approved.<sup>28</sup>

<sup>28</sup> Areas without adequate or approved SIP budgets for either the 1997 ozone NAAQS or the 1-hour ozone NAAQS are required to demonstrate conformity using one or both of the interim emissions tests depending on their classification as required by 40 CFR 93.119.

#### *B. What is the rationale for our proposal?*

At this time, we are proposing to revoke the 1997 ozone NAAQS for transportation conformity purposes only. The revocation of the 1997 ozone NAAQS for this limited purpose would occur 1 year after the effective date of initial area designations for the 2008 ozone NAAQS. Similar to our rationale in the Phase 1 rule for implementation of the 1997 ozone NAAQS, we believe this approach makes the most sense because it would result in only one ozone NAAQS—the 2008 ozone NAAQS—applying for purposes of transportation conformity, after the end of the one-year transportation conformity grace period that applies to newly designated nonattainment areas. (CAA section 176(c)(6)). If the 1997 ozone NAAQS were to remain in place after conformity applies for the 2008 ozone NAAQS, metropolitan planning organizations and other state, local, and federal transportation and air quality agencies in areas that are currently nonattainment or maintenance for the 1997 ozone NAAQS and will be designated nonattainment for the 2008 ozone NAAQS would be required to implement the transportation conformity program for both ozone NAAQS concurrently. This could lead to unnecessary complexity for conformity determinations, especially if an area's boundaries for the two ozone NAAQS differ from one another and the same test of conformity cannot be used for both ozone NAAQS. Even where an area's boundaries are unchanged, different analysis years under the conformity rules may be required for each ozone NAAQS. Furthermore, we believe that it is more important to determine conformity for the new 2008 ozone NAAQS that is more protective of health and welfare.

For transportation conformity purposes, this proposal would provide a seamless transition from demonstrating conformity for the 1997 ozone NAAQS to demonstrating conformity for the 2008 ozone NAAQS. Revoking the 1997 ozone NAAQS 1 year after the effective date of designations for the limited purpose of transportation conformity would leave no gap in conformity's application in any 2008 ozone nonattainment areas.

#### *C. Why is it necessary to revoke the 1997 ozone NAAQS now for transportation conformity purposes?*

The EPA has determined that it is necessary to establish the date for the revocation of the 1997 ozone NAAQS as it applies for transportation conformity

purposes now in order to provide state and local transportation and air quality agencies with certainty as to what conformity requirements will apply after designations are finalized for the 2008 ozone NAAQS. Areas designated nonattainment for the 2008 ozone NAAQS will have 1 year after the effective date of the designation to complete a conformity determination for the 2008 ozone NAAQS. If an area does not complete the required conformity determination by the end of the 1-year grace period, the area will enter a conformity lapse until the required determination is completed.<sup>29</sup> Based on 2008–2010 air quality monitoring data, and as discussed elsewhere in today's notice, we anticipate that 52 areas would be designated as nonattainment areas and 44 of these areas are either nonattainment or maintenance for the 1997 ozone NAAQS. Areas designated nonattainment for the 2008 NAAQS will likely need the full 1-year grace period provided in CAA section 176(c)(6) to complete the required initial conformity determination. Those areas that are designated as either nonattainment or maintenance for the 1997 ozone NAAQS at the time they are designated as nonattainment for the 2008 ozone NAAQS will need certainty as to the specific requirements for that conformity determination. For example, they need to know what analysis years must be addressed and, if the boundaries for the two ozone NAAQS are different, they need to know whether to address conformity for both areas and which test or tests would apply.

By determining conformity for the 2008 standard, which is the more health and welfare protective standard, the EPA is both:

- Fulfilling the CAA's requirements for transportation conformity which include preventing new air quality violations, not making existing violations worse and not delaying any interim milestones; and
- Making the most efficient use of state and local resources in fulfilling those requirements.

In addition, a large number of areas that are currently required to determine conformity for the 1997 ozone NAAQS are attaining the 2008 ozone NAAQS based on 2008–2010 air quality data. If these areas are designated as attainment areas for the 2008 ozone NAAQS, they would not be required to demonstrate

<sup>29</sup> During a lapse, an area can proceed with only a limited amount of transportation projects including projects that are exempt from conformity, projects and project phases that had previously been approved and transportation control measures included in an approved SIP.

conformity for the 1997 ozone NAAQS, as of the effective date of the revocation of the 1997 ozone NAAQS. These areas would no longer have to expend resources to make conformity determinations for the 1997 ozone NAAQS.

