



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA-R09-OAR-2012-0936; FRL-9767-4]

**Designation of Areas for Air Quality Planning Purposes;
California; Morongo Band of Mission Indians**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to correct an error in a previous rulemaking that revised the boundaries between nonattainment areas in Southern California established under the Clean Air Act for the purposes of addressing the revoked national ambient air quality standard for one-hour ozone. EPA is also proposing to revise the boundaries of certain Southern California air quality planning areas to designate the Indian country of the Morongo Band of Mission Indians, California (Morongo Reservation) as a separate air quality planning area for the one-hour and 1997 eight-hour ozone standards.

DATES: Written comments must be received on or before [Insert date 30 days from the date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R09-OAR-2012-0936, by one of the following methods:

1. <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
2. E-mail: israels.ken@epa.gov.
3. Fax: 415-947-3579.
4. Mail or deliver: Ken Israels (Mailcode AIR-8), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Instructions: All comments will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through the <http://www.regulations.gov> or e-mail; <http://www.regulations.gov> is an anonymous access system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at <http://www.regulations.gov> and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed directly below.

FOR FURTHER INFORMATION CONTACT: Ken Israels, Grants and Program Integration Office (AIR-8), U.S. Environmental Protection Agency, Region IX, (415) 947-4102, israels.ken@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms "we," "us," "our," and "Agency" refer to EPA.

Table of Contents

- I. Background
 - A. Banning Pass and the Morongo Band of Mission Indians
 - B. National Ambient Air Quality Standards
 - C. Area Designations and Classifications
- II. Proposed Action
 - A. Legal Authority
 - B. Proposed Correction to 2003 Action

C. Proposed Boundary Redesignation of the Morongo Reservation
as a Separate Nonattainment Area for the One-Hour Ozone and
Eight-Hour Ozone Standards

III. Summary of Proposed Action and Request for Public Comment

IV. Statutory and Executive Order Reviews

I. Background

A. *Banning Pass and the Morongo Band of Mission Indians*

Connecting the South Coast Air Basin to the Coachella Valley, the Banning Pass (also known as the San Gorgonio Pass) is one of the three major routes by which air pollutants are transported out of the Los Angeles metropolitan area (which lies within the South Coast Air Basin). Banning Pass runs in an east-west direction for about 15 miles and is about 5 miles wide. The pass starts west of Beaumont, California at an elevation of about 2,200 feet and reaches a maximum elevation of around 2,600 feet in the city of Beaumont, then drops to an elevation of near 1,400 feet between Cabazon and White Water. The San Bernardino Mountains are on the north side of the pass and the San Jacinto Mountains are on the south side. The San Bernardino Mountains reach a maximum elevation of approximately 11,500 feet at the top of San Gorgonio Mountain and the San Jacinto Mountains reach a maximum elevation of approximately 10,800 feet at Mt. San Jacinto.

The Morongo Band of Mission Indians, California ("Morongo Tribe" or "Tribe") is a federally-recognized Indian tribe whose Indian country¹ ("Morongo Reservation" or "Reservation") lies within the Banning Pass. The Morongo Reservation covers approximately 35,000 acres and is home to approximately 1,500 full-time residents.² The Morongo Reservation is rural, and most of the current land use is residential or agricultural. The Morongo Reservation also hosts a hotel and casino, among other enterprises.

The eastern edge of the Morongo Reservation abuts the current boundary between the South Coast Air Basin and Southeast Desert/Coachella Valley air planning areas. Most of the Morongo Reservation is located north of Interstate 10, just east of the City of Banning, but some of the Reservation is located south of Interstate 10 as well.

B. National Ambient Air Quality Standards

¹ "Indian country" as defined at 18 U.S.C. 1151 refers to: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." The Morongo Tribe is the only Tribe that has Indian country in the portion of the Banning Pass at issue in this rulemaking.

² See EPA's 2008 eight-hour ozone standard designations Technical Support Document (TSD) found at http://www.epa.gov/groundlevelozone/designations/2008standards/documents/R9_C A_TSD_FINAL.pdf

The Clean Air Act (CAA or "Act") requires EPA to establish a National Ambient Air Quality Standard (NAAQS or "standard") for pollutants that "may reasonably be anticipated to endanger public health and welfare" and to develop a primary and secondary standard for each NAAQS. The primary standard is designed to protect human health with an adequate margin of safety and the secondary standard is designed to protect public welfare and the environment. EPA has set NAAQS for six common air pollutants, referred to as criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter, and lead.

