

or safety risk that EPA has reason to believe may have a disproportionate effect on children. This rule is not subject to Executive Order 13045 because it is not economically significant.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTA), 15 U.S.C. 272 note, requires federal agencies to use technical standards that are developed or adopted by voluntary consensus to carry out policy objectives, so long as such standards are not inconsistent with applicable law or otherwise impracticable. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Absent a prior existing requirement for the state to use voluntary consensus standards, EPA has no authority to disapprove a SIP submission for failure to use such standards, and it would thus be inconsistent with applicable law for EPA to use voluntary consensus standards in place of a SIP submission that otherwise satisfies the provisions of the Act. Therefore, the requirements of section 12(d) of the NTTA 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.*).

The Congressional Review Act, (5 U.S.C. 801 *et seq.*), as added by the Small Business Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 25, 2003. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not

be challenged late in proceedings to enforce its requirements.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Hazardous air pollutants, Volatile organic compounds.

Dated: October 24, 2002.

Bharat Mathur,

Acting Regional Administrator, Region 5.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

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

Subpart YY—Wisconsin

2. Section 52.2570 is amended by adding paragraph (c)(107) to read as follows:

§ 52.2570 Identification of plan.

* * * * *

(c) * * *

(107) On June 12, 2002, the Wisconsin Department of Natural Resources submitted a site specific revision to its SIP for emissions from Northern Engraving Corporation's Holmen and Sparta facilities in the form of a Environmental Cooperative Agreement for incorporation into the federally enforceable State Implementation Plan. It consists of portions of the Environmental Cooperative Agreement which supersede portions of rules in the State Implementation Plan. The Cooperative Agreement establishes an exemption for pre-construction permitting activities for certain physical changes or changes in the method of operation at the Northern Engraving Corporation's Holmen and Sparta facilities.

(i) Incorporation by reference.

(A) The following provisions of the Environmental Cooperative Agreement between Northern Engraving Corporation (NEC) and the Wisconsin Department of Natural Resources signed on June 10, 2002: Section XI of the Environmental Cooperative Agreement (Operational Flexibility and Variances) and Part IA. of Appendix C.3: Specific Permit Conditions under the Environmental Cooperative Agreement for NEC's Sparta facility.

[FR Doc. 03-1516 Filed 1-23-03; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[DC039-2030; MD073-3101; VA090-5063; FRL-7441-9]

Determination of Nonattainment as of November 15, 1999, and Reclassification of the Metropolitan Washington, DC Ozone Nonattainment Area; District of Columbia, Maryland, Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to issue a determination that the Metropolitan Washington, D.C. serious ozone nonattainment area (hereinafter referred to as the Washington area) did not attain the 1-hour ozone national ambient air quality standard (NAAQS) by the November 15, 1999 Clean Air Act (CAA) deadline for serious ozone nonattainment areas. As a result, the Washington area is reclassified by operation of law as a severe ozone nonattainment area on the effective date of this rule. The District of Columbia, the State of Maryland and the Commonwealth of Virginia each must submit by March 1, 2004, a State Implementation Plan (SIP) revision for the Washington area that meets the severe area ozone nonattainment area requirements of CAA section 182(d). Finally, EPA is adjusting the dates by which the area must achieve a nine (9) percent reduction in ozone precursor emissions to meet the 2002 rate-of-progress (ROP) requirement and adjusting contingency measure requirements as this relates to the 2002 ROP milestone. In an Order entered on December 18, 2002, the United States District Court for the District of Columbia directed EPA to publish a final action in the **Federal Register** determining whether the Washington area had attained the applicable ozone standard under the CAA and any reclassification of the area required as a result of this determination. This final determination and this notice are in direct response to and comply with the Court's order.

DATES: This final rule is effective on March 25, 2003.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814-2179, or by e-mail at *Cripps.Christopher@epa.gov*.

SUPPLEMENTARY INFORMATION: The use of “we,” “us,” or “our” in this document refers to EPA.

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I. What Is the Background for This Rule?

A. When Did EPA Propose to Reclassify the Washington Area?

On November 13, 2002, EPA proposed to find that the Washington serious ozone nonattainment area did not attain the 1-hour ozone NAAQS by November 15, 1999, the attainment deadline for serious ozone nonattainment areas under CAA section 181(a). See 67 FR 68805. The proposed finding was based upon ambient air quality data from the

years 1997, 1998, 1999. These data showed that the 1-hour ozone NAAQS of 0.12 parts per million (ppm) had been exceeded on an average of more than one day per year over this three-year period and that the area did not qualify for an attainment date extension under section 181(a)(5). EPA also proposed that the appropriate reclassification of the area was to severe ozone nonattainment.

B. What Is the Washington Ozone Nonattainment Area?

For the purposes of this final rule, the Washington ozone nonattainment area (the Washington area) consists of: the District of Columbia; Calvert, Charles, Frederick, and Montgomery, Prince Georges counties in Maryland; and, the counties of Arlington, Fairfax, Loudoun, Prince William and Stafford and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park in Virginia. See 40 CFR 81.309, 40 CFR 81.321 and 40 CFR 81.347.

C. What Is a SIP?

Section 110 of the CAA requires states to develop air pollution regulations and

control strategies to ensure that state air quality meet the NAAQS established by EPA. These ambient standards are established under section 109 of the CAA, and they currently address six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide.

Each state must submit these regulations and control strategies to us for approval and incorporation into the Federally-enforceable SIP.

Each Federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin. These SIPs can be extensive. They may contain state regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

D. What Is the NAAQS for Ozone?

The NAAQS for ozone is expressed in two forms which are referred to as the 1-hour and 8-hour standards. Table 1 summarizes the ozone standards.

Standard	Value	Type	Method of compliance
1-hour	0.12 ppm	Primary and Secondary	Must not be exceeded, on average, more than one day per year over any three-year period at any monitor within an area.
8-hour annual	0.08 ppm	Primary and Secondary	The average of the fourth highest daily maximum 8-hour average ozone concentration measured at each monitor over any three-year period.

(Primary standards are designed to protect public health and secondary standards are designed to protect public welfare and the environment.)

The 1-hour ozone standard of 0.12 parts per million (ppm) was promulgated in 1979. The 1-hour ozone standard continues to apply to the Washington area, and it is the classification of the Washington area with respect to the 1-hour ozone standard that is addressed in this document.

E. How Did EPA Apply the CAA Provisions Regarding Determinations of Nonattainment and Reclassifications to the Washington Area?

On November 13, 2002, EPA proposed its finding that the Washington area did not attain the 1-hour ozone standard by the applicable date (67 FR 68805). In that notice of proposed rulemaking we discussed how we believed the provisions of section 181(b)(2), the relevant sections of the CAA regarding determinations of attainment and reclassifications for failure to attain,

would apply to the Washington area. See 67 FR at 68806 to 68808. The proposed finding was based upon ambient ozone concentration data for the period 1997 through 1999, from the monitoring sites in the Washington area, several of which recorded an average of more than one exceedance per day per year.