*D. Is the EPA proposing to revoke the 1997 ozone NAAQS for other purposes as part of this rulemaking?*

As part of this rule, the EPA is not proposing to revoke the 1997 ozone NAAQS for purposes other than transportation conformity. Because of the necessity to quickly finalize a rule addressing nonattainment area classifications, we are not including a broad proposal here regarding revocation of the 1997 NAAQS and how anti-backsliding requirements might apply if the 1997 standard is revoked for purposes other than transportation conformity. We are developing a separate proposed rule that will address those issues and we expect to issue that proposed rule in the spring of 2012. We plan to address any comments on the issue of revocation and anti-backsliding for all requirements other than transportation conformity in the context of that future, separate rulemaking.

#### **V. What does this rulemaking not address?**

This proposed rulemaking does not propose to establish attainment or nonattainment designations for specific areas nor does it address the principles that will be considered in the designation process. Because the designations are not the subject of this proposed rule, we do not intend to respond to comments concerning designations in the context of this rulemaking.

In addition, this proposed rule does not address any specific SIP requirements associated with different classification categories. This proposed rule also does not address revocation of the 1997 ozone NAAQS for purposes other than transportation conformity. Similarly, anti-backsliding issues are not addressed in this rule. The remaining implementation requirements for the 2008 NAAQS will be addressed in a separate rulemaking. We do not intend to respond in the context of this rulemaking to comments pertaining to implementation issues that will be addressed by a future rulemaking.

#### **VI. Statutory and Executive Order Reviews**

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it raises novel legal or policy issues arising out of legal mandates. Accordingly, EPA submitted this action to OMB for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

*B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

The EPA is proposing this Classifications Rule for the 2008 ozone NAAQS so that areas may be classified by operation of law at the time of designation as provided in section 181(a) of the CAA. This proposed rule would also revoke the 1997 ozone NAAQS for transportation conformity purposes only. The EPA is proposing this limited revocation in order to bring certainty to the transportation conformity process consistent with prior court decisions and CAA section 176(c). This rule, in conjunction with another implementation rule we plan to propose in the future, will help states identify planning requirements that apply for purposes of attaining and maintaining the 2008 ozone NAAQS. No new information needs to be collected from the states as a result of this proposed rule.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any regulation subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of these proposed regulations on small entities, small entity is defined as: (1) A small business as defined in the Small Business Administration’s (SBA) regulations at 13 CFR 121.201; (2) a

small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The CAA requires the EPA to designate areas and provides for nonattainment areas to be classified by operation of law at the time of designation. This rule provides a method for establishing these classifications and interpreting the associated attainment deadlines. The CAA also requires that nonattainment and maintenance areas make transportation conformity determinations. This rule proposes to revoke the 1997 ozone NAAQS 1 year after the effective date of designations so that areas designated nonattainment for the 2008 ozone NAAQS are required to address conformity requirements for only the more protective 2008 ozone NAAQS.

After considering the economic impacts of this proposed rule on small entities, the EPA certifies that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

*D. Unfunded Mandates Reform Act*

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, and tribal governments, in the aggregate, or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

This action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The

requirement to designate and classify nonattainment areas is imposed by the CAA as are the requirements for nonattainment and maintenance areas to make transportation conformity determinations. This proposed rule, if made final, would interpret how the classification provisions in section 181(a) will apply for purposes of the 2008 8-hour ozone NAAQS that was finalized on March 27, 2008. (See 73 FR 16436). It also proposes to revoke the 1997 ozone NAAQS 1 year after the effective date of designations for the 2008 ozone NAAQS for transportation conformity purposes only. Thus, Executive Order 13132 does not apply to these proposed regulations.

Although this action does not have federalism implications as defined in Executive Order 13132, the EPA recognizes that the adoption in 2008 of the more health-protective ozone standards will result in additional effort by state agencies responsible for managing air quality programs. Under the CAA, achieving these health benefits requires the combined efforts of the federal, state, and local governments, each accomplishing the tasks for which they are best suited. In the spirit of Executive Order 13121 and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA is soliciting comments on this proposal from state and local officials.

#### *F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The proposed rules do not have a substantial direct effect on one or more Indian tribes, since no tribe has to develop classification recommendations under these proposed regulatory revisions. This proposal revokes the 1997 ozone NAAQS for transportation and does not significantly or uniquely affect the communities of Indian tribal governments, as the CAA requires transportation conformity to apply in any area that is designated nonattainment or maintenance by the EPA. Furthermore, these proposed regulation revisions do not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. The CAA and the Tribal Air Rule establish the relationship of the federal government and tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. These proposed regulations revisions do not have tribal

implications. Thus, Executive Order 13175 does not apply to this action.

