

# ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 51

[EPA-HQ-OAR-2009-0897; FRL-9909-28-OAR]

RIN 2060-AQ07

### Withdrawal of the Prior Determination or Presumption That Compliance With the CAIR or the NO<sub>x</sub> SIP Call Constitutes RACT or RACM for the 1997 8-Hour Ozone and 1997 Fine Particle NAAQS

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

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is proposing to withdraw any prior determination or presumption, for the 1997 8-hour ozone national ambient air quality standard (NAAQS) and the 1997 fine particle (PM<sub>2.5</sub>) NAAQS, that compliance with the Clean Air Interstate Rule (CAIR) or the NO<sub>x</sub> SIP Call automatically constitutes reasonably available control technology (RACT) or reasonably available control measures (RACM) for oxides of nitrogen (NO<sub>x</sub>) or sulfur dioxide (SO<sub>2</sub>) emissions from electric generating unit (EGU) sources participating in these regional cap-and-trade programs.

**DATES:** *Comments.* Comments must be received on or before July 9, 2014. *Public Hearings.* If anyone contacts us requesting a public hearing on or before June 24, 2014, we will hold a public hearing. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period and the public hearing.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2009-0897, by one of the following methods:

- *www.regulations.gov.* Follow the online instructions for submitting comments. Attention Docket ID No. EPA-HQ-OAR-2009-0897.
- *Email:* [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov). Attention Docket ID No. EPA-HQ-OAR-2009-0897.
- *Fax:* (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2009-0897.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No.

EPA-HQ-OAR-2009-0897, U.S. Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please include a total of two copies.

- *Hand Delivery:* U.S. Environmental Protection Agency, William Jefferson Clinton West Building (Air Docket), 1301 Constitution Avenue NW., Room 3334, Washington, DC 20004, Attention Docket ID No. EPA-HQ-OAR-2009-0897. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions.* Direct your comments to Docket ID No. EPA-HQ-OAR-2009-0897. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or email. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at [www.epa.gov/epahome/dockets.htm](http://www.epa.gov/epahome/dockets.htm).

*Docket.* All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov)

index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kristin Riha, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mailcode C539-01, Research Triangle Park, NC 27711, telephone: (919) 541-2031; fax number: (919) 541-5315; email address: [riha.kristin@epa.gov](mailto:riha.kristin@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

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

Entities potentially affected by this action include states (typically state air pollution control agencies) and, in some cases, local governments that are responsible for air quality management and planning. In particular, states with areas designated nonattainment for the 1997 8-hour ozone NAAQS and/or the 1997 PM<sub>2.5</sub> NAAQS and that are located within the geographic areas covered by the NO<sub>x</sub> SIP Call<sup>1</sup> and/or the CAIR<sup>2</sup> may be affected by this action. EGUs located in such geographic regions may also be affected by any new RACT or RACM reviews that may result from final rulemaking on this action. These sources are in the following groups:

<sup>1</sup> See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Final Rule, 63 FR 57356 (October 27, 1998).

<sup>2</sup> See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule, 70 FR 25162 (May 12, 2005).

Industry group	SIC <sup>a</sup>	NAICS <sup>b</sup>
Electric Services .....	492	221111, 221112, 221113, 221119, 221121, 221122.

<sup>a</sup> Standard Industrial Classification.

<sup>b</sup> North American Industry Classification System.

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

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

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

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

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

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

*D. What information should I know about a possible public hearing?*

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long at (919) 541-0641 before 5 p.m. on June 24, 2014. If requested, further details concerning a public hearing for this proposed rule will be published in a separate **Federal Register** notice. For updates and additional information on a public hearing, please check the EPA's Web site for this rulemaking at <http://www.epa.gov/airquality/ozonepollution/actions.html>.

*E. How is this notice organized?*

The information presented in this notice is organized as follows:

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**II. Background**

*A. CAA Requirements and the Definitions of RACT and RACM*

The Clean Air Act (CAA) requires the EPA to designate areas as either attainment, nonattainment, or unclassifiable for each NAAQS. States have primary responsibility for implementing the NAAQS within their borders, and each state must develop a state implementation plan (SIP) that contains adequate provisions for attainment and maintenance of the NAAQS. The SIPs developed by states must meet the applicable statutory requirements. For areas designated nonattainment, Part D of the CAA requires that SIPs must include certain control measures. Subpart 1 of Part D contains generally applicable requirements for all nonattainment areas. Subpart 2 and Subpart 4 of Part D contain additional requirements applicable to certain ozone and particulate matter (PM, including PM<sub>2.5</sub>) nonattainment areas, respectively.

Among the general statutory requirements for all nonattainment areas is the requirement in section 172(c)(1) that SIPs: “provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology).” Ozone nonattainment areas that are subject to the requirements of Subpart 2 must meet more specific RACT requirements in accordance with section 182(b)(2)(C). States located within the Ozone Transport Region (OTR) have additional requirements to impose RACT on sources statewide, rather than only in nonattainment areas, in accordance with section 184.