In 1979, EPA promulgated the first ozone³ standard of 0.12 parts per million (ppm), averaged over a one-hour period ("one-hour ozone standard"), to replace an earlier photochemical oxidant standard. In 1997, EPA revised the ozone standard to 0.08 ppm, eight-hour average ("1997 eight-hour ozone standard"), and then, in 2008, lowered the eight-hour ozone standard to 0.075 ppm ("2008 ozone standard"). Today's proposed action relates only to the designations and classifications for the one-hour ozone and 1997 eight-hour ozone standards, discussed

³ Ground-level ozone is a gas that is formed by the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_x) in the atmosphere in the presence of sunlight. These precursor emissions are emitted by many types of pollution sources, including power plants and industrial emissions sources, on-road and off-road motor vehicles and engines, and smaller sources, collectively referred to as area sources.

below, but relies on EPA's analysis and rationale for the Agency's recent designations for the 2008 ozone standard.

C. Area Designations and Classifications

Areas of the country were originally designated as attainment, nonattainment, or unclassifiable following enactment of the 1977 Amendments to the CAA. See 43 FR 8962 (March 3, 1978). These designations were generally based on monitored air quality values compared to the applicable standard. Under the 1990 Amendments to the CAA, ozone nonattainment areas were further classified as "Marginal," "Moderate," "Serious," "Severe" or "Extreme" depending upon the severity of the ozone problem. Area designations and classifications are codified in 40 CFR part 81; area designations and classifications for California are codified at 40 CFR 81.305.

EPA has historically designated areas in Southern California by referencing air basins, including the South Coast Air Basin⁴ and the Southeast Desert Air Basin. More recently, the EPA has recognized California's division of the former Southeast Desert Air Basin into the Mojave Desert Air Basin and the Salton Sea Air Basin. The relevant portion of the Southeast Desert Air Basin (and Salton Sea Air Basin) for the purposes of this

⁴ The South Coast includes Orange County, the southwestern two-thirds of Los Angeles County, southwestern San Bernardino County, and western Riverside County (see 40 CFR 81.305).

proposed action is Coachella Valley, which covers roughly the middle third of Riverside County, i.e., east of the South Coast Air Basin and west of the Little San Bernardino Mountains.

Historically, the Morongo Reservation was included in the Coachella Valley portion of the Southeast Desert Air Basin and was designated accordingly for the various standards. In 2002, the State of California requested that EPA revise the boundaries of the South Coast Air Basin and the Southeast Desert Air Basin to remove the Banning Pass area from the Coachella Valley portion of the Southeast Desert Air Basin and include it in the South Coast Air Basin. See 68 FR 57820 (October 7, 2003).⁵ Specifically, California sought to establish a new boundary approximately 18 miles east of the then-established boundary between the South Coast Air Basin and the Coachella Valley portion of the Southeast Desert Air Basin. The boundary between the two basins was to be moved from the range line common to

⁵ California also requested two other specific boundary changes: (1) to move the eastern boundary of the Coachella Valley portion of the Southeast Desert ozone nonattainment area further east to match the boundaries of the Coachella Valley PM-10 nonattainment area, and (2) to correct an error in the eastern boundary of the San Bernardino County portion of the South Coast Air Basin with respect to carbon monoxide. Unlike the boundary change to enlarge the South Coast to include the entire Banning Pass area, the change in the eastern boundary of the Coachella Valley portion of the Southeast Desert ozone nonattainment area did not affect Indian country and would not be affected by today's proposed action. The approval of the State's request to correct the carbon monoxide boundary simply fixed a typographical error and thereby removed from the South Coast carbon monoxide nonattainment area a portion of San Bernardino County that neither EPA nor California intended to be included. See 68 FR 48848, at 48850 (August 15, 2003). EPA's correction of the carbon monoxide boundary in San Bernardino County would also be unaffected by today's proposed action.

Range 2 West and Range 1 West to the range line common to Range 2 East and Range 3 East (San Bernardino Base and Meridian).⁶ On October 7, 2003, EPA approved California's boundary change request (68 FR 57820).

With respect to the one-hour ozone standard, EPA's 2003 action had the effect of moving the Morongo Reservation from the Coachella Valley portion of the "Southeast Desert Modified AQMA Area" ("Southeast Desert") to the South Coast Air Basin and changing the designations and classifications accordingly. Specifically, EPA's 2003 action had the effect of changing the ozone nonattainment area classification for the Banning Pass area, including the Morongo Reservation, from "Severe-17" to "Extreme".⁷

In 2004, EPA promulgated area designations and classifications for the 1997 eight-hour ozone standard. Among the California areas, EPA designated the "Los Angeles-South

⁶ For a detailed map of the area, please see the technical support document (TSD) for this proposed rulemaking available in the docket for this action, EPA-R09-OAR-2012-0936.