Section 181(b)(2)(A) of the Clean Air Act requires that when EPA determines that an area has not attained the standard by its statutorily required date the area shall be reclassified by operation of law to the higher of—

- (1) The next higher classification for the area, or
- (2) The classification applicable to the area’s design value as determined at the time EPA publishes its notice that the area failed to attain.

Even if a serious area’s design value at the time of reclassification is lower than the design value for serious areas that serious area cannot be reclassified to a lower classification because the minimum statutory classification

resulting from a failure to attain is severe.

The air quality data upon which we made the proposed finding of failure to attain the ozone NAAQS were available for comment in our November 13, 2002, notice of proposed rulemaking. For a listing of the average number of days when ambient ozone concentrations exceeded the one-hour ozone standard, See 67 FR at 68807–68808 (November 13, 2002). We received no adverse comments pertaining to that air quality data and the proposed determination of noattainment.

EPA has determined that the relevant air quality data for the period of 1997 through 1999, inclusive, for the Washington area shows that the Washington area contained at least one monitor with an average annual number of expected exceedances that was greater than the 1.0 allowed by the 1-hour ozone NAAQS. Although currently classified as a “serious” nonattainment area, if the Washington area were being

classified for the first time today, the classification applicable to the area's design value would be "marginal." However, section 181(b)(2)(A)(1) requires that an area be reclassified to the higher of its current design value or the next higher classification (with the exception that no area can be reclassified to "extreme"). "Severe," not "marginal," is the next higher nonattainment classification from "serious" under CAA. Therefore, we make the determination pursuant to section 181(b)(2)(B) of the CAA that the Washington area did not attain the one-hour ozone standard by the November 15, 1999, attainment date, and that the area is reclassified by operation of law to severe nonattainment on the effective date of this rule.

F. Why Is This Action Necessary?

On November 13, 2002, the Sierra Club filed a complaint in the United States District Court for the District of Columbia against EPA (*Sierra Club v. Whitman*, No. 1:02CV02235(JR)) regarding, among other things, the attainment status and classification of the Washington area. On December 18, 2002, the United States District Court for the District of Columbia issued an order directing EPA to publish, by January 27, 2003, a determination of whether the Washington area had attained the applicable ozone standard under the CAA. The Court also ordered EPA to publish in the **Federal Register** a notice of a final action reflecting both this determination and any reclassification of the area required as a result of the determination. Our final determination and this notice comply with the Court's Order.

II. What Does This Action Do?

In this action, EPA is issuing a final determination that the Washington area did not attain the 1-hour ozone NAAQS by November 15, 1999, as prescribed in section 181 of the CAA, in fulfilling our nondiscretionary duty pursuant to the CAA. As a result of this final determination, the Washington area is reclassified by operation of law to severe ozone nonattainment pursuant to section 181(b)(2) of the CAA. In addition, this action sets the dates by which the District of Columbia (the District), Maryland and Virginia (collectively referred to as "the States") each must submit SIP revisions addressing the CAA's pollution control requirements for severe ozone nonattainment areas (the "severe area SIP") and to attain the 1-hour NAAQS for ozone. The required post-1999 ROP nine percent reduction originally was

required by November 15, 2002 under the CAA. However, that date has elapsed. Therefore, in this action EPA is allowing the District, Maryland and Virginia to demonstrate that the first required post-1999 nine percent ROP is achieved as expeditiously as practicable after November 15, 2002, but in any case no later than November 15, 2005. EPA is allowing the District, Maryland and Virginia to key contingency measures for the 2002 ROP milestone to this new date.¹

III. What Public Comments Were Received and What are EPA's Responses?

In the November 13, 2002, notice of proposed rulemaking (67 FR 68805) for this action, EPA proposed: (1) To find that the Metropolitan Washington, DC serious ozone nonattainment area has failed to attain the one-hour ozone NAAQS by November 15, 1999, and, as a consequence, the Washington area would be reclassified as a severe nonattainment area; (2) to require the District of Columbia, the State of Maryland and the Commonwealth of Virginia to submit revisions to their State Implementation Plan (SIP) that adopt the severe area requirements by the earlier of one year after the effective date of a final action on the attainment determination or March 1, 2004; and (3) to allow the District, Maryland and Virginia to adjust the dates by which the area must achieve a nine percent reduction in ozone precursor emissions to meet the 2002 rate-of-progress requirement to a date as expeditiously as practicable (but in no case any later than November 15, 2005), and to adjust the contingency measure requirement as this relates to the 2002 rate-of-progress requirement accordingly.

We solicited public comments on these issues discussed in the notice of proposed rulemaking as well as other relevant matters. We received comment letters from Earth Justice Legal Defense Fund (on behalf of the Sierra Club), the Virginia Department of Transportation, Dominion Energy and three residents of the Washington area.

In this document, EPA is responding to adverse comments that are germane to this final action and which were submitted in response to the November 13, 2002, notice of proposed rulemaking (67 FR 68805).

EPA received no adverse comments pertaining to the data used for our

nonattainment determination, and therefore we are making the determination that Washington did not attain by its attainment deadline.

A. Finding of Failure to Attain and Reclassification to Severe

Summary of Comments in Support of EPA's Proposed Action

EPA received comments supporting the determination of nonattainment and the change in the classification from serious to severe. One resident of the District expressed concern about personal health effects of breathing air in the District which the commenter believes is not as clean as in more rural areas. Another commenter stated support for the proposed finding of failure to attain and stated concurrence that the resulting reclassification by operation of law should result in a severe classification.

Comments Adverse to EPA's Proposed Action

Comment #1: We received one comment that stated the major reason that the Washington, area is being reclassified from serious to severe is because of transport from outside the area. The commenter claimed that other States and industries in the "Ohio Valley" have not reduced emissions soon enough to enable the Washington area attain by 1999.

Response #1: While EPA agrees that the Washington area is significantly affected by transport from outside the area, the U.S. Court of Appeals for the D.C. Circuit ruled on July 2, 2002 that EPA is precluded from extending the Washington area's attainment date unless the extension qualifies under CAA section 181(a)(5) or it involves reclassification to a higher classification. With respect to attainment date extensions, the D.C. Circuit also ruled that the plain language of the Clean Air Act "sets a deadline without an exception for setbacks owing to ozone transport." Therefore, the Court held that EPA is without authority to extend the attainment deadline for the Washington area unless we also reclassify the area as a severe nonattainment area. See *Sierra Club v. Whitman*, 294 F.3d 155, 163 (D.C. Cir. 2002).