The EPA refers to the requirement for “reasonably available control measures” as RACM, and refers to the subset of RACM in the parenthetical for “reasonably available control technology” as RACT. RACT and RACT measures apply broadly to a range of source categories located in designated nonattainment areas, including large stationary sources such as EGUs. The EPA has historically interpreted RACT

to mean the lowest emissions limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.<sup>3</sup>

RACT requirements are specifically intended to impose emission controls for purposes of attainment and maintenance of the NAAQS within a specific nonattainment area. The EPA has interpreted the terms RACT and RACM for purposes of Subpart 1 requirements as being the level of emissions control that is necessary to provide for expeditious attainment of the NAAQS within a nonattainment area. Courts have upheld this interpretation of the statute with respect to nonattainment SIPs.<sup>4</sup>

In contrast to nonattainment plan requirements, section 110(a)(2)(D)(i) requires each state's SIP to contain provisions that will prevent emissions from sources in the state from having certain prohibited impacts on the air quality of other states, via interstate transport. In particular, section 110(a)(2)(D)(i)(I) requires that a state's SIP must contain provisions to prevent emissions in amounts that would "contribute significantly to nonattainment in, or interfere with maintenance by, any other state" with respect to a NAAQS. The EPA has initiated several regulatory programs pursuant to section 110(a)(2)(D)(i)(I) to address interstate transport of emissions that have such prohibited impacts on attainment of the ozone and PM<sub>2.5</sub> NAAQS on a regional basis.

#### B. The NO<sub>x</sub> SIP Call

In October 1998, the EPA published a rule under section 110(a)(2)(D)(i) of the CAA, commonly referred to as the "NO<sub>x</sub> SIP Call." This rule was intended to reduce NO<sub>x</sub> emissions (a precursor for ozone formation) from sources that significantly contribute to nonattainment or interfere with maintenance of the ozone NAAQS in one or more downwind states. To implement these reductions, the NO<sub>x</sub> SIP Call required 22 states and the District of Columbia to submit SIP revisions prohibiting those NO<sub>x</sub> emissions that the EPA determined to be adversely impacting downwind air quality problems. The NO<sub>x</sub> SIP Call

provided a regional emissions cap-and-trade program as one mechanism for states to meet their interstate transport requirements under section 110(a)(2)(D)(i). Through this mechanism, affected sources could meet emissions reductions requirements either by installing NO<sub>x</sub> emissions controls or by purchasing allowances from other sources located within the geographic region covered by the NO<sub>x</sub> SIP Call.

#### C. The CAIR

In May 2005, the EPA published another rule under section 110(a)(2)(D)(i) of the CAA, referred to as the "Clean Air Interstate Rule" (or the CAIR). The CAIR required reductions of NO<sub>x</sub> and/or SO<sub>2</sub> emissions across 28 states and the District of Columbia needed to eliminate significant contribution to nonattainment, or interference with maintenance of, the 1997 8-hour ozone NAAQS and/or the 1997 PM<sub>2.5</sub> NAAQS in one or more downwind states.<sup>5</sup> Similar to the NO<sub>x</sub> SIP Call, the EPA provided a regional emissions cap-and-trade mechanism as one means for upwind states to meet the interstate transport requirements of section 110(a)(2)(D)(i). By this mechanism, affected sources could meet their emission reduction requirements either by installing controls for NO<sub>x</sub> and/or SO<sub>2</sub> emissions, or by purchasing allowances from other sources located in the geographic region covered by the CAIR. On April 28, 2006 (71 FR 25328), the EPA also promulgated Federal Implementation Plans (FIPs) for all jurisdictions covered by the CAIR to address the section 110(a)(2)(D)(i) requirements in the event that states were unable to make a SIP submission containing state measures necessary to alleviate interstate transport.

A number of parties filed petitions for review in 2008 to challenge the CAIR on various grounds. As a result of this litigation, the United States Court of Appeals for the District of Columbia Circuit (the Court) remanded the CAIR to the EPA, but later decided not to vacate the rule.<sup>6</sup> In the process of remanding the CAIR, however, the Court identified serious concerns with the EPA's reading of the statute and analytical approach, including such core issues as the agency's method of evaluating significant contribution to nonattainment and interference with maintenance of the NAAQS. In response to the remand of the CAIR, the EPA

finalized another rule, the "Cross-State Air Pollution Rule" (CSAPR) on July 6, 2011 (published in the **Federal Register** on August 8, 2011).<sup>7</sup> This rule was then vacated by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) on August 21, 2012.<sup>8</sup> In its opinion vacating the CSAPR, the D.C. Circuit instructed the EPA to continue administering the CAIR pending promulgation of a valid replacement. The United States Supreme Court subsequently agreed to review the decision of the D.C. Circuit and issued a decision on April 29, 2014, that reversed the judgment of the D.C. Circuit and remanded the case for further proceedings. At this time, CSAPR remains stayed and CAIR remains in place.

Both the NO<sub>x</sub> SIP Call and the CAIR were intended and designed to eliminate interstate transport of pollutants that have impacts on attainment and maintenance of the ozone and/or PM<sub>2.5</sub> NAAQS in downwind areas. Thus, they provide significant emissions reductions that assist downwind areas with attainment or maintenance of the NAAQS, and allow downwind states to develop SIPs in reliance on regional emissions reductions. However, the EPA did not intend that either the NO<sub>x</sub> SIP Call or the CAIR would completely obviate the potential need for additional local pollution controls in downwind nonattainment areas, nor did the EPA intend either action to override the statutory requirements for SIPs for nonattainment areas.<sup>9</sup>

In order to help states address the specific statutory requirement for SIPs for nonattainment areas for the 1997 8-hour ozone NAAQS and 1997 PM<sub>2.5</sub> NAAQS, the EPA promulgated both regulations and guidance applicable to each NAAQS in separate implementation rules. Within those actions, the EPA addressed questions concerning the intersection of the requirements for regional control strategies and the requirements for local control strategies to reduce interstate transport in individual nonattainment

<sup>3</sup> See Memorandum from Roger Strelow titled, "Guidance for Determining Acceptability of SIP Regulations in Non-Attainment Areas." (December 9, 1976.) See also "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498 (April 16, 1992).

<sup>4</sup> See *NRDC v. EPA*, 571 F.3d 1245, at 1252–53 (D.C. Cir. 2009).

<sup>5</sup> NO<sub>x</sub> is a precursor for ozone formation, while both NO<sub>x</sub> and SO<sub>2</sub> are precursors for PM<sub>2.5</sub> formation.

<sup>6</sup> See *North Carolina v. EPA*, 531 F.3d 896; modified by 550 F.3d 1176 (D.C. Cir. 2008).

<sup>7</sup> See "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, Final Rule," 76 FR 48208 (August 8, 2011).

<sup>8</sup> See *EME Homer City Generation L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), cert. granted 133 S. Ct. 2857 (2013).

<sup>9</sup> See the CAIR, 70 FR 25184 (discussing the need for both regional and local emission reductions to bring all areas into attainment); See also Clean Air Fine Particle Implementation Rule, 72 FR 20587 (discussing the need for regional and national emission reduction programs in conjunction with local controls in SIPs for nonattainment areas to bring all areas into attainment).

areas needed for local attainment purposes. In particular, the EPA focused on the issue of whether, or to what extent, compliance by EGUs with the requirements of the NO<sub>x</sub> SIP Call and/or the CAIR could also be construed as compliance with the RACT requirements for local nonattainment SIPs for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS. The EPA's approach to this issue for each NAAQS is described in more detail later.

#### *D. The Phase 2 Ozone Implementation Rule*

On November 29, 2005 (70 FR 71612), the EPA published an ozone implementation rule to address nonattainment SIP requirements for the 1997 8-hour ozone NAAQS (the Phase 2 Ozone Implementation Rule). The Phase 2 Ozone Implementation Rule addressed various statutory requirements, including the requirement for RACT-level controls for sources located within nonattainment areas generally, and controls for NO<sub>x</sub> emissions from EGUs in particular. After explaining its analysis of the issue, the EPA indicated its determination that the regional NO<sub>x</sub> emissions reductions that result from either the NO<sub>x</sub> SIP Call or the CAIR would meet the NO<sub>x</sub> RACT requirement for EGUs located in states included within the respective NO<sub>x</sub> SIP Call or CAIR geographic regions. Thus, the EPA concluded that: “[t]he State need not perform a NO<sub>x</sub> RACT analysis for sources subject to the State's emission cap-and-trade program where the cap-and-trade program has been adopted by the State and approved by the EPA as meeting the NO<sub>x</sub> SIP Call requirements or, in States achieving the CAIR reductions solely from electric generating units (EGUs), the CAIR NO<sub>x</sub> requirements.”<sup>10</sup>

In January 2006, Earthjustice, on behalf of the Natural Resources Defense Council (NRDC), filed a petition for reconsideration of the Phase 2 Ozone Implementation Rule, objecting to the EPA's determination that, in certain circumstances, compliance with the requirements of the CAIR would constitute RACT for NO<sub>x</sub> emissions for EGUs located in states within the CAIR region.<sup>11</sup> The petition raised objections to an alleged failure to seek public comment on the determination and to the agency's interpretation of the CAA to allow a regional emissions reduction program to constitute RACT for sources

located within nonattainment areas, as well as other related issues. The EPA granted the petition for reconsideration of the Phase 2 Ozone Implementation Rule and subsequently conducted a Supplemental Technical Analysis to assess whether compliance with the CAIR could satisfy the NO<sub>x</sub> RACT requirement for EGUs in certain geographic areas.<sup>12</sup> A proposed rule, which presented this analysis and solicited comments regarding the reconsideration of whether the CAIR would constitute RACT for NO<sub>x</sub> emissions for EGUs located in states within the CAIR region, was published in December 2006. The EPA did not reconsider or request comments on its prior determination that the NO<sub>x</sub> SIP Call constitutes RACT for those sources covered by the NO<sub>x</sub> SIP Call.

The EPA then published a final notice of reconsideration on June 8, 2007 (72 FR 31727), reflecting the agency's additional evaluation of whether compliance with the CAIR could constitute RACT for NO<sub>x</sub> emissions for certain EGUs. In that action, the EPA modified its conclusion regarding when compliance with the CAIR may satisfy NO<sub>x</sub> RACT requirements for EGUs in areas within the CAIR region. The EPA reaffirmed its determination that, in many ozone nonattainment areas, compliance with the CAIR would satisfy NO<sub>x</sub> RACT requirements for EGUs in such areas.<sup>13</sup> However, the EPA stated that this determination would only apply to specific areas for which the EPA's Supplemental Technical Analysis showed that the CAIR was projected to achieve equal or greater NO<sub>x</sub> emissions reductions than application of source-by-source application of RACT to the EGUs within the nonattainment area. Even in those nonattainment areas where the EPA did not make a formal determination, however, the EPA also established a separate presumption that compliance with the CAIR, in certain circumstances, could satisfy NO<sub>x</sub> RACT requirements for EGUs in any area

within the CAIR region.<sup>14</sup> The EPA thus announced that states could rely initially on this presumption, even in areas where the agency had made no formal determination, assuming certain conditions. Finally, the EPA reiterated in the final notice of reconsideration that EGU sources complying with the requirements of the NO<sub>x</sub> SIP Call would also be considered to have met their ozone NO<sub>x</sub> RACT obligations, assuming certain conditions.<sup>15</sup>

In addition to the Supplemental Technical Analysis, the EPA provided various legal and policy bases for its determinations and presumptions in the final notice of reconsideration of the Phase 2 Ozone Implementation Rule. For example, the EPA argued that its interpretation of section 172(c) to allow RACT to include consideration of regionwide emissions reductions, rather than nonattainment area specific reductions only, was permissible because of the use of the term “reasonable” as part of the definition of RACT.<sup>16</sup> As a policy matter, the EPA also argued that emissions reductions that result from regional scale programs like the CAIR often “will achieve a more effective and economically efficient air quality improvement in nonattainment areas than application of source-by-source RACT.”<sup>17</sup>