The EPA specifically solicits additional comment on this proposed action from tribal officials.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action would establish classifications for areas that do not attain the 2008 ozone standard.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

These proposed revisions to the regulations do not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal

executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed regulations would, if promulgated, establish classification thresholds for designated nonattainment areas for the 2008 ozone NAAQS, which are designed to protect all segments of the general populations. As such, they do not adversely affect the health or safety of minority or low-income populations and are designed to protect and enhance the health and safety of these and other populations. Today’s action also proposes to revoke the 1997 ozone NAAQS for transportation conformity purposes only. Such a revocation would not lead to disproportionately high and adverse human health or environmental effects on minority or low-income populations as the CAA requires transportation conformity to apply in any area that is designated nonattainment or maintenance by the EPA. This proposed rule ensures that transportation conformity is demonstrated in all areas that are designated nonattainment for the more protective 2008 ozone NAAQS.

## **VII. Statutory Authority**

The statutory authority for this action is provided by sections 110; 176; 181; and 301(a)(1) of the CAA, as amended (42 U.S.C. 7409; 42 U.S.C. 7506; 42 U.S.C. 7511; 42 U.S.C. 7601(a)(1)).

### **List of Subjects**

#### *40 CFR Part 50*

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

#### *40 CFR Part 51*

Air pollution control, Intergovernmental relations, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Dated: February 7, 2012.

**Lisa P. Jackson,**  
Administrator.

For the reasons stated in the preamble, Title 40, Chapter I of the Code of Federal Regulations is proposed to be amended as follows:

**PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS**

1. The authority citation for Part 50 continues to read as follows:

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

2. Section 50.10 is amended by adding a paragraph (c) to read as follows:

**§ 50.10 National 8-hour primary and secondary ambient air quality standards for ozone.**

\* \* \* \* \*

(c) The 1997 ozone NAAQS set forth in paragraph (a) of this section will no longer apply to an area for transportation conformity purposes 1 year after the effective date of the designation of the area for the 2008 ozone NAAQS pursuant to section 107 of the CAA. The 1997 ozone NAAQS set forth in this section will continue to remain applicable to all areas for all other purposes notwithstanding the promulgation of the 2008 ozone NAAQS under § 50.15 or the designation of areas for the 2008 ozone NAAQS. Area designations and classifications with respect to the 1997 ozone NAAQS are codified in 40 CFR part 81.

**PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS**

3. The authority citation for Part 51 continues to read as follows:

**Authority:** 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

4. Part 51 is amended by adding a new subpart AA to read as follows:

**Subpart AA—Provisions for Implementation of the 2008 Ozone National Ambient Air Quality Standards**

Sec.

51.1100 Definitions.

51.1101 Applicability of Part 51.

51.1102 Classification and nonattainment area planning provisions.

51.1103 Application of classification and attainment date provisions in section 181 of subpart 2 of the CAA to areas subject to § 51.1102(a).

**Subpart AA—Provisions for Implementation of the 2008 Ozone National Ambient Air Quality Standards.**

**§ 51.1100 Definitions.**

The following definitions apply for purposes of this subpart. Any term not defined herein shall have the meaning as defined in 40 CFR 51.100.

(a) *1-hour NAAQS* means the 1-hour primary and secondary ozone national ambient air quality standards codified at 40 CFR 50.9.

(b) *1997 NAAQS* means the 8-hour primary and secondary ozone national ambient air quality standards codified at 40 CFR 50.10.

(c) *2008 NAAQS* means the 2008 primary and secondary ozone NAAQS codified at 40 CFR 50.15.

(d) *1-hour ozone design value* is the 1-hour ozone concentration calculated according to 40 CFR part 50, Appendix H and the interpretation methodology issued by the Administrator most recently before the date of the enactment of the CAA Amendments of 1990.

(e) *8-hour ozone design value* is the 8-hour ozone concentration calculated according to 40 CFR part 50, Appendix P.

(f) *CAA* means the Clean Air Act as codified at 42 U.S.C. 7401–7671q (2010).

(g) *Attainment area* means, unless otherwise indicated, an area designated as either attainment, unclassifiable, or attainment/unclassifiable.

(h) *Attainment year ozone season* shall mean the ozone season immediately preceding a nonattainment area's maximum attainment date.

(i) *Designation for the 2008 NAAQS* shall mean the effective date of the designation for an area for the 2008 NAAQS.

(j) *Higher classification/lower classification.* For purposes of determining whether a classification is higher or lower, classifications under subpart 2 are ranked from lowest to highest as follows: Marginal; Moderate; Serious; Severe; and Extreme.

(k) *Initially designated* means the first designation that becomes effective for an area for the 2008 NAAQS and does not include a redesignation to attainment or nonattainment for the 2008 NAAQS.

(l) *Maintenance area* means an area that was designated nonattainment for a specific NAAQS and was redesignated to attainment for that NAAQS subject to a maintenance plan as required by CAA section 175A.

(m) *Nitrogen Oxides (NO<sub>x</sub>)* means the sum of nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(n) *Ozone season* means for each state, the ozone monitoring season as defined in 40 CFR Part 58, Appendix D, section 2.5 for that state.