⁷ For carbon monoxide, EPA's action had the effect of changing the designation of the Banning Pass area from "unclassifiable/attainment" to "Serious" nonattainment. With respect to particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers ("PM₁₀"), the action did not change the designation or classification of the Banning Pass because both the South Coast Air Basin and Coachella Valley are "Serious" nonattainment areas for that pollutant. Both the South Coast and Coachella Valley are designated as unclassifiable or attainment for the nitrogen dioxide and sulfur dioxide standards, but, for nitrogen dioxide, the South Coast Air Basin is a former nonattainment area for which a maintenance plan has been approved. See 63 FR 39747 (July 24, 1998). Today's proposed action relates only to the designations and classifications for the one-hour ozone and 1997 eight-hour ozone standards.

Coast Air Basin, CA," the boundary of which coincided with the boundary for the one-hour ozone standard, as amended in 2003 to include the entire Banning Pass, including the Morongo Reservation, as a "Severe-17" nonattainment area. See 69 FR 23858 (April 30, 2004). In EPA's 2004 final rule, the Agency designated "Riverside Co. (Coachella Valley), CA" ("Coachella Valley") as a "Serious" nonattainment area. In 2007, the State of California requested that EPA reclassify the South Coast nonattainment area from "Severe-17" to "Extreme" and the Coachella Valley nonattainment area from "Serious" to "Severe-15" for the 1997 eight-hour ozone standard.

In response to EPA's 2003 boundary change action and California's 2007 reclassification request, the Morongo Tribe requested that EPA create a separate nonattainment area for the Morongo Reservation or, alternatively, move the western boundary of the Coachella Valley area westward to include the Morongo Reservation. See letter from Robert Martin, Chairman, Morongo Band of Mission Indians, to Deborah Jordan, Director, Air Division, EPA Region IX, dated May 29, 2009.

In 2009, in response to California's 2007 reclassification request, EPA proposed that all Indian country in the South Coast be reclassified in keeping with the classification of non-Indian country State lands to "Extreme" for the 1997 eight-hour ozone

standard. See 43 FR 43654 (August 27, 2009). In 2010, EPA took final action granting the request by California to reclassify the South Coast Air Basin from "Severe-17" to "Extreme" for the 1997 eight-hour ozone standard, and to reclassify all Indian country, except that pertaining to the Morongo Tribe and the Pechanga Tribe, in keeping with the reclassification of non-Indian country State lands to "Extreme." With respect to the Morongo Tribe and the Pechanga Tribe, EPA deferred reclassification pending EPA's final decisions on their previously-submitted boundary change requests. See 75 FR 24409 (May 5, 2010). In EPA's 2010 final rule, the Agency also granted the request to reclassify the Coachella Valley nonattainment area to "Severe-15."

Today's proposed action would correct EPA's 2003 action to the extent that the action relates to the designations and classifications of the Morongo Reservation for the one-hour ozone standard and would establish a separate one-hour ozone nonattainment area for the Reservation. Today's proposed action would also grant the Tribe's request to revise the boundary designation and to designate the Morongo Reservation as a

separate nonattainment area for the 1997 eight-hour ozone standard.⁸

Today's proposed action would not affect the current designations and classifications of the Morongo Reservation for any of the other standards. Today's proposed action would also not affect the designations and classifications for any pollutant with respect to State lands.

II. Proposed Action

A. Legal Authority

The relevant statutory provisions for this proposed action are CAA section 110(k)(6), which is EPA's error correction authority, and CAA sections 107(d)(3), 301(a) and 301(d), which are EPA's authority to redesignate Indian country areas under these circumstances.

Section 110(k)(6) of the CAA provides: "Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval,

⁸ If we finalize our proposed action to revise the boundaries of the South Coast to designate the Morongo Reservation as a separate nonattainment area for the 1997 eight-hour ozone standard, EPA will withdraw our proposed rule to reclassify Indian country in the South Coast to "Extreme" for the 1997 eight-hour ozone standard (74 FR 43654, August 27, 2009) to the extent that the 2009 proposed rule relates to the Morongo Reservation.

disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public." We interpret this provision to authorize the Agency to make corrections to a promulgated regulation when it is shown to our satisfaction that (1) we clearly erred in failing to consider or inappropriately considering information made available to EPA at the time of the promulgation, or the information made available at the time of promulgation is subsequently demonstrated to have been clearly inadequate, and (2) other information persuasively supports a change in the regulation. See 57 FR 56762, at 56763 (November 30, 1992).

Sections 107(d)(3)(A)-(C) provide that EPA may initiate the redesignation process "on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate," and "promulgate the redesignation, if any, of the area or portion thereof." CAA section 107(d)(3) does not refer to Indian country, but consistent with EPA's discretionary authority in CAA sections 301(a) and 301(d)(4) to directly administer CAA programs, and protect air quality in Indian country through

federal implementation, EPA is authorized to directly administer sections 107(d)(3)(A)-(C) and redesignate Indian country areas.⁹

B. Proposed Correction to 2003 Action

We have reviewed the materials submitted by the State of California in connection with the State's 2002 request to enlarge the South Coast Air Basin to include the Banning Pass area, thereby removing the area from the Southeast Desert. We have also reviewed EPA's rationale for approving the State's request. On the basis of that review, and for reasons given below, EPA has concluded that while EPA's action to approve California's request was not erroneous with respect to state lands, it was erroneous with respect to the Morongo Reservation and that we have sufficient justification to correct the error at this time.

