

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MEDICAL ADVOCATES FOR HEALTHY )  
AIR and SIERRA CLUB, )  
Petitioners, )  
v. ) PETITION FOR REVIEW  
UNITED STATES ENVIRONMENTAL ) and  
PROTECTION AGENCY, LISA P. )  
JACKSON, Administrator, U.S. )  
Environmental Protection Agency, and ) CORPORATE DISCLOSURE  
JARED BLUMENFELD, Regional ) STATEMENT  
Administrator, Region IX, U.S. )  
Environmental Protection Agency, )  
Respondents. )  
\_\_\_\_\_  
)

Petition for Review

Pursuant to section 307(b)(1) of the federal Clean Air Act, 42 U.S.C. § 7607(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure, Medical Advocates for Healthy Air and Sierra Club (“Petitioners”) hereby petition this Court for review of the final rule entitled “Approval and Promulgation of Air Quality Implementation Plans; California; Determinations of Failure To Attain the One-Hour Ozone Standard,” promulgated by Respondents and published in the Federal Register on December 30, 2011 at 76 Fed. Reg. 82133 (Attachment A).

Petitioners' Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners Medical Advocates for Healthy Air and Sierra Club certify that they have no parent companies and that no publicly held corporations own 10 percent or more of the Petitioners.

Respectfully submitted this 28th day of February, 2012.

/s Erin M. Tobin  
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## **CERTIFICATE OF SERVICE**

I am a citizen of the United States of America and a resident of the County of San Francisco; I am over the age of 18 years and not a party to the within entitled action; my business address is 426 17<sup>th</sup> Street, 5<sup>th</sup> Floor, Oakland, California 94612.

I hereby certify that on February 28th, 2012, I caused to be served one true copy of the **PETITION FOR REVIEW and CORPORATE DISCLOSURE STATEMENT** via certified mail on the following persons:

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I certify under penalty of perjury that the foregoing is true and correct.

Executed on February 28th, 2012 in Oakland, California.

/s Erin M. Tobin  
ERIN M. TOBIN

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**Paperwork Reduction Act**

These rules are not subject to Section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501) since they do not contain any new information collection requirements.

**Small Business Regulatory Enforcement Fairness Act**

Because these rules relate to Agency procedure and practice and merely modify the Agency's internal processing of ballots in representation cases, the Board has determined that the Congressional review provisions of the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801) do not apply.

**List of Subjects in 29 CFR Part 102**

Administrative practice and procedure; Labor-management relations.

Accordingly, the Board amends 29 CFR part 102 as follows:

**PART 102—RULES AND REGULATIONS, SERIES 8**

- 1. The authority citation for 29 CFR part 102 continues to read as follows:

**Authority:** Section 6, National Labor Relations Act, as amended (29 U.S.C. 151, 156). Section 102.117 also issued under Section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)). Sections 102.143 through 102.155 also issued under Section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

**Subpart X—Special Procedures When the Board Lacks a Quorum**

- 2. Add § 102.182 to subpart X to read as follows:

**§ 102.182 Representation Cases Should Be Processed to Certification.**

During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Signed in Washington, DC, on December 28, 2011.

**Mark Gaston Pearce,**  
*Chairman.*

[FR Doc. 2011-33668 Filed 12-29-11; 8:45 am]

**BILLING CODE P**

**NATIONAL LABOR RELATIONS BOARD****29 CFR Part 104****RIN 3142-AA07****Notification of Employee Rights Under the National Labor Relations Act**

**AGENCY:** National Labor Relations Board.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** On August 30, 2011, the National Labor Relations Board (Board) published a final rule requiring employers, including labor organizations in their capacity as employers, subject to the National Labor Relations Act (NLRA) to post notices informing their employees of their rights as employees under the NLRA. (76 FR 54006, August 30, 2011.) On October 12, 2011, the Board amended that rule to delay the effective date from November 14, 2011, to January 31, 2012. (76 FR 63188, October 12, 2011.) The Board hereby further amends that rule to delay the effective date from January 31, 2012, to April 30, 2012. The purpose of this amendment is to facilitate the resolution of the legal challenges with respect to the rule.

**DATES:** This amendment is effective December 30, 2011. The effective date of the final rule published at 76 FR 54006, August 30, 2011, and amended at 76 FR 63188, October 12, 2011, is delayed from January 31, 2012 to April 30, 2012.

**FOR FURTHER INFORMATION CONTACT:** Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273-1067 (this is not a toll-free number), 1-(866) 315-6572 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** On August 30, 2011, the National Labor Relations Board published a final rule requiring employers, including labor organizations in their capacity as employers, subject to the National Labor Relations Act (NLRA) to post notices informing their employees of their rights as employees under the NLRA. The Board subsequently determined that in the interest of ensuring broad voluntary compliance with the rule concerning notification of employee rights under the National Labor Relations Act, further public education and outreach efforts would be helpful. Accordingly, the Board changed the effective date of the rule from November 14, 2011, to January 31, 2012, in order to allow time for such an education and outreach effort. On December 19, 2011, the U.S. District Court for the District of

Columbia requested that the Board consider postponing the effective date of the rule in connection with a pending proceeding concerning the rule. The Board has determined that postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule. Accordingly, the Board has decided to change the effective date of the rule from January 31, 2012 to April 30, 2012.

Signed in Washington, DC, on December 23, 2011.

**Mark Gaston Pearce,**  
*Chairman.*

[FR Doc. 2011-33571 Filed 12-29-11; 8:45 am]

**BILLING CODE 7545-01-P**

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[EPA-R09-OAR-2011-0638; FRL-9612-8]

**Approval and Promulgation of Air Quality Implementation Plans; California; Determinations of Failure To Attain the One-Hour Ozone Standard**

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is taking final action to determine that three areas in California, previously designated nonattainment for the now-revoked one-hour ozone national ambient air quality standard (NAAQS), did not attain that standard by their applicable attainment dates: the Los Angeles-South Coast Air Basin Area ("South Coast"), the San Joaquin Valley Area ("San Joaquin Valley"), and the Southeast Desert Modified Air Quality Maintenance Area ("Southeast Desert"). These determinations are based on three years of quality-assured and certified ambient air quality monitoring data for the period preceding the applicable attainment deadline.

**DATES: Effective Date:** This rule is effective on January 30, 2012.

**ADDRESSES:** EPA has established docket number EPA-R09-OAR-2011-0638 for this action. The index to the docket is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in

either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:**

Doris Lo, (415) 972-3959, or by email at [lo.doris@epa.gov](mailto:lo.doris@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

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### I. EPA's Proposed Action

On September 14, 2011 (76 FR 56694), EPA proposed to determine, under the Clean Air Act (CAA or “Act”), that three areas previously designated nonattainment for the one-hour ozone NAAQS—the South Coast, the San Joaquin Valley, and the Southeast Desert—failed to attain the NAAQS for one-hour ozone by their applicable one-hour NAAQS attainment dates.

#### A. Background

##### Regulatory Context

The Act requires us to establish NAAQS for certain widespread pollutants that cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare (sections 108 and 109 of the Act). In 1979, we promulgated the revised one-hour ozone standard of 0.12 parts per million (ppm) (44 FR 8202, February 8, 1979).<sup>1</sup>

An area is considered to have attained the one-hour ozone standard if there are no violations of the standard, as determined in accordance with the regulation codified at 40 CFR section 50.9, based on three consecutive calendar years of complete, quality-assured and certified monitoring data. A violation occurs when the ambient ozone air quality monitoring data show greater than one (1.0) “expected number” of exceedances per year at any site in the area, when averaged over three consecutive calendar years.<sup>2</sup> An

<sup>1</sup> For ease of communication, many reports of ozone concentrations are given in parts per billion (ppb); ppb = ppm × 1000. Thus, 0.12 ppm becomes 120 ppb (or between 120 to 124 ppb, when rounding is considered).

<sup>2</sup> An “expected number” of exceedances is a statistical term that refers to an arithmetic average. An “expected number” of exceedances may be

exceedance occurs when the maximum hourly ozone concentration during any day exceeds 0.124 ppm. For more information, please see “National 1-hour primary and secondary ambient air quality standards for ozone” (40 CFR 50.9) and “Interpretation of the 1-Hour Primary and Secondary National Ambient Air Quality Standards for Ozone” (40 CFR part 50, appendix H).

The Act, as amended in 1990, required EPA to designate as nonattainment any area that was violating the one-hour ozone standard, generally based on air quality monitoring data from the 1987 through 1989 period (section 107(d)(4) of the Act; 56 FR 56694, November 6, 1991). The Act further classified these areas, based on the severity of their nonattainment problem, as Marginal, Moderate, Serious, Severe, or Extreme.

The control requirements and date by which attainment of the one-hour ozone standard was to be achieved varied with an area’s classification. Marginal areas were subject to the fewest mandated control requirements and had the earliest attainment date, November 15, 1993, while Severe and Extreme areas were subject to more stringent planning requirements and were provided more time to attain the standard. Two measures that are triggered if a Severe or Extreme area fails to attain the standard by the applicable attainment date are contingency measures [section 172(c)(9)] and a major stationary source fee provision [sections 182(d)(3) and 185] (“major source fee program” or “section 185 fee program”).

##### Designations and Classifications

On November 6, 1991, EPA designated the South Coast<sup>3</sup> as “Extreme” nonattainment for the one-hour ozone standard, with an attainment date no later than November 15, 2010 (56 FR 56694). In its November 6, 1991 final rule, EPA designated the San Joaquin Valley<sup>4</sup> as “Serious” nonattainment for the one-hour ozone standard, but later reclassified the valley as “Severe” (66 FR 56476, November 8, 2001), and then as “Extreme” (69 FR

equivalent to the number of observed exceedances plus an increment that accounts for incomplete sampling. See, 40 CFR part 50, appendix H. Because, in this context, the term “exceedances” refers to days (during which the daily maximum hourly ozone concentration exceeded 0.124 ppm), the maximum possible number of exceedances in a given year is 365 (or 366 in a leap year).

<sup>3</sup> The South Coast includes Orange County, the southwestern two-thirds of Los Angeles County, southwestern San Bernardino County, and western Riverside County (see 40 CFR 81.305).

<sup>4</sup> San Joaquin Valley includes all of Fresno, Kings, Madera, Merced, San Joaquin, Stanislaus, and Tulare counties, as well as the western half of Kern County (see 40 CFR 81.305).

