

in any Office manual of practice in a particular case.

(iii) Consultation with another Office employee.

(iv) Familiarity with:

(A) Preexisting works that are similar.

(B) Registered works, works sought to be registered, a copyright application, registration, denial of registration, or request for reconsideration.

(C) Copyright law or other law.

(D) The actions of another Office employee.

(v) Reliance on particular facts or arguments.

(2) To inquire into the manner in and extent to which the employee considered or studied material in performing the function.

(3) To inquire into the bases, reasons, mental processes, analyses, or conclusions of that Office employee in performing the function.

(4) In exceptional circumstances, the General Counsel may waive these limitations pursuant to § 205.3 of this part.

Dated: February 17, 2004.

**David O. Carson,**

*General Counsel.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[CA 112-RECLAS, FRL-7625-7]

### Clean Air Act Reclassification, San Joaquin Valley Nonattainment Area; California; Ozone

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to grant a request by the State of California to voluntarily reclassify under the Clean Air Act ("CAA" or "the Act") the San Joaquin Valley Ozone Nonattainment Area ("San Joaquin Valley Air Basin" or "SJVAB") from a severe to an extreme 1-hour ozone nonattainment area. EPA is also proposing that the State submit, by no later than October 1, 2004, an extreme ozone nonattainment area plan addressing the requirements of CAA section 182(e) and that the State submit revised Title V and New Source Review rules that reflect the extreme area requirements no later than 12 months from the effective date of the final reclassification.

Final reclassification of the SJVAB will stop the sanctions and federal

implementation plan clocks that were started under CAA section 179(a) upon EPA's 2002 finding that the State failed to submit the statutorily required severe area attainment demonstration for the area.

Several Indian tribes have reservations located within the boundaries of the SJVAB. EPA implements relevant reclassification provisions of the CAA in these reservations and is also proposing that these areas be reclassified from a severe to an extreme 1-hour ozone nonattainment area. Thus, this action could potentially affect these tribes. Accordingly, EPA has notified the affected tribal leaders of our proposed action and is inviting consultation with interested tribes.

EPA will accept comments on all aspects of this proposed rule. However, as discussed in section II. below, EPA believes that the CAA compels the Agency to grant a voluntary reclassification when requested by a State.

**DATES:** Comments on this proposed action must be received by March 24, 2004.

**ADDRESSES:** Send comments to David Wampler, Planning Office (AIR-2), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901 or e-mail to [wampler.david@epa.gov](mailto:wampler.david@epa.gov), or submit comments at <http://www.regulations.gov>.

You can inspect and copy the docket for this action at our Region IX office during normal business hours (*see ADDRESSES* above). Due to increased security, we suggest that you call at least 24 hours prior to visiting the Regional Office so that we can make arrangements to have someone meet you. The **Federal Register** notice is also available as an electronic file on EPA's Region 9 Web Page at <http://www.epa.gov/region09/air>.

**FOR FURTHER INFORMATION CONTACT:** David Wampler, Planning Office (AIR-2), Air Division, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972-3975.

**SUPPLEMENTARY INFORMATION:** Throughout this document, the words "we," "us," or "our" mean U.S. EPA.

### I. Background

The San Joaquin Valley Ozone Nonattainment Area ("San Joaquin Valley Air Basin" or "SJVAB") consists of the following counties in California's central valley: San Joaquin, the western

portion of Kern,<sup>1</sup> Fresno, Kings, Madera, Merced, Stanislaus and Tulare.

Upon the date of enactment of the 1990 Clean Air Act Amendments, the SJVAB was classified as a serious ozone nonattainment area for the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"). (56 FR 56694, November 6, 1991 and CAA section 181(a)(1)).

In December 2001, EPA reclassified the SJVAB from a serious to a severe nonattainment area for the 1-hour ozone NAAQS. (66 FR 56476, November 8, 2001). This reclassification resulted from the failure of the SJVAB to attain the standard by November 15, 1999 as required for serious nonattainment areas. CAA section 181(a) and (b)(2). In our final action, we explained that the State of California would need to submit by May 31, 2002 a state implementation plan ("SIP") revision addressing the severe area planning requirements including, but not limited to, a demonstration of attainment of the severe 1-hour ozone standard by November 15, 2005, and a rate of progress ("ROP") demonstration of creditable ozone precursor emission reductions of at least 3 percent per year until attainment. (66 FR 56476, 56481, November 8, 2001).