EPA is issuing a final finding that the Washington area failed to attain the 1-hour ozone NAAQS and is reclassified by operation of law to severe nonattainment.

¹ The severe area ROP plan will also have to provide for the second increment of post-1999 ROP for the period 2002 to 2005 and thus must achieve a minimum of 18 percent emission reduction from base line emissions by November 15, 2005.

B. Severe Area SIP Revision Submittal Schedule

Comments Supporting a Shorter Schedule and on Application of Section (i)

One commenter submitted extensive comments in opposition to the proposed schedule for submittal of the severe area SIP.

This commenter claims EPA's use of section 182(i) is arbitrary and capricious and contrary to law. The commenter notes that the CAA set deadlines for SIP submittals for serious and severe areas in CAA sections 182(c)(2) and (d). The commenter claims those deadlines are not subject to adjustment and have long passed.

This commenter noted the following deadlines as examples:

(1) November 15, 1992: "VMT offset" SIP due under CAA section 182(d)(1).

(2) November 15, 1992: NSR program mandated by CAA sections 172(c)(5) and 173 including the lower stationary source major source thresholds for severe areas.

(3) November 15, 1994: for the attainment demonstration due under CAA sections 182(c)(2) and (d).

(4) December 31, 2000: SIP provision due under CAA section 182(d)(3) to fulfill the requirements of section 185.

The commenter claims that section 182(i) requires areas to meet the deadlines of sections 182(b)-(d) and allows EPA to adjust those deadlines only to the extent necessary or appropriate to assure consistency among the required submissions. The commenter claims that EPA has not provided a rationale why the proposed schedule is necessary and appropriate and therefore EPA must make immediate "findings of incompleteness" under section 110(k)(1)(B).

The commenter further claims the proposed schedule has other problems in that the schedule runs afoul of the statutory attainment and ROP deadlines:

(1) The 2002 ROP plan will be due 16 months after the 2002 milestone date,

(2) The first potential sanction could only be imposed by August-September 2005 around 34 months after the 2002 ROP milestone date and around two months before the attainment date.

(3) The second potential sanction and the mandate for any needed Federal Implementation Plan would not come due until after the attainment deadline of November 15, 2005. Thus the commenter concludes the proposed schedule also is contrary to the CAA in that the plans would not be submitted and implemented prior to ROP and attainment deadlines.

With regard to the 2002 milestone, the commenter further claims that the Courts have already said that the Washington area SIP ROP plan is deficient and must be disapproved because the plan fails to provide an annual average of three percent ROP after November 15, 1999. The commenter's theory is that section 182(c)(2)(B) mandates post-1999 ROP even for serious areas and that the submittal deadline for this SIP is November 15, 1994. Under this theory the commenter concludes the EPA has no authority to extend the deadline for submittal of the ROP plans since the statutory due date of November 15, 1994 is past.

The same commenter further asserts that even if EPA could lawfully extend the submittal date (although the commenter disputes this very point) the standard for submission should be "as soon as possible." The commenter submitted a schedule recently developed by the Metropolitan Washington Air Quality Committee (MWAQC)² that the commenter interprets as a demonstration that the air quality planning agencies could develop the entire severe area SIP by July 2003. The commenter maintains that EPA must set the submittal date to no later than the date the air quality planning agencies maintain is necessary to finish the task.

One other commenter urged EPA to be proactive in enforcing the severe area requirements and urged EPA to enable an expeditious switch from the MOBILE5 to MOBILE 6.

Response to Comments Supporting a Shorter Schedule and on Application of Section 182(i)

Response to Comment on Section 182(i): EPA's exercise of discretion under section 182(i) to adjust the submission deadlines for the severe area requirements that become applicable to the D.C. area for the first time upon the effective date of the area's reclassification is not arbitrary or capricious, and is in keeping with the terms and purpose of the statute. Section 182(i) states that the Administrator may adjust applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions of new requirements applicable to an area which has been reclassified. Where a submission date has passed and is therefore impossible

to meet, EPA has concluded that the Administrator may establish a later date. EPA has applied this interpretation in its prior reclassification rulemaking actions. See Santa Barbara, California, (62 FR 65025, December 10, 1997); Phoenix, Arizona (62 FR 60001, November 6, 1997); and Dallas-Fort Worth, Texas (63 FR 8128, February 18, 1998). The structure of the Clean Air Act itself reinforces this interpretation. Under the Act, the original dates for submissions for areas initially classified as serious, severe, and extreme areas was 1994. The attainment date for serious areas is 1999. Thus the Act does not require EPA to make a determination of whether or not a serious area met its 1999 attainment deadline until more than five years after the original submission date for areas originally classified as severe. Since the original 1992, 1994 and 2000 submission dates have elapsed, it is impossible for EPA to establish any of these as the submission deadline for a newly reclassified area.

EPA has determined that in light of the fact that the original submission dates for severe areas have elapsed prior to the time that we issued the proposed reclassification rulemaking for the Washington area, it is a reasonable exercise of EPA's discretion to adjust the applicable submission deadlines in order to ensure consistency among the new requirements. Because it is impossible for the state to meet long-expired deadlines, EPA must set new deadlines that will ensure consistency of submissions for requirements that the state is only being notified that it must meet. This is entirely in keeping with the discretion that Congress accorded EPA in section 182(i), and with EPA's prior reclassification rulemakings making appropriate adjustments to submission deadlines. Because the States must now meet newly imposed requirements such as post-1999 ROP and additional severe area control requirements, EPA must set prospective submission dates, and has authority under section 182(i) to make these dates consistent.

To interpret the Clean Air Act as the commenter suggests would give the reclassification retroactive effect by holding the States in default of their submission obligations before the events necessary to trigger that obligation (reclassification) has occurred. Until EPA acts to reclassify an area, the states are under no obligation to make the required submissions. To subject them to a lapsed deadline after reclassification would be patently unfair and contrary to the statute's intent. Giving the submission deadlines

²The commenter identified this agency as the Metropolitan Washington Council of Governments (MWCOC).

retroactive effect would also be inconsistent with the Administrative Procedure Act, 5 U.S.C. 553(d), which requires that before a rule takes effect, persons affected will have advance notice of its requirements. A failure to meet an obligation, especially one accompanied by sanctions, cannot occur in advance of the imposition of that obligation. The obligation to submit requirements to meet the severe area classification did not exist for the Washington area prior to the final action that reclassifies the area. Giving retroactive effect to the old SIP submission deadlines would also preclude EPA from exercising the discretion with respect to setting the deadlines for these submissions that is specifically afforded by section 182(i).