First, a review of the items listed in EPA's administrative record for EPA's proposed (68 FR 48848, August 15, 2003) and final (68 FR 57820, October 7, 2003) rules approving

⁹ Revisions of designations are referred to as "redesignations." Boundary changes revise an area's designation and, as such, represent one type of redesignation. As a general matter, EPA is no longer acting to redesignate areas with respect to the revoked one-hour ozone standard. However, in this instance, EPA is proposing to revise the designation of an air quality planning area in concert with a proposal to correct a clear error that occurred with respect to Indian country prior to revocation of the one-hour ozone standard. As indicated in this document, EPA believes that correction of this error is justified by the specific jurisdictional context and the on-going regulatory impacts on the Morongo Tribe arising from the error.

California's boundary change request reveals no reference to, or map illustrating the location of, the Morongo Reservation.

Second, from review of the record, it is clear that EPA understood its action as one in which the Agency was taking action on a State request under CAA section 107(d)(3)(D). See, e.g., the proposed rule at 48850 ("... we are proposing to fully approve [the requests] under CAA section 107(d)(3)(D)."). Section 107(d)(3)(D) provides: "The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State." Typically, however, states are not approved to administer programs under the CAA 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 an eligible Indian tribe itself under an EPA-approved program. In this case, the Morongo Tribe has not applied under CAA section 301(d) for treatment-in-a-similar-manner-as-a-state (TAS) for purposes of designations and redesignations under section 107(d) and does not implement any relevant EPA-approved CAA regulatory program, nor has the tribe developed a tribal implementation plan (TIP).¹⁰

¹⁰ In addition, the CAA does not require Indian tribes to develop and seek approval of air programs, and pursuant to our authority in CAA section 301(d), EPA has interpreted relevant CAA requirements for submission of air

In these circumstances, EPA is the appropriate entity to administer relevant CAA programs in Indian country.

Thus, with respect to the Indian country located within an area subject to a State boundary change request, EPA is the appropriate entity to initiate and promulgate the redesignation, and EPA could do so under CAA sections 107(d)(3)(A)-(C) and sections 301(a) and 301(d)(4), as discussed above in subsection II.A ("Legal Authority"). While EPA thus had authority to change the boundary of the South Coast Air Basin with respect to Indian country, it is apparent from the proposed and final rules in 2003 that EPA did not recognize that it was acting under that authority or appropriately consider the effect of the action on Indian country lands. EPA recognized only that the Agency was acting on a State request under section 107(d)(3)(D) and reviewed the request accordingly. As noted previously, states are not approved to administer CAA programs in Indian country.¹¹

If EPA's actions had more explicitly addressed the fact that the State's request affected tribal lands, and also had expressly considered the Tribe's position with respect to the State's request to revise the boundary in relation to Indian

programs as not applying to tribes. See 40 CFR 49.4.

¹¹ EPA is not excluding the possibility that Tribes can agree with State requests in certain circumstances, nor are we suggesting that we would undo actions we took just because we did not explicitly identify Indian country land that was included with the State land.

country, EPA might well have relied upon the same criteria cited in the proposed rule. The criteria, set forth in section 107(d)(3)(A) include "air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate". The evaluation of "planning and control considerations" for Indian country, however, differs from that for State lands. In this instance, with respect to State lands, the South Coast Air Quality Management District (SCAQMD) has planning and permitting responsibility over the entire Banning Pass area, as well as the South Coast, and Coachella Valley, and administers an EPA-approved (nonattainment) New Source Review (NSR) program under which permits may be issued to new or modified stationary sources.

In contrast, EPA currently administers relevant CAA programs on the Morongo Reservation. Until recently, EPA had not established a NSR program applicable to the Reservation. This means that a higher ozone classification, and simultaneous lowering (i.e., more stringent) of NSR major source thresholds, would have presented a greater challenge for new and modified stationary sources at the Morongo Reservation than for similar sources on State lands in the Banning Pass subject to SCAQMD's EPA-approved NSR program. (EPA's NSR rule for Indian country,

including the Morongo Reservation, was published on July 1, 2011 at 76 FR 38748 and took effect on August 30, 2011.)

Moreover, state law and SCAQMD rules restrict the use of emission reduction credits generated under SCAQMD rules by major new or modified sources located within the South Coast Air Basin, but outside the scope of the SCAQMD program. See SCAQMD Rule 1309 ("Emission Reduction Credits"), subsection (h)(3); and California Health & Safety Code section 40709.6 ("Offset by reductions credited to stationary sources located in another district"). Given the few emissions sources on the Morongo Reservation, reliance upon emissions reductions by sources off the Reservation to offset emissions from any major new or modified sources on the Reservation is inevitable and because of the limitations in state law and SCAQMD rules, the availability of such emissions reductions is uncertain.

Therefore, as described above, in the specific circumstances presented here, and based on our review of the record from the 2003 rulemaking, we conclude that EPA erred in including the Morongo Reservation in the 2003 boundary change approval. Because Indian country was subsumed into a larger area for which the State requested a boundary revision, EPA should not have acted solely with respect to the State's request under section 107(d)(3)(D), but should have fulfilled its

responsibilities pursuant to section 107(d)(3)(A)-(C), and sections 301(a) and 301(d) and considered the relevant criteria from the perspective of Indian country.

Furthermore, we recognize that the boundary change has had adverse regulatory impacts on the Morongo Tribe, particularly by lowering the one-hour ozone NSR major source threshold from 25 tons per year to 10 tons per year. This adverse regulatory impact continues to affect the Tribe, even though the one-hour ozone standard was revoked, effective on June 15, 2005 [i.e., one year from the designations for the eight-hour ozone standard - see 40 CFR 50.9(b)].

With respect to the one-hour ozone standard and the related NSR major source thresholds, the Tribe continues to be affected because, in the wake of a decision by the U.S. Court of Appeals for the D.C. Circuit challenging EPA's Phase I Implementation Rule for the eight-hour ozone standard,¹² the NSR requirements that had applied by virtue of the area's classification as of June 15, 2004 continue to apply under anti-backsliding requirements established by EPA for the transition from the one-hour ozone standard to the eight-hour ozone standard. See 77 FR 28424 (May 14, 2012) for information concerning the NSR

¹² *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review).

requirement and the anti-backsliding provisions for the former one-hour ozone standard. Thus, notwithstanding the revocation of the one-hour ozone standard, the applicable major source NSR thresholds for the Morongo Reservation continue to be 10 tons per year, based on the inclusion of the Reservation in the South Coast because the South Coast was classified as "Extreme" for the one-hour ozone standard on June 15, 2004.

In sum, given the on-going effects that flow from our 2003 error, we are persuaded to propose action now to correct the error in our 2003 boundary change action as it relates to the Morongo Reservation.

In considering how to correct the error in our 2003 boundary change action, we have concluded from our review of the administrative record for that rulemaking that EPA did not commit an error with respect to State lands. Our proposed action addresses only the specific regulatory impact on the Morongo Reservation, and otherwise leaves the 2003 action unchanged. Thus, we propose to rescind the 2003 boundary change rule only with respect to the Morongo Reservation for the revoked one-hour ozone standard.

Revocation of the 2003 boundary change rule with respect to the Morongo Reservation would return it to its status before the 2003 boundary change, when the Reservation was included in the

Southeast Desert one-hour ozone nonattainment area. (see section I.C. herein). In this action, however, EPA is taking the additional step of proposing to revise the boundaries of the Southeast Desert to designate the Morongo Reservation as a separate one-hour ozone nonattainment area. If both proposed actions are finalized, the Morongo Reservation would resume the one-hour ozone nonattainment classification it previously shared with the Southeast Desert (i.e., "Severe-17").

We are not proposing to rescind the 2003 action with respect to area designations for any of the other standards, because the Tribe has not faced any significant adverse regulatory impacts from the boundary change with respect to those pollutants. Our proposed action would not affect any area designations or classifications with respect to State lands.

C. Proposed Boundary Redesignation of the Morongo Reservation as a Separate Nonattainment Area for the One-Hour Ozone and 1997 Eight-Hour Ozone Standards

As noted previously, on May 29, 2009, the Morongo Tribe submitted a request to EPA for a boundary change to create a separate ozone nonattainment area, or in the alternative, to move the western boundary of the Coachella Valley nonattainment area westward to include the Morongo Reservation. As noted above, we are authorized to redesignate Indian country areas

under these circumstances under CAA sections 107(d)(3)(A)-(C), 301(a) and 301(d).

Recently, EPA issued a policy (referred to herein as the "Tribal Designation Policy") for establishing separate air quality designations for areas of Indian country.¹³ Where EPA receives a request for a boundary change from a tribe seeking to have its Indian country designated as a separate area, the policy indicates that EPA will make decisions regarding these requests on a case-by-case basis after consultation with the tribe. As a matter of policy, EPA believes that it is important for tribes to submit the following information when requesting a boundary change: a formal request from an authorized tribal official; documentation of Indian country boundaries to which the air quality designation request applies; concurrence with EPA's intent to include the identified tribal lands in the 40 CFR part 81 table should EPA separately designate the area; and a multi-factor analysis to support the request. See Tribal Designation Policy, pages 3 and 4.

The Tribal Designation Policy states that EPA intends to make decisions regarding a tribe's request for a separate air quality designation after all necessary consultation with the

¹³ See memorandum from Stephen D. Page, Director, EPA Office of Air Quality Planning and Standards, to EPA Regional Air Directors, Regions I-X, dated December 20, 2011, titled "Policy for Establishing Separate Air Quality Designations for Areas of Indian Country."

tribe and, as appropriate, with the involvement of other affected entities, and after evaluating whether there is sufficient information to support such a designation. Boundary change requests for a separate air quality designation should include an analysis of a number of factors (referred to as a "multi-factor analysis,") including air quality data, emissions-related data (including source emissions data, traffic and commuting patterns, population density and degree of urbanization), meteorology, geography/topography, and jurisdictional boundaries.¹⁴ EPA believes these factors are appropriate to consider in acting under CAA sections 107(d) (3) (A) - (C), 301(a) and 301(d).

On May 29, 2009, the Chairman of the Morongo Tribe submitted the Tribe's request for a separate ozone nonattainment area that included a multi-factor analysis addressing air quality data, emissions data, meteorology, geography/topography, and jurisdictional boundaries. As such, although submitted prior to release of the Tribal Designation Policy, the Morongo Tribe's request for a boundary change to create a separate ozone nonattainment area, in conjunction with EPA's additional analysis found in the technical support document for this

¹⁴ The Tribal Designation Policy also states that, in addition to information related to the identified factors, tribes may submit any other information that they believe is important for EPA to consider.

proposed action, represents the type of formal, official request and supporting information called for in the policy.¹⁵

EPA recently reviewed the Morongo Tribe's multi-factor analysis in connection with designating areas of the country for the 2008 ozone standard. Upon review of the Tribe's analysis and EPA's own supplemental analysis in light of the Tribal Designation Policy, EPA designated the Morongo Reservation as a separate nonattainment area for the 2008 ozone standard. See 77 FR 30088 (May 21, 2012). We believe that EPA's analysis and recent decision to designate the Morongo Reservation as a separate nonattainment area for the 2008 ozone standard is directly relevant to our consideration of whether to revise the boundaries of existing air quality planning areas to designate the Morongo Reservation as a separate nonattainment area for the one-hour and 1997 eight-hour ozone standards. We recognize that the three standards address the same pollutant, and thus share multi-factor analyses and considerations.¹⁶

EPA is therefore adopting the analysis and rationale previously relied upon by EPA in establishing the Morongo

¹⁵ In addition, EPA has consulted with the tribe several times about this matter.

¹⁶ EPA also notes that in using many of the same factors found in the 2008 ozone designations process, we are using factors that represent the most current information regarding meteorology, air quality, etc. in the area and therefore we believe serve the purposes of being representative for the previously established ozone standards.

nonattainment area for the 2008 ozone standard. Key findings from the 2008 ozone designations decision that we are adopting for this proposed action include:¹⁷

- *Air quality data:* The SCAQMD-run monitor in Banning is located within two miles of the Morongo monitor, and data from SCAQMD's Banning monitor is appropriate for use as a regulatory monitor and is representative of air quality within the Morongo Reservation. Eight-hour ozone concentrations measured at the SCAQMD-run Banning ozone monitor shows continued violations of the 1997 eight-hour ozone standard and, reflecting the transitional nature of the Banning Pass area, contrast with the higher design values of the South Coast Air Basin to the west and lower design values in Southeast Desert to the east;¹⁸
- *Emissions data:* Sources of air pollutants located on or associated with the Morongo Reservation consist of

¹⁷ See the TSD associated with this proposal for our detailed analysis of each of the factors. Our TSD also shows that violations continue for the one-hour standard and that the transitional characteristic observed for the eight-hour ozone data also applies to the one-hour ozone data.

¹⁸ In performing our analysis, EPA relied on data from the following monitoring stations in our air quality system (AQS): Redlands (AQS #06-071-4003), Banning (AQS #06-065-0012), and Palm Springs (AQS #06-065-5001). EPA believes that the Banning monitor, given its proximity, is representative of the Morongo Indian Country's air quality. EPA also notes that, while the Morongo Tribe operates its own monitor, we did not use that data for this action.

stationary sources that generate less than 20 tons per year (tpy) of NO_x and less than 20 tpy of VOC, and motor vehicles for travel associated with the 1,500 residents and visitors to the Morongo Casino Resort. In contrast, ozone precursor emissions from the adjacent Los Angeles-South Coast Air Basin nonattainment area exceed 400,000 tpy of NO_x and over 200,000 tpy of VOC, with a total population of approximately 17 million people.¹⁹ To the east, ozone precursor emissions from the adjacent Riverside County (Coachella Valley, which was originally part of the Southeast Desert Air Basin) nonattainment area exceed 50,000 tpy of NO_x and 28,000 tpy of VOC, with a population of over 2 million people;²⁰