On October 2, 2002 (67 FR 61784; effective September 18, 2002), EPA found that the State failed to submit by May 31, 2002 the following required severe area SIP revisions for the SJVAB: (1) A demonstration of attainment of the 1-hour ozone NAAQS by no later than 2005; (2) a ROP demonstration as described above; (3) an emission control rule for lime kilns; (4) an emissions inventory; and (5) contingency measures. In our final action, we stated that, pursuant to CAA section 179(a), if the State did not submit the required plan revisions, the offset sanction identified in CAA section 179(b) would be applied in the affected area followed by the highway sanction 6 months after the offset sanction was imposed. We also stated that the sanction clock would stop upon a finding by EPA that the State has made complete<sup>2</sup> submittals addressing these severe area requirements. Finally, we explained that, under CAA section 110(c), EPA must promulgate a federal implementation plan ("FIP") no later than two years after the finding under section 179(a) unless the Agency takes

<sup>1</sup> See 66 FR 56476 (November 8, 2001) (boundary change for the San Joaquin Valley establishing the eastern portion of Kern County as its own nonattainment area).

<sup>2</sup> The requirements regarding completeness of SIP submittals are found in CAA section 110(k)(1) and 40 CFR part 51, appendix V.

final action to approve the required SIP revisions within that time.

The State has submitted all of the required severe area plan requirements except for a demonstration of attainment of the ozone standard by 2005 and EPA has found these submittals to be complete.<sup>3</sup>

## II. Reclassification of the SJVAB to Extreme Ozone Nonattainment

By letter dated January 9, 2004, The State requested that EPA reclassify the SJVAB from a severe to an extreme nonattainment area for the 1-hour ozone standard.<sup>4</sup> The State made the request because they and the San Joaquin Valley Unified Air Pollution Control District ("District") believe that sufficient emission reductions to demonstrate attainment of the 1-hour ozone NAAQS by 2005 in the SJVAB have not yet been defined.

Section 181(b)(3) of the CAA provides for "voluntary reclassification" and states that "\* \* \* [t]he Administrator shall grant the request of any State to reclassify a nonattainment area in that State \* \* \* to a higher classification" and that "\* \* \* [t]he Administrator shall publish a notice in the **Federal Register** of any such request and of action by the Administrator granting the request." Emphasis supplied.

EPA intends to take final action granting the State's request for a voluntary reclassification. We believe that the plain language of section 181(b)(3) mandates that we approve such a request and, as such, gives the Agency no discretion to deny it.<sup>5</sup> We are, however, considering the relevance of the State's request to reclassification of Indian Country areas located within the SJVAB. Typically, states have no jurisdiction under the Clean Air Act in Indian country, and California has not been approved by EPA to administer any CAA programs in Indian country. CAA actions in Indian country would thus generally be taken either by EPA,

or by a tribe itself under an EPA-approved program. Irrespective of that issue, however, we believe that, as a matter of EPA's federal implementation of relevant provisions of the CAA over Indian country within the SJVAB, these areas of Indian country should similarly be reclassified to extreme. Ground-level ozone continues to be a pervasive pollution problem in areas, such as the SJVAB, throughout the United States. Ozone and precursor pollutants that cause ozone can be transported into an area from pollution sources found many miles away. Therefore EPA recommends that boundaries for nonattainment areas be drawn to encompass both areas with direct sources of the pollution problem as well as nearby areas in the same airshed. Classifications of nonattainment areas are coterminous with their boundaries. EPA believes that this approach best ensures public health protection from the adverse effects of ozone pollution. Therefore, it is generally counterproductive from an air quality and planning perspective to segregate land areas located well within the boundaries of a nonattainment area, such as the seven Indian reservations in the SJVAB. Moreover, violations of the one-hour ozone standard, which are measured and modeled throughout the nonattainment area, as well as shared meteorologic conditions, would dictate the same result. EPA does, however, recognize the significance of Indian country boundaries within the nonattainment area and, as described below, will consult with the affected Tribes regarding the need for reclassification of their Indian country.

## III. Consequences of Reclassification

### A. Sanctions and FIP

EPA believes that when a nonattainment area is reclassified, the CAA attainment requirements of the new classification supersede those of the previous classification; therefore the former attainment requirements are moot. In other words, once a nonattainment area has been reclassified and, as a result, has a new statutory attainment deadline, the deadline applicable to the previous classification no longer has any logical, practical or legal significance. *See, e.g.*, 61 FR 54972, 54974 (October 23, 1996). Consequently, when the SJVAB is reclassified to extreme,<sup>6</sup> the failure of the State to submit a severe area ozone attainment demonstration will no longer have any significance. Therefore, upon

the effective date of the reclassification, the sanction and FIP clocks that were started as a result of the Agency's October 2, 2002 finding that the State failed to submit the severe area attainment demonstration will stop.

### B. Required Plan, New Source Review and Title V Permit Program Revisions

As discussed below, the extreme classification, once effective, will require revisions to the SJVAB portion of California's SIP. We propose that the State submit, by no later than October 1, 2004, an extreme ozone nonattainment area plan for the SJVAB. In addition, we propose that the State submit revised New Source Review rules and Title V program revisions for the areas within the District's jurisdiction within 12 months from the effective date of the final reclassification.

1. *Extreme Area Plan Requirements.* Under 182(e), extreme area plans are required to meet all the requirements for severe area plans<sup>7</sup> plus the requirements for extreme areas, including, but not limited to: (1) A 10 ton per year major source definition; (2) additional reasonably available control technology (RACT) rules for sources subject to the new lower major source cutoff; (3) a new source review offset requirement of at least 1.5 to 1; (4) a rate of progress demonstration of emission reductions of ozone precursors of at least 3 percent per year from 2005 until the attainment date;<sup>8</sup> (5) clean fuels for boilers as required for at CAA section 182(e)(3); and contingency measures.

The extreme area plan for the SJVAB must also contain adopted regulations and/or enforceable commitments to adopt and implement control measures in regulatory form by specified dates, sufficient to make the required rate of progress and to attain the 1-hour ozone NAAQS as expeditiously as practicable but no later than November 15, 2010. The new attainment demonstration should be based on the best information available. While we realize that modeling based on Central California Ozone Study (CCOS)<sup>9</sup> data may not be

<sup>7</sup> The CAA specifically excludes certain severe area requirements from the extreme area requirements, *e.g.*, section 182(c)(6), (7) and (8).

<sup>8</sup> The CAA does not allow the state to use the provision at CAA 182(c)(2)(B)(ii) that would allow the state to demonstrate to the satisfaction of the Administrator that less than 3 percent reduction per year is approvable if the plan reflecting such lesser amount includes all measures that can feasibly be implemented in the area.

<sup>9</sup> The Central California Ozone Study is a large field measurement program conducted during the summer of 2000 to provide a more comprehensive and liable data base for future ozone analyses.

<sup>3</sup> Rule 4313—Lime Kilns was submitted to EPA on June 5, 2003. EPA found the submittal complete on July 18, 2003 and approved the rule on September 4, 2003 (68 FR 52510). The District's Amended 2002 and 2005 Ozone Rate of Progress Plan for San Joaquin Valley, with its associated emissions inventory and contingency measures, was submitted to EPA on April 10, 2003. EPA found the submittal complete on September 4, 2003.

<sup>4</sup> Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board, to Mr. Wayne Nastri, Regional Administrator, EPA Region IX, dated January 9, 2004.

<sup>5</sup> Compare CAA reclassifications based on the failure of a nonattainment area to attain a NAAQS. *See, e.g.*, section 181(b)(2)(A): "Within 6 months following the applicable attainment date \* \* \* the Administrator shall determine, based on the area's design value \* \* \* whether the area attained the standard by that date." Emphasis supplied.

<sup>6</sup> Under section 181(b)(3) of the Act, the attainment deadline for a severe area voluntarily reclassified to extreme is as expeditiously as practicable but no later than November 15, 2010.

completed in time for use in the extreme area plan, the State should, to the extent possible, use available new data.

In anticipation of the reclassification of the SJVAB, work on the extreme area plan has been ongoing since 2002 but has not yet been completed because of a delay in the photochemical modeling. The District now projects completion of the plan in May 2004, and Board adoption in the summer of 2004.<sup>10</sup> Given the current status of the plan development, EPA believes that a submittal deadline of October 1, 2004 is reasonable.

**2. NSR and Title V Program Revisions.** In addition to the required plan revisions discussed above, the District must revise its New Source Review (NSR) rule to reflect the extreme area definitions for major new sources and major modifications and to increase the offset ratio for these sources from the ratio for severe areas in CAA section 182(d)(2) to 1.5 to 1. CAA section 182(e)(1) and (2). The District must also make any changes in its Title V operating permits program necessary to reflect the change in the threshold from 25 tpy for severe areas to 10 tpy for extreme areas. We are proposing that the State submit any required revisions to these programs by no later than 12 months from the effective date of the final reclassification.

#### IV. Effect of EPA's Implementation of the New 8-hour Ozone NAAQS on Today's Proposed Action

On June 2, 2003, EPA published in the **Federal Register** a proposed rule that outlined two distinct options on how EPA would implement the revised 8-hour ozone air quality standard issued by EPA in 1997, including the transition from implementation of the 1-hour standard to implementation of the 8-hour standard. (68 FR 32802). EPA issued draft regulatory text on August 6 (68 FR 46536), and on October 21 (68 FR 60054) invited comments on alternative classification options. At this time, EPA is in the process of evaluating comments we received on the proposed implementation rule—and subsequent notices—and we expect to finalize the rule soon. At the same time, we are working with the states and tribes to finalize the 8-hour designations by April 15, 2004. After the implementation rule is final and the 8-hour area designations are set, we will be able to fully evaluate how the transition to the revised 8-hour standard will impact the existing

requirements to implement the 1-hour ozone standard.

#### V. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. EPA has determined that the voluntary reclassification would not result in any of the effects identified in Executive Order 12866 sec. 3(f). Voluntary reclassifications under 181(b)(3) of the CAA are based solely upon requests by the State and EPA is required under the CAA to grant them. These actions 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, reclassification cannot be said to impose a materially adverse impact on State, local, or tribal governments or communities. For the aforementioned reasons, this action is also not subject to Executive Order 32111, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). These actions do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) for the following reasons: EPA is required to grant requests by States for voluntary reclassifications and such reclassifications in and of themselves do not impose any federal intergovernmental mandate. Several Indian tribes have reservations located within the boundaries of the SJVAB. EPA is responsible for the implementation of federal Clean Air Act programs in Indian country, including reclassifications. EPA has notified the affected tribal officials and will be consulting with all interested tribes, as provided for by Executive Order 13175 (65 FR 67249, November 9, 2000). EPA will ensure that each tribe is contacted and given the opportunity to enter into consultation on a government-to-government basis. Because EPA is required to grant requests by States for voluntary reclassifications and such reclassifications in and of themselves do not impose any federal intergovernmental mandate, this rule

also does not have Federalism implications as it does 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 (64 FR 43255, August 10, 1999). This action is also not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. As discussed above, a voluntary reclassification under section 181(b)(3) of the CAA is based solely on the request of a State and EPA is required to grant such a request. In this context, it would thus be inconsistent with applicable law for EPA, when it grants a State's request for a voluntary reclassification to use voluntary consensus standards. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, National parks, Nitrogen oxides, Ozone, Volatile organic compounds, Wilderness areas.

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

Dated: February 13, 2004.

**Wayne Nastri,**

*Regional Administrator, Region IX.*

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## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 67

[Docket No. FEMA–P–7641]

#### Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities

Information regarding the CCOS is available on-line at <http://www.arb.ca.gov/airways/ccos/ccos.htm>.

<sup>10</sup> See the District's Draft Status Report for the January 6 and 7, 2004 Workshop and related documents.