In *Sierra Club v. Whitman*, 130 F. Supp.2d 78 (D.D.C. 2001), *affirmed*, 285 F.3d 63 (D.C. Cir. 2002), a case involving the reclassification of the St. Louis nonattainment area, the District Court refused to interpret the reclassification provisions as authorizing relief that would treat submission deadlines as having lapsed prior to EPA having issued a reclassification rulemaking. The court stated that such an interpretation “could ‘create * * * an injustice at the hands of the court itself.’” 130 F. Supp.2d at 94. Such relief “could throw the (area) into extreme noncompliance.” *Id.* The court refused to impose such relief when it “could effectively penalize the state and local entities that are required to comply with EPA findings.” *Id.* In the St. Louis case, the Sierra Club demanded not only retroactive reclassification, but also demanded that the district court declare that “the State of Missouri has failed to file a SIP revision that comports with the requirements of section 7511a(c) by the statutory deadline of May 15, 1998,” *id.* at 87, a date that had long since passed. The district court refused to do so, recognizing that this would unfairly penalize the States, which are entitled to rely on EPA’s actions in anticipating the burdens that will be imposed pursuant to the CAA. Imposition of sanctions would also have unfair adverse consequences for emissions sources.

The D.C. Circuit upheld the District court’s ruling. “In any event, what Sierra Club sought—to have the effective date of EPA’s court-ordered determination converted to the date the statute envisioned, rather than the actual date of EPA’s action—was a form of relief the district court quite properly rejected.” *Sierra Club v. Whitman* 285 F.3d 63, 68 (D.C. Cir. 2002). The D.C. Circuit continued: “Although EPA

failed to make the nonattainment determination within the statutory time frame, Sierra Club’s proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time.” *Id.* See also *NRDC v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994).

EPA believes that it has provided an adequate rationale for its exercise of discretion in setting the applicable submission deadlines, and that it would be unreasonable and inappropriate to make the “immediate findings of incompleteness” that the commenter suggests.

Response to Comment on ROP Submissions

The Commenter’s contention that the ROP submissions are inadequate also ignores the fact that reclassification is occurring in 2003, and thus it is impossible for the State to meet the 2002 milestone date. See the discussion in the preceding paragraphs regarding the impossibility of meeting deadlines that have already passed, and the ROP discussion in the following paragraphs.

The commenter claims that “the rate of progress plans for the Washington area are already deficient because they fail to provide for the post-1999 progress mandated by section 182(c)(2)(B). *Sierra Club v. Whitman*, 294 F.2d 155, 163 (D.C. Cir. 2002).” The commenter claims plans to fulfill the post-1999 ROP obligation we due to EPA by November 15, 1994, and that because such plans were never submitted, EPA must therefore “disapprove those plans immediately.”

With respect to the claim that EPA must disapprove these previously submitted ROP plans, this claim is not relevant to the proposed action, which was for the reclassification of the Washington area concurrent with the establishment of a reasonable deadline for submitting SIP revisions. EPA will be taking a separate action on the submitted ROP plans, which will address their approvability.

With respect to the claim that the area was required to submit to EPA a plan to fulfill post-1999 ROP by November 15, 1994, the commenter ignores the context of the Circuit Court’s decision with respect to post-1999 ROP obligations. The Circuit Court was merely agreeing with an observation made by the plaintiff that “with an attainment date in 2005, ‘the rate of progress plan for the Washington area had to demonstrate a 9% reduction in emissions from 1996 to

1999, another 9% from 1999 to 2002, and another 9% from 2002 to 2005’” (emphasis added).

However, the Circuit Court vacated as contrary to the statute EPA’s approval of a 2005 attainment date for the Washington area to attain as serious area. 294 F.2d at 164. Consequently, until the effective date of final action to reclassify the Washington area as a severe nonattainment area with an attainment date of November 15, 2005, the attainment date for the Washington area remained the November 15, 1999 date for serious areas. Indeed, it is the failure of the Washington area to attain the one-hour ozone NAAQS by November 15, 1999 that results in the area being reclassified as a severe area.

As a serious area with a lapsed attainment date of November 15, 1999, the Washington area had no legal obligation to provide for post-1999 ROP. As noted by the Circuit Court, only an area with an attainment date of 2005 has a legal obligation to provide for post-1999 ROP. The Washington area will not have an attainment date of 2005 until the effective date of its reclassification as a severe area. A serious area has an obligation to provide for ROP until its attainment date, which is 1999. See section 182(c)(2)(B) and section 181(a)(1). Not until it is reclassified to severe does an area have a later attainment date and a consequent obligation to provide for ROP until that later attainment date (2005 in the case of the Washington area). See section 182(d). As explained elsewhere in this section of this document in the responses regarding application of section 182(i), the Administrative Procedure Act requires that new obligations, such as the one to demonstrate post-1999 ROP for an area reclassified to severe nonattainment, cannot be imposed retroactively.

Response to Comment on Findings of Incompleteness

One commenter suggests that because EPA has not provided a rationale why the proposed schedule is necessary and appropriate the SIP is past due (under the schedule provisions of section 182(b)–(d)) and thus EPA must make immediate “findings of incompleteness” under section 110(k)(1)(B). As discussed in previous paragraphs of this document, EPA disagrees with the commenter that section 182(i) prohibits EPA from providing the state with time to submit a SIP consistent with its reclassification from serious to severe. As provided in the preceding paragraphs, EPA has concluded that it is reasonable and appropriate to provide the state until March 1, 2004, to submit

a SIP based on its reclassification. Thus, there is no SIP due yet and there is no basis to find that the state failed to submit a complete SIP. To the extent the commenter is suggesting that EPA

determine the area's serious area SIP to be incomplete, EPA notes that the serious area SIP revisions for which EPA has not issued a final action were deemed complete or deemed complete

by operation of law under CAA section 110(k)(1)(B). These serious area SIP revisions and their submission dates are listed in the following table.

TABLE 2.—SUBMITTAL DATES OF SERIOUS AREA SIP REVISIONS
[Post-1996 ROP Plans and Contingency Measure Plans]

	District of Columbia	Maryland	Virginia
Initial submittal dates	November 10, 1997	December 24, 1997	December 19, 1997.
Amendment dates	May 25, 1999	May 20, 1999	May 25, 1999.
Attainment Demonstrations			
Initial submittal dates	April 24, 1998	April 29, 1998	April 29, 1998.
Amendment dates	October 27, 1998	August 17, 1998	August 18, 1998.
Supplemental dates	February 16, 2000	February 14, 2000	February 9, 2000.
		(MD SIP No. 00-01) ...	
Supplemental dates	March 22, 2000	March 31, 2000	March 31, 2000.
		(MD SIP No. 00-02) ...	

All the attainment demonstration SIP revisions were deemed complete by operation of law under CAA section 110(k)(1)(B) six-months after the dates listed in the preceding table. Therefore, the latest of these revisions related to the attainment demonstration, those submitted in March 2000, were complete by operation of law on or prior to October 1, 2000.