- *Meteorology:* Under most meteorological conditions, air from the coastal plain (i.e., South Coast) to the west is funneled through Banning Pass to the desert area to the east. As a mountain pass area, the

¹⁹ See page 5 of the Morongo portion of the 2008 eight-hour ozone standard TSD found at http://www.epa.gov/groundlevelozone/designations/2008standards/documents/R9_CA_TSD_FINAL.pdf

²⁰ See page 6 of the Morongo portion of the 2008 eight-hour ozone standard TSD found at http://www.epa.gov/groundlevelozone/designations/2008standards/documents/R9_CA_TSD_FINAL.pdf

meteorology is dissimilar from that of either the coastal plain to the west or the desert area to the east. The winds are more frequent and stronger, with a more westerly component, than those in most of the coastal plain, and the temperatures vary more than in most of the coastal plain but not as much as in the desert area to the east.²¹ Thus, in some ways, the Banning Pass is transitional between the coastal and desert areas; in other ways, as a mountain pass, the Banning Pass is simply unlike either area to the west or east;

- *Geography/topography*: The topographical characteristics of the Banning Pass create very different climatic conditions than found in the coastal plain to the west or the desert area to the east, such as persistently strong westerly air flow that is compressed and channeled by the elevated land mass of the Pass itself and the steep mountain peaks to the north and south; and

²¹ Meteorological information for the Morongo Reservation is from *2005-2009 Weather and Air Quality Summary*, prepared by the Morongo Band of Mission Indians, Environmental Protection Department, Tribal Air Program, August 2010.

- *Jurisdictional boundaries:* Although the Morongo Reservation contains stationary and mobile sources of ozone precursors, the magnitude of ozone precursor emissions is very small compared to emissions from the adjacent Los Angeles-South Coast Air Basin and Coachella Valley nonattainment areas. Because the analysis of factors does not conclusively indicate that the sources located on the Morongo Reservation contribute to nonattainment in the surrounding area, EPA believes that consistent with the principles set forth in the Tribal Designation Policy, the jurisdictional boundaries factor is especially important in the decision-making process for designating the Morongo Reservation.

Air quality data, meteorology and topography indicate that the Morongo Reservation experiences transitional conditions characteristic of a mountain pass area through which pollutants are channeled from a highly urbanized metropolitan nonattainment area to the west to the relatively less developed nonattainment area to the east. Considering the three factors of air quality data, meteorology, and topography, EPA could reasonably include the Morongo Reservation in either the South Coast nonattainment area to the west, or the Southeast Desert nonattainment area to

the east, as EPA has done in the past for the one-hour ozone standard and the 1997 eight-hour ozone standard. Alternatively, the Agency could establish a separate nonattainment area for the Morongo Reservation as it did for the 2008 eight-hour ozone standard.²²

However, taking into account the minimal amount of emissions associated with activities on the Morongo Reservation and corresponding minimal contribution to regional ozone violations, we believe that in these circumstances it is appropriate to assign particular weight to the jurisdictional boundaries factor, and it is consistent with the principles for designations of Indian country set forth in the Tribal Designation Policy. Moreover, the Tribe has invested in the development of its own air program, including operation of weather stations and an air monitoring station, and has expressed interest in development of its own permitting program. Under the jurisdictional boundaries factor, we find that redesignation of the Morongo Reservation as a separate ozone nonattainment area for the one-hour ozone and 1997 eight-hour ozone standards would be appropriate. Therefore, consistent with the designation of the Morongo Reservation for the 2008 ozone standard, we propose to revise the boundaries of the Southeast

²² See 77 FR 30088, dated May 21, 2012.

Desert one-hour ozone nonattainment area and the boundaries of the South Coast 1997 eight-hour ozone nonattainment area to designate the Morongo Reservation as a separate nonattainment area for the one-hour and 1997 eight-hour ozone standards.

III. Summary of Proposed Action and Request for Public Comment

Under section 110(k)(6) of the CAA, EPA is proposing to correct an error in a 2003 final action that revised the boundaries between areas in Southern California established under the CAA for the purposes of addressing the standard for one-hour ozone. EPA has determined that the Agency erred in the 2003 final action to change the boundary of the South Coast Air Basin, which enlarged the basin to include all of the Banning Pass area. In taking that action, EPA failed to consider the presence of Indian country (i.e., the Morongo Reservation) located therein. EPA thus failed to consider the status of the Indian country under the appropriate statutory and regulatory provisions when it evaluated and acted upon the State's boundary change request. EPA believes that its error resulted in regulatory consequences for the Morongo Tribe that justify making a correction.

Specifically, EPA is proposing to rescind the 2003 final action, as it pertains to the Morongo Reservation for the one-

hour ozone standard. This proposed action would not affect the designations and classifications of State lands.