**§ 51.1101 Applicability of Part 51.**

The provisions in subparts A–X of part 51 apply to areas for purposes of the 2008 NAAQS to the extent they are not inconsistent with the provisions of this subpart.

**§ 51.1102 Classification and nonattainment area planning provisions.**

An area designated nonattainment for the 2008 NAAQS will be classified in accordance with CAA section 181, as interpreted in § 51.1103(a), and will be subject to the requirements of subpart 2 that apply for that classification.

**§ 51.1103 Application of classification and attainment date provisions in section 181 of subpart 2 of the CAA areas subject to § 51.1102(a).**

(a) In accordance with CAA section 181(a)(1), each area designated nonattainment for the 2008 ozone NAAQS shall be classified by operation of law at the time of designation. The classification shall be based on the 8-hour design value for the area at the time of designation, in accordance with Table 1. A state may request a higher or lower classification as provided in paragraphs (b) and (c) of this section. For each area classified under this section, the attainment date for the 2008 NAAQS shall be as expeditious as practicable but not later than the date provided in Table 1 as follows:

TABLE 1—CLASSIFICATION FOR 2008 8-HOUR OZONE NAAQS (0.075 PPM) FOR AREAS SUBJECT TO SECTION 51.1102(A)

Area class		8-Hour design value (ppm ozone)	Primary standard attainment date (years after designation for 2008 primary NAAQS)**
Marginal .....	from .....	0.076	3

TABLE 1—CLASSIFICATION FOR 2008 8-HOUR OZONE NAAQS (0.075 PPM) FOR AREAS SUBJECT TO SECTION 51.1102(A)—Continued

Area class		8-Hour design value (ppm ozone)	Primary standard attainment date (years after designation for 2008 primary NAAQS)**
Moderate .....	up to* .....	0.086	6
	from .....	0.086	
Serious .....	up to* .....	0.100	9
	from .....	0.100	
Severe-15 .....	up to* .....	0.113	15
	from .....	0.113	
Severe-17 .....	up to* .....	0.119	17
	from .....	0.119	
Extreme .....	up to* .....	0.175	20
	equal to or above .....	0.175	

\* But not including.

\*\* The attainment date is [Option 1: The date that is the specified number of years after the effective date of designations for the primary NAAQS. Option 2: December 31 of the calendar year].

(b) A state may request, and the Administrator must approve, a higher classification for any reason in accordance with CAA section 181(b)(3).

(c) A state may request, and the Administrator may in the Administrator's discretion approve, a higher or lower classification in accordance with CAA section 181(a)(4).

(d) Any area designated nonattainment that includes in whole or in part the following areas will be classified by operation of law for the 2008 ozone NAAQS in accordance with the voluntary classification request submitted and approved for each area for the 1997 ozone NAAQS: (For reference: Ventura Co, CA; Los Angeles-South Coast, CA; San Joaquin Valley, CA; Riverside County, CA; and Sacramento Metro, CA.)

[FR Doc. 2012-3284 Filed 2-13-12; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 60**

[EPA-HQ-OAR-2010-0873; FRL-9630-8]

RIN 2060-AH23

**Quality Assurance Requirements for Continuous Opacity Monitoring Systems at Stationary Sources**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** The EPA is proposing to establish quality assurance and quality control (QA/QC) procedures for continuous opacity monitoring systems (COMS) used to demonstrate continuous compliance with opacity standards as

specified in federally enforceable regulations. This action is necessary because we do not currently have QA/QC procedures for COMS. This action would require COMS used to demonstrate continuous compliance to meet these procedures (referred to as Procedure 3).

**DATES:** Written comments must be received by March 15, 2012. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2010-0873 by mail to U.S. Environmental Protection Agency, Mail Code: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of two copies. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lula H. Melton, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Measurement Technology Group (Mail Code: E143-02), Research Triangle Park, NC 27711; telephone number: (919) 541-2910; fax number: (919) 541-0516; email address: melton.lula@epa.gov.

**SUPPLEMENTARY INFORMATION:**

**I. Why is the EPA issuing this proposed rule?**

This document proposes to add QA/QC procedures for COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations. The quality assurance requirements will be

added as Procedure 3 to Appendix F of 40 CFR part 60. We have published a direct final rule adding QA/QC procedures for COMS used for compliance determination with opacity standards in federally enforceable standards to the quality assurance requirements in Appendix F of 40 CFR Part 60 in the "Rules and Regulations" section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule, and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

**II. Does this action apply to me?**

Procedure 3 applies to a COMS used to demonstrate continuous compliance with opacity standards as specified in federally enforceable regulations.

**III. Statutory and Executive Order Reviews**

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735,