20550, April 16, 2004) for the one-hour ozone standard, with the same attainment date (November 15, 2010) as the South Coast. In its 1991 final rule, EPA designated the Southeast Desert<sup>5</sup> as “Severe-17” nonattainment for the one-hour ozone standard, with an attainment date no later than November 15, 2007.

Outside of Indian country,<sup>6</sup> the South Coast lies within the jurisdiction of the South Coast Air Quality Management District (SCAQMD). Similarly, with the exception of Indian country, San Joaquin Valley lies within the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD). Likewise, excluding Indian country, the Los Angeles portion of the Southeast Desert lies within the Antelope Valley Air Quality Management District (AVAQMD), the San Bernardino County portion of the Southeast Desert lies within the Mojave Desert Air Quality Management District (MDAQMD), and the Riverside County portion of the Southeast Desert lies within the SCAQMD.

Under California law, each air district is responsible for adopting and implementing stationary source rules, such as the fee program rules required under CAA section 185, while the California Air Resources Board (CARB) adopts and implements consumer products and mobile source rules. The district and state rules are submitted to EPA by CARB.

##### Transition From One-Hour Ozone Standard to Eight-Hour Ozone Standard

In 1997, EPA promulgated a new, more protective standard for ozone based on an eight-hour average concentration (the 1997 eight-hour ozone standard). In 2004, EPA published the 1997 eight-hour ozone designations and classifications and a rule governing certain facets of implementation of the eight-hour ozone standard (herein referred to as the “Phase 1 Rule”) (69 FR 23858 and 69 FR 23951, respectively, April 30, 2004).

<sup>5</sup> The Southeast Desert covers the Victor Valley/Barstow region in San Bernardino County, the Coachella Valley region in Riverside County, and the Antelope Valley portion of Los Angeles County (see 40 CFR 81.305).

<sup>6</sup> “Indian country” as defined at 18 U.S.C. 1151 refers to: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

Although EPA revoked the one-hour ozone standard (effective June 15, 2005), to comply with anti-backsliding requirements of the Act, eight-hour ozone nonattainment areas remain subject to certain requirements based on their one-hour ozone classification. Initially, in our rules to address the transition from the one-hour to the eight-hour ozone standard, EPA did not include contingency measures or the section 185 fee program among the measures retained as one-hour ozone anti-backsliding requirements.<sup>7</sup> However, on December 23, 2006, the United States Court of Appeals for the District of Columbia Circuit determined that EPA should not have excluded these requirements (and certain others not relevant here) from its anti-backsliding requirements. *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (DC Cir. 2006) reh'g denied 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review) (referred to herein as the *South Coast* case).

Thus, the Court vacated the provisions that excluded these requirements. As a result, States must continue to meet the obligations for one-hour ozone NAAQS contingency measures and, for Severe and Extreme areas, section 185 major source fee programs. EPA has issued a proposed rule that would remove those specific portions of *40 CFR 51.905(e)* that the court vacated, and that addresses contingency measures for failure to attain or make reasonable further progress toward attainment of the one-hour standard. See *74 FR 2936*, January 16, 2009 (proposed rule); *74 FR 7027*, February 12, 2009 (notice of public hearing and extension of comment period).

#### Rationale for Proposed Action

In our September 14, 2011 proposed rule, we explained that, after revocation of the one-hour ozone standard, EPA must continue to provide a mechanism to give effect to the one-hour anti-backsliding requirements that have been specifically retained. See *South Coast*, 47 F.3d 882, at 903. In keeping with this responsibility with respect to one-hour anti-backsliding contingency measures and section 185 fee programs for these three California areas, on September 14, 2011, EPA proposed to determine that each area failed to attain the one-hour ozone standard by its applicable attainment date.

<sup>7</sup>Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 FR 23951 (April 30, 2004).

#### B. Technical Evaluation

A determination of whether an area's air quality meets the one-hour ozone standard is generally based upon three years of complete,<sup>8</sup> quality-assured and certified air quality monitoring data gathered at established State and Local Air Monitoring Stations ("SLAMS") in the nonattainment area and entered into the EPA's Air Quality System (AQS) database. Data from air monitors operated by state/local agencies in compliance with EPA monitoring requirements must be submitted to the AQS database. Monitoring agencies annually certify that these data are accurate to the best of their knowledge. Accordingly, EPA relies primarily on data in its AQS database when determining the attainment status of an area. See 40 CFR 50.9; 40 CFR part 50, appendix H; 40 CFR part 53; 40 CFR part 58, appendices A, C, D and E. All data are reviewed to determine the area's air quality status in accordance with 40 CFR part 50, appendix H.

Under EPA regulations at 40 CFR 50.9, the one-hour ozone standard is attained at a monitoring site when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million (235 micrograms per cubic meter) is equal to or less than 1, as determined by 40 CFR part 50, appendix H.<sup>9</sup>

In our September 14, 2011 proposed rule, EPA proposed to determine that the South Coast, the San Joaquin Valley, and the Southeast Desert failed to attain the one-hour ozone standard by their applicable attainment dates based on findings that the number of expected exceedances at sites in each of the three nonattainment areas was greater than one per year in the period prior to the applicable attainment date. These proposed determinations were based on three years of quality-assured and certified ambient air quality monitoring data in AQS for the 2008–2010 monitoring period for the South Coast and the San Joaquin Valley, and quality-assured and certified data in AQS for 2005–2007 for the Southeast Desert.

<sup>8</sup>Generally, a "complete" data set for determining attainment of the ozone is one that includes three years of data with an average percent of days with valid monitoring data greater than 90% with no single year less than 75%. See 40 CFR part 50, appendix I. There are less stringent data requirements for showing that a monitor has failed an attainment test and thus has recorded a violation of the standard.

<sup>9</sup>The average number of expected exceedances is determined by averaging the expected exceedances of the one-hour ozone standard over a consecutive three calendar year period. See 40 CFR part 50, appendix H.

In so doing, in our September 14, 2011 proposed rule, we reviewed documents prepared by CARB and the local air districts in connection with the ozone monitoring networks as well as any applicable EPA technical systems audits to determine the comprehensiveness and reliability of the data reported to AQS and used by EPA to determine the attainment status of the areas with respect to the one-hour ozone standard. We then evaluated the ozone monitoring data contained in AQS from each area against the criterion discussed above to determine whether the areas attained the one-hour ozone standard by their applicable attainment dates.

With respect to the South Coast, based on the monitoring data from 29 ozone monitoring sites for the years 2008–2010, we found that, generally, the highest ozone concentrations in the South Coast occur in the northern and eastern portions of the area. We also determined that the highest three-year average of expected exceedances at any site in the South Coast Air Basin for 2008–2010 is 10.4 (at Crestline, a site located at 4,500 feet elevation in the San Bernardino Mountains). Because the calculated exceedance rate of 10.4 represents a violation of the one-hour ozone standard (a three-year average of expected exceedances less than or equal to 1), and taking into account the extent and reliability of the applicable ozone monitoring network, and the data collected therefrom, we proposed in our September 14, 2011 action to determine that the South Coast Air Basin failed to attain the one-hour ozone standard (as defined in 40 CFR part 50, appendix H) by the applicable attainment date (*i.e.*, November 15, 2010). Please see pages 56696–56698 in the September 14, 2011 proposed rule for additional information on the ozone monitoring network operating in the South Coast during the relevant period and the data collected therefrom.

With respect to the San Joaquin Valley, based on the monitoring data from 22 ozone monitoring sites for the years 2008–2010, we found that, generally, the highest ozone concentrations in San Joaquin Valley occur in the central (*i.e.*, in and around the city of Fresno) and the southern portions (*i.e.*, southeast of Bakersfield) of the area. We also determined that the highest three-year average of expected exceedances at any site in the San Joaquin Valley for 2008–2010 is 6.6 at Arvin, a site located with mountains to the east, west, and south. Because the calculated exceedance rate of 6.6 represents a violation of the one-hour ozone standard (a three-year average of expected exceedances less than or equal

to 1), and taking into account the extent and reliability of the applicable ozone monitoring network, and the data collected therefrom, we proposed in our September 14, 2011 action to determine that the San Joaquin Valley failed to attain the one-hour ozone standard (as defined in 40 CFR part 50, appendix H) by the applicable attainment date (*i.e.*, November 15, 2010). Please see pages 56698–56699 in the September 14, 2011 proposed rule for additional information on the ozone monitoring network operating in the San Joaquin Valley during the relevant period and the data collected therefrom.

With respect to the Southeast Desert, based on the monitoring data from nine ozone monitoring sites for the years 2005–2007, we found that, generally, the highest ozone concentrations in the Southeast Desert occur in the far southwestern portion of the area, near mountain passes through which pollutants are transported to the Southeast Desert from the South Coast Air Basin. We also determined that the highest three-year average of expected exceedances at any site in the Southeast Desert for 2005–2007 is 2.3 at Palm Springs in Riverside County and Hesperia in San Bernardino County. Because the calculated exceedance rate of 2.3 represents a violation of the one-hour ozone standard (a three-year average of expected exceedances less than or equal to 1), and taking into account the extent and reliability of the applicable ozone monitoring network, and the data collected therefrom, we proposed to determine in our September 14, 2011 proposed action that the Southeast Desert failed to attain the one-hour ozone standard (as defined in 40 CFR part 50, appendix H) by the applicable attainment date (*i.e.*, November 15, 2007). Please see pages 56699–56700 in the September 14, 2011 proposed rule for additional information on the ozone monitoring network operating in the Southeast Desert during the relevant period and the data collected therefrom.

#### C. Consequences

In our September 14, 2011 proposed rule, we explained that a final determination of a Severe or Extreme area's failure to attain by its one-hour ozone NAAQS attainment date would trigger the obligation to implement one-hour contingency measures for failure to attain under section 172(c)(9) and fee programs under sections 182(d)(3), 182(f), and 185. Section 172(c)(9) requires one-hour ozone SIPs, other than for "Marginal" areas, to provide for implementation of specific measures (referred to herein as "contingency

measures") to be undertaken if the area fails to attain the NAAQS by the attainment date. Thus, in our September 14, 2011 proposed rules, we stated that a consequence of the proposed determinations, if finalized, would be to give effect to any one-hour ozone contingency measures that are not already in effect within the three subject California nonattainment areas.