Second, under CAA section 107(d)(3), 301(a) and 301(d), we propose to revise the boundaries of the Southeast Desert to designate the Morongo Reservation as a separate nonattainment area for the one-hour ozone standard and to classify the Morongo Reservation as "Severe-17," i.e., consistent with its prior classification when it was included in the Southeast Desert. Third, also under CAA section 107(d)(3), 301(a) and 301(d), we are proposing to revise the boundaries of the South Coast to designate the Morongo Reservation as a separate nonattainment area for the 1997 eight-hour ozone standard and to classify the Morongo Reservation as "Severe-17," i.e., consistent with its original classification when it was included in the South Coast.

We are proposing to redesignate the Morongo Reservation as a separate air quality planning area for the one-hour ozone and 1997 eight-hour ozone standards based on our conclusion that factors such as air quality data, meteorology, and topography do not definitively support inclusion of the Reservation in either the South Coast or the Southeast Desert air quality planning areas, that Morongo Reservation emissions sources contribute minimally to regional ozone concentrations, and that the

jurisdictional boundaries factor should be given particular weight under these circumstances.

If finalized as proposed, the Morongo air quality planning area for the one-hour and 1997 eight-hour ozone standards would have the same boundaries as the Morongo nonattainment area for the 2008 eight-hour ozone standard. Moreover, if finalized as proposed, new or modified stationary sources proposed for construction on the Morongo Reservation would be subject to the NSR major source thresholds for "Severe-17" ozone nonattainment areas, rather than the more stringent thresholds for "Extreme" ozone nonattainment areas.

EPA is soliciting public comments on the issues discussed in this document and will accept comments for the next 30 days. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, [58 FR 51735 (October 4, 1993)] the Agency must determine whether the regulatory action 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 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. Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this proposed action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This proposed action would merely correct an error in a previous rulemaking and redesignate certain air quality planning area boundaries, and thereby reinstate certain CAA designations and corresponding requirements to which the affected area had previously been subject.

B. Paperwork Reduction Act

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* 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. This proposed 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.*). An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

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 this rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any direct requirements on small entities. EPA is proposing to correct an error in a previous rulemaking and redesignate certain air quality planning area boundaries, and

thereby reinstate certain CAA designations and corresponding requirements to which the affected area had previously been subject. This proposed action is intended to, among other purposes, facilitate and support the Morongo Tribe's efforts to develop a tribal air permit program by re-establishing, within the Morongo Reservation, the less-stringent New Source Review major source thresholds that had applied under the area's previous "Severe-17" classification for the one-hour ozone standard.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.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, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-

effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The proposed rule imposes no enforceable duty on any State, local or tribal governments or the private sector. In any event, EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of

\$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This proposed action also does not have Federalism implications because 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 proposed action would merely correct an error in a previous rulemaking and redesignate certain air quality planning area boundaries, and thereby

reinstate certain CAA designations and corresponding requirements to which the affected area had previously been subject, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" are defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes." Under section 5(b) of Executive Order 13175, EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early

in the process of developing the proposed regulation. Under section 5(c) of Executive Order 13175, EPA may not issue a regulation that has tribal implications and that preempts tribal law, unless the Agency consults with tribal officials early in the process of developing the proposed regulation.

EPA has concluded that this action would have tribal implications. In 2009, the Morongo Tribe requested that EPA create a separate area for the Morongo Reservation in part due to the adverse regulatory impacts resulting from the Agency's 2003 boundary change action. EPA consulted with representatives of the Morongo Tribe prior to, and following, the Tribe's 2009 boundary change request, concerning the issues covered herein. In today's proposed action, EPA is responding to the Tribe's 2009 boundary change request and has proposed an action that would eliminate the adverse regulatory impacts arising from EPA's 2003 boundary change action. As described herein, we agree with the Tribe that the boundary should be corrected to reflect their concerns. As proposed, this action will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. Rather, the proposed action would relieve the Tribe of the additional requirements that flowed from the boundary change and corresponding change in CAA designations and

classifications. Thus, the requirements of sections 5(b) and 5(c) of the Executive Order do not apply to this rule.

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

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This proposed rule is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this rule present a disproportionate risk to children.

H. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards 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 EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rule does not involve establishment of technical standards, and 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 to this action.

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

Executive Order 12898 (59 FR 7629 (February 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.

EPA has determined that this proposed action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not directly affect the level of protection provided to human health or the environment. In this action, EPA is proposing to correct an error in a previous rulemaking and redesignate certain air quality planning area boundaries, and thereby reinstate certain CAA designations and corresponding requirements to which the affected area had previously been subject.

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control,
Intergovernmental relations, National parks, Ozone, Wilderness
areas.

Dated: December 20, 2012.

Jared Blumenfeld,
Regional Administrator,
Region IX.

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