On November 3, 1997, the District submitted the Post-1996 plan to EPA as a proposed revision to the District's SIP. On December 10, 1997, EPA determined that the Post-1996 plan fulfilled the completeness criteria set out at 40 CFR part 51, appendix V (1991), as amended by 57 FR 42216 (August 26, 1991). On May 25, 1999, the District submitted a revised Post-1996 plan document to EPA as a revision to the District's SIP. On July 14, 1999, EPA determined that this revised Post-1996 plan fulfilled the completeness criteria set out at 40 CFR part 51, appendix V.

On December 24, 1997, Maryland submitted the Post-1996 plan to EPA as a proposed revision to Maryland's SIP. On January 14, 1998, EPA determined that the Post-1996 plan fulfilled the completeness criteria set out at 40 CFR part 51, appendix V. On May 20, 1999, Maryland submitted a revised Post-1996 plan document to EPA as a revision to Maryland's SIP. On July 14, 1999, EPA determined that this revised Post-1996 plan fulfilled the completeness criteria set out at 40 CFR part 51, appendix V.

On December 19, 1997, Virginia submitted the Post-1996 plan to EPA as a proposed revision to Virginia's SIP. On January 12, 1998, EPA determined that the Post-1996 plan fulfilled the completeness criteria set out at 40 CFR part 51, appendix V (1991). On May 25, 1999, Virginia submitted a revised 1999 Post-1996 plan document to EPA as a

revision to Virginia's SIP. On July 26, 1999, EPA determined that this revised Post-1996 plan fulfilled the completeness criteria set out at 40 CFR part 51, appendix V.

EPA believes that it has provided an adequate rationale for its exercise of discretion in setting the applicable submission deadlines, and that it would be unreasonable, inappropriate and contrary with applicable law to make the "immediate findings of incompleteness" that the commenter suggests.

Response to Comment That July 2003 Should Be the Submittal Date

One commenter submitted a schedule that was presented to the Transportation Planning Board (TPB) at their December 18, 2002, meeting. EPA does not disagree that this schedule was developed on December 4, 2002, and adopted by the Metropolitan Washington Air Quality Committee (MWAQC). However, this schedule clearly shows three parallel tracks of activities: the first is the "SIP schedule"; the second is "State Action Deadlines"; and the third is "TPB Conformity". The schedule says that in January 2003 the preliminary shortfall analysis for 2005 will be completed. The same document says that in February 2003 the States will provide schedules for Title I modifications.

The severe area SIP has many elements. One is a ROP plan for the post-1999 ROP milestone years to include conformity budgets, emission target levels determinations, and future year emissions levels projections. Another is revisions to the area's mobile source emissions estimates for the base year and previously submitted 2005 budgets using MOBILE6. Historically, the MWAQC develops these elements of

the SIP, ensures inter-State coordination and ensures that appropriate consultation regarding the mobile source emissions budgets with the transportation planning agencies occurs. However, it is the States, not MWAQC, that must adopt the MWAQC plans for inclusion in each State's SIP. Historically, the States have had to adopt control measure regulations to support the MWAQC air quality plans and meet CAA requirements for nonattainment areas.

The severe area SIP elements that will require action by the District, Virginia and Maryland include any needed changes to each jurisdiction's new source review permitting rules to incorporate the severe area offset ratios and major source thresholds or to lower reasonable available control technology major source thresholds. Other examples could include adoption of regulations to address any post-1999 ROP plan reduction needs not provided by the current control strategies in the SIPs and to address contingency measure requirements.

The District of Columbia, Virginia and Maryland each have written to EPA indicating that they support the date of March 1, 2004, to complete the total severe area SIP package. These States have clarified that MWAQC's use of the term "severe area SIP" does not mean the total package.

The Maryland Department of the Environment (MDE) understands that MWAQC's plan is to finalize and forward a recommended SIP revision to the States in July 2003. MDE indicates that MDE will need to complete additional tasks after the MWAQC completes its work on the severe area SIP for the Washington area. These tasks

include promulgating the new mandatory Title I provisions like New Source Review, contingency measures and any shortfall measures that result from the MWAQC process. Maryland has already started to draft regulations for some of these SIP elements, but believes that it will take until March 1, 2004 to finalize many of the rules that will need to be included as part of the final SIP submittal.

The District of Columbia Department of Health, Division of Air Quality (DC DAQ), points out that the schedule adopted by the MWAQC is very aggressive and establishes milestones and actions for which MWAQC is responsible, but it does not include all the steps involved in developing a complete SIP.

DC DAQ notes it can not complete by July 2003 either the regulatory process for the required Title I NSR changes or the NO_x RACT determinations for sources that emit between 25 and 50 tons per year by July 2003. The DC DAQ notes it cannot complete these in less than six months and notes the normal schedule for adoption of rules is ten months. The DC DAQ has informed us that any measures identified as RACM will require time beyond July 2003 for the development of implementation plans and schedules.

The Virginia Department of Environmental Quality (DEQ) points out that the schedule adopted by the MWAQC is very aggressive and establishes milestones and actions for which MWAQC is responsible, but it does not include all the steps involved in developing a complete SIP.

DEQ notes it can not complete by 2004 either the regulatory process for the additional rulemakings required or the NO_x RACT determinations for sources that emit between 25 and 50 tons per year before March 2004. DEQ is currently working on both of these tasks. DEQ has informed us that any measures identified as RACM will require time beyond July for the development of implementation plans and schedules.

Given that the contingency measures or other necessary measures (e.g., any remaining reasonably available control measures or measure needed to uncover a shortfall found by the ROP planning which is scheduled to be available only in January 2003) have not been selected (or even identified), EPA does not believe that any State could adopt new measures between January and July 2003. Nothing from the States indicates otherwise.

For the reasons set forth above, we cannot conclude from the information before us that the schedule provided by

the one commenter reflects the intention that all three States would submit complete severe area SIP packages to EPA by July 2003. Indeed, three of the States have informed us that they could not meet, and have never intended or committed to meet, a July 2003 SIP submittal deadline.

Likewise, information received from the States provides no reason to extend the severe area SIP submittal date beyond what we proposed on November 13, 2002. We proposed a submittal date of one year after the effective date of a final reclassification to severe but not later than March 1, 2004. Because one year after the effective date of this action will be past March 1, 2004, we are setting a deadline for the submission of the severe area SIP as March 1, 2004.

Comments Supporting a Longer Schedule Than That Proposed

Two commenters asserted that one year to develop the severe area SIP is insufficient given the length of time required by one state's regulatory adoption process and the need to allow time to identify additional control measure needs to meet the severe area requirement. The first of these two commenters noted that one state needed 18 months to adopt control regulations while the second stated that the same state would require 18 to 24 months for this process. The first of these two commenters urged EPA to set the due date for submittal of the severe area SIP to 24 months. The second of these two commenters urged EPA to add at least six months to the proposed March 1, 2004, date found in the proposal or to allow enforceable commitments.

