

**ENVIRONMENTAL PROTECTION
AGENCY**

40 CFR Part 50

[FRL-7519-3]

RIN 2060-AK78

**Stay of Authority Under 40 CFR 50.9(b)
Related to Applicability of 1-Hour
Ozone Standard**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to stay its authority to determine that the 1-hour national ambient air quality standard for ozone no longer applies in areas that meet that standard. Under an existing EPA rule, EPA can determine that the 1-hour standard no longer applies to an area upon finding that the area has met that standard. The final stay will ensure that the 1-hour standard remains in place nationwide until EPA issues a new rule governing how and when the 1-hour standard should be removed. EPA is addressing that issue as part of a proposed rule for implementing the 8-hour ozone standard (68 FR 32801, June 2, 2003), and is providing the public an opportunity to comment on the issue. The stay will remain effective until the Agency takes final action revising or reinstating its authority to remove the 1-hour ozone standard, and addresses any public comments received on certain relevant issues. This final rule addresses comments received during the comment period on the previously proposed rule issued December 27, 2002.

DATES: The effective date for this final rule is August 25, 2003.

ADDRESSES: Documents relevant to this action are available for inspection at the EPA Docket Center (Air Docket), located at 1301 Constitution Avenue, NW, Room: B108, Washington, DC 20004, telephone (202) 566-1742, fax (202) 566-1741, between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Questions concerning this final rule should be addressed to Annie Nikbakht, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, Ozone Policy and Strategies Group, Mail Drop C539-02, Research Triangle Park, NC 27711, telephone (919) 541-5246.

SUPPLEMENTARY INFORMATION: Electronic Availability—The official record for this final rule, as well as the public version,

has been established under Docket Number OAR-2002-0067. To view electronically the docket for this rule, see <http://www.epa.gov/rpas>.

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I. Background

On December 27, 2002, EPA issued a proposed rule (67 FR 79460) to stay its authority under the second sentence of 40 CFR 50.9(b) to determine that the 1-hour ozone standard no longer applies based on a determination that an area met that standard. The EPA proposed that the stay would be effective until such time as EPA takes final action in a subsequent rulemaking addressing whether the second sentence of 40 CFR 50.9(b) should be modified in light of the Supreme Court's decision in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), regarding implementation of the 8-hour ozone NAAQS.

II. Summary of Today's Action

In today's action, EPA is finalizing the stay and providing that prior to lifting such a stay, we will consider and address any comments concerning (a) which, if any, implementation activities for an 8-hour ozone standard, including designations and classifications, would need to occur before EPA would determine that the 1-hour ozone standard no longer applied to an area, and (b) the effect of revising the ozone NAAQS on existing designations for the pollutant ozone.

The EPA plans to consider the timeframe and basis for revoking the 1-hour standard in the implementation rulemaking that it will propose shortly in response to a remand from the Supreme Court. The EPA believes that it is appropriate to reconsider this issue because, at the time EPA promulgated § 50.9(b), EPA anticipated that subpart 2 would not apply for purposes of implementing the revised ozone standard. It makes sense, in light of the many issues that are now being considered regarding implementation of the 8-hour standard, including the applicability of subpart 2 for purposes of implementing that standard, for EPA to consider simultaneously the most effective means to transition from implementation of the 1-hour standard to implementation of the revised 8-hour ozone NAAQS.

III. Summary of Comments and Responses

The EPA received two comments on the proposed rule during the comment period which ended on January 27, 2003. Both commenters were concerned that the regulatory language could be construed as staying EPA's authority to determine whether an area has met the 1-hour ozone standard. The proposed language said that EPA was staying its authority "to determine that an area has attained the 1-hour standard and that the 1-hour standard no longer applies." The EPA agrees that the language in the regulatory text, as proposed, could be construed in the manner suggested by the commenters. The EPA did not intend to propose that it was staying its authority to determine whether an area has attained the 1-hour standard. In fact, the Clean Air Act (CAA) requires EPA to make such determinations within 6 months of a nonattainment area's attainment date. See CAA section 181(b)(2); section 179(c). In order to avoid confusion, EPA is modifying the regulatory text as follows:

EPA's authority under paragraph (b) of this section to determine that the 1-hour standard no longer applies to an area based on a determination that the area has attained the 1-hour standard is stayed . . .

The EPA believes this language makes clear that EPA is only staying its authority to determine the 1-hour standard no longer applies to an area, which is triggered by a determination that the 1-hour standard has been attained. Thus, while EPA may still determine that an area has attained the 1-hour NAAQS, such a determination would not provide a basis for revoking the 1-hour standard for that area.

One group of commenters was further concerned that the proposed regulatory text did not fully reflect the settlement agreement in which EPA agreed to propose this stay. The EPA intended its proposed action to fully reflect the settlement agreement as evidenced by the preamble language providing that EPA would not lift the stay until such time as it considered certain identified issues in a future rulemaking action. See 67 FR 79460. The EPA did not consider it necessary to include such language in the proposed regulatory text as EPA fully intended to comply with such obligation if it took final action providing in the preamble that it would do so. However, EPA understands the concern raised by these commenters—the need for regulatory certainty—and believes it is appropriate to include these conditions in the regulatory text. Thus, EPA is modifying the regulatory text to provide that its regulatory

authority to revoke the 1-hour standard is stayed:

until such time as EPA issues a final rule revising or reinstating such authority and considers and addresses in such rulemaking any comments concerning (1) which, if any, implementation activities for a revised ozone standard (including but not limited to designation and classification of areas) would need to occur before EPA would determine that the 1-hour ozone standard no longer applies to an area, and (2) the effect of revising the ozone NAAQS on the existing 1-hour ozone designations.

Another commenter raises additional issues that are not directly implicated by the limited action EPA is taking here to stay its authority to revoke the 1-hour standard. Specifically, the commenter recommends that (1) EPA not require areas to update maintenance plans for the 1-hour standard but rather be allowed to commit to submit plans for the 8-hour standard; (2) EPA revoke the 1-hour ozone standard after the 8-hour standard is fully enforceable and the designation and classification process for the 8-hour standard is complete; and (3) EPA issue its guidance for implementing the 8-hour NAAQS as quickly as possible so that areas may consider such guidance in making recommendations regarding designations for the 8-hour NAAQS. The EPA intends to issue its rulemaking and guidance regarding 8-hour NAAQS implementation as expeditiously as possible. It is in that rulemaking that EPA will consider the other issues raised by the commenter: whether areas will have an ongoing obligation to update 1-hour maintenance plans and the time at which the 1-hour standard should be revoked.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is “significant” and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines a “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this action is not a “significant regulatory action” and was not submitted to OMB for review.

B. Paperwork Reduction Act

This final rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

C. Regulatory Flexibility Act (RFA)

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

For purposes of assessing the impacts of today’s final rule on small entities, small entity is defined as: (1) A small business as defined in the Small Business Administration’s regulations at 13 CFR 12.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today’s final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

This final action will not impose any requirements on small entities. This final action stays EPA’s regulatory authority to determine the 1-hour standard no longer applies to an area, which authority was based on EPA’s determining that the 1-hour standard has been attained. It does not establish requirements applicable to small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments, and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable laws. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This final action also does not impose any additional enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in UMRA. Because today’s action does not create any additional mandates, no further UMRA analysis is needed.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have

federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This final action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action stays the language of 40 CFR 50.9(b) regarding EPA’s authority to take action and imposes no additional burdens on States or local entities; it does not change the existing relationship between the national government and the States or the distribution of power and responsibilities among the various branches of government. Thus, the requirements of section 6 of this Executive Order do not apply to this final rule.

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

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have Tribal implications.” This final rule does not have Tribal implications, as specified in Executive Order 13175, because it will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Today’s

action does not significantly or uniquely affect the communities of Indian Tribal governments, and does not impose substantial direct compliance costs on such communities. Thus, Executive Order 13175 does not apply to this final rule.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045, because this action is not “economically significant” as defined under Executive Order 12866 and there are no environmental health risks or safety risks addressed by this rule.

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

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104–113, 12(d)(15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

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

Under Executive Order 12898, each Federal agency must make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

environmental effects of its programs, policies, and activities on minorities and low-income populations. Today’s final action to stay EPA’s authority under 40 CFR 50.9(b) related to applicability of the 1-hour ozone standard does not have a disproportionate adverse effect on minorities and low-income populations.

K. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by August 25, 2003. Filing a petition of 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)).

L. Congressional Review Act

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 of the CRA provides an exception to this requirement. For any rule for which an agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest, the rule may take effect on the date set by the Agency. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This final rule is effective August 25, 2003.

List of Subjects in 40 CFR Part 50

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

Dated: June 20, 2003.

Christine Todd Whitman,
Administrator.

For the reasons set forth in the preamble, part 50 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 50—AMENDED

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

Authority: 42 U.S.C. 7410, *et seq.*

■ 2. Section 50.9 is amended by adding paragraph (c) to read as follows:

§ 50.9 National 1-hour primary and secondary ambient air quality standards for ozone.

* * * * *

(c) EPA's authority under paragraph (b) of this section to determine that the 1-hour standard no longer applies to an area based on a determination that the area has attained the 1-hour standard is stayed until such time as EPA issues a final rule revising or reinstating such authority and considers and addresses in such rulemaking any comments concerning (1) which, if any, implementation activities for a revised ozone standard (including but not

limited to designation and classification of areas) would need to occur before EPA would determine that the 1-hour ozone standard no longer applies to an area, and (2) the effect of revising the ozone NAAQS on the existing 1-hour ozone designations.

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