In November 2008, the U.S. Court of Appeals for the D.C. Circuit heard oral argument concerning multiple petitions for judicial review of the EPA's Phase 2 Ozone Implementation Rule and the Notice of Reconsideration. Among other issues, the petitioners (including NRDC) challenged the EPA's determination that compliance with the NO<sub>x</sub> SIP Call and/or the CAIR could satisfy NO<sub>x</sub> RACT requirements for EGUs in ozone nonattainment areas, and the EPA's specific determinations for some areas and general presumption for other areas, that compliance with the CAIR could satisfy NO<sub>x</sub> RACT for EGUs in ozone nonattainment areas. In view of its decision in *North Carolina v. EPA*, in which the Court had previously remanded the CAIR and in response to the parties' joint suggestion to the Court that any further litigation of CAIR-related issues be held in abeyance given the *North Carolina* decision, the Court deferred consideration of the litigants' challenges to the Phase 2 Ozone Implementation Rule and Reconsideration Notice insofar as they related to the CAIR program.

<sup>10</sup> See Phase 2 Ozone Implementation Rule, 70 FR 71617.

<sup>11</sup> See “Petition for Reconsideration,” filed by David Baron, Earthjustice, on behalf of NRDC (January 30, 2006). A copy of the petition is located in the docket for this action.

<sup>12</sup> See “Technical Support Document for Phase 2 of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Notice of Reconsideration; NO<sub>x</sub> RACT for EGUs in CAIR States—Supplemental Technical Analysis,” December 2006. (Docket ID no. EPA-HQ-OAR-2003-0079, item number EPA-HQ-OAR-2003-0079-1044.2) (Supplemental Technical Analysis).

<sup>13</sup> Specifically, the EPA determined that compliance with the CAIR would meet the NO<sub>x</sub> RACT requirements for ozone nonattainment areas in sections 172(c)(1) and 182(f), and the statewide NO<sub>x</sub> RACT requirements for SIPs for states located within the Ozone Transport Region pursuant to sections 184(b) and 182(f). See Phase 2 Ozone Implementation Rule—Notice of Reconsideration, 72 FR 31730.

<sup>14</sup> See Phase 2 Ozone Implementation Rule—Notice of Reconsideration, 72 FR 31730.

<sup>15</sup> Id. 72 FR 31731.

<sup>16</sup> Id. 72 FR 31730.

<sup>17</sup> Id.

As a result of this litigation, the Court decided that the provisions in the Phase 2 Ozone Implementation Rule indicating that a state need not perform (or submit) a NO<sub>x</sub> RACT analysis for EGU sources subject to a cap-and-trade program that meets the requirements of the NO<sub>x</sub> SIP Call are inconsistent with the statutory requirements of section 172(c)(1).<sup>18</sup> The Court specifically held that the Phase 2 Ozone Implementation Rule allowing use of the NO<sub>x</sub> SIP call to constitute RACT without any locally applicable analysis regarding the equivalence of NO<sub>x</sub> SIP Call and RACT reductions: “is inconsistent with the Clean Air Act . . . in allowing participation in a regional cap-and-trade program to satisfy an area-specific statutory mandate.” The Court emphasized that: “the RACT requirement calls for reductions in emissions from sources in the area; reductions from sources outside the nonattainment area do not satisfy the requirement . . . Accordingly, participation in the NO<sub>x</sub> SIP call would constitute RACT only if participation entailed at least RACT-level reductions in emissions from sources within the nonattainment area.”

The Court rejected the EPA’s arguments that a regional emissions reductions program like the NO<sub>x</sub> SIP Call would result in greater emissions reductions in nonattainment areas as unsupported by any adequate technical analysis.<sup>19</sup> The Court likewise rejected the EPA’s argument that regionwide emissions reductions would collectively achieve better emissions reductions because this argument did not comport with the explicit “in the area” language of section 172(c)(1).<sup>20</sup> With respect to the EPA’s argument that the statute is ambiguous as to whether each individual source within a nonattainment area must install RACT, the Court concluded that even if that were correct, the EPA had failed to evaluate the impact of the NO<sub>x</sub> SIP Call on the air quality within specific nonattainment areas, and thus the EPA “has failed to establish that NO<sub>x</sub> SIP Call compliance can be equated to RACT compliance.”<sup>21</sup> The Court disagreed with the EPA’s theory that section 172(c)(6), which authorizes auctions as a permissible form of control measure, could allow reliance on a regional cap-and-trade type program in lieu of the RACT requirement for

sources “in the area.”<sup>22</sup> Finally, the Court rejected the argument that the EPA’s interpretation should be upheld because a state could still elect to define RACT to require greater emissions reductions from EGUs in a given area for local attainment needs, concluding that: “[a] state’s decision to require stricter controls cannot eliminate the defect in the EPA’s approach—failing to implement the requirement of at least RACT-level reductions in emissions from sources in the nonattainment area.”<sup>23</sup>

Based on the foregoing reasoning, the Court remanded the provision of the Phase 2 Ozone Implementation Rule determining that the NO<sub>x</sub> SIP Call satisfies NO<sub>x</sub> RACT for EGUs because the EPA had failed to show that compliance with the NO<sub>x</sub> SIP Call would achieve at least RACT-level reductions in each nonattainment area. In deciding not to vacate the provision, however, the Court noted that a determination that RACT was satisfied by compliance with the NO<sub>x</sub> SIP Call might be permissible for an area if accompanied by a technical analysis demonstrating that the program in fact “results in greater emissions reductions in a nonattainment area than would be achieved if RACT-level controls were installed in that area.”<sup>24</sup> In other words, the Court rejected the notion that a regional cap-and-trade program intended to eliminate interstate transport of emissions consistent with section 110(a)(2)(D)(i) could automatically constitute RACT-level control as required by section 172(c)(1), but held open the possibility that such a program might in fact result in the same, or higher, level of emissions reductions in individual nonattainment areas.

Significantly, the Court did not address at all the EPA’s comparable determinations and presumption that compliance with the CAIR would constitute NO<sub>x</sub> RACT for EGUs in ozone nonattainment areas under certain circumstances. As mentioned earlier, the Court (in response to the joint suggestion of the parties) deferred consideration of the CAIR-related challenges to the EPA’s determinations and presumption because at the time of this decision, the Court had already remanded the CAIR.<sup>25</sup> However, on August 30, 2013, the U.S. Court of Appeals for the D.C. Circuit granted the EPA’s request for voluntary remand of the CAIR determination and vacatur of

the CAIR presumption. In granting the agency’s request, the Court said that “[v]acatur of the presumption is appropriate in light of the *NRDC v. EPA* . . .”<sup>26</sup>

#### E. The PM<sub>2.5</sub> Implementation Rule

On April 25, 2007 (72 FR 20586), the EPA published the “Clean Air Fine Particle Implementation Rule” to address nonattainment SIP requirements for the 1997 PM<sub>2.5</sub> NAAQS (the PM<sub>2.5</sub> Implementation Rule).<sup>27</sup> That action provided regulations and additional guidance in the preamble for state plans required to implement the 1997 PM<sub>2.5</sub> NAAQS. The PM<sub>2.5</sub> Implementation Rule provided a framework for developing SIP submissions for nonattainment areas based on the Subpart 1 requirements for nonattainment areas found in section 172 of the CAA.<sup>28</sup>

With respect to the requirements of section 172 (c)(1), the PM<sub>2.5</sub> Implementation Rule used a combined RACT/RACM approach, where a state’s obligation to implement RACT was considered as part of the overall RACM obligation for EGU sources. RACT/RACM was defined in the Rule as the set of emission reduction measures needed to attain the standards as expeditiously as practicable in the nonattainment area at issue. Through guidance in the preamble to the final PM<sub>2.5</sub> Implementation Rule, the EPA also established a presumption that compliance with the CAIR would satisfy RACT/RACM requirements for SO<sub>2</sub> and NO<sub>x</sub> emissions from EGUs in states participating in the CAIR cap-and-trade program for such emissions.<sup>29</sup>

For SO<sub>2</sub>, the EPA’s guidance recommended that states that obtained all SO<sub>2</sub> reductions required by the CAIR from EGUs could presume that such sources located within a designated nonattainment area were meeting SO<sub>2</sub> RACT/RACM requirements because of

<sup>26</sup> *NRDC v. EPA*, No. 09–1198 (D.C. Cir.) (order of August 30, 2013).

<sup>27</sup> The PM<sub>2.5</sub> Implementation Rule is now codified at 40 CFR Section 51.1000–1012. Section 51.1010 addresses the RACT and RACM requirements.

<sup>28</sup> The EPA notes that on January 4, 2013, the PM<sub>2.5</sub> Implementation Rule was remanded by the U.S. Court of Appeals for the D.C. Circuit. The Court ruled that the EPA should have issued the implementation rule under the Clean Air Act requirements of Subpart 4. (See *NRDC v. EPA*, 706 F.3d 428 (D.C. Cir. 2013). This proposal addresses only one aspect of the remanded PM<sub>2.5</sub> Implementation Rule, i.e., the presumption that CAIR is RACT/RACM for purposes of attainment plans for the 1997 PM<sub>2.5</sub> NAAQS. This issue is not directly related to the Court’s decision in *NRDC v. EPA*. The EPA intends to respond to the Court’s remand in that decision in another rulemaking that will address implementation requirements for the PM<sub>2.5</sub> NAAQS more broadly.

<sup>29</sup> See PM<sub>2.5</sub> Implementation Rule, 72 FR 20623.

<sup>18</sup> See *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

<sup>19</sup> Id. 571 F.3d at 1257.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id. 571 F.3d at 1258.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id. at 1250.

overall regional SO<sub>2</sub> reductions from EGUs. The guidance indicated that this presumption could be used without conducting a technical analysis comparing the CAIR and RACT/RACM reductions for the specific nonattainment area. For NO<sub>x</sub>, the EPA similarly recommended that so long as the EGU sources in the state were required to operate NO<sub>x</sub> emissions controls on a year-round basis to comply with the CAIR, then that state could presume that those EGUs were meeting NO<sub>x</sub> RACT/RACM requirements because of overall regional NO<sub>x</sub> reductions from EGUs. The EPA made no decision with respect to what might constitute RACT/RACM level controls for direct PM<sub>2.5</sub> emissions from EGUs in relation to the CAIR because the CAIR only addressed the NO<sub>x</sub> and SO<sub>2</sub> emissions from such sources.

Based on this presumption that compliance with the CAIR would constitute RACT/RACM level controls for SO<sub>2</sub> and NO<sub>x</sub> emissions from EGUs within the CAIR region, the EPA concluded that: "States may define RACT/RACM as the CAIR level of control on the collective group of sources in the region rather than impose a specific level of control on individual sources."<sup>30</sup> In other words, the EPA indicated that states could presume that EGUs located within a given nonattainment area were meeting the RACT/RACM requirement, based solely upon a regional program that imposed controls on sources both within and outside designated nonattainment areas. The EPA acknowledged that reliance on the presumption could result in situations where specific EGUs located within nonattainment areas might elect to comply with the CAIR through the acquisition of allowances, rather than the reduction of emissions. Although the EPA articulated a series of policy and technical reasons for the appropriateness of considering a regional control program like the CAIR to be a preferable approach, the agency also acknowledged that a state might "conclude that establishing additional 'beyond CAIR' emissions control requirements on specific sources in nonattainment areas is warranted to provide for attainment as expeditiously as practicable."<sup>31</sup> These policy and technical arguments are very similar to those made by the EPA in connection with challenges to the Phase 2 Ozone Implementation Rule, and rejected by the Court decision discussed in further detail previously in this notice.

In June 2007, the EPA received a petition for reconsideration filed by Earthjustice on behalf of several petitioners (including NRDC) that raised several objections to the PM<sub>2.5</sub> Implementation Rule.<sup>32</sup> One of the principle objections raised by the petition is that under the CAA, compliance with a regional trading program, such as the CAIR, should not be presumed to satisfy RACT/RACM requirements for individual EGU sources located in nonattainment areas. The petitioner argued that the effect of the "CAIR–RACT presumption" was to waive the CAA RACT requirements for individual EGU sources located within PM<sub>2.5</sub> nonattainment areas. The petition also asserts that the presumption and its accompanying rationale were added to the rule after the close of the public comment period, and that the EPA therefore failed to seek public comment on the final rule's determination that the CAIR presumptively satisfies SO<sub>2</sub> and NO<sub>x</sub> RACT requirements for EGUs located in nonattainment areas. The petition further maintains that the EPA lacks authority to establish a presumption on what satisfies RACT in this fashion, and that the EPA's conclusion that the CAIR can be presumed to satisfy RACT is arbitrary and capricious because it lacked a factual basis. Lastly, the petition also maintained that even if an initial presumption that compliance with the CAIR constituted compliance with the RACT requirements of section 172(c)(1) were otherwise permissible, the final rule would be arbitrary and unlawful because it failed to explain if or how the presumption can be rebutted.

Significantly, Earthjustice filed the petition for reconsideration of the PM<sub>2.5</sub> Implementation Rule well before the Court in the *NRDC v. EPA* case addressed the comparable issue with respect to the NO<sub>x</sub> SIP Call in the context of the Phase 2 Ozone Implementation Rule. Nevertheless, the petitioner made essentially the same points as the Court in the *NRDC v. EPA* case that to allow compliance with a regional cap-and-trade program to constitute RACT for sources located within a nonattainment area automatically, or pursuant to an unsupported presumption, would be contrary to the explicit requirements of section 172(c)(1). Moreover, the EPA notes that multiple parties have indicated that they intend to challenge

the PM<sub>2.5</sub> Implementation Rule on this same issue through petitions for review currently pending in the Court.

In light of the arguments raised in the petition for reconsideration, and in light of the Court's decision in *NRDC v. EPA*, the EPA decided to grant the petition for reconsideration on this issue and initiate this rulemaking.<sup>33</sup>

#### *F. Impact of the NRDC v. EPA Court Decision on Determinations and Presumptions*

The EPA has reevaluated whether compliance with the NO<sub>x</sub> SIP Call could automatically constitute NO<sub>x</sub> RACT for EGUs in light of the Court's opinion in the *NRDC v. EPA* case. Given the explicit wording of section 172(c)(1) that sources "in the area" must at a minimum adopt RACT controls for that area, the EPA believes that it is no longer appropriate to presume that this requirement is automatically met through the participation of sources in a regional emissions cap-and-trade program. Implicit in a regional cap-and-trade program is that some sources may elect to use allowances in lieu of emissions controls to meet the regional emissions reductions requirements, and that those elections could change from year to year. The EPA believes that it would be inappropriate to pre-judge whether participation in a cap-and-trade program satisfies NO<sub>x</sub> RACT for EGU sources in any given nonattainment area. The EPA further believes that states could rely on a regional emissions cap-and-trade program for purposes of meeting NO<sub>x</sub> RACT requirements if they conduct the appropriate analysis demonstrating that compliance by EGUs participating in this program results in actual emission reductions in the particular nonattainment area that are equal to, or greater than, emission reductions that would result if RACT were applied to each individual EGU source or the EGU source category in the nonattainment area.

Additionally, based on the logic of the *NRDC v. EPA* Court decision, and the concerns raised in the petition for reconsideration on the PM<sub>2.5</sub> Implementation Rule, the EPA believes that it would be inappropriate absent an analysis for the EPA to pre-judge whether regional cap-and-trade programs would constitute RACT or RACM for covered sources in a particular PM<sub>2.5</sub> nonattainment area.

<sup>32</sup> See "Petition for Reconsideration," filed by Paul Cort, Earthjustice, on behalf of the American Lung Association, Medical Advocates for Healthy Air, Natural Resources Defense Council, and the Sierra Club (June 25, 2007). A copy of the petition is in the docket for this action.

<sup>33</sup> See letter dated April 25, 2011, from Lisa P. Jackson to Paul Cort, Earthjustice. A copy of this letter is located in the docket for this action.

<sup>30</sup> Id. at 72 FR 20624.

<sup>31</sup> Id. at 72 FR 20625.

### III. Proposed Action

In this notice, the EPA is proposing to: (1) Withdraw from the Phase 2 Ozone Implementation Rule the determination that compliance with the NO<sub>x</sub> SIP Call satisfies NO<sub>x</sub> RACT for EGUs located in certain ozone nonattainment areas or in states within the OTR; (2) withdraw from the Phase 2 Ozone Implementation Rule the separate determination that compliance with the CAIR satisfies NO<sub>x</sub> RACT for EGUs located in certain ozone nonattainment areas; and (3) withdraw from the PM<sub>2.5</sub> Implementation Rule any presumption that compliance with the CAIR automatically satisfies RACT/RACM requirements for SO<sub>2</sub> and NO<sub>x</sub> emissions from EGUs located in PM<sub>2.5</sub> nonattainment areas.

In general, the EPA supports flexible, common sense approaches that provide the health and environmental protections required under the CAA while maximizing flexibility for states. The EPA also supports maintaining the integrity of regional cap-and-trade programs. Therefore, as a result of this action, states would retain the option of relying on source participation in a regional cap-and-trade program for purposes of meeting the RACT or RACM requirements for the 1997 ozone NAAQS or the 1997 PM<sub>2.5</sub> NAAQS if there is a technical analysis that supports the conclusion that participation in the cap-and-trade program is equivalent. More information about this flexibility is included below.

The EPA has reevaluated whether compliance with the NO<sub>x</sub> SIP Call could constitute NO<sub>x</sub> RACT for EGUs in light of the Court's opinion in the *NRDC v. EPA* case. Given the explicit wording of section 172(c)(1) that sources "in the area" must at a minimum adopt RACT controls for that area, the EPA believes that it is no longer appropriate to determine that this requirement is automatically addressed for certain sources based upon the participation of those sources in a regional cap-and-trade program. After reconsideration, the EPA believes that it would be consistent with the statutory provision, with the overall structure of the CAA with respect to nonattainment plans, and with the overarching objective to provide for expeditious attainment of the NAAQS in each nonattainment area, that states should evaluate the EGUs located within designated nonattainment areas for any necessary controls. As noted above, the *NRDC v. EPA* decision left open the possibility that an area-specific analysis might establish that compliance with a regional cap-and-trade program like the

NO<sub>x</sub> SIP Call could simultaneously result in factual compliance with the RACT requirement for sources located within nonattainment areas, and EPA's elimination of the prior determination will in no way prevent a state from conducting and relying on such an analysis. States have the option of conducting a technical analysis for the specific nonattainment area considering the emissions controls required by a regional cap-and-trade program, and demonstrating that compliance by EGUs participating in the program results in actual emission reductions in the particular nonattainment area that are equal to or greater than the emission reductions that would result if RACT were applied to each individual EGU source or the EGU source category within the nonattainment area.

We note that subsequent to the *NRDC v. EPA* decision, the Court granted the EPA's request for a remand of a similar determination, previously made in the Phase 2 Ozone Implementation Rule, that compliance with the CAIR could, in some circumstances, automatically satisfy RACT requirements for certain sources. Following the *North Carolina v. EPA* decision that remanded the CAIR, the Court had deferred consideration of whether compliance with the CAIR could automatically satisfy a source's obligation to install RACT for the 1997 ozone NAAQS. Following vacatur of the rule that was to replace the CAIR, however, the EPA decided that it would be appropriate to reconsider this determination also in light of the earlier decision in *NRDC v. EPA*. The EPA believes that the logic of the *NRDC v. EPA* decision extends to any determination that sources subject to a regional trading program such as the CAIR automatically comply with RACT requirements for NO<sub>x</sub>. In other words, the decision establishes that any such determination is permissible if supported by an adequate technical demonstration showing that the trading program would result in equal or greater emission reductions than would be achieved by application of RACT to the relevant sources or source categories.

The EPA does not believe the analysis to support the CAIR determination in the Phase 2 Ozone Implementation Rule provides an adequate technical demonstration. For this reason, the EPA is also proposing to withdraw its conclusion, made in the Phase 2 Ozone Implementation Rule final notice of reconsideration, that the EPA's Supplemental Technical Analysis gives an adequate demonstration that participation in the CAIR is projected to achieve equal or greater annual emissions reductions from EGUs than

source-by-source RACT for certain specific areas.

The EPA is proposing this action because it no longer believes that the assumptions held within the Supplemental Technical Analysis are adequate to make such a showing. After reconsideration, the EPA now concludes that the analysis's across-the-board assumptions regarding what constitutes RACT for all sources in all nonattainment areas were inadequate, and did not consider whether more advanced control technologies, such as post-combustion controls (*e.g.*, selective catalytic reduction or selective non-catalytic reduction), might at some time be technically and economically feasible for specific sources in some areas.

The EPA is consequently proposing to amend Section 51.912 to state explicitly that for each individual major source, or major source category, in a nonattainment area, states must conduct a RACT analysis for purposes of 1997 8-hour ozone NAAQS SIPs.

As part of the PM<sub>2.5</sub> Implementation Rule, the EPA included a presumption that EGU participation in the CAIR constituted RACT or RACM for SO<sub>2</sub> for EGU sources in a particular nonattainment area. The EPA did not include a supporting analysis for this presumption as part of the Rule. The EPA believes that the logic of the *NRDC v. EPA* decision extends to any presumption that sources subject to a regional emissions cap-and-trade program such as the CAIR automatically comply with RACT or RACM requirements for NO<sub>x</sub> or SO<sub>2</sub>.

As a result of this action, states should not rely merely on the fact that sources are complying with a regional cap-and-trade program as a basis for RACT or RACM-level emissions controls for the 1997 8-hour ozone NAAQS or the 1997 PM<sub>2.5</sub> NAAQS. States must comply with the provisions of the CAA, which require an evaluation of emissions sources, such as EGUs, located within designated nonattainment areas for potential RACT or RACM controls, and imposition of such controls as may be necessary for expeditious attainment of the NAAQS within the area.

However, states retain the option of conducting a technical analysis for the specific nonattainment area considering the emissions controls required by a regional cap-and-trade program, and demonstrating that compliance by EGUs participating in the cap-and-trade program results in actual emission reductions in the particular nonattainment area that are equal to or greater than the emission reductions that would result if RACT or RACM

were applied to an individual EGU source or the EGU source category within the nonattainment area. States could conduct this analysis for the EGUs in the nonattainment area, either individually or in the aggregate.

The EPA anticipates that in many areas, such an evaluation will likely indicate that EGUs within the nonattainment area at issue are already adequately controlled for NO<sub>x</sub> and SO<sub>2</sub> emissions, whether by virtue of the NO<sub>x</sub> SIP Call, the controls required by the CAIR, or by other means. However, based on the logic of the *NRDC v. EPA* Court decision, and the concerns raised in the petition for reconsideration of the PM<sub>2.5</sub> Implementation Rule, the EPA believes that it would be inappropriate to pre-judge that outcome prior to state development of locally applicable demonstrations showing equivalent reductions.

The EPA is soliciting comments on the withdrawal of the determinations and presumption as explained previously in this notice. Additionally, the EPA does not believe that the withdrawal of the determinations and presumption has a practical impact on state planning and emissions control efforts, either currently or prospectively, for the 1997 ozone and PM<sub>2.5</sub> NAAQS. The EPA has worked closely with those states who previously relied on the determinations or presumption, and in those instances either the states or EPA (through SIP approval notices) have conducted, or are currently conducting, the appropriate analysis to demonstrate that EGUs in each nonattainment area have met the RACT or RACM requirements. The EPA is not aware of any states that have raised concerns about the need to conduct a new RACT or RACM analysis as a result of the policy changes proposed in this rulemaking. The EPA is soliciting comments on our assessment that the withdrawal of the determinations and presumption does not have a practical impact on states.

#### IV. Statutory and Executive Order Reviews

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it raises novel policy issues. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any

changes made in response to OMB recommendations have been documented in the docket for this action.

##### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action merely interprets the statutory requirements that apply to states in preparing their SIPs.

##### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (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 this proposed rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards. (See 13 CFR 121.); (2) A 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 this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not directly impose any requirements on small entities. Rather, this rule interprets the obligations of the CAA for states to submit implementation plans in order to attain the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

##### *D. Unfunded Mandates Reform Act*

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, 2 U.S.C. 1531–1538) for state, local, or tribal governments or the private sector. The action imposes no enforceable duty on

any state, local, or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action merely interprets the statutory requirements that apply to states in preparing their SIPs.

##### *E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action does not impose any new mandates on state or local governments. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA is specifically soliciting comments on this proposed rule from state and local officials.

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

This rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The rule does not have a substantial direct effect on one or more Indian tribes, since no tribe has to develop a Tribal Implementation Plan under this regulation. Furthermore, this rule does not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. The CAA and the Tribal Air Rule establish the relationship of the federal government and tribes in developing plans to attain the NAAQS, and this rule does nothing to modify that relationship. This rule does not have tribal implications. Thus, Executive Order 13175 does not apply to this action. However, the EPA did conduct outreach to tribes on a regularly scheduled conference call with the National Tribal Air Association on March 27, 2014, where tribes were provided a brief overview of the proposed rule. The EPA specifically solicits additional comment on this proposed action from tribal officials.

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

The EPA interprets E.O. 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the E.O. has the potential to influence the regulation. This action is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This proposal is designed to help implement the already-established ozone and PM<sub>2.5</sub> NAAQS, which were both promulgated in 1997 to protect the health and welfare of individuals, including children, who are susceptible to the adverse effects of exposure to unhealthy levels of ozone and PM<sub>2.5</sub>.

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

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy because it does not establish requirements that directly affect the general public and the public and private sectors, but, rather interprets the statutory requirements that apply to states in preparing their SIPs. The SIPs themselves will likely establish requirements that directly affect the general public, and the public and private sectors.

*I. National Technology Transfer and Advancement Act*

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

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

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because if it has any effect on the level of protection provided to human health or the environment, the effect will be to increase the level of protection by resulting in more stringent emission controls on EGUs in affected nonattainment areas.

**Statutory Authority**

The statutory authority for this action is provided by 42 U.S.C. 7501, 7502, 7511a, 7513a, 7513b and 7601.

**List of Subjects in 40 CFR Part 51**

Environmental protection, Administrative practice and procedure, Air pollution control, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 29, 2014.

**Gina McCarthy**,  
Administrator.

For reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

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

- 1. The authority citation for part 51 continues to read as follows:

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

- 2. Section 51.912 is amended by adding paragraph (a)(4) to read as follows:

**§ 51.912 What requirements apply for reasonably available control technology (RACT) and reasonably available control measures (RACM) under the 8-hour NAAQS?**

(a) \* \* \*

(4) An individual RACT determination must be made for each major source or major source category meeting the applicable major source size within a nonattainment area.

\* \* \* \* \*

[FR Doc. 2014–13415 Filed 6–6–14; 8:45 am]

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[Docket Nos. FWS–HQ–ES–2014–0012; FWS–HQ–ES–2014–0013; FWS–HQ–ES–2014–0014; 450 003 0115]

**Endangered and Threatened Wildlife and Plants; 90-Day Finding on Petitions To List Two Tortoises as Endangered or Threatened and a Sloth as Endangered**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition findings and initiation of status reviews.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce 90-day findings on two petitions to list two species (Flat-tailed tortoise (*Pyxis planicauda*) and Spider tortoise (*Pyxis arachnoides*)) as endangered or threatened and one petition to list one species (Pygmy three-toed sloth (*Bradypus pygmaeus*)) as endangered under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that these petitions present substantial scientific or commercial information indicating that the petitioned actions may be warranted. Therefore, with the publication of this document, we are initiating a review of the status of these species to determine if the petitioned actions are warranted. To assure that the best scientific and commercial data informs the status review and, if warranted, the subsequent listing determinations, and to provide an opportunity for all interested parties to provide information for consideration for the status assessment, we are requesting information regarding these species (see Request for Information, below). Based on the status reviews, we will issue 12-month findings on the petitions, which will address whether