Section 182(d)(3) requires SIPs to include provisions required under section 185, and section 185 requires one-hour ozone SIPs in areas classified as "Severe" or "Extreme" to provide that, if the area has failed to attain the standard by the applicable attainment date, each major stationary source of ozone precursors located in the area must begin paying a fee [computed in accordance with section 185(b)] to the State. Section 182(f) extends the section 185 requirements, among others, that apply to major stationary sources of VOCs to major stationary sources of NO<sub>x</sub> unless EPA has waived such requirements for NO<sub>x</sub> sources in the particular nonattainment area. Thus, in our September 14, 2011 proposed rules, we stated that another consequence of the determinations, if finalized, would be to give effect to the section 185 fee requirements to the extent they are not already in effect within the three subject California nonattainment areas.

Please see pages 56700–56701 in the September 14, 2011 proposed rule for additional information on the consequences of our proposed determinations in the three subject California one-hour ozone nonattainment areas.

#### II. Public Comments and EPA Responses

Our September 14, 2011 proposed rule provided a 30-day comment period. During this period, we received three comment letters: a letter from the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) dated October 12, 2011; a letter from the South Coast Air Quality Management District (SCAQMD) dated October 13, 2011; and a letter from Earthjustice dated October 14, 2011. None of the commenters challenge EPA's proposed air quality determinations themselves, nor any aspect of the technical basis for the proposed determinations. Rather, they variously challenge the necessity, rationale, and statutory basis for the proposed actions and the consequences that they entail. We have summarized the comments from each commenter's letter and provide EPA's responses below.

#### San Joaquin Valley Unified Air Pollution Control District—Comments and Responses

**SJVUAPCD Comment #1:** The SJVUAPCD provides a number of grounds to support its argument that EPA should not make a determination that the San Joaquin Valley failed to meet its deadline for attaining the one-hour ozone standard. The District's reasons include: the one-hour ozone standard has been revoked; EPA's Phase 1 Ozone Implementation rule stated that EPA will no longer make findings of failure to attain for one-hour ozone nonattainment areas, citing 69 FR 23951, at 23984 (April 30, 2004); while certain provisions of EPA's April 2004 Ozone Implementation rule were vacated, the applicable provision related to findings of failure to attain was not challenged, and thus EPA remains bound by it.

**EPA Response to SJVUAPCD Comment #1:** Under EPA's April 30, 2004 Phase 1 Rule, EPA is no longer obligated, after revocation of the one-hour ozone standard, to determine pursuant to section 179(c) or 181(b)(2) of the CAA whether an area attained the one-hour ozone standard by that area's attainment date for the one-hour ozone standard. See 40 CFR 51.905(e)(2). EPA agrees that the relevant provision from EPA's Phase 1 Rule [*i.e.*, 40 CFR 51.905(e)(2)] was not challenged and has not been vacated, but disagrees that this provision precludes EPA from making the determinations that are the subject of this notice. First, although the provision states that the Agency is no longer obligated to make certain determinations, it does not prohibit the Agency from exercising its discretion to do so. However, more to the point, EPA is not today invoking the authority of section 179(c) to determine that the San Joaquin Valley failed to attain the one-hour ozone standard by the applicable attainment date. Rather, EPA is acting pursuant to its obligations to give effect to two specific one-hour ozone anti-backsliding requirements whose implementation is dependent on such determinations. In doing so, EPA is complying with the DC Circuit's directive to formulate the Agency's procedures to dovetail with the required anti-backsliding measures. For the reasons explained in our September 14, 2011 proposed rule and further below, EPA is acting pursuant to its authority under section 301(a) and also the relevant portion of section 181(b)(2).

**SJVUAPCD Comment #2:** The SJVUAPCD believes that EPA's action is unnecessary with respect to the San Joaquin Valley because the District's

one-hour ozone contingency measures take effect without further action by the District or EPA, and because, with respect to section 185 fees, the DC Circuit did not specify the mechanism that EPA must use to trigger section 185 fees, and the District's rule implementing section 185 has been proposed for approval by EPA.

*EPA Response to SJVUAPCD*

*Comment #2:* EPA recognizes that the approved one-hour ozone plan for the San Joaquin Valley relies on existing State and federal on- and off-road road new engine standards to meet the contingency measure requirements in section 172(c)(9), 75 FR 10420, at 10432 (March 8, 2010) and that such standards are already being implemented and provide an estimated additional benefit in 2011 beyond the reductions from those measures in 2010 regardless of our determination of failure to attain the one-hour ozone standard for the San Joaquin Valley. EPA also recognizes that the District's rule (*i.e.*, District Rule 3170) that is intended to implement section 185 of the CAA in connection with the one-hour ozone standard does not condition its applicability upon EPA's determination of failure by the area to attain the one-hour ozone standard by the applicable attainment date and that the rule has been submitted to EPA for review.<sup>10</sup> EPA, however, believes that a determination of failure to attain the one-hour ozone standard is appropriate to eliminate any uncertainty as to whether such measures and rules must continue to be implemented in San Joaquin Valley for anti-backsliding purposes.

*South Coast Air Quality Management District—Comments and Responses*

*SCAQMD Comment #1:* SCAQMD asserts that there is no need for EPA to make the proposed determinations. SCAQMD believes that, with respect to the South Coast, there is no need for a "trigger mechanism" which would inform the area that, due to its failure to attain, the area must implement section 185 fees and contingency measures because the related section 185 fees rule (SCAQMD Rule 317) has been adopted and submitted to EPA and because the contingency measures have already been implemented.

*EPA Response to SCAQMD Comment #1:* We recognize that SCAQMD Rule 317 has already been adopted by the District and submitted to EPA by CARB as a revision to the California SIP. As is true for the corresponding SJVUAPCD rule, SCAQMD Rule 317 does not

condition applicability on EPA making a determination of failure to attain the one-hour ozone standard (by the applicable attainment date), and thus, the rule is in effect regardless of EPA's determination herein. EPA has not yet acted to approve this SIP revision.

Furthermore, prior to today's action, there has been no final determination of the area's failure to attain, which is what establishes the requirement to implement a rule developed to comply with section 185. Without a dispositive determination that implementation is required, it would be difficult if not impossible to clearly establish and enforce the obligation, and to assess when it may cease. Moreover, because EPA has not yet taken final action to approve SCAQMD Rule 317, and if we were to disapprove the rule, or if we were to approve SCAQMD Rule 317, but find that the SCAQMD is not administering and enforcing the rule, EPA could be under an obligation to implement the fee program required under section 185 [see CAA section 185(d)]. Thus, in order to comply with the process set forth in section 185, and to provide a legal basis for the State and/or EPA as appropriate to collect fees, EPA must ensure that the necessary determination for application of section 185 has been made. Thus, EPA concludes that, in the circumstances presented, the agency must make the determination that triggers the obligation to implement section 185, and we do so today in this document.

Moreover, the Agency has grounds to make today's determination other than for purposes of implementing contingency measures. EPA's determination is also linked to implementation of anti-backsliding requirements under section 185. Thus, today's action is not aimed solely at one-hour ozone contingency measures.

*SCAQMD Comment #2:* Even if it were necessary for EPA to have a "trigger mechanism" to cause an area to implement its section 185 fee, or to implement contingency measures, the SCAQMD believes it is not necessary to use a formal determination of failure to attain. The SCAQMD states that there is nothing in the *South Coast* case that indicated that a formal determination of failure to attain is necessary and that, as a result, EPA could simply send the affected districts a letter informing them that those obligations had been triggered based on submitted monitoring data.

*EPA Response to SCAQMD Comment #2:* EPA's established practice for making a determination whether an area has attained, or failed to attain, the NAAQS is to conduct a rulemaking

under the Administrative Procedure Act (APA), not to issue a letter, a list or some other informal document. In other words, if there has not been a rulemaking providing notice and an opportunity for comment, there has not been an attainment determination. EPA's longstanding practice in this regard was explicitly recognized and upheld more than a decade ago by the United States Court of Appeals for the DC Circuit. The Court rejected the Sierra Club's arguments that means other than rulemaking were sufficient for this purpose, especially when a determination results in additional obligations for an area. See *Sierra Club v. Whitman*, 285 F.3d 63, at 66 (DC Cir. 2002). In determining through notice and comment rulemaking that the South Coast failed to attain the one-hour ozone standard by the applicable attainment date, EPA is acting consistently with its established practice and applicable administrative procedure law in making such determinations.

*SCAQMD Comment #3:* The SCAQMD asserts that the CAA does not authorize EPA to make the proposed determinations. In support of this assertion, the SCAQMD argues that:

- While CAA sections 179(c) and 179(d) require EPA to determine whether an area attained the standard by the applicable attainment date and that a new attainment demonstration requirement is triggered by a determination of failure to attain the standard by the applicable attainment date under those provisions, the one-hour ozone standard has been revoked and, as a result, the one-hour ozone standard is no longer a "standard" for the purposes of section 179(c) and section 179(d);

*•* EPA's past statements, such as those from EPA's April 30, 2004 Phase 1 Rule, indicate that areas would no longer have the obligation to demonstrate attainment of the revoked one-hour ozone standard if the area had an approved one-hour ozone attainment demonstration; and

*•* The recent decision published by the U.S. Court of Appeals for the Ninth Circuit (*Association of Irritated Residents v. EPA*, 632 F.3d 584 (9th Cir. 2011) that appears to require EPA to assure that California demonstrate attainment of the one-hour ozone standard for the South Coast was rendered without consideration of the fact that the plan in issue there was aimed at attaining the one-hour ozone standard, which had been revoked by the time EPA acted on the plan, and that the decision is pending appeal and not yet final.

<sup>10</sup>EPA proposed approval of SJVUAPCD Rule 3170 at 76 FR 45212 (July 28, 2011).

**EPA Response to SCAQMD Comment #3:** In making today's final determinations, we are not acting pursuant to section 179(c) nor triggering the related requirements under section 179(d). Neither of these provisions was retained as a 1-hour ozone anti-backsliding requirement, and the relevant provisions of the anti-backsliding rule in this respect were not challenged. As explained in our September 14, 2011 proposed rule, we are acting here in accordance with our obligation to enforce specific one-hour ozone anti-backsliding requirements, and the DC Circuit's instruction to us in the *South Coast* case that we determine the process necessary for that purpose. Thus, as explained in our proposal and elsewhere in this notice, we are acting here pursuant to our general authority in section 301(a) and the relevant portion of section 181(b)(2) concerning attainment determinations (*i.e.*, not the portion concerning reclassifications, which the commenter correctly notes was not retained for anti-backsliding purposes), and for the purpose of effectuating the two anti-backsliding provisions that are triggered by a determination of failure to meet the attainment deadline—contingency measures and section 185 fees.

EPA believes that the Ninth Circuit's decision in the *Association of Irritated Residents* (*AIR*) case cited by SCAQMD has no bearing on the question raised in this rulemaking regarding whether EPA must invoke section 179 when it seeks to make a determination regarding 1-hour ozone contingency and fee anti-backsliding measures. The *AIR* case centers on EPA's duties under section 110(l) of the CAA when it reviews a SIP revision, particularly, a SIP revision that includes an attainment demonstration. It does not pertain to the issue raised in this rulemaking—whether section 179, though not preserved in EPA's anti-backsliding provisions, should nonetheless be tacked on for the first time here as an additional anti-backsliding requirement to impose yet further planning for a revoked standard. In contrast to *AIR*, which considers EPA's duty at the time it reviews a plan, the question raised in this rulemaking is not whether the plan's faults were known at the time of plan review. The question here regarding section 179(c) concerns only whether that section's provision, which was not preserved as an anti-backsliding requirement, can be applied to extract an additional round of planning based on a subsequent failure to attain. As EPA explains elsewhere in this notice, the answer is that it cannot. Section 179's requirement for additional

planning was not included in the anti-backsliding measures that were exhaustively litigated, reviewed and dispository determined by the DC Circuit. As noted, the exclusion of section 179, and in particular the additional planning requirements in section 179(d), from the list of applicable requirements that continue to apply for anti-backsliding purposes was not challenged and remains the current law. Above all, sections 179(c) and (d) are not necessary to the enforcement of any of the anti-backsliding requirements which are included.

**SCAQMD Comment #4:** SCAQMD acknowledges that EPA's proposal described the consequences of the determinations only in terms of section 185 fees and contingency measures, but is concerned that if EPA finalizes the proposed action, it will be used in an effort to compel SCAQMD to submit a plan to attain the revoked one-hour standard.

**EPA Response to SCAQMD Comment #4:** EPA's final determinations in this rulemaking are intended to effectuate only those 1-hour anti-backsliding requirements that have been specifically retained, and which are activated by a finding of failure to attain. For the reasons set forth at length elsewhere in these responses, EPA is not acting pursuant to section 179, and does not believe that section's provisions can be invoked to require additional rounds of planning for the revoked 1-hour standard. EPA and the states are implementing the one-hour standard, which has been revoked, by means of the specified one-hour anti-backsliding requirements. While EPA agrees that it must continue to make determinations of attainment or failure to attain the one-hour ozone standard by the applicable attainment date, it is for the sole purpose of ensuring implementation of those one-hour ozone anti-backsliding requirements (section 185 fees and contingency measures) and not to trigger new attainment demonstration plans or reclassifications for the revoked one-hour ozone standard. EPA's reasoning is elaborated further in its responses below to the comments of Earthjustice.

**SCAQMD Comment #5:** SCAQMD states that it has recently initiated the 2012 Air Quality Management Plan (AQMP) development process. SCAQMD anticipates that the 2012 AQMP will be submitted to EPA by the end of 2012 and will include a demonstration of attainment of the 24-hour PM<sub>2.5</sub> standard and an update to the "black box" commitment under CAA section 182(e)(5) for attainment of the 1997 8-hour ozone standard. SCAQMD asserts that this plan will

necessarily include all feasible measures and believes that it is doubtful that additional measures could be identified solely for the purposes of addressing the revoked one-hour ozone standard. SCAQMD also asserts that the strategies for emissions reductions would essentially be the same for both the one and eight-hour ozone standards. SCAQMD argues that no separate additional plan for the revoked one-hour ozone standard should be required, since the 2012 plan for the eight-hour standard will evaluate future one-hour ozone design values and, all feasible measures are being taken, and the additional resource needed to prepare such a demonstration would divert resources away from the effort to demonstrate attainment with the current NAAQS. Thus, SCAQMD believes that requiring a new attainment demonstration for the one-hour ozone standard is not necessary and is overly burdensome given the upcoming 2012 AQMP.

**EPA Response to SCAQMD Comment #5:** As stated above, EPA believes that the anti-backsliding requirements applicable for the revoked 1-hour ozone standard are limited to those specified in EPA's regulations and the *South Coast* decision, and do not and should not compel additional planning for the one-hour standard here. We agree that requiring a new attainment demonstration for the one-hour ozone standard for the South Coast is not necessary or required by a final determination today that the South Coast failed to attain the one-hour ozone standard by the applicable attainment date. As set forth in our September 14, 2011 proposed rule and elsewhere in this document, we are making today's determination pursuant to our authority under CAA section 301(a) and also under the relevant portion of section 181(b)(2), in order to ensure implementation of only those measures specifically identified as one-hour ozone anti-backsliding requirements—in this case—contingency measures and section 185 fees.

**SCAQMD Comment #6:** SCAQMD requests that EPA clarify that a final determination of failure to attain does not trigger any obligation to submit an attainment demonstration for the revoked one-hour ozone standard.

**EPA Response to SCAQMD Comment #6:** In this final rule, EPA explains and responds to comments concerning the statutory basis and rationale set forth in our September 14, 2011 proposed rule for the determination of failure to attain the one-hour ozone standard by the applicable attainment date. EPA is taking this action under its authority to

ensure implementation of one-hour ozone anti-backsliding requirements under CAA section 301(a) and the relevant portion of section 181(b)(2). Thus, EPA is stating plainly that today's determination does not trigger any requirement for the State of California to prepare and submit a new attainment demonstration for the one-hour ozone standard under section 179(c) and (d) for any of the three subject California nonattainment areas. As EPA has stated elsewhere, a new additional attainment demonstration triggered by a failure to attain the one-hour ozone standard by the attainment date is not an "applicable requirement" for the purposes of anti-backsliding in 40 CFR 51.905 and 40 CFR 51.900(f).

**SCAQMD Comment #7:** The SCAQMD requests that EPA separate the Coachella Valley from the remainder of the Southeast Desert Air Basin and determine that the Coachella Valley has attained the one-hour ozone standard. SCAQMD acknowledges that the Coachella Valley still exceeded the revoked one-hour ozone standard in the three-year period before 2007, but believes that Coachella Valley can now show it has attained the revoked one-hour standard based on data from the 2008–2010 period.

**EPA Response to SCAQMD Comment #7:** The air quality determinations that are the subject of this rulemaking focus solely on whether the areas attained the one-hour ozone standard by the applicable attainment dates. Whether an area is currently attaining the standard is not relevant to these determinations. In the case of the South Coast and the San Joaquin Valley, the applicable attainment date was November 15, 2010, and the determination of whether the areas attained by the applicable attainment date is based on data from 2008–2010. For the Southeast Desert, the determination of whether the area met its attainment date is based on data for 2005–2007. As a Severe-17 area, the area's applicable attainment date for the one-hour ozone standard was November 15, 2007.

In today's rulemaking, EPA is not addressing current attainment of the one-hour ozone standard in these areas or making a determination regarding current attainment of any area. Should the SCAQMD wish to seek a revision of the boundary of the Southeast Desert one-hour ozone nonattainment area in order to establish a separate Coachella Valley one-hour ozone nonattainment area and a determination by EPA that this area is currently attaining the one-hour ozone standard, the SCAQMD should work with CARB to prepare and submit a request for a boundary

redesignation under CAA section 107(d)(3)(D) and for a related attainment determination. EPA would then consider such requests in a separate rulemaking.

**SCAQMD Comment #8:** SCAQMD states that it believes that, for the sake of consistency and to avoid future litigation, EPA should make determinations similar to today's determinations for all areas in the United States that failed to attain the revoked ozone standard by their applicable attainment dates.

**EPA Response to SCAQMD Comment #8:** By mid-2012, EPA intends to make a determination of attainment or failure to attain the one-hour ozone standard for approximately 20 areas throughout the country, consisting of almost every one-hour ozone nonattainment area that was classified as Moderate or above on June 15, 2005 (the date of revocation of the one-hour ozone standard) and that is currently designated as nonattainment for the 1997 8-hour ozone standard. The only two exceptions, Portsmouth-Dover-Rochester, New Hampshire and Providence, Rhode Island were classified as "Serious" for the one-hour ozone standard, and thus not subject to section 185 fee requirements, and EPA has determined through rulemaking that they are attaining the 1997 eight-hour ozone standard. See 75 FR 64949 (October 21, 2010)(Providence, RI); and 76 FR 14805 (March 18, 2011) (Portsmouth-Dover-Rochester, NH).

The areas for which EPA has made determinations regarding attainment of the one-hour ozone standard, or for which EPA is committed to make determinations, are: South Coast (CA); San Joaquin Valley (CA); Southeast Desert (CA); Chicago-Gary-Lake County (IL-IN); Houston-Galveston (TX); Milwaukee-Racine (WI); New York-N. New Jersey-Long Island (NY-NJ-CT); Baltimore (MD); Baton Rouge (LA); Philadelphia-Wilmington-Trenton (PA-NJ-DE-MD); Sacramento Metro (CA); Ventura County (CA); Metropolitan Washington (DC-MD-VA); Beaumont-Port Arthur (TX); Boston-Lawrence-Worcester (MA-NH); Dallas-Fort Worth (TX); El Paso (TX); Greater Connecticut (CT); Springfield (Western MA); Atlantic City (NJ); and Poughkeepsie (NY).

#### *Earthjustice—Comments and Responses*

**Earthjustice Comment #1:** Earthjustice states that it assumes that EPA's failure to cite the relevant sections of the CAA and fully explain the implications of a failure to attain is an oversight because it contends that the requirements in CAA sections 179(c) and 181(b)(2) plainly mandate EPA to determine

whether a nonattainment area attained the standard by the applicable attainment date.

#### *EPA Response to Earthjustice*

**Comment #1:** For a number of reasons, EPA does not agree that it is compelled to act under the authority of CAA sections 179(c) and 181(b)(2) when making determinations for the revoked one-hour ozone standard. CAA section 179(c) requires, in relevant part, that EPA determine, based on the area's air quality as of the attainment date, whether the area attained the standard by that date. CAA section 179(c) applies to all of the NAAQS whereas CAA section 181(b)(2), in relevant part, largely mirrors section 179(c) and applies specifically to the ozone standard.

Both section 179(c) and 181(b)(2) refer to the "standard," which doubtless applies to the NAAQS, but which does not clearly apply to a revoked standard, such as the one-hour ozone standard, which was revoked after promulgation of the 1997 eight-hour ozone standard, one year after the effective date of designations for the 1997 ozone standard. See 40 CFR 50.9(b). Based on an effective date of June 15, 2004 for designations for the eight-hour ozone standard (see 69 FR 23951, April 30, 2004), the date for revocation of the one-hour ozone standard was June 15, 2005. Because we are well past that date, the revoked one-hour ozone NAAQS no longer constitutes a "standard" for the purposes of sections 179(c) or 181(b)(2).

Moreover, not all CAA provisions that applied prior to revocation of the one-hour standard were preserved as anti-backsliding requirements. Only specified requirements were identified and retained as applicable requirements. While EPA's identification of these requirements was challenged in the *South Coast* litigation, the DC Circuit's decisions in that case disposed of those challenges and closed the door on the issue of what constitutes an anti-backsliding requirement. The provisions of the rule indicating that EPA would not be obligated to make determinations under section 179(c) for purposes of future planning or section 181(b)(2) for purposes of reclassifications were not challenged and stand as promulgated. Even more significantly, the consequences of determinations set forth in portions of those provisions—reclassification and additional one-hour planning—were not retained as anti-backsliding requirements. This aspect of the anti-backsliding regime was not challenged by litigants or addressed by the South Coast Court. The court vacated only those portions of EPA's implementation rule that it addressed in

its *South Coast* decision. In accordance with EPA's Phase 1 Ozone Implementation Rule, EPA is no longer obligated, after revocation of the one-hour ozone standard, to determine pursuant to section 179(c) or section 181(b)(2) of the CAA whether an area attained the one-hour ozone standard by that area's attainment date for the one-hour ozone standard. See 40 CFR 51.905(e)(2). While EPA remains obligated to ensure implementation of those one-hour ozone anti-backsliding measures that were retained as applicable requirements, EPA is not obligated to, and has elected not to apply section 179(c) to make determinations whether an area attained the one-hour ozone standard by the applicable attainment date. EPA is undertaking these determinations expressly and solely to give effect to the anti-backsliding requirements for contingency measures and section 185 fees that have been retained as applicable requirements and which are linked to such determinations, under our authority under CAA section 301(a) and the relevant portion of section 181(b)(2) consistent with the *South Coast* decision. The only anti-backsliding requirements related to attainment planning for the one-hour ozone standard are contained in EPA's regulation 40 CFR 51.905(a), which does not include any obligations for subsequent planning rounds under section 179(d). Section 179(d) prescribes consequences that were not retained for purposes of anti-backsliding after revocation of the one-hour ozone standard.

*Earthjustice Comment #2:* Earthjustice states its belief that the consequences of a failure to attain are plainly enumerated in the Act—a new plan meeting the requirements of section 110 and 172 [see section 179(d)], contingency measures approved under section 172(c)(9) and section 185 fees.

*EPA Response to Earthjustice*  
*Comment #2:* As stated on page 56700 of our September 14, 2011 proposed rule, we agree that a final determination that a Severe or Extreme area failed to attain by its one-hour ozone NAAQS attainment date triggers a State's obligation to implement one-hour contingency measures for failure to attain under section 172(c)(9) and fee programs under sections 182(d)(3), 182(f), and 185. Because the South Coast, San Joaquin Valley, and Southeast Desert areas are classified as Extreme (or Severe in the case of the Southeast Desert) for the one-hour ozone standard, today's final determinations of failure to attain by the applicable attainment date trigger the

obligation to implement such one-hour contingency measures and fee programs.

We do not agree, however, that these determinations re-activate a requirement to prepare and submit an additional round of one-hour attainment planning pursuant to CAA section 179(d). Section 179(d) was not retained as an anti-backsliding requirement, and as explained in Response to Comment #1, above, EPA is not applying section 179 in order to make the determinations of failure to attain for the three subject California areas under section 179(c). For these and other reasons set forth elsewhere in this notice, the additional plan requirements under section 179(d) are not triggered.

*Earthjustice Comment #3:* Earthjustice cites the decision by the Court of Appeals for the DC Circuit in the *South Coast Air Quality Mgmt. Dist. v. EPA* case (472 F.3d 882, 903–904 (DC Cir. 2007) in asserting that EPA unsuccessfully attempted to delete certain statutory requirements (*i.e.*, new plan under section 179(d), contingency measures under section 172(c), and section 185 fees) in the Agency's 2004 Phase 1 Rule.

*EPA Response to Earthjustice*  
*Comment #3:* We agree that the *South Coast* case, cited above, vacated the provisions of EPA's Phase 1 Rule that excluded section 172(c)(9) contingency measures and section 185 fees from the list of applicable requirements for purposes of anti-backsliding after revocation of the one-hour ozone standard. We disagree, however, that the *South Coast* decision preserves EPA's obligations under CAA section 179(c) or the related State obligations under CAA section 179(d) after revocation of the one-hour ozone standard. EPA's authority to revoke the one-hour ozone standard was specifically challenged in the *South Coast* case but upheld by the DC Circuit. See *South Coast*, 472 F.3d 882, at 899 ("Therefore, EPA retains the authority to revoke the one-hour standard so long as adequate anti-backsliding provisions are introduced.") As we have noted, the claim that all the specific requirements of sections 179(c) and (d) and 181(b)(2) should be retained and imposed as anti-backsliding measures was not raised in the *South Coast* case and cannot be resurrected at this time. Because the one-hour ozone standard has been revoked, it is no longer a "standard" for the purposes of CAA section 179(c) and thus the statutory requirements of section 179(d) also no longer apply. While EPA is obliged to make those determinations necessary to effectuate the contingency measure and fee anti-backsliding requirements, there is nothing that

requires EPA to make those determinations under section 179 or 181, or that dictates the imposition of the consequences formerly imposed by those sections before revocation, *i.e.*, reclassification, second-round attainment planning. These were not retained as anti-backsliding requirements and 40 CFR 51.905(e)(2) made that explicit, was never challenged, and was not vacated by the *South Coast* decision. Commenters are conflating EPA's obligation to determine whether an area attained by its one-hour ozone attainment date with the terms of section 179, which exceed the limits of, and are not necessary for purposes of anti-backsliding requirements.

*Earthjustice Comment #4:* Earthjustice observes that EPA promulgated, as part of the Agency's Phase 1 Rule, a provision that states in essence that, after revocation, EPA is no longer obliged to determine pursuant to section 179(c) or section 181(b)(2) whether an area attained the one-hour ozone standard by that area's attainment date for the one-hour ozone standard, but asserts that EPA has never interpreted the statute or EPA's regulations as allowing EPA to avoid making the required determinations under sections 179(c) or 181(b)(2) when needed to fulfill the obligations of the CAA. In support of this contention, Earthjustice points to the text found in EPA's one-hour ozone attainment determinations for Washoe County [as citing both 179(c) and 181(b)(2)], Philadelphia and District of Columbia [as citing section 181(b)(2)], Southern New Jersey [as citing section 181(b)(2)] and Milwaukee [as citing section 181(b)(2)].

*EPA Response to Earthjustice*  
*Comment #4:* First, the only example that Earthjustice claims as evidence that EPA has conceded that it remains obligated after revocation of the one-hour ozone standard to make attainment determinations for the one-hour ozone standard under section 179(c), is an attainment determination that was made *before* the one-hour ozone standard was revoked. EPA's one-hour ozone attainment determination for Washoe County, Nevada was published on May 3, 2005 (70 FR 22803), the one-hour ozone standard was revoked on June 15, 2005. Therefore, EPA's determination for Washoe County proves nothing about EPA's obligation to make attainment determinations under section 179(c) of the Act after revocation. To the contrary, 40 CFR 51.905(e)(2) clearly provides: "Upon revocation of the 1-hour NAAQS for an area, EPA is no longer obligated (A) To determine pursuant to section 181(b)(2)

or section 179(c) of the CAA whether an area attained \* \* \*.”

Second, although after revocation, on a number of occasions, EPA has cited section 181(b)(2)—but never section 179—when determining that areas attained the one-hour ozone standard by the applicable deadline, all of these rulemakings were determinations of attainment rather than determinations of failure to attain. Because the areas met their attainment deadlines, EPA was not determining or imposing the consequences of failure to attain. Moreover, when EPA invoked section 181(b)(2) in determining that areas had attained the one-hour ozone deadline, EPA made clear in those actions that the only portion of section 181(b)(2) applicable for purposes of the one-hour ozone anti-backsliding requirements was the obligation to make the determination itself, since the portions of the section prescribing the consequence of reclassification had not been retained. 40 CFR 51.905(e).

For example, in one of the determinations of attainment, EPA noted that:

“EPA remains obligated under section 181(b)(2) to determine whether an area attained the one-hour ozone NAAQS by its attainment date. However, after the revocation of the one-hour ozone NAAQS, EPA is no longer obligated to reclassify an area to a higher classification for the one-hour NAAQS based upon a determination that the area failed to attain the one-hour NAAQS by the area’s attainment date for the one-hour NAAQS. (40 CFR 51.905(e)(2)(i)(B).) Thus even if we make a finding that an area has failed to attain the one-hour ozone NAAQS by its attainment date, the area would not be reclassified to a higher classification.” 73 FR 42727, at 42728 (July 23, 2008).

As EPA has noted, after revocation, the only possible anti-backsliding requirements triggered by a failure to attain the one-hour ozone attainment deadline are the requirements of sections 172(c)(9) (*i.e.*, contingency measures) and 185 (*i.e.*, fees). Thus, even if EPA were to invoke section 181(b)(2) as the statutory basis under which EPA is obligated to make determinations of attainment or failure to attain the one-hour ozone standard in the South Coast, San Joaquin Valley, and Southeast Desert, no requirement for new plans would be triggered for these areas. None of EPA’s post-revocation determinations regarding one-hour attainment deadlines cite section 179(c). All of the post-revocation rulemakings determining attainment by the attainment deadline that cite section 181(b)(2) do so only with respect to the obligation to make the requisite air quality determination for the sole

purpose of the applicable one-hour anti-backsliding requirements linked to such determinations, *i.e.*, contingency measures and section 185 fees. An additional round of one-hour attainment planning is not one of these “applicable requirements.” See 40 CFR 51.900(f) and 51.905(a)(1). One could also conclude that the requirement and corresponding obligation to adopt and implement a new one-hour attainment plan for failure to attain the one-hour ozone standard by the applicable attainment date, in contrast to the obligation to adopt and implement contingency measures and fees, could not be an “applicable requirement” for anti-backsliding purposes for the purposes of 40 CFR 51.900(f) and 51.905(a)(1) in the South Coast, San Joaquin Valley and Southeast Desert because the only applicable attainment dates that could trigger new planning requirements for these areas were well after June 15, 2004, the date of designation for the eight-hour ozone standard and the date that determines which “applicable requirements” apply to any given eight-hour ozone nonattainment area. As such, new planning requirements triggered by a failure to attain by the applicable attainment date could not have been a requirement on that date, and thus could not be an “applicable requirement” for the purposes of anti-backsliding.

*Earthjustice Comment #5:* Earthjustice contends that, between the plain language of the CAA and EPA’s consistent interpretation of these provisions, there is no question that section 179(c) or section 181(b)(2) is the appropriate authority for making the determinations that the South Coast, San Joaquin Valley, and Southeast Desert one-hour ozone nonattainment areas have failed to attain the applicable attainment dates but notes that EPA cites neither one, but instead cites section 301(a) as providing the authority for EPA’s determination. Earthjustice faults the September 14, 2011 proposed rule for failing to explain how or why section 301(a) provides the appropriate authority for the action, what regulations are being “prescribed” under section 301(a), and why such regulations are “necessary” given the statutory and regulatory commands.

*EPA Response to Earthjustice Comment #5:* Section 301(a)(1) of the CAA, in relevant part, provides that: “The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.” Today’s final rule is a regulation that included EPA review and evaluation of air quality

information in relation to a standard and that followed the procedural requirements of the Administrative Procedure Act, including publication of a proposed rule and the consideration of public comments.

EPA’s invocation of section 301(a) is appropriate because the *South Coast* Court required EPA to determine the procedures necessary to enforce the contingency measures and section 185 fees requirements, but did not specify those procedures. In the words of the *South Coast* court: “While EPA maintains that it would be impractical to enforce [section 185 fees] because EPA will no longer make findings of attainment \* \* \*, section 172(e) does not condition its strict distaste for backsliding on EPA’s determinations of expediency; EPA must determine its procedures after it has identified what findings must be made under the Act.” *South Coast*, 472 F.3d 882, at 903. The court’s decision in *South Coast* did not compel EPA to make determinations for the one-hour ozone standard under any specific provision of the statute, much less CAA sections 179(c) or 181(b)(2). Nor did the Court’s decision vacate 40 CFR 51.905(e)(2), which relieves EPA of the obligation to make determinations under sections 181(b) and section 179. The *South Coast* decision simply required EPA to identify the procedures to make the findings related to anti-backsliding measures.

In response, EPA has identified a determination of attainment or failure to attain the one-hour ozone standard by the applicable attainment date, made through notice and comment rulemaking, as the necessary and appropriate procedure to be followed to effectuate the specific one-hour ozone anti-backsliding measures of sections 172(c)(9) and 185. EPA believes that section 301(a) therefore provides appropriate authority for EPA to promulgate the necessary procedures to fulfill the objective of ensuring implementation of anti-backsliding measures and be consistent with 40 CFR 51.905(e)(2). EPA also believes that it would not bring about any different result were EPA instead to invoke that portion of section 181(b)(2) that addresses such attainment determinations. To this extent, EPA agrees with the suggestion of the commenter that it may also rely on authority of section 181(b)(2) as a basis for continuing to make determinations for the limited purpose of effectuating one-hour ozone contingency measures and section 185 fees. After revocation, the other portions of section 181(b)(2) regarding consequences of these determinations, including

reclassifications, are no longer applicable under 40 CFR 51.905(e)(2). Conversely, there is no need or justification for reliance on section 179(c), which has played no role with respect to the one-hour standard since revocation of the standard. For the purpose of ensuring the contingency measure and fee anti-backsliding measures, it is not necessary for EPA to trigger the obsolete planning requirements of section 179(d) with which section 179(c) was linked, nor is EPA obligated to do so. In these circumstances, section 179 should not be used to revive an additional one-hour planning obligation that has not been preserved as an anti-backsliding requirement.

We recognize that, subsequent to revocation of the one-hour ozone standard, we have cited section 181(b)(2) as preserving an obligation to make determinations of attainment for the one-hour ozone standard by the applicable attainment date. As we have observed, however, we have been careful in every instance to sever the attainment determination itself from other portions of that section—notably, the obligation to reclassify areas that fail to attain the one-hour ozone standard by the applicable attainment date. EPA believes it is consistent with the statute, the *South Coast* decision and EPA's Phase 1 Rule to proceed either under section 301(a) or section 181(b)(2)'s provision for making a determination, for the limited purpose of ensuring implementation of anti-backsliding measures. In acting under either provision, EPA is enforcing those specific requirements that are applicable for anti-backsliding. In no way do EPA's determinations act to revive the additional one-hour requirements that have not been retained for anti-backsliding—one-hour planning requirements under section 179(d) and reclassification.

*Earthjustice Comment #6:* Earthjustice questions whether the action to determine that the three subject California nonattainment areas failed to attain the one-hour ozone standard by the applicable attainment dates is an authority that has been delegated to the Regional Administrator from the EPA Administrator.

*EPA Response to Earthjustice*

*Comment #6:* Section 301(a)(1) of the CAA, in relevant part, provides that: "The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or

expedient." This rulemaking is not one of the regulations subject to section 7607(d) (*i.e.*, section 307(d)).

Under the authority of CAA section 301(a)(1), the Administrator has delegated numerous authorities under the Clean Air Act. As noted above, EPA believes that it may also rely on authority of section 181(b)(2) as a basis for continuing to make determinations for the limited purpose of effectuating one-hour ozone contingency measures and section 185 fees, and with respect to section 181(b)(2), Delegation 7–110 in the Delegations Manual provides authority for Regional Administrators to make these determinations. Delegation 7–110 in relevant part delegates authority to regional administrators: "[t]o determine, based on the number of exceedances, whether an area attained its ozone standard by the date required (181(b)(2))." Therefore, the EPA Region IX Regional Administrator is duly authorized to take the final action that he does today through this document.

In addition, under Delegation 7–10 (in Chapter 7 of EPA's Delegations Manual), the EPA Administrator has delegated authority to propose or take final action on any SIP under section 110 of the CAA to the Regional Administrators. Among the references cited in Delegation 7–10 are section 110 and section 301(a) of the CAA. EPA's final determinations of failure to attain the one-hour ozone standard by the applicable attainment dates for South Coast, San Joaquin Valley, and Southeast Desert are not SIP actions themselves but are made herein under CAA section 301(a) for the express purpose of ensuring implementation of one-hour ozone SIP requirements, namely, contingency measures and section 185 fees, that applied to these areas as Severe or Extreme areas for the revoked one-hour ozone standard at the time of designation of these areas for the eight-hour ozone standard. For these reasons, EPA's final determinations made herein by the EPA Region IX Regional Administrator are covered by both Delegation 7–110 and 7–10.

*Earthjustice Comment #7:* Earthjustice contends that EPA's invocation of section 301(a) is not adequate to prescribe new regulatory requirements revising the well-established "obligations" to make findings under sections 179(c) and 181(b)(2) to implement the requirements of the CAA. Earthjustice argues that EPA is attempting to change its interpretation of its statutory requirements, and asks EPA to explain its reasoning for this alleged change so as to allow commenters to meaningfully comment on the Agency's rationale. Earthjustice

further states that such a change in the ozone implementation rules must be made through national rulemaking signed by the Administrator.

*EPA Response to Earthjustice*

*Comment #7:* EPA disagrees with Earthjustice's characterization of EPA's actions here as somehow prescribing new regulatory requirements. Rather, it is Earthjustice that is seeking to use EPA's determinations here to impose additional plan requirements that have not been retained for one-hour anti-backsliding. EPA here is simply making the same air quality determinations and applying the same notice and comment rulemaking process that it used prior to revocation. The only difference is that, after revocation of the one-hour standard, the purpose and consequences of these determinations are no longer "reclassification" (section 181(b)(2)) or requiring additional rounds of SIP revisions (section 179(d)). The purpose is to ensure implementation of those one-hour ozone requirements that EPA and the *South Coast* Court have taken pains to identify with specificity. EPA is thus acting consistently with the 2004 Phase 1 Rule and with the directives of the Court in the *South Coast* case. Simply because EPA acknowledges it now has an obligation to make these determinations for purposes of legitimate anti-backsliding requirements does not mean that these determinations call down all the consequences that had been excluded from those identified by EPA and the Court. See 40 CFR 51.905(e)(2). Earthjustice, not EPA, is attempting to change the established rules of anti-backsliding by reviving moribund portions of sections 179 under the guise of enforcing EPA's obligation to make attainment determinations for quite different purposes. It is Earthjustice that seeks improperly to add to the list of anti-backsliding requirements by representing new requirements as merely a procedural mechanism to enforce those that have been legitimately recognized.

We strongly disagree with the commenter's claim that we are changing our interpretation of the Agency's statutory obligations with respect to the one-hour ozone standard. As explained above, since revocation of the one-hour ozone standard, we have never cited section 179(c) as preserving an obligation on our part to determine whether an area attained the one-hour ozone standard by the applicable attainment date. We certainly have never stated or implied, after revocation of the one-hour standard that a determination of failure to attain by the one-hour attainment deadline would

call for additional section 179(d) planning requirements. As pointed out above, since revocation we have cited section 181(b)(2) only in the context of making determinations of attainment that do not result in any attendant requirements relating to additional planning or reclassifications, but rather only to implement two specific anti-backsliding measures.

Lastly, contrary to Earthjustice's contention, we believe that, the specific language in 40 CFR 51.905(e)(2) eliminating any compulsion for EPA to make determinations under section 179(c) for the one-hour ozone standard and the availability of other more appropriate procedures to enforce anti-backsliding requirements, refute any argument for reliance on that section. The only reason to involve section 179(c) would be the illegitimate one of seeking, long after anti-backsliding requirements have been debated and established, to add section 179(d) plans to the list. It is disingenuous to argue the necessity of invoking the authority of section 179(c) to enforce the only anti-backsliding requirements in play, which clearly do not include additional one-hour attainment demonstration plans under section 179(d). The *South Coast* decision did not vacate 40 CFR 51.905(e)(2). It established only that, notwithstanding that provision, EPA must continue to make determinations of attainment for purposes other than those addressed by that regulation. EPA today is complying with the directive of the Court, and making through notice and comment rulemaking the requisite determinations to implement the specific anti-backsliding measures of contingency measures and section 185 fees.

*Earthjustice Comment #8:* By relying on CAA section 301(a), Earthjustice is concerned that EPA is attempting to invent new procedures for determining attainment in order to avoid the obligation under section 179(d) to prepare a new one-hour ozone plan. Waiving the planning obligations would, in Earthjustice's view, violate the statute.

*EPA Response to Earthjustice Comment #8:* EPA is not waiving any planning requirements under section 179(d), because they are not applicable as one-hour anti-backsliding requirements. In accordance with 40 CFR 51.905(e)(2), we are no longer obligated to make attainment determinations under section 179(c) and there is nothing in the *South Coast* case or in EPA's past statements to the contrary. In any event, there is no provision for retaining further planning under section 179(d) with respect to the

revoked one-hour ozone standard. See also EPA Responses to Earthjustice Comments elsewhere in this final rule.

*Earthjustice Comment #9:* Earthjustice contends that spikes in one-hour ozone concentrations over 0.12 ppm are harmful to public health and that EPA's decision to adopt an eight-hour ozone standard was not based on any determination that these shorter-term exposures were no longer of concern. Earthjustice cites EPA's 1997 final rule establishing the eight-hour ozone standard as describing new evidence that EPA had found of an array of adverse health effects associated with short-term exposures (*i.e.*, 1 to 3 hours) above the standard level of 0.12 ppm.

*EPA Response to Earthjustice Comment #9:* At root, Earthjustice objects to EPA's decision in 1997 to replace the one-hour ozone standard with the eight-hour ozone standard rather than retaining both standards. 62 FR 38856 (July 18, 1997). This issue was raised many years ago in the comments on EPA's proposal (61 FR 65716, December 13, 1996) to revise the ozone standard. A number of commenters on EPA's 1996 proposal urged EPA to maintain standards based on both one-hour and eight-hour averaging times to provide protection from one- and eight-hour exposures of concern. 62 FR 38856, at 38863 (column 1). These commenters generally argued that an 8-hour standard alone could still allow for unhealthy high one-hour exposures. While EPA acknowledged the possibility that an eight-hour ozone standard alone could allow for high one-hour exposures of concern, at and above 0.12 ppm, EPA concluded for the reasons set forth in the 1997 final rule that replacing the one-hour ozone standard with an eight-hour ozone standard, considering the level and form adopted, was appropriate to provide adequate and more uniform protection of public health from both short-term (1–3 hours) and prolonged (6 to 8 hours) exposure to ozone in the ambient air. 62 FR 38856, at 38863 (column 2). The decision to retain only the new eight-hour ozone standard included the result that, apart from the specific requirements of 40 CFR 51.905(a) regarding one-hour ozone plans, an attainment demonstration for the eight-hour standard would provide requisite protection against violations of both the one- and the eight-hour standards. EPA's decision to replace the one-hour ozone standard with an eight-hour ozone standard has long been settled, and EPA does not intend, and is not required to re-open that issue in the context of today's determinations.

*Earthjustice Comment #10:* Citing CAA section 181(a) and the *South Coast* case, Earthjustice believes that Congress clearly intended the most polluted ozone areas to address the harms caused by these peak concentrations within 20 years of the 1990 CAA Amendments, and contends that it would not make sense to decide that attainment of the one-hour standard was no longer needed when the one-hour ozone problem is just as serious as Congress believed it to be.

#### *EPA Response to Earthjustice Comment #10:*

This comment essentially restates the objection to EPA's decision in 1997 to replace the one-hour ozone standard with an eight-hour ozone standard and EPA's decision in 2004 to revoke the one-hour ozone standard for all areas of the country by a fixed date, rather than by the date when areas were found to have attained the one-hour ozone standard. In response to the proposed rule that culminated in our 2004 Phase 1 Rule, we received and considered comments that EPA should retain the one-hour ozone standard because it is necessary to protect public health. Comments submitted in that rulemaking included the same assertion that the one-hour ozone standard may be more protective of public health than the eight-hour ozone standard in several areas such as the South Coast and Houston, and the same assertion that revocation would be contrary to the CAA and Congressional intent. In our 2004 Phase 1 Rule, we responded to these comments, pointing out that the question whether the one-hour ozone standard is necessary to protect public health is a standard-setting issue that was resolved in EPA's 1997 final rule promulgating the eight-hour ozone standard to replace the one-hour ozone standard. See 69 FR 23951, at 23970 (column 1) (April 30, 2004).

Earthjustice's comment here regarding Congressional intent is the same argument that was made in the *South Coast* case challenging EPA's authority to revoke the one-hour standard. There, the environmental petitioners contended that the one-hour ozone standard cannot be withdrawn because Congress "codified" the one-hour ozone standard in subpart 2, but the court recognized that, by establishing the periodic NAAQS review process in section 109(d)(1) of the CAA, Congress clearly contemplated the possibility that scientific advances would require amendment of the national ambient air quality standard, and upheld EPA's authority to revoke the one-hour ozone standard so long as adequate anti-backsliding provisions were applied. *South Coast*, 472 F.3d 882, at 899.

In our 2004 Phase 1 Rule, in response to comments on the scope of its anti-backsliding requirements, EPA specifically addressed planning requirements under the one-hour ozone standard: “Where they are not required by anti-backsliding provisions, EPA does not believe that the additional burden States would undertake in planning to achieve both the 1-hour and the 8-hour NAAQS is necessary to protect public health.” 69 FR 23951, at 23971 (April 30, 2004). The *South Coast* case also disposed of the specific challenges raised as to the adequacy of the anti-backsliding provisions in EPA’s implementation rule, and established specifically which measures were required to be retained. As EPA has explained elsewhere in responses to comments, those provisions do not include additional attainment plans under section 179. The provisions of 40 CFR 51.905(e)(2) relating to section 179(c) were not challenged or vacated by the *South Coast* court. Contrary to commenter’s contention, today’s determinations fully discharge EPA’s responsibility to address the only one-hour ozone anti-backsliding measures (contingency measures and section 185 fees) activated by determinations of failure to meet one-hour attainment deadlines. EPA has struck the balance between preserving old one-hour ozone requirements and allowing current planning and control requirements for the newer standards to function on their behalf. It is long past the time to challenge this balance and dispute the revocation of the one-hour ozone standard and the established set of one-hour anti-backsliding requirements, which do not include additional rounds of one-hour ozone planning. We also note that California has submitted attainment demonstration plans for all three subject California nonattainment areas for the 1997 eight-hour ozone standard; such plans also serve to promote attainment of the revoked one-hour standard.

Earthjustice’s comment seeks to remind EPA that the DC Circuit stated: “The Act placed states onto a one-way street whose only outlet is attainment.” *South Coast* at 472 F.3d 882, at 900. In making today’s determinations to ensure implementation of one-hour ozone contingency measures and section 185 fees, which the DC Circuit has resolved are those required by anti-backsliding upon failure to attain the revoked standard, EPA is heeding the DC Circuit’s admonition in *South Coast* and fulfilling the requirements of the Act.

**Earthjustice Comment #11:** Earthjustice contends that EPA cannot reasonably conclude that the South

Coast, San Joaquin Valley and Southeast Desert areas, now that they have failed to attain and their attainment plans appear inadequate, can be relieved of this obligation to demonstrate attainment. In support of this contention, Earthjustice cites two Ninth Circuit decisions, *Association of Irritated Residents v. EPA*, 632 F.3d 584, at 594 (9th Cir. 2011) (herein referred to as the *AIR* case), and *Hall v. EPA*, 273 F.3d 1146, at 1159 (9th Cir. 2001) (herein referred to as the *Hall* case).

*EPA Response to Earthjustice*

**Comment #11:** As explained elsewhere in these responses, EPA evaluates the adequacy of a plan containing a demonstration of attainment, and whether it meets all applicable requirements, when EPA acts to approve or disapprove the plan and not after the applicable attainment date. In the case of the three subject California nonattainment areas, EPA approved the one-hour ozone plans prior to the applicable attainment dates and thus, the determinations that the areas did not actually attain the one-hour ozone standard by the applicable attainment dates was not an issue under consideration at that time and does not undermine the validity of EPA’s prior approvals of the plans at the time they were taken.

The anti-backsliding requirements for one-hour ozone attainment demonstrations are set forth in 40 CFR 51.900(f)(13) and 51.905(a)(1)(i). For the purposes of anti-backsliding, an eight-hour ozone nonattainment area is obligated to have a fully-approved attainment demonstration plan for the one-hour ozone standard based on the area’s ozone classification that the area had at the time of designation for the eight-hour ozone standard. Thus, the State of California is obligated to have a fully-approved “Extreme” area attainment demonstration plan for the South Coast and the San Joaquin Valley and a fully-approved “Severe-17” area attainment demonstration plan for the Southeast Desert. EPA approved the relevant South Coast plan in April 2000 (65 FR 18903, April 10, 2000), the relevant San Joaquin Valley plan in March 2010 (75 FR 10420, March 8, 2010),<sup>11</sup> and the relevant Southeast Desert plan in January 1997 (62 FR 1150, January 8, 1997).

EPA did disapprove a revision to the attainment demonstration plan for the South Coast in March 2009 (74 FR 10176, March 10, 2009) because the

measures upon which the revised attainment demonstration relied had been withdrawn, but such disapproval does not necessarily undermine EPA’s prior approval of the attainment demonstration plan for the South Coast. This will depend on the final decision in the *AIR* case, once all appeals have been resolved. It is possible that EPA will need to consider requiring California to prepare and submit a new one-hour ozone attainment demonstration plan for the South Coast, but if EPA were to do so, the Agency would be acting pursuant to a decision that the State had not complied with the anti-backsliding requirement for a one-hour ozone attainment demonstration under 40 CFR 51.905(a)(1) for the South Coast, and not because the area had failed to attain the one-hour ozone standard by the applicable attainment date.

Earthjustice cites the *AIR* case and *Hall* in support of its contention that it is unreasonable for EPA to conclude that, in light of the failure of the three subject California nonattainment areas to attain the one-hour ozone standard by the applicable attainment dates, the areas can be relieved of the obligation to demonstrate attainment of the one-hour ozone standard. This argument erroneously assumes that there is an additional obligation to submit a revised one-hour attainment plan even after valid approval of the State’s plan as required under 40 CFR 51.905(a). These two cases stand for the principle that, under section 110(l) of the CAA, when EPA reviews a SIP revision, EPA must evaluate the existing SIP and make a determination as to whether the existing SIP, as modified by the SIP revision at hand, would provide for attainment of the national ambient air quality standards. In *AIR*, the specific SIP revision at issue was a revised attainment demonstration plan for the one-hour ozone standard for the South Coast. In *Hall*, the specific SIP revision at issue was a set of revised new source review rules for Clark County, Nevada.

Section 110(l) of the CAA applies to SIP revisions, and, unlike the case in *AIR*, EPA is not acting today on any SIP revision and thus section 110 and both the *Hall* and *AIR* cases are not relevant to this action. After revocation of the one-hour standard, a State’s obligation with respect to attainment demonstration plans for the one-hour ozone standard is defined in 40 CFR 51.905(a)(1)(i). As stated above, because California has submitted and EPA has approved the one-hour ozone plans for San Joaquin Valley and the Southeast Desert, the State has addressed its one-hour ozone attainment plan obligations

<sup>11</sup> EPA’s approval of the San Joaquin Valley “Extreme” area one-hour ozone plan is the subject of ongoing litigation in the Ninth Circuit Court of Appeals. *Sierra Club v. EPA* (Nos. 10-71457, 10-71458).

for these areas. For the South Coast, as explained above, whether the State has satisfied this obligation may depend on the final resolution and mandate by the Court in the *AIR* case, but does not depend on today's determination. For all three subject areas, today's determinations serve to ensure the implementation of one-hour ozone contingency measures and section 185 fees, which, unlike further one-hour attainment planning, are the measures required by the Court-approved anti-backsliding provisions.

**Earthjustice Comment #12:** Earthjustice demands that, in the final rule, EPA clearly communicate that, for the South Coast, San Joaquin Valley and Southeast Desert areas, new one-hour ozone plans complying with the requirements of section 179(d) must be submitted to EPA within one year of the date EPA publishes the final determinations.

**EPA Response to Earthjustice Comment #12:** For the reasons set forth elsewhere in EPA's response to comments, we disagree that the determinations that we make in this document trigger a requirement under CAA section 179(d) on the State of California to prepare and submit SIP revisions including new demonstrations of attainment for the one-hour ozone standard for the three subject California nonattainment areas. A new section 179(d) ozone plan, triggered by section 179(c) is not an applicable anti-backsliding requirement.

With respect to anti-backsliding requirements, the *South Coast* Court vacated the Phase 1 Rule only with respect to the measures addressed. Here, the only pertinent anti-backsliding measures triggered by a determination of failure to meet the one-hour deadline are one-hour contingency measures for failure to attain and section 185 fees. In the *South Coast* decision reviewing EPA's implementation rule, neither 51.905(e)'s provisions regarding sections 179 and 181, nor the exclusion of section 179(d) from one-hour anti-backsliding requirements was challenged by the parties or addressed by the Court. Challenges regarding anti-backsliding specifically addressed sections 172(c)(9) and 185 and two other anti-backsliding provisions not relevant here (NSR and conformity). To effectuate section 172(c)(9) and section 185 anti-backsliding provisions, EPA is determining that these three areas failed to attain by their one-hour attainment dates. But EPA has explained at length why these determinations do not reinstate the additional planning requirements of section 179(d) that were

not retained as anti-backsliding measures.

**Earthjustice Comment #13:** Earthjustice contends that the South Coast, San Joaquin Valley, and Southeast Desert continue to exceed the 0.12 ppm one-hour ozone standard on a regular basis, that these spikes have consequences. Earthjustice asserts that, after more than 20 years, the residents of these areas have not been afforded the protections needed and required by the Clean Air Act to meet even this standard.

**EPA Response to Earthjustice Comment #13:** EPA recognizes that exceedances of the one-hour ozone standard in the three subject California nonattainment areas have occurred, and is making final determinations that the three areas have failed to attain the one-hour ozone standard by their applicable attainment dates. However, EPA also recognizes that significant progress has been made in lowering peak hourly concentrations, frequency of exceedances, and the geographic extent of exceedances in these areas. Since passage of the CAA Amendments of 1990, one-hour ozone concentrations in these areas have decreased, despite significant increases in population and vehicle miles traveled. For example, CARB data indicates that the number of days on which concentrations exceeded the one-hour ozone standard have dropped from 131 in 1990 to only 9 in 2010 in the South Coast, from 45 in 1990 to only 7 in 2010 in San Joaquin Valley, and from 76 in 1990 to only 3 in the Mojave Desert portion of the Southeast Desert. Moreover, a comparison of CARB's one-hour ozone data from the three-year period prior to revocation (2002–2004) with corresponding data from the three-year period following revocation (2006–2008) shows a decrease in the annual number of days on which the one-hour standard was exceeded from 46 to 27 in the South Coast, from 26 to 13 in San Joaquin Valley, and from 11 to 4 in the Mojave Desert portion of the Southeast Desert. While we acknowledge that even this significant progress has not yet resulted in attainment, it does not bear the hallmark of backsliding.

We disagree that the residents of these areas are not afforded the protections needed and required by the Clean Air Act. Through today's determinations, all applicable anti-backsliding requirements for the revoked one-hour ozone standard must be implemented. One-hour anti-backsliding measures, moreover, do not operate in a vacuum. State planning efforts for attainment of the current, more protective eight-hour ozone standard, and adoption and

implementation of control measures actively continue.<sup>12</sup> These provide an ongoing regimen for reducing ozone concentrations in terms of both the one- and the eight-hour ozone standards. Thus, EPA believes that the residents of these areas are being afforded the protections that are required in accordance with EPA regulations and the CAA.

### III. Final Action

After revocation of the one-hour ozone standard, EPA must continue to provide a mechanism to give effect to the one-hour anti-backsliding requirements, see *South Coast*, 47 F.3d 882, at 903. Thus, pursuant to EPA's obligation and authority under section 301(a) and the relevant portion of section 181(b)(2) to ensure implementation of one-hour ozone anti-backsliding requirements, and for the reasons given above and in our September 14, 2011 proposed rule, EPA is taking final action to determine that the South Coast, the San Joaquin Valley, and the Southeast Desert failed to attain the one-hour ozone standard by the applicable attainment dates. For South Coast and San Joaquin Valley, quality-assured and certified data collected during 2008–2010 show that these two "Extreme" one-hour ozone nonattainment areas failed to attain the standard by November 15, 2010. For Southeast Desert, a "Severe-17" one-hour ozone nonattainment area, quality-assured and certified data for 2005–2007 show that the area failed to attain the standard by November 15, 2007.

These determinations bear on the areas' obligations with respect to the one-hour ozone standard anti-backsliding requirements whose implementation is triggered by a failure to attain by the applicable attainment date: section 172(c)(9) contingency measures for failure to attain and sections 182(d)(3) and 185 major stationary source programs.

### IV. Statutory and Executive Order Reviews

These actions make determinations that certain areas did not attain the applicable standard based on air quality, and do not impose any requirements beyond those required by statute and regulation. For that reason, these actions:

- Are not a "significant regulatory action" subject to review by the Office of Management and Budget under

<sup>12</sup> On December 15, 2011, EPA took final actions to approve SIP revisions for the South Coast and San Joaquin Valley as meeting, among other requirements, the requirement to demonstrate attainment of the 1997 eight-hour ozone standard.

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

- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Are not subject to the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Do not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. section 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a “major rule” as defined by 5 U.S.C. section 804(2).

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 February 28, 2012. 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 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 16, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations 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 F—California

- 2. Section 52.282 is amended by adding paragraph (d) to read as follows:

##### § 52.282 Control strategy and regulations: Ozone.

\* \* \* \* \*

(d) *Determinations that Certain Areas Did Not Attain the 1-Hour Ozone NAAQS.* EPA has determined that the Los Angeles-South Coast Air Basin Area and the San Joaquin Valley Area extreme 1-hour ozone nonattainment areas did not attain the 1-hour ozone NAAQS by the applicable attainment date of November 15, 2010 and that the Southeast Desert Modified Air Quality Maintenance Area severe-17 1-hour ozone nonattainment area did not attain the 1-hour ozone NAAQS by the applicable attainment date of November 15, 2007. These determinations bear on the areas' obligations with respect to the one-hour ozone standard anti-backsliding requirements whose implementation is triggered by a determination of failure to attain by the applicable attainment date: section

172(c)(9) contingency measures for failure to attain and sections 182(d)(3) and 185 major stationary source fee programs.

[FR Doc. 2011-33475 Filed 12-29-11; 8:45 am]

#### BILLING CODE P

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 180

[EPA-HQ-OPP-2010-0865; FRL-9330-2]

#### Tepraloxydim; Pesticide Tolerances

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

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for residues of tepraloxydim in or on the imported commodities ‘Pea and bean, dried shelled, except soybean, subgroup 6C’ and ‘Sunflower subgroup 20B’. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA). This regulation also removes established tolerances for residues of tepraloxydim on ‘Lentil, seed’ and ‘Pea, dry, seed,’ as residues on these commodities will be covered by the new tolerance on the pea and bean subgroup (6C).

**DATES:** This regulation is effective December 30, 2011. Objections and requests for hearings must be received on or before February 28, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the

#### SUPPLEMENTARY INFORMATION).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2010-0865. All documents in the docket are listed in the docket index available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.