EPA's Response To Comment on Need for a Longer Schedule for Submission

EPA believes that the deadlines it has set for submission of the severe area requirements are consistent with the Clean Air Act and are adequate for the area to achieve compliance. EPA has discretion to adjust deadlines under section 182(i). EPA believes that a period up to eighteen months would be consistent with the Act, since under section 110(k)(5) the Clean Air Act SIP revision provision, states have up to 18 months to submit a SIP revision after receiving a SIP call notice.

Given that the States have indicated in this case that March 1, 2004, is not unreasonable, and we received no adverse comments from the states during the comment period indicating that they could not meet this deadline, EPA is setting a deadline for the submission of the severe area SIP as March 1, 2004.

C. Rate-of-Progress (ROP) and Contingency Measures for 2002

Comments in Support of Allowing the States To Adjust the 2002 Milestone

One commenter supported the "expeditious" standard as being appropriate. Another commenter agreed with EPA that the nine percent reduction should be achieved as soon as practicable after November 15, 2002.

Comments in Opposition To Allowing the States To Adjust the 2002 Milestone

One commenter stated that EPA cannot move the November 15, 2002, statutory deadline for the 2002 ROP reduction of nine percent between November 15, 1999, and November 15, 2002. The commenter claims that the ROP plan for the Washington area has to demonstrate a nine percent reduction in emissions between November 15, 1999, and November 15, 2002, (as well as nine percent between November 15, 1996, and November 15, 1999, and another nine percent between November 15, 2002, and November 15, 2005). The commenter claims that if the states cannot show a nine percent reduction between November 15, 1999 and November 15, 2002, then the states must implement the only alternative scheme allowed by statute, namely that of section 182(c)(2)(B)(ii).

The same commenter asserts that even if the statute were not explicit as to the ROP deadline, the proposed "as expeditiously as practicable" standard should be "as soon as possible with every control measure." The commenter further asserts that the term "practicable" in "as expeditiously as practicable" is not defined in terms of what factors will go into the determination and thus could be used to nullify the statutory deadline.

This commenter further asserts that EPA does not have the statutory authority to move the 2002 ROP milestone date and thus there is no need for the contingency plan requirement to account for a date other than November 15, 2002.

Response: With respect to the assertion that EPA lacks authority to allow the States to demonstrate the first required post-1999 nine percent ROP, due under the statute by November 15, 2002, as expeditiously as practicable, EPA disagrees, in light of the fact that the statutory deadline has passed. It is impossible for the states to demonstrate any progress by a date that passed before the time the area became classified a severe area and thus first became subject to the requirement to demonstrate post-1999 ROP. EPA agrees that the Washington area must now

demonstrate such progress, but reasonably concludes that the states must have some time in which to actually develop and implement the measures to achieve such ROP. EPA has addressed similar issues on several occasions in the past when areas for various reasons have not timely submitted progress SIPs, and when the date for achieving progress had passed prior to EPA action on a progress SIP. EPA has routinely concluded in these circumstances that the area should demonstrate the required ROP as expeditiously as practicable once the statutory date for achieving such ROP had passed. *See, e.g.*, 65 FR 31485 (May 18, 2000), 63 FR 28898 (May 27, 1998), 62 FR 31343 (June 9, 1997). Even though, as the commenter points out, there is no provision in the statute expressly addressing the situation where an area has failed to timely submit a progress SIP, EPA must fill the statutory gap where such SIPs are submitted after the date for achieving progress, and EPA has reasonably done so in this case by following its past practice of requiring such SIPs to demonstrate ROP as expeditiously as practicable. Although no court has directly addressed the issue of the propriety of this “as expeditious as practicable” standard, courts have addressed other issues concerning ROP plans submitted after the statutory date for achieving ROP, which have demonstrated ROP as expeditiously as practicable, without expressing any concern with that standard. *See, e.g., Sierra Club v. EPA*, 252 F.3d 943 (8th Cir. 2001) (Court upheld calculation methods used in 15 percent ROP plan submitted three years after statutory date demonstrating achievement of ROP seven years after statutory date).

The commenter indicates that the only statutory provision allowing less than a nine percent reduction by 2002 is CAA section 182(c)(2)(B)(ii). However, the commenter misconstrues that section which provides for areas to demonstrate that they have adopted various feasible measures in exchange for achieving a less than nine percent reduction. Although this provision would remain available to the Washington area states should they be unable to demonstrate the required average annual three percent reduction after November 15, 1996, through the attainment date of November 15, 2005, EPA did not propose to allow the states to show less than the nine percent reduction. EPA merely acknowledged in the proposal that the statutory date for achieving the nine percent reduction had passed and that in such event the

states should demonstrate the full nine percent reduction as expeditiously as practicable.

The commenter also objects to the observed stringency of the “as expeditious as practicable” standard, citing a case involving the 1987 attainment date in the 1977 version of the Clean Air Act, in which the court held that once an attainment date has passed an area must demonstrate attainment “as soon as possible with every available control measure.” *Delaney v. EPA*, 898 F.2d 687, 691 (9th Cir. 1990). However, that case was interpreting EPA’s 1981 guidance on planning for post-1987 attainment, in which EPA had indicated that areas which could not attain by 1987 should identify all “measures possible in a longer time frame that, together with the measures already evaluated, will result in attainment as quickly as possible after 1987.” 46 FR 7186, 7188 (January 22, 1981). Subsequent to the *Delaney* opinion, EPA published a **Federal Register** notice in which it clarified that the agency never intended that its 1981 guidance be interpreted to require the imposition of draconian control measures, nor to require immediate attainment after 1987 if only such measures could produce it. 55 FR 38326 (September 17, 1990). To avoid future misinterpretation of this guidance, EPA then revoked those aspects of the 1981 guidance requiring the use of “all possible measures” after 1987. *Id.*, at 38327. The EPA instead concluded that Federal and State post-1987 planning should attain the standard “as expeditiously as practicable,” as required by section 172(a)(2). EPA concluded that the statute does not require measures that are absurd, unenforceable, or impracticable, and thus that, after 1987, EPA would equate its interpretation of the Ninth Circuit’s standard in *Delaney* of attainment “as soon as possible” absent absurd, impossible, or unenforceable measures with the statutory test of attainment “as expeditiously as practicable.” *Id.* This is the interpretation EPA has consistently held since that time, as noted in the various **Federal Register** actions mentioned above where areas have missed statutory deadlines for attainment or ROP.

Moreover, EPA notes that one court, while finding *Delaney* not precisely on point for its purpose of fashioning a remedy in a citizen’s enforcement action, nevertheless made some instructive observations on the relationship between the two standards. The Court noted that: “[A]lthough the *Delaney* opinion utilized the ‘as soon as possible’ standard employed by EPA

guidelines, it did not do so out of rejection of the ‘practicable’ standard or out of concern that the two standards differed. Rather it simply had no occasion to compare them. Indeed the *Delaney* court appeared to blur them when it criticized Arizona for rejecting measures without demonstrating that such measures were ‘impracticable’ or unreasonable.” *Citizens for a Better Environment v. Deukmejian*, 746 F. Supp. 976, 985 (N.D. Cal. 1990). The Court went on to observe that: “As a practical matter, however, no Court will use its equitable powers to impose remedies that are irrational, albeit ‘possible.’ Thus as long as time is considered paramount, and the term ‘practical’ is strictly construed in keeping with the purposes of the Act, the ‘as expeditiously as practicable’ standard should yield no less results than an ‘as soon as possible’ standard.” *Id.*

The Court concluded that “when properly interpreted, there is no practical difference between the two standards.” *Id.* EPA agrees with this assessment.

The commenter further complains that EPA’s standard does not impose any particular deadline, and that it is too vague and undefined. However, the standard is the very one established in the statute for attainment of the standard, and years of experience in implementation of the statute has provided EPA and the states sufficient familiarity with the standard. Finally, the commenter notes that the states have already submitted ROP plans which the D.C. Circuit has allegedly found deficient for failure to include progress through 2002, thus warranting disapproval. As we stated previously this claim is not relevant to the proposed action, which was for reclassification of the Washington area concurrent with the establishment of a reasonable deadline for submitting SIP revisions. The commenter’s contention that the ROP submissions are inadequate for not having ROP for 2002 and 2005 also ignores the fact that reclassification is occurring in 2003, and thus it is impossible for the State to meet the 2002 milestone date. Refer to the discussion in the preceding section entitled “Severe Area SIP Revision Submittal Schedule” regarding the impossibility of meeting deadlines that have already passed, and the ROP discussion regarding the Washington area’s post-1999 ROP obligation that appears elsewhere in this document.

The severe area ROP plan will also have to provide for the second increment of post-1999 ROP for the period 2002 to 2005 and thus must

achieve a minimum of 18 percent emission reduction from base line emissions by November 15, 2005. Therefore, this delay does not reduce the overall ROP obligation.

With respect to the claim that EPA incorrectly asserted that contingency plans would need to account for any adjustment in the 2002 ROP milestone date, EPA disagrees. As discussed in the preceding paragraphs, EPA reasonably concluded that after 2002 the 2002 ROP milestone date should be adjusted to be "as expeditiously as practicable," and thus contingency measures would properly be keyed to this new date.

The requirements for contingency measures for failure to attain the 1-hour ozone NAAQS by November 15, 2005 or a 2005 ROP milestone failure are not affected by this action.

D. Triggering Implementation of Contingency Measures

Summary of Public Comments Received and EPA's Response

Comment: One commenter urged EPA to specify in the final rulemaking that any adjustment of the 2002 ROP milestone would not trigger or require the implementation of contingency measures in the area.

Response: EPA believes that allowing the first required post-1999 nine percent ROP, due by November 15, 2002, to be demonstrated as expeditiously as practicable after that date does not trigger the need to implement contingency measures prior to that date.

EPA is allowing the District, Maryland and Virginia to demonstrate that the first required post-1999 nine percent ROP, due under the statute by November 15, 2002, as expeditiously as practicable after that date in the event that control measures currently in the SIPs of the District, Maryland and Virginia or already promulgated by EPA, have not already achieved the required nine percent reduction by November 15, 2002. This first post-1999 ROP reduction has to be from base line emissions and account for growth in emissions through November 15, 2002. We have noted that for the Washington area there are emission reductions not relied on or credited in the ROP plan accruing between November 15, 1999, and November 15, 2002, from the January 1, 2000, implementation of phase 2 of the reformulated gasoline program, NO_x reductions beyond RACT, and other on-road measures, such as the national low emission vehicle (NLEV) program, and a variety of off-road national emissions reduction programs. See 66 FR at 615, January 3, 2001. These measures have and will continue to

provide additional reductions beyond those credited in the area's post-1996 ROP for the November 15, 1999, ROP milestone. These measures meet the ROP creditability requirements of CAA sections 182(b) and (c) because these measures are already in the approved SIPs or are rules promulgated by the EPA. However, EPA had insufficient information at the time of the November 13, 2002, notice of proposed rulemaking (and currently still has insufficient information) to determine whether or not these measures achieve the required nine percent reduction in base line emissions for the first post-1999 period. One major factor in demonstrating ROP for any milestone year is the release of a revised mobile source emissions factor model, MOBILE6. As discussed elsewhere in this document, as well as in the November 13, 2002, notice of proposed rulemaking (67 FR at 68811) the revised MOBILE6 model must be used for the severe area SIP and the MOBILE6 model must be used to redetermine 1990 base line emissions and prior target levels, as well as the new 2002 and 2005 year target levels and control strategy projections.

In the event that the Washington area can demonstrate that the required nine percent reduction occurred by November 15, 2002, (with the current SIP plus Federal measures), then the contingency requirement will not be triggered. In the event the area cannot demonstrate the required nine percent reduction did occur by November 15, 2002, (with the current SIP plus Federal measures) then EPA has determined that the District, Maryland and Virginia ROP SIP would be able to adjust the milestone date for the first required post-1999 nine percent ROP to a date that is as expeditiously as practicable after November 15, 2002. As explained in prior paragraphs, this is because the statutory 2002 ROP date lapsed before the area was first classified as severe ozone nonattainment. Only a finding that the area failed to achieve the required reductions by that new milestone could trigger the need to implement contingency measures.

E. Impacts on Mobile Source Emissions Budgets and Transportation Planning

Summary of Public Comments Received and EPA's Response

Comment #1: One commenter stated agreement with our assessment that a portion of the Washington area air quality problem is due to transport and agreement that there has been improvement in ozone air quality in the area. For these reasons the commenter asserted that the area should not be

subjected to punitive measures such as sanctions, nor subject to lapses or "freezes" of the transportation planning processes.

Response #1: This action does not create a "conformity freeze" or impose sanctions.³ Under section 179(a), sanctions can result from an EPA finding that a State failed to submit a required SIP revision (or has submitted one that does not meet the completeness requirements of the CAA and EPA regulations) or other required submission required under the CAA, result from a disapproval of a required submission, or result from a finding that a State is not implementing all or part of its approved SIP.⁴ Likewise, under the conformity rule, 40 CFR part 93, a conformity freeze only results when EPA disapproves a ROP or attainment demonstration SIP revision without making a protective finding. See 40 CFR 93.120(a)(2). This final rule does none of these things.

Comment #2: One commenter asserted that transportation planning should not be subject to a conformity freeze due to action on the plans subject to the July 2, 2002, Court ruling on EPA's January 3, 2001, final rule on the Washington area SIP.

Response #2: This comment is not germane to this action. EPA did not propose action on any SIP revision in the November 13, 2002, notice of proposed rulemaking. The action EPA takes on the SIP revisions formerly covered by the now vacated January 3, 2001, final rule will be the subject of separate rulemaking action(s). EPA intends to establish in a forthcoming notice of proposed rulemaking in the **Federal Register** a separate public comment period on these SIP revisions.

Comment #3: One commenter stated that the District, Maryland and Virginia had provided MOBILE5 budgets for the Washington area that were found to be adequate. This commenter claimed these budgets were consistent with the attainment plan and were the most recent budgets at the time these budgets were developed. The commenter urged that no conformity freeze should ensue because these budgets are adequate. This commenter urged EPA to allow the area to continue to use any adequate MOBILE5 derived budgets until

³ In a conformity freeze the only transportation projects that could be found to conform would be those included in the first three years of the currently conforming transportation plan and transportation improvement program (TIP). No new plans, TIPs, or plan/TIP amendments could be found to conform after the effective date of the disapproval.

⁴ EPA's completeness criteria that are promulgated pursuant to section 110(k)(1) of the CAA are found in appendix V to 40 CFR part 51.

MOBILE6 based budgets are found to be adequate.

Response #3: This action has no effect on the adequacy status of budgets or the determination of which budgets are in effect. These comments are not germane to this action because EPA did not propose any action on any budgets in the November 13, 2002, notice of proposed rulemaking.

Our discussion of conformity issues in the November 13, 2002, notice of proposed rulemaking was only for the purpose of informing the public of the status of the separate process related to the adequacy status of the budgets in the SIP for which EPA's approval was vacated by the July 2, 2002, court ruling. EPA has taken no final action with respect to adequacy and thus the budgets in the vacated SIPs currently can not be used for conformity. The previously approved ROP budgets in the 15 percent ROP SIPs are currently in effect. (See 64 FR 42629, August 5, 1999, 65 FR 44686, July 19, 2000, and 65 FR 59727, October 6, 2000.) See the discussion under section XIII of the notice of proposed rulemaking entitled "What are the Transportation Conformity Implications of Reclassification?" (67 FR at 68810, November 13, 2002).

F. MOBILE6 Model and the Submittal Schedule

In the November 13, 2002, notice of proposed rulemaking, we discussed the MOBILE6 release to interpret and reiterate application of our guidance affiliated with the January 29, 2002, official release of the MOBILE6 emission factor model to the SIP revisions that the Washington area needed to prepare if the area was reclassified to severe.

Summary of Public Comments Received and EPA's Responses

Comment #1: One commenter claims the MOBILE5 emission factor model lacks the ability to predict real emissions because it uses average trip speed to predict emissions and thus misses the influence of variations in speed on emissions. The commenter further claims that MOBILE6 will have the same imperfection because it merely substitutes average speed on each link for average trip speed. The commenter asserts that MOBILE6 will be replaced in a few years, that this planned replacement shows MOBILE6 is inadequate and that tax dollars should not be spent on using a model that is inadequate for its intended purpose.

Response #1: In the November 13, 2002, notice of proposed rulemaking, we discussed the MOBILE6 release to

interpret and reiterate application of our guidance affiliated with the January 29, 2002, official release of the MOBILE6 emission factor model to the severe area SIP revisions that would become due if the Washington area was reclassified to severe. As a consequence, application of our guidance policy relating to the phase-in of MOBILE6 will require additional plan development in the case of the Washington area that would not have occurred otherwise. This increase in scope of the severe area SIP development is one factor in setting the deadline for submission of the severe area SIP.

The Washington area States had submitted a plan to demonstrate that the Washington area would attain the ozone NAAQS by November 15, 2005, once transport-controls implemented in upwind areas have had time to take effect. This plan included, among other things, 2005 motor vehicle emissions budgets, a ROP plan through 1999 and the approved 1990 base year emission inventory. The District, Maryland and Virginia had used the MOBILE5b model to quantify the on-road mobile source emissions for the ROP plan through 1999, the 2005 motor vehicle emissions budgets and the 1990 base year inventory.

If the Washington area had been reclassified to severe nonattainment well before the release of MOBILE6 the existing submittals might have formed part of the severe area SIP by adding the other elements including (but not limited to) ROP plans through 2005, contingency measures and revised major stationary source thresholds and severe area offset ratios. In the absence of an official release of MOBILE6, the States could have continued to use MOBILE5b to develop the missing ROP plans for 2002 and 2005 and to revise the 2005 attainment motor vehicle emissions budgets to reflect any new transportation control measures that might be adopted.

However, MOBILE6, which has been officially released, incorporates numerous changes in emissions that necessitate a revision to the 1990 base year inventory which is, among other things, the planning base line from which the 2002 and 2005 ROP targets are calculated. The changes incorporated into MOBILE6 were not merely limited to coding in the effects of new regulations under the federal motor vehicle control program but also looked at factors and data that result in changed emission rates for 1999 and earlier years. MOBILE6 is a major revision of the MOBILE model. The revision is based on much new data, but also on new understanding of vehicle

emission processes. It includes the effects of regulations that have been issued since MOBILE5b was released, and it includes new features designed to make the model more useful. The improvements in the data and calculations have led to improved estimates of highway vehicle emissions. In some cases, the updated MOBILE6 emissions are significantly different from the emissions estimated with MOBILE5.

In the November 13, 2002, notice of proposed rulemaking, EPA intended to state our position that the severe area ROP plan and attainment demonstration need to use MOBILE6 to calculate ROP targets, ROP and attainment motor vehicle emissions budgets using MOBILE6. Because MOBILE6 is the best model currently available and has been officially released, EPA reaffirms that MOBILE6 must be used by Maryland, Virginia and the District of Columbia to quantify mobile source emissions levels and benefits of mobile source emissions control measures and programs when developing the severe area SIP for the Washington area. These uses include (but are not limited to) revision of the 1990 base year emissions inventory, development of the target levels for the 2002 and 2005 ROP plans future year emissions projections, and development of motor vehicle emissions budgets.

EPA is currently developing the framework for the model that will eventually replace MOBILE6. While work has begun on the new model, we estimate that it will not be completed until the fall of 2005. In other words, based on EPA's current schedule it is likely that the new model will not be available more than one or two months prior to the area's attainment date of November 15, 2005. Therefore, it is not possible for EPA to allow the area to wait until the new model is available to submit the severe area SIP revisions that are required. For areas reclassified under section 181(b), pursuant to section 182(i) of the CAA EPA can adjust applicable deadