VII. Executive Order 12866

Under Executive Order 12866,[4] the Agency must determine whether a regulation is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.[5]

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

VIII. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 (''UMRA''), Public Law 104–4, EPA must prepare a budgetary impact statement to accompany any general notice of proposed rulemaking or final rule that includes a federal mandate which may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under Section 205, for any rule subject to Section 202 EPA generally must select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Under Section 203, before establishing any regulatory requirements that may significantly or uniquely affect small governments, EPA must take steps to inform and advise small governments of the requirements and enable them to provide input.

EPA has determined that the final rule promulgated today does not include a federal mandate as defined in UMRA. The rule does not include a federal mandate that may result in estimated annual costs to State, local or tribal governments in the aggregate, or to the private sector, of $100 million or more, and it does not establish regulatory requirements that may significantly or uniquely affect small governments.

IX. Paperwork Reduction Act

The action in today's notice does not impose any new information collection burden. Implementation of this action would eliminate the existing requirement that product transfer documents (PTDs) for gasoline must identify the oxygenates present. No new information collection requirements would result from the implementation of the regulatory amendment which is the subject of this action. To the contrary, its implementation would eliminate a compliance burden from the majority of regulated parties.

The Office of Management and Budget (OMB) has previously approved the information collection requirements of the Regulation of Deposit Control Additives contained in 40 CFR Part 80 under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0275 (EPA ICR Numbers 1655–01, 1655–02, and 1655–03).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Copies of the ICR documents may be obtained from Sandy Farmer, Information Policy Branch; EPA; 401 M St., SW. (mail code 2136); Washington, DC 20460 or by calling (202) 260–2740. Include the ICR and/or OMB number in any correspondence.

X. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

XI. Statutory Authority

The statutory authority for the proposed action in this rule is granted to EPA by sections 114, 211(a), (b), (c), and (l), and 301 of the Clean Air Act as amended: 42 U.S.C. 7414, 7545(a), (b), (c) and (l), and 7601.

List of Subjects in 40 CFR Part 80

Environmental protection, Fuel additives, Gasoline detergent additives, Gasoline, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: October 30, 1997.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, part 80 of title 40 of the Code of Federal Regulations is amended as follows:

PART 80—[AMENDED]

1. The authority citation for part 80 continues to read as follows:

Authority: Sections 114, 211 and 301(a) of the Clean Air Act as amended (42 U.S.C. 7414, 7545, and 7601(a)).

§ 80.158 [Amended]

2. Section 80.158(a) is amended as follows:

a. Paragraph (a)(5) is removed.

b. Paragraphs (a)(6) through (a)(10) are redesignated as paragraphs (a)(5) through (a)(9).

§ 80.171 [Amended]

3. Section 80.171(a) is amended as follows:

a. Paragraph (a)(5) is removed.

b. Paragraphs (a)(6) through (12) are redesignated as paragraphs (a)(5) through (a)(11).

[FR Doc. 97–29391 Filed 11–5–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[AZ–001–BU; FRL–5917–4]

Clean Air Act Reclassification; Arizona-Phoenix Nonattainment Area; Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finding that the Phoenix nonattainment area (Maricopa

[4] 58 FR 51736 (October 4, 1993).

[5] *Id.* at section 3(f)(1)–(4).

County, Arizona) has not attained the 1-hour ozone national ambient air quality standard (NAAQS) by the applicable attainment date in the Clean Air Act (CAA) for moderate ozone nonattainment areas, November 15, 1996. EPA is also denying Arizona's application for a one-year extension of the November 15, 1996 attainment date for the Phoenix area. The finding and denial are based on EPA's review of monitored air quality data from 1994 through 1996 for compliance with the 1-hour ozone NAAQS. As a result of the finding and denial, the Phoenix ozone nonattainment area will be reclassified by operation of law as a serious ozone nonattainment area on the effective date of this action. The effect of the reclassification will be to continue progress toward attainment of the 1-hour ozone NAAQS through the development of a new State implementation plan (SIP), due 12 months from the effective date of this action, addressing attainment of that standard by November 15, 1999.

EFFECTIVE DATE: December 8, 1997.

FOR FURTHER INFORMATION CONTACT: Frances Wicher, Office of Air Planning, AIR–2, Air Division, U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California 94105, (415) 744–1248.

SUPPLEMENTARY INFORMATION:

I. Background

Under sections 107(d)(1)(C) and 181(a) of the Clean Air Act (CAA), the Phoenix metropolitan area was designated nonattainment for the 1-hour ozone NAAQS and classified as ''moderate.'' See 56 FR 56694 (November 6, 1991). Moderate nonattainment areas were required to show attainment by November 15, 1996. CAA section 181(a)(1).

Pursuant to section 181(b)(2)(A) of the CAA, EPA has the responsibility for determining, within six months of an area's applicable attainment date, whether the area has attained the 1-hour ozone NAAQS.[1] Under section 181(b)(2)(A), if EPA finds that an area has not attained the 1-hour ozone NAAQS, it is reclassified by operation of law to the higher of the next higher classification or to the classification applicable to the area's design value at the time of the finding. CAA section 181(b)(2)(B) of the Act requires EPA to publish a notice in the **Federal Register** identifying areas which failed to attain the standard and therefore must be reclassified by operation of law.

If a state does not have the clean data necessary to show attainment of the NAAQS, it may apply, under CAA section 181(a)(5) of the CAA, for a one-year attainment date extension. Issuance of an extension is discretionary, but EPA can exercise that discretion only if the state has: (1) complied with the requirements and commitments pertaining to the applicable implementation plan for the area, and (2) the area has measured no more than one exceedance of the ozone NAAQS at any monitoring site in the nonattainment area in the year preceding the extension year.

A complete discussion of the statutory provisions and EPA policies governing findings of whether an area failed to attain the ozone NAAQS and extensions of the attainment date can be found in the proposal for this action at 62 FR 46229 (September 2, 1997).

II. Proposed Action

On September 2, 1997, EPA proposed to find that the Phoenix ozone nonattainment area failed to attain the 1-hour ozone NAAQS by the applicable attainment date. 62 FR 46229. The proposed finding was based upon ambient air quality data from the years 1994, 1995, and 1996. These data showed that the 1-hour ozone NAAQS of 0.12 parts per million had been exceeded on average more than one day per year over this three-year period. Attainment of the 1-hour NAAQS is demonstrated when an area averages one or less days per year over the standard during a three-year period. 40 CFR 50.9 and Appendix H. EPA also proposed that the appropriate reclassification of the area was to serious, based on the area's 1994–1996 design value of 0.132 ppm. For a complete discussion of the Phoenix ozone data and method of calculating both the average number of days over the ozone standard and the design value, see 62 FR 46230.

EPA also proposed to deny the State of Arizona's application for a one-year extension of the moderate area ozone attainment date for the Phoenix nonattainment area. The proposed denial was based, in part, on evidence that the Phoenix area is not close to attainment of the 1-hour ozone standard and will need additional controls to attain, and, in part, on the area's failure to meet the second statutory criterion for granting an extension. That criterion requires that the area have no more than one exceedance of the ozone NAAQS in 1996. CAA section 181(a)(5)(B). The Fountain Hills special purpose monitor in the eastern part of the Phoenix nonattainment area recorded 4 exceedances of the 1-hour ozone NAAQS in 1996. For a complete discussion of the basis for the proposed denial of the extension, including EPA's policies related to the use of special purpose monitoring data, see 62 FR 46231.

Finally, EPA proposed to require submittal of the serious area SIP revisions no later than 12 months from the effective date of the area's reclassification.

III. Response to Comments

EPA received twenty-one comment letters in response to its September 2, 1997 proposal. Comments were received from Arizona Governor Jane Dee Hull, the Arizona legislative leadership, U.S. Senator Jon Kyl and U.S. Representative John Shadegg, the Arizona Department of Environmental Quality (ADEQ), the Maricopa County Environmental Services Department (MCESD), several local elected officials, numerous business groups, and one environmental group.

EPA wishes to express its appreciation to each of these individuals and organizations for taking the time to comment on the proposal. Each raised important issues to which EPA welcomes the opportunity to respond.

As described above, EPA's proposal was composed of three elements: (1) a finding of failure to attain by the statutory deadline of November 15, 1996; (2) a denial of the State's application for a one-year extension of the attainment date; and (3) a 12-month schedule for submittal of the revised SIP.

Most commenters emphasized Arizona's leadership in the development and implementation of effective ozone controls (many of which are only mandated for serious or severe ozone nonattainment areas) and its demonstrated commitment to making real improvements in air quality. Among the controls cited are: the State's premier vehicle emissions inspection program (which includes the only regulatory use of remote sensing), Maricopa County's Travel Reduction Program, the extension of the Federal Reformulated Gasoline (RFG) program to the Phoenix area, the State's adoption

[1] On July 18, 1997 (62 FR 38856), EPA revised the ozone NAAQS to establish a 8-hour standard; however, in order to ensure an effective transition to the new 8-hour standard, EPA also retained the 1-hour NAAQS for an area until such time as it determines that the area meets the 1-hour standard. See revised 40 CFR 50.9 at 62 FR 38894. As a result of retaining the 1-hour standard, CAA part D, subpart 2, *Additional Provisions for Ozone Nonattainment Areas*, including the reclassification provisions of section 181(b), remain applicable to areas that are not attaining the 1-hour standard. Unless otherwise indicated, all references in this notice are to the 1-hour ozone NAAQS.

of its own, more stringent ''Clean Burning Gasoline'' program as well as numerous other control programs such as the voluntary lawnmower replacement program, mandatory conversion of government fleets to alternative fuels, and incentives for conversion of private fleets to alternative fuels and for the construction of public fueling facilities. The City of Phoenix also listed a number of innovative air quality measures that it has implemented, and finally, APS noted the voluntary efforts of business and community groups including the Business for Clean Air Challenge program.

EPA is very aware of Arizona's leadership and noted the State's dedicated efforts to adopt and implement controls to attain the ozone standard in its proposal. See 62 FR 46232. The Agency would like to make clear that in taking this action it is neither ignoring Arizona's exemplary efforts to adopt controls to improve its air quality nor minimizing Arizona's commitment to clean air. Both are evidenced by the numerous controls listed above and the State's continuing efforts to evaluate its ozone situation.

As stated above, neither the determination of attainment/nonattainment nor the determination of whether an area met the statutory extension criterion relating to exceedances of the ozone NAAQS in 1996 allows for reviewing an area's efforts to adopt controls. This exercise involves little more than a rote review of available ambient air quality data. While EPA may desire more flexibility in this situation to reward Arizona for its demonstrated leadership, the Agency has not been granted that flexibility under the Clean Air Act.

For the most part, commenters made similar, and frequently identical, comments. The issues raised relate principally to (1) the adverse impacts of the reclassification to serious, (2) the retention of the 1-hour ozone NAAQS in EPA's recent action revising the ozone NAAQS, (3) the denial of the request for a one-year attainment date extension, (4) EPA's compliance with the Regulatory Flexibility Act, and (5) proposed measures to mitigate the impact of the reclassification. Many of the comments received did not directly address EPA's proposals and instead focused on issues that have been the subject of earlier EPA rulemakings (*e.g.*, retention of 1-hour ozone standard), outside of EPA's regulatory authority in this action (*e.g.*, the reclassification to serious), or unrelated to the action (*e.g.*, approval of Arizona's excess emissions rule).

In this preamble, EPA is responding to the most significant comments received and has provided more detailed and complete answers to all comments received in the Response to Comments (RTC) document which is part of the technical support document (TSD) for this rulemaking. Copies of the TSD as well as other documents in the docket for this rulemaking may be obtained from the contact listed at the beginning of this notice.

A. Comments Related to the Proposed Finding of Failure to Attain Comment

ADEQ and others note that Arizona has implemented most of the mandatory control programs for both serious and severe ozone nonattainment areas and the only remaining requirements are for more stringent new source review (NSR) and the federal clean fleets program. Because the imposition of these serious area requirements will do little to improve air quality in the Phoenix metropolitan area, the commenters contend that the reclassification is effectively punitive.

Response: Serious ozone nonattainment areas (like all other classifications) are subject to both specific requirements for mandatory control programs and more general requirements for attainment and reasonable further progress. EPA agrees that the Maricopa area already has in place most of the mandatory control programs required for serious area. The State, however, has yet to address the requirements for attainment by 1999 in CAA section 181(c)(2)(A) or the 9 percent rate-of-progress requirement in section 181(c)(2)(B). Both these requirements are very likely to require measures beyond the specific control programs mandated by a serious area classification, resulting in improved air quality for the Phoenix area.

The classification structure of the Act is a clear statement of Congress's belief that the later attainment deadlines afforded higher-classified and reclassified areas require compensating increases in the stringency of controls. The reclassification provisions of the Clean Air Act are a reasonable mechanism to assure continued progress toward attainment of the health-based ambient air quality standards when areas miss their attainment deadlines and are not punitive.

Comment: ADEQ, MCESD, and others asserted that the schedules for planning and attainment under a reclassification almost certainly guarantee failure because it would be difficult to complete the needed technical analysis within the proposed 12-month SIP submittal schedule and then to implement any additional controls needed before the 1999 ozone season.

Response: EPA agrees that the short time available for planning and attainment between the moderate area deadline of November 15, 1996 and the serious area deadline of November 15, 1999 makes completing the required technical analysis and adopting additional controls difficult. The State, however, has already adopted or is in the process of adopting a number of controls that will contribute substantial emission reductions in 1997 or beyond. These controls include the federal reformulated gasoline program for 1997, Arizona's Clean Burning Gasoline program for 1998 and later, improvements to the vehicle emission inspection program, and an industrial solvent cleaning rule (currently schedule for adoption in early 1998). In addition, ADEQ continues to evaluate and refine the Urban Airshed modeling performed for the draft Voluntary Early Ozone Plan (VEOP). All these actions give Arizona a head start in meeting the serious area requirements.

In proposing a 12-month schedule for submittal of the revised plan, EPA understood that this was an ambitious schedule but stated that it believed ''a 12-month schedule is appropriate because the attainment date for serious areas, November 15, 1999, is little more than 2 years away and the State will need to expedite adoption and implementation of controls to meet that deadline.'' See 62 FR 42633. EPA is therefore retaining the 12-month schedule for submittal of the SIP revisions needed to meet the serious area requirements.

Comment: Commenters argue that because stationary sources are not the cause of the ozone problem in Phoenix, the more stringent new source review (NSR) requirements that come with the serious area classification will do little to improve the air quality and are thus merely punitive.

Response: Phoenix is not being singled out for more stringent NSR requirements than any other similarly-classified area in the Country such as Atlanta, Washington, D.C. and San Diego. The more stringent NSR provisions (which principally affect which sources are subject to major source NSR) are required by statute of all serious areas without exception. This tightening of control requirements as areas move up the classification ladder and are given more time to attain is part of the basic Clean Air Act scheme for ozone attainment. In establishing this scheme, Congress determined that the more stringent NSR provision were reasonable for serious areas and, since

Congress did not provide relief from these requirements for reclassified areas, it also determined that they were reasonable without exception for moderate areas being reclassified to serious.

B. Comments Related to Retention of the 1-Hour Ozone Standard Comment

A number of comments were received on the legality of EPA's decision, having promulgated an 8-hour NAAQS, to defer revocation of the 1-hour ozone NAAQS.

Response: The continued applicability of the 1-hour standard until EPA determines that the applicable area is meeting that standard is not the subject of this rulemaking. This rulemaking only concerns the finding that the Phoenix area failed to attain the 1-hour standard and the denial of the State's request for an extension of the attainment deadline for that standard. The issue of the continued applicability of the 1-hour standard was part of the rulemaking in which EPA promulgated an 8-hour ozone standard. 62 FR 38856 (July 18, 1997). That rulemaking proceeding, not this one concerning Phoenix, was the appropriate forum in which to raise issues concerning the continued applicability of the 1-hour standard.

C. Comments Related to the Proposal to Deny Arizona's Application for a One-Year Extension of the Attainment Date

Almost all comments received opposed EPA's proposed denial of the State's application for a one-year extension of the November 15, 1996 attainment date. Before responding to the specific comments raised with regard to this issue, some introductory remarks are in order. In general, the commenters misperceive the nature of section 181(a)(5) of the CAA that provides:

> Upon application of any State, the Administrator *may* extend for 1 additional year (hereinafter referred to as the ''Extension Year'') the [attainment deadline] if—
>
> (A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and
>
> (B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.
>
> No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area. Emphasis added.

Many commenters erroneously assume that if the conditions in subparagraphs A and B above are met, then EPA must automatically grant the extension. However, by its terms, section 181(a)(5) is ultimately discretionary. See 62 FR 46230. While EPA cannot grant an extension request if the conditions are not met, it is not required to do so even if they are.

While EPA believes, as discussed at length below, that the second condition has not been met, the Agency has ample justification for denying the request even if that were not the case. In its proposal, EPA articulated two reasons to deny the extension request. The first—the failure to meet the second extension criterion—will be discussed further below. The second—that the Phoenix area was not close to attainment—went virtually unaddressed by most the commenters. As EPA stated in its notice:

> [T]he underlying premise of an extension is that an area is close to attainment and already has in place the control strategy needed for attainment. All evidence in front of the Agency indicates that the Phoenix area is not close to attainment of the 1-hour ozone standard and that, despite the State's dedicated efforts to adopt and implement controls, the area will need to continue its on going planning and control efforts. Thus, even if the Phoenix area met the statutory requirements for granting an extension, *EPA believes that such an extension would not be appropriate at this time.* Emphasis added. 62 FR 46232.

While several commenters questioned EPA's conclusion that the Phoenix area was not close to attainment, their comments (which are addressed later) did not persuade EPA that its conclusion was wrong. In fact, an equal number of commenters tacitly agreed with EPA's position by arguing the need for long-term measures to solve Phoenix's ozone problem and the impossibility of showing attainment by 1999.

The central thrust of the comments EPA received on the extension issue is that EPA improperly included data from special purpose monitors (SPMs)[2] in its calculation of whether the Phoenix area experienced no more than one exceedance of the ozone NAAQS in 1996, the year preceding the extension year, and had EPA properly excluded the data, then the Phoenix area would have been granted an extension. For the reasons discussed below, EPA believes that it was entitled to rely on that data in making this assessment. However, even if the SPM data were excluded from the calculation, the Agency believes that it can properly exercise its discretion to deny the State's extension request.

As documented below and in Appendix B to the TSD, since at least 1989, Arizona has maintained an inadequate official monitoring network and has consistently declined to convert the SPMs (which meet all of EPA's technical criteria) to cure those deficiencies. If it had to rely solely on this inadequate monitoring network, it would be impossible for EPA to determine whether the Phoenix area had one or fewer exceedances of the ozone standard in 1996 because the official network does not adequately represent Phoenix's air quality. Only when the data from the SPMs are combined with those of the official network is it possible to make this determination and with the SPM data it is clear that the Phoenix area is not close to attaining the ozone 1-hour NAAQS. Modeling conducted by the State confirms this conclusion. Thus the underlying intent of the statute's extension provision has not been met. In acknowledging this reality, EPA can appropriately exercise its discretion to deny the extension request.

Comment: ADEQ contends that in a letter dated June 6, 1997, to the Clerk of the United States Court of Appeals for the Third Circuit, EPA's legal counsel noted that EPA was not required to consider non-network (i.e., not part of the SLAMS/NAMS network) data showing violations of the NAAQS. Letter, June 6, 1997, from Lois J. Schiffer, Assistant Attorney General, Environmental Natural Resources Division (by Greer S. Goldman), U.S. Department of Justice (DOJ) to P. Douglas Sisk, Clerk, United States Court of Appeals for the Third Circuit (''3rd Circuit letter''). ADEQ also cites *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 121 F.3d 106 (3rd Cir. 1997), to support its position that EPA in the past has excluded exceedance data from its evaluation of a redesignation request because the data came from monitors that were not part of the SLAMS network.

Response: In the 3rd Circuit letter, EPA actually concluded that the Agency's regulation on the use of SPM data, 40 CFR 58.14, does not authorize it to take into account the State's intended use of SPM data that otherwise meet that regulation's requirements when deciding whether to use it in an ozone redesignation action.[3] As a result, under EPA's regulation, all available SPM data that meet the minimum federal siting and quality assurance requirements in 40 CFR Part 58 must be used in making regulatory decisions

[2] In the Phoenix area, MCESD operates eight ozone monitors in its official or state or local air monitoring station/national air monitoring station (SLAMS/NAMS) network. ADEQ and MCESD operate a total of nine ozone special purpose monitors in the area.

[3] This letter was signed by DOJ on behalf of EPA and accurately reflects the Agency's position on the use of SPM data.

such as redesignations and reclassifications.

Southwestern Pennsylvania Growth Alliance involves EPA's disapproval of the Commonwealth of Pennsylvania's request to redesignate the Pittsburgh-Beaver Valley nonattainment area to attainment for ozone. The disapproval was based on 1995 violations of the ozone standard recorded on the area's SLAMS/NAMS network. 61 FR 19193 (May 1, 1996) The Southwestern Pennsylvania Growth Alliance (SWPGA), an organization of major manufacturers and local governments in the Pittsburgh-Beaver Valley region, sought review of EPA's disapproval by the Third Circuit Court of Appeals. A full history of EPA's actions on Pennsylvania's redesignation request can be found in the TSD for today's notice.

Among the issues raised by SWPGA was the use of the 1995 SLAMS/NAMS data. SWPGA argued that EPA acted contrary to the Act by considering the 1995 ozone exceedances because they occurred after the EPA's 18 month deadline to act on the State's redesignation request which had been submitted in November, 1993. In an effort to clarify certain statements made in its brief, EPA identified certain instances where it had not used available data when acting on a redesignation request. In one instance, the San Francisco-Bay Area redesignation to attainment for ozone, EPA had excluded SPM data from its redesignation evaluation. The other instance, LaFourche Parish, Louisiana, involved only SLAMS/NAMS data. 121 F.3d at 115.

The court then directed EPA to address a number of questions, including why it is lawful for EPA to exclude consideration of data from monitors that are not part of the SLAMS network. The 3rd Circuit letter cited by ADEQ is EPA's response to the court on this issue. As stated in this letter (p. 4):

> For data from monitors that are not part of the SLAMS network required by [40 CFR] Part 58 [EPA's monitoring regulation], EPA regulations provide that EPA will exclude the data when they do not meet the terms of 40 CFR 58.14. That section provides, in relevant part:
>
> Any ambient air quality monitoring station other than a SLAMS or [prevention of significant deterioration] station from which the State intends to use the data as part of a demonstration of attainment or nonattainment or in computing a design value for control purposes of the [NAAQS] must meet the requirements for SLAMS described in section 58.22 and, after January 1, 1983, must also meet the requirements for SLAMS as described in section 58.13 and appendices A and E to this part.
>
> * * * In at least one case, EPA has interpreted section 58.14 to make a state's intent a factor in determining whether data from special purpose monitors that otherwise meet the requirements of section 58.14 may be excluded from consideration in an ozone redesignation action. However, EPA has recently evaluated that interpretation and concluded that it is not authorized by section 58.14.

The passage supports the conclusion that the only circumstance under which SPM data may be excluded is if the data do not meet the siting and quality assurance requirements of Part 58.

The statement that ADEQ cites from the 3rd Circuit letter comes from the letter's concluding paragraph which discusses the specific facts of *Southwestern Pennsylvania Growth Alliance.* All monitoring data under consideration in that case came from SLAMs monitors; there were no SPM data at issue in EPA's decision to deny the redesignation request. In this context, it is clear that the 3rd Circuit letter does not indicate that EPA may ignore SPM data:

> It should be noted, however, that the issue of whether EPA has discretion to decide if data from outside the official monitoring network should be used in redesignation decisions is not at issue in this case, where all monitored violations of the ozone standard were recorded at official network monitors. And even if EPA were required to consider non-network data showing violations, EPA would not be authorized to ignore violations at official network monitors when determining whether an area has attained the standard and is entitled to redesignation. 3rd Circuit letter (p. 4).

ADEQ also cites the court's opinion to support its contention that EPA has excluded SPM data in the past. While the court noted that ''[i]n at least one case, the EPA has excluded exceedance data from its evaluation of a redesignation request because the data came from monitors that were not part of the [SLAMS] network * * *,'' it went on to state in the same paragraph:

> Assuming arguendo that the EPA's exclusion of non-SLAMS exceedance data violates the EPA's duty not to redesignate an area that fails to attain the NAAQS, *the EPA's prior disregard of this duty did not relieve the EPA of its obligation to act correctly in other cases.* Emphasis added. 121 F.3d at 115.

Based on its interpretation of Section 58.14, and the facts of the Phoenix air quality situation discussed below, EPA believes that it is acting correctly in not excluding the SPM data from consideration in the Phoenix extension decision.

Comment: Numerous commenters questioned the timing of EPA's issuance of the *Memorandum,* ''Agency Policy on the Use of Special Purpose Monitoring Data,'' dated August 22, 1997, by John Seitz, EPA Director of the Office of Air Quality Planning and Standards (''SPM policy'' or ''SPM memo''), noting that it was issued just 3 days in advance of EPA's announcement that it was proposing to find that the Phoenix area had failed to attain the ozone standard and to deny the State's extension request. The commenters contend that, absent this ''ad hoc policy,'' EPA would not have been able to propose to deny Arizona's one-year extension request based upon the use of the special purpose monitor data that EPA has heretofore rejected.

Commenters state that the information submitted to EPA's AIRS and additional data submitted to EPA by ADEQ demonstrate that, had the Fountain Hills special purpose monitor data properly been excluded, the criterion in section 181(a)(5)(B) would have been satisfied. Commenters note that during the year preceding the extension year (1996), there was only one exceedance of the ozone NAAQS at a SLAMS or NAMS monitor (the exceedance at the Mesa SLAMS monitor on July 23, 1996, when a reading of 0.127 ppm ozone was recorded) and that this was the only ozone exceedance recorded during the entire calendar year of 1996 on any official SLAMS or NAMS monitor.

Response: The proper treatment of SPM data has been growing national interest for some time, increasing the need for EPA to issue national guidance. As noted in the SPM memo (p. 1):

> [OAQPS] has received several inquiries from Regional Offices into how special purpose monitoring data can be used in making a variety of regulatory decisions such as designations, classifications, and attainment date extensions. [It] also [has] a final ruling from the U.S. Court of Appeals for the Third Circuit which supports the U.S. EPA denial of Pennsylvania's redesignation request for the Pittsburgh-Beaver Valley ozone nonattainment area. In light of these questions, legal developments, and the new [NAAQS] implementation directives, [OAQPS] believe[s] it is necessary to discuss the use of all publicly available special purpose monitoring data for all regulatory applications.

Further impetus for the SPM policy was the revised ozone NAAQS under which EPA must determine within 90 days of their July 18, 1997 publication which areas of the Country are attaining the 1-hour standard. National guidance is clearly essential to assure consistency in the use of SPM data for these determinations.

The interest in and the need for a clear statement of the Agency's policy on SPM data was thus far broader than the Phoenix situation. The Agency did not, as the commenters imply, create an

''ad hoc'' policy simply to justify its proposed denial of Arizona's request for an extension but rather it articulated a national policy applicable to all areas of the Country.

The commenters, however, wrongly assert that EPA needed the August 22, 1997 SPM policy to justify its denial of Arizona's extension request. Even without a formal written policy statement, EPA believes that it has sound reasons to use the SPM data in this case, including the inadequate SLAMS/NAMS network in Phoenix, the discrepancies in measured air quality between the official monitors and the SPMs, and its long-established regulations governing the use of SPM data.

Moreover, the June 6, 1997 letter to the Third Circuit and the Court's subsequent July 28, 1997 decision *in Southwestern Pennsylvania Growth Alliance,* both available long before EPA's announcement, may be read to imply that EPA must consider available SPM data in making regulatory decisions such as granting extension requests. As noted in the SPM memo (p. 2):

> The Third Circuit Court decision supports the view that the EPA may not redesignate an area from nonattainment to attainment if the EPA knows that the area is not meeting the ozone NAAQS. Specifically, if the U.S. EPA knows of a violation or violations of the ozone NAAQS by either examining information within the AIRS or data from other sources and these data meet all 40 CFR Part 58 requirements, the U.S. EPA cannot determine that an area is attaining the NAAQS.

This logic applies equally to extension requests: if EPA knows of more than one exceedance in an area in the year preceding the extension year by either examining information within AIRS or data from other sources and these data meet all 40 CFR part 58 requirements, EPA cannot grant an extension of the attainment date.

Finally, EPA notes that it informed Arizona of its intention to use the SPM data in advance of its August 25, 1997 announcement. In a presentation to the May 19, 1997 meeting of the Arizona air quality monitoring network stakeholders,[4] EPA stated that the current Maricopa SLAM network was deficient and that it could not, without inclusion of the SPM sites, support the granting of an extension. At the June 9, 1997 meeting, EPA distributed the 3rd Circuit letter and noted that EPA would soon be formally clarifying its use of SPM data. EPA also made a series of courtesy calls to state and local agencies the week before its announcement to inform them that it would be proposing to find that Phoenix had failed to attain and that it was proposing to deny the extension request based in part on the SPM data.

Comment: Several commenters contend that the use of the SPM data in this instance is inconsistent with actions taken in other nonattainment areas where SPM data were excluded for the purposes of making similar determinations and conclude that if EPA had followed its earlier precedents then data from the Fountain Hills special purpose monitor would not have been used to deny the extension request. ADEQ also notes that the SPM memo implicitly concedes that Agency policy up to the date of the memorandum had been to reject exactly the kind of monitoring data on which EPA based its decisions to propose to deny the one-year extension. Commenters view EPA's refusal to follow prior precedent and disregard special purpose monitor data in this situation as a simple case of disparate treatment.

Response: EPA's previous record on the use of SPM data contains numerous examples of instances where the Agency has used SPM data in making designation and classification decisions. While commenters note one instance where EPA did not use available SPM data (the Beaumont-Port Arthur reclassification), and the SPM memo notes one other (the San Francisco-Bay Area redesignation), there are many more instances where the Agency has used SPM data to either designate or classify an area, including the original classification of the Phoenix area as moderate for ozone and the PM–10 nonattainment designations for the Bullhead City and Payson, Arizona areas. See 56 FR 56694, 56703 (November 6, 1991) and 58 FR 67334, 67336 (December 21, 1993), respectively. Outside of Arizona, EPA has used SPM data to redesignate to nonattainment portions of White Top Mountain in New York and Smyth County, Virginia. See 56 FR 56694, 56704.

Many commenters cited EPA's 1996 action to correct the Beaumont/Port Arthur, Texas area ozone classification from serious to moderate as an example of EPA's inconsistent use of SPM data. 61 FR 14496 (April 2, 1996). In this case, data from an SPM had originally been utilized to classify the Beaumont/Port Arthur area as a serious ozone nonattainment area. Based on additional information provided by Texas, EPA corrected the reclassification under CAA section 110(k)(6) from serious to moderate, stating that the data from the SPM should not have been used for classification purposes because, among other reasons, the SPM was not a part of the state monitoring network, the data from the monitor were utilized for research purposes, and the data were not reported to EPA's Aerometric Information Retrieval System (AIRS).

Commenters contend that in these three circumstances the Phoenix situation closely parallels Beaumont-Port Arthur's; therefore, EPA should treat the Phoenix SPM data in a like manner by excluding it. In response, EPA notes that it has clarified its policy on the treatment of SPM data since the April 2, 1996 action on Beaumont-Port Arthur, resulting in all three of these circumstances no longer being grounds for excluding SPM data.[5]

Even if EPA's regulations and policy were that valid SPM data could be excluded in some cases (which they are not), EPA believes that there are two compelling reasons to use the SPM data in the Phoenix case. These reasons are (1) the inadequacy of the Maricopa ozone monitoring network and (2) the large discrepancy between air quality when measured on Maricopa's SLAMS/NAMS network and when measured on the SLAMS/NAMS/SPM network.

Since 1989, EPA has consistently found that Maricopa's existing ozone SLAMS/NAMS network is inadequate to meet the monitoring objectives of Part 58, more specifically the requirement for a site measuring maximum concentration. A complete history of EPA's evaluations of the Maricopa County monitoring network can be found in Appendix D to the TSD. Numerous evaluations, including the recent VEOP, have indicated that maximum ozone concentrations are occurring in the rapidly-developing eastern-northeastern portion of

[4] ADEQ convened a series of facilitated stakeholder meetings in May through July, 1997 to discuss the ambient air quality monitoring network in Maricopa County. Participants included MCESD, other local agencies, industry representatives, and environmental groups. EPA also participated in the meetings.

[5] This policy clarification is clearly permissible. Moreover, even if it were a change or revision in policy, rather than a clarification, it would also clearly be permissible. It is well established that an agency may modify or reverse its interpretation over time provided the agency supplies a reasoned basis for the change. See *e.g., Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 863 (1984); *Motor Vehicle Manufacturers Assoc. of the U.S., Inc.* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 42 (1983)(''we fully recognize that ''[regulatory] agencies do not establish rules of conduct to last forever' * * * and that an agency must be given ample latitude to ''adapt their rules and policies to the demands of changing circumstances.' ''); *Good Samaritan Hospital* v. *Shalala,* 113 S. Ct. 2151, 2161 (1993) (''[A]n administrative agency is not disqualified from changing its mind * * *''). EPA provided that reasonable basis in the SPM memo.

Maricopa County.[6] While there are SLAMS sites located throughout the central part of the Phoenix metropolitan area, there are no SLAMS sites on the eastern edge of the Phoenix area. EPA has been urging the County for nearly a decade to locate an ozone SLAMS monitor in this area. The County has responded by locating numerous SPM sites there (including the Fountain Hills SPM site) but has yet to convert any of those sites into SLAMS or NAMS.

Based solely on this inadequate network, it is not possible for EPA to accurately determine the area's compliance with the second statutory criterion for extensions. Such a determination can only be made based on data from a complete network that accurately reflects air quality in the area; therefore, even if the SPM data were excluded from the calculation, the Agency believes that it can properly exercise its discretion to deny the State's extension request.

The inadequate SLAMS network has led to a troubling discrepancy between the air quality measured on the SLAMS/NAMS network and that network when augmented by the SPM sites. This is illustrated by Table 1 below.

TABLE 1.—AIR QUALITY COMPARISON BETWEEN THE SLAMS/NAMS NETWORK AND SLAMS/NAMS/SPM NETWORK

[Maricopa County, 1994–1996]

	SLAMS/NAMS network	SLAMS/NAMS/SPM network (w/o Mt. Ord or Blue Point)
Number of Ozone Exceedance	10	44
Number of Ozone Violations	2	13
Number of Days over the Ozone Standard	6	21

Clearly had EPA ignored the SPM data in Maricopa County, it would have greatly underestimated the severity of the area's air quality and inappropriately downplayed the impact of that air quality on public health.

Given the significant probability that the Phoenix area would eventually face reclassification to serious even if it were granted an extension, EPA questions the actual benefit of an extension to the area. The commenters have made extensive comments on the adverse impacts of reclassification, among them the short-term planning and attainment deadlines facing newly serious areas and the imposition of the more stringent NSR provisions. An extension would only compound the problem of the short time frames while simply deferring the more stringent NSR provisions for a short time. Hence, even if it were within its discretion to grant an extension, EPA stands by its belief that an extension is not appropriate at this time.

Comment: A number of commenters noted that the Phoenix area had not experienced any ozone exceedances in 1997 and asserted that this indicates that the area's ozone problem has been solved. Noting that the number of ozone exceedances peaked in 1995 and decreased in 1996, the County stated that the ''reality check'' provided by the ambient data indicates a trend contradictory to EPA's contention that the Phoenix area is not close to attainment.

Response: The clean ozone air quality that the Phoenix area has experienced this year is very good news. These lower ozone readings are due in some part to the introduction of reformulated gasoline and the continuing implementation of other control programs such as the State's premier vehicle emission inspection program.

Unfortunately, a single year of ozone data cannot be used to conclude that an area is close to attaining the 1-hour ozone standard. The Phoenix area has experienced another year (1989) in which ozone exceedances were not recorded, only to have the subsequent years show widespread violations.

Ozone levels are related to both emission levels and meteorology. As a result of this meteorological component, ozone levels can vary greatly from year to year. The 1-hour ozone standard accounts for the weather's effect by evaluating compliance over a three-year period (that is, an area can average no more than 1 exceedance per year over a three-year period). 40 CFR 50.9 and part 50, Appendix H.

There is some reason to believe that favorable weather patterns this year have also contributed to Phoenix's low ozone readings. In fact, 1997 has been an unusually good year for air quality throughout the West. All areas in EPA Region 9 (with the exception of San Diego and the Imperial Valley) have shown decreases in second-high ozone levels from 1996 to 1997, many greater than Phoenix's. None of these areas has introduced substantial new emission reduction programs, like Phoenix, that would account for these decreases.

D. Comments Related to the Regulatory Flexibility Act Requirements

Comment: A number of commenters claimed that EPA failed to comply with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) in its proposal.[7] The commenters claim that EPA's certification that its action would not have a significant economic impact on a substantial number of small entities is incorrect.

In support of their argument, the commenters state that small businesses that emit 50 tpy or more of VOC will become subject to reasonably available control technology (RACT) requirements, more stringent NSR requirements, and the Title V operating permit program as a result of the reclassification to serious and describe in more detail the potential adverse impacts of these requirements on small businesses.[8]

The commenters further assert that EPA's reliance on *Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985) for not preparing a regulatory flexibility analysis is misplaced. Finally, as an aside, the commenters note that *Mid-Tex* was decided a decade before Congress enacted SBREFA and more significantly,

[6] This is borne out by the fact that all but one of the 1996 exceedances (the one at the Mesa SLAMS monitor) occurred at monitors to the east or northeast of the metropolitan area.

[7] SBREFA amended the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*

[8] EPA notes that businesses that emit 100 tpy or more are already subject to some of these requirements under the moderate area classification.

SBREFA imposes outreach requirements on EPA and OSHA which are imposed on no other government agencies (citing 5 U.S.C. 609(b) and (d)).

Response: The Regulatory Flexibility Act provides that, whenever an agency is required to publish a general notice of rulemaking for a proposed rule, the agency must prepare an initial regulatory flexibility analysis for the proposed rule unless the head of the agency certifies that the rule ''will not, if promulgated, have a significant economic impact on a substantial number of small entities'' (section 605(b)). EPA certified the proposed determination that the Phoenix area did not attain the 1-hour ozone standard by the attainment date and the proposed denial of the attainment date extension request,[9] based on its conclusion that the rule would not establish requirements applicable to small entities and therefore would not have a significant economic impact on small entities within the meaning of the RFA. EPA is reaffirming that certification in this final action.

As described elsewhere in this notice, CAA section 181(b) requires EPA to determine whether an area has attained a NAAQS by the applicable attainment deadline. If EPA finds that the area has not attained, the section generally provides that the area ''shall be reclassified by operation of law'' (section 181(b)(2)(A)). The section requires EPA to publish a notice in the **Federal Register** identifying each area the Agency has determined to be in nonattainment and ''identifying'' the resulting reclassification of the area (section 181(b)(2)(B)).

While determinations that trigger a reclassification do not themselves establish regulatory requirements applicable to small (or large) entities, they may, as noted by the commenters, trigger the application to small entities of regulatory requirements established by other rulemakings under the Clean Air Act (and conceivably other statutes). EPA, however, has concluded that the word ''impact'' as used in the RFA does *not* include regulatory requirements that the rule does not establish, but may trigger under the terms of other rules or statutory provisions. For the reasons discussed at length in the TSD, EPA believes that the RFA's text, legislative history and case law, including *Mid-Tex,* all make clear that RFA analysis is limited to the requirements of the rule being promulgated.

A more detailed discussion of this issue may be found in the TSD for this rulemaking.

E. Comments Related to Mitigating the Adverse Impacts of Reclassification

Many commenters suggested several steps that could be taken to mitigate the adverse impacts of the reclassification to serious. While EPA will briefly respond to most of the suggestions here, many involve issues that are being dealt with in forums other than this action. EPA will continue to work with interested parties in Arizona to address these issues in those other forums. EPA also received questions regarding the implementation of NSR and Title V requirements. Those questions are addressed in the TSD.

Comment: Commenters requested that EPA suspend further enforcement of the 1-hour ozone NAAQS in the Phoenix Metropolitan area by amending its ''implementation policy'' for the revised 8-hour ozone NAAQS. Commenters contend that EPA has the flexibility and authority to do so under the ''implementation policy'' by citing the policy's statements that implementation of the new 8-hour ozone NAAQS should be ''carried out to maximize common sense, flexibility, and cost effectiveness.'' 62 FR 38421 (July 18, 1997).

Response: The document referred to and cited by the commenters as the ''Implementation Policy,'' 62 FR 38421 (July 18, 1997) is a memorandum to the EPA Administrator entitled ''Implementation of Revised Air Quality Standards for Ozone and Particulate Matter'' (''President's Memorandum'') signed by President Clinton for the implementation of the revised ozone and particulate matter standards. Attached to that memorandum is a strategy, ''Implementation Plan for Revised Air Quality Standards'' (''Implementation Plan'') outlining the steps for implementing these standards. EPA is currently developing guidance and proposed rules consistent with the President's Memorandum. EPA is committed to the goals of maximizing common sense, flexibility, and cost effectiveness in implementing the revised NAAQS.

EPA's action reclassifying Phoenix as a serious ozone nonattainment area is in no way inconsistent with those goals. Furthermore, it is consistent with the continued applicability of the 1-hour standard and subpart 2 as provided for in EPA's rulemaking on the ozone NAAQS. See 62 FR 38856, 38873. To the extent that the comments concern that issue, they are not appropriately raised in this rulemaking.

Neither the provisions of 40 CFR 50.9, as revised (62 FR 38856, 38894), nor any other statutory or regulatory provisions, provide EPA with the authority to suspend enforcement of the 1-hour NAAQS in Phoenix. Moreover, as noted earlier, the Phoenix area has not complied with some of the most significant serious area requirements (e.g., the 9 percent rate of progress requirement). Finally EPA believes that complying with those requirements will have a positive, not detrimental, effect on the ability of Phoenix to comply with the 8-hour standard. Additional comments related to this point are addressed in the TSD.

Comment: The commenters requested that EPA execute an agreement with the State of Arizona to act upon submitted SIP revisions within a fixed period of time based upon priorities identified by the State and to set a schedule for acting on future SIP revisions.

Response: EPA Region 9 receives hundreds of requests each year to revise federally-enforceable SIPs from over 40 different state and local air pollution agencies. These include requests to modify inventories, attainment demonstrations, and administrative, permit, and prohibitory regulations. Given the available resources, Region 9 is unable to review and act on each of these requests as quickly as it would like. As a result, the Agency relies on the state and local agencies to prioritize submittals so that the most important ones to the state and local agencies can be acted on first. Region 9 does expect to take final action soon on several revisions submitted by Maricopa County and has recently contacted the Arizona air pollution agencies to request that they identify those submittals that need to be acted quickly in order to issue Title V permits or for other purposes. Region 9 will process submittals in the priority order requested by these agencies.

Comment: Commenters requested that EPA approve EPA Arizona Administrative Code (A.A.C.) R18–2–310 (The Arizona Excess Emissions Rule) as a revision to the SIP.

Response: This comment is closely related to a lawsuit brought by the Arizona Mining Association with regard to EPA's interim approval of Arizona's Title V operating permit program on October 30, 1996 (61 FR 55910). The parties involved in the suit have had constructive exchanges, which EPA expects to continue, on the appropriate treatment of the Arizona Excess Emissions Rule during the settlement discussions.

[9] Commenters only addressed the potential impact on small businesses of the reclassification (which is based on the determination of nonattainment and the denial of the extension request), and not the potential impacts of the SIP submittal schedule. Therefore, the latter action is not discussed further in response to this comment.

Comment: Commenters request that EPA adopt realistic, streamlined national Prevention of Significant Deterioration (PSD) and New Source Review (NSR) regulations.

Response: EPA recognizes that its current regulations governing the new source review programs mandated by both parts C (PSD) and D (NSR) of Title I of the Clean Air Act are a source of concern for many people. On July 23, 1996, EPA proposed major revisions (known as the NSR reform proposal) to its PSD and NSR regulations. 61 FR 38250. EPA has received many comments on its proposal and is currently carefully reviewing and considering these comments as it develops the final rule. EPA's goal for this final rule is to simplify its NSR and PSD regulations consistent with the Clean Air Act requirements for those programs.

Comment: Commenters request that EPA adopt a regulatory affirmative defense for sources with potential VOC emissions of from 50 to 100 tons per year that will apply to enforcement of the NSR requirements in ozone nonattainment areas that meet certain criteria.

Response: It appears that the commenters are attempting to ease the perceived regulatory burden that will be imposed on sources that emit between 50 and 100 tons of VOC per year as a result of the reclassification. EPA will study the proposal, but its initial response is that the commenters' suggested approach is not the most effective means for addressing their underlying concerns. EPA believes it may be constructive to engage in a dialogue regarding possible mechanisms for limiting sources' potential to emit to below the thresholds that trigger NSR. However, where a source's actual emissions exceed the major source threshold or the source is unable to reduce its potential to emit below the major source threshold, the source is subject to major NSR.

Comment: Commenters request that EPA continue to expeditiously act to approve the Arizona Clean Burning Gasoline Program.

Response: EPA has been very pleased to support Arizona's efforts to bring reformulated gasoline to the Phoenix area. In addition to approving the Governor's request to join the federal program and the State's request for lower RVP limits, the Agency participated in the development of the new CBG rules in order to correct any approval problems early in the process. EPA is now working closely with ADEQ to act on the recent submittal of the CBG rules. This work is among EPA's highest priorities.

F. Other Comments

Comment: Senator Kyl and Representative Shadegg commented that by using data collected from 1994 through 1996 as the basis for its decision, EPA has not taken into account the significant and positive effects of the RFG program and other actions taken by the State of Arizona to reduce ozone pollution and that this results in an inaccurate and unwarranted reclassification of Phoenix to serious. They comment further that this violates principles in President's July 18, 1997 memorandum that ''implementation of the air quality standards is to be carried out to maximize common sense, flexibility, and cost effectiveness.''

Response: EPA agrees that the 1994–1996 data do not reflect the 1997 implementation of the RFG program and that this program will have a continuing positive effect on ozone levels in the Phoenix area. EPA, however, is constrained by statute from considering 1997 data in its finding of failure to attain and denial of the extension request.

CAA section 181(b)(4) requires EPA to determine if an area has attained ''as of the attainment date.'' For Phoenix, the attainment date is November 15, 1996, and under long-established procedures, determining attainment as of that date requires reviewing data from the three years immediately preceding that date or 1994 through 1996. 40 CFR 50.9 and part 50, Appendix H.

The criterion for extensions in CAA section 181(a)(5)(B) is that ''no more than one exceedance of the [ozone standard] has occurred in the area in the year preceding the Extension Year.'' The extension year is 1997, thus the ''year preceding'' is 1996.

VI. Final Action

EPA is finding that the Phoenix ozone nonattainment area did not attain the ozone NAAQS by November 15, 1996, the CAA attainment date for moderate ozone nonattainment areas. EPA is also denying Arizona's application for a one-year extension of the attainment date. As a result of this finding and denial, the Phoenix ozone nonattainment area is reclassified by operation of law as a serious ozone nonattainment area on the effective date of today's action and the submittal of the serious area SIP revisions will be due no later than 12 months from this effective date. The requirements for this SIP submittal are established in CAA section 182(c) and applicable EPA guidance.

Nothing in this action should be construed as permitting, allowing or establishing a precedent for any future action. Each finding of failure to attain, request for an extension of an attainment date, and establishment of a SIP submittal date shall be considered separately and shall be based on the factual situation of the area under consideration and in relation to relevant statutory and regulatory requirements.

VI. Administrative Requirements

A. Executive Order (E.O.) 12866

Under E.O. 12866, (58 FR 51735, October 4, 1993), EPA is required to determine whether today's action is a ''significant regulatory action'' within the meaning of the E.O., and therefore should be subject to OMB review, economic analysis, and the requirements of the E.O. *See* E.O. 12866, sec. 6(a)(3). The E.O. defines, in sec. 3(f), a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may meet at least one of four criteria identified in section 3(f), including,

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

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

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

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

EPA has determined that neither the finding of failure to attain it is making today, the denial of Arizona's request for a one-year extension of the attainment data, nor the establishment of SIP submittal schedule would result in any of the effects identified in E.O. 12866 sec. 3(f). As discussed in the response to comments above and in more detail in the TSD, findings of failure to attain under section 181(b)(2) of the Act are based upon air quality considerations, and reclassifications must occur by operation of law in light of certain air quality conditions. These findings do not, in and of themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because

those requirements are automatically triggered by classifications that, in turn, are triggered by air quality values, findings of failure to attain and reclassification cannot be said to impose a materially adverse impact on State, local, or tribal governments or communities. The same is true of the determination not to grant a one-year extension, in light of the fact that this determination is also based in part on air quality values. Similarly, the establishment of new SIP submittal schedules merely establishes the dates by which SIPs must be submitted, and does not adversely affect entities.

B. Regulatory Flexibility

Under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

As discussed in the response to comments above and in more detail in the TSD, a finding of failure to attain (and the consequent reclassification by operation of law of the nonattainment area) under section 181(b)(2) of the Act, a denial of a one-year extension request, and the establishment of a SIP submittal schedule for a reclassified area, do not, in-and-of-themselves, directly impose any new requirements on small entities. *See Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985) (agency's certification need only consider the rule's impact on entities subject to the requirements of the rule). Instead, this rulemaking simply makes a factual determination and establishes a schedule to require States to submit SIP revisions, and does not directly regulate any entities. Therefore, pursuant to 5 U.S.C. 605(b), EPA reaffirms its certification made in the proposal (62 FR 46233) that today's final action will not have a significant impact on a substantial number of small entities within the meaning of those terms for RFA purposes.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 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 the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, when EPA promulgates ''any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more'' in any one year. A ''Federal mandate'' is defined, under section 101 of UMRA, as a provision that ''would impose an enforceable duty'' upon the private sector or State, local, or tribal governments'', with certain exceptions not here relevant. Under section 203 of UMRA, EPA must develop a small government agency plan before EPA ''establish[es] any regulatory requirements that might significantly or uniquely affect small governments''. Under section 204 of UMRA, EPA is required to develop a process to facilitate input by elected officers of State, local, and tribal governments for EPA's ''regulatory proposals'' that contain significant Federal intergovernmental mandates. Under section 205 of UMRA, before EPA promulgates ''any rule for which a written statement is required under [UMRA sec.] 202'', EPA must identify and consider a reasonable number of regulatory alternatives and either adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, or explain why a different alternative was selected.

Generally, EPA has determined that the provisions of sections 202 and 205 of UMRA do not apply to this decision. Under section 202, EPA is to prepare a written statement that is to contain assessments and estimates of the costs and benefits of a rule containing a Federal Mandate ''unless otherwise prohibited by law.'' Congress clarified that ''unless otherwise prohibited by law'' referred to whether an agency was prohibited from considering the information in the rulemaking process, not to whether an agency was prohibited from collecting the information. The Conference Report on UMRA states, ''This section [202] does not require the preparation of any estimate or analysis if the agency is prohibited by law from considering the estimate or analysis in adopting the rule.'' 141 Cong. Rec. H3063 (Daily ed. March 13, 1995). Because the Clean Air Act prohibits, when determining whether an area attained the ozone standard or met the criteria for an extension, from considering the types of estimates and assessments described in section 202, UMRA does not require EPA to prepare a written statement under section 202. Although the establishment of a SIP submission schedule may impose a federal mandate, this mandate would not create costs of $100 million or more, and therefore, no analysis is required under section 202. The requirements in section 205 do not apply because those requirements for rules ''for which a written statement is required under section 202 * * *.''

With regard to the outreach described in UMRA section 204, EPA discussed its proposed action in advance of the proposal with State officials.

Finally, section 203 of UMRA does not apply to today's action because the regulatory requirements finalized today—the SIP submittal schedule—affect only the State of Arizona, which is not a small government under UMRA.

D. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the Administrative Procedures Act (APA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by section 804(2) of the APA as amended.

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 5, 1998. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, Intergovernmental relations, Ozone.

Dated: October 27, 1997.

Harry Seraydarian,

Acting Regional Administrator.

Part 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 81—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

2. Section 81.303 is amended by revising the table for Arizona— Ozone, for the Phoenix Area to read as follows:

§ 81.303 Arizona

* * * * *

ARIZONA-OZONE

Designated area	Designation		Classification	
	Date	Type	Date	Type
Phoenix Area:				
Maricopa County (part)	11/15/90	Nonattainment	12/8/97	Serious.
The Urban Planning Area of the Maricopa Association of Governments is bounded as follows:				
1.Commencing at a point which is at the intersection of the eastern line of Range 7 East, Gila and Salt River Baseline and Meridian, and the southern line of Township 2 South, said point is the southeastern corner of the Maricopa Association of Governments Urban Planning Area, which is the point of beginning;				
2. Thence, proceed northerly along the eastern line of Range 7 East which is the common boundary between Maricopa and Pinal Counties, as described in Arizona Revised Statute Section 11–109, to a point where the eastern line of Range 7 East intersects the northern line of Township 1 North, said point is also the intersection of the Maricopa County Line and the Tonto National Forest Boundary, as established by Executive Order 869 dated July 1, 1908, as amended and showed on the U.S. Forest Service 1969 Planimetric Maps;				
3. Thence, westerly along the northern line of Township 1 North to approximately the southwest corner of the southeast quarter of Section 35, Township 2 North, Range 7 East, said point being the boundary of the Tonto National Forest and Usery Mountain Semi-Regional Park;				
4. Thence, northerly along the Tonto National Forest Boundary, which is generally the western line of the east half of Sections 26 and 35 of Township 2 North, Range 7 East, to a point which is where the quarter section line intersects with the northern line of Section 26, Township 2 North, Range 7 East, said point also being the northeast corner of the Usery Mountain Semi-Regional Park;				
5. Thence, westerly along the Tonto National Forest Boundary, which is generally the south line of Section 19, 20, 21 and 22 and the southern line of the west half of Section 23, Township 2 North, Range 7 East, to a point which is the southwest corner of Section 19, Township 2 North, Range 7 East;				
6. Thence, northerly along the Tonto National Forest Boundary to a point where the Tonto National Forest Boundary intersects with the eastern boundary of the Salt River Indian Reservation, generally described as the center line of the Salt River Channel;				
7. Thence, northeasterly and northerly along the common boundary of the Tonto National Forest and the Salt River Indian Reservation to a point which is the northeast corner of the Salt River Indian Reservation and the southeast corner of the Fort McDowell Indian Reservation, as shown on the plat dated July 22, 1902, and recorded with the U.S. Government on June 15, 1902;				

ARIZONA-OZONE—Continued

Designated area	Designation		Classification	
	Date	Type	Date	Type
8. Thence, northeasterly along the common boundary between the Tonto National Forest and the Fort McDowell Indian Reservation to a point which is the northeast corner of the Fort McDowell Indian Reservation;				
9. Thence, southwesterly along the northern boundary of the Fort McDowell Indian Reservation, which line is a common boundary with the Tonto National Forest, to a point where the boundary intersects with the eastern line of Section 12, Township 4 North, Range 6 East;				
10. Thence, northerly along the eastern line of Range 6 East to a point where the eastern line of Range 6 East intersects with the southern line of Township 5 North, said line is the boundary between the Tonto National Forest and the east boundary of McDowell Mountain Regional Park;				
11. Thence, westerly along the southern line of Township 5 North to a point where the southern line intersects with the eastern line of Range 5 East which line is the boundary of Tonto National Forest and the north boundary of McDowell Mountain Regional Park;				
12. Thence, northerly along the eastern line of Range 5 East to a point where the eastern line of Range 5 East intersects with the northern line of Township 5 North, which line is the boundary of the Tonto National Forest;				
13. Thence, westerly along the northern line of Township 5 North to a point where the northern line of Township 5 North intersects with the easterly line of Range 4 East, said line is the boundary of Tonto National Forest;				
14. Thence, northerly along the eastern line of Range 4 East to a point where the eastern line of Range 4 East intersects with the northern line of Township 6 North, which line is the boundary of the Tonto National Forest;				
15. Thence, westerly along the northern line of Township 6 North to a point of intersection with the Maricopa-Yavapai County line, which is generally described in Arizona Revised Statute Section 11–109 as the center line of the Aqua Fria River (Also the north end of Lake Pleasant);				
16. Thence, southwesterly and southerly along the Maricopa-Yavapai County line to a point which is described by Arizona Revised Statute Section 11–109 as being on the center line of the Aqua Fria River, two miles southerly and below the mouth of Humbug Creek;				
17. Thence, southerly along the center line of Aqua Fria River to the intersection of the center line of the Aqua Fria River and the center line of Beardsley Canal, said point is generally in the northeast quarter of Section 17, Township 5 North, Range 1 East, as shown on the U.S. Geological Survey's Baldy Mountain, Arizona Quadrangle Map, 7.5 Minute series (Topographic), dated 1964;				
18. Thence, southwesterly and southerly along the center line of Beardsley Canal to a point which is the center line of Beardsley Canal where it intersects with the center line of Indian School Road;				

ARIZONA-OZONE—Continued

Designated area	Designation		Classification	
	Date	Type	Date	Type
19. Thence, westerly along the center line of West Indian School Road to a point where the center line of West Indian School Road intersects with the center line of North Jackrabbit Trail; 20. Thence, southerly along the center line of Jackrabbit Trail approximately nine and three-quarter miles to a point where the center line of Jackrabbit Trail intersects with the Gila River, said point is generally on the north-south quarter section line of Section 8, Township 1 South, Range 2 West; 21. Thence, northeasterly and easterly up the Gila River to a point where the Gila River intersects with the northern extension of the western boundary of Estrella Mountain Regional Park, which point is generally the quarter corner of the northern line of Section 31, Township 1 North, Range 1 West; 22. Thence, southerly along the extension of the western boundary and along the western boundary of Estrella Mountain Regional Park to a point where the southern extension of the western boundary of Estrella Mountain Regional Park intersects with the southern line of Township 1 South; 23. Thence, easterly along the southern line of Township 1 South to a point where the south line of Township 1 South intersects with the western line of Range 1 East, which line is generally the southern boundary of Estrella Mountain Regional Park; 24. Thence, southerly along the western line of Range 1 East to the southwest corner of Section 18, Township 2 South, Range 1 East, said line is the western boundary of the Gila River Indian Reservation; 25. Thence, easterly along the southern boundary of the Gila River Indian Reservation which is the southern line of Sections 13, 14, 15, 16, 17, and 18, Township 2 South, Range 1 East, to the boundary between Maricopa and Pinal Counties as described in Arizona Revised Statues Section 11–109 and 11–113, which is the eastern line of Range 1 East; 26. Thence, northerly along the eastern boundary of Range 1 East, which is the common boundary between Maricopa and Pinal Counties, to a point where the eastern line of Range 1 East intersects the Gila River; 27. Thence, southerly up the Gila River to a point where the Gila River intersects with the southern line of Township 2 South; and 28. Thence, easterly along the southern line of Township 2 South to the point of beginning which is a point where the southern line of Township 2 South intersects with the eastern line Range 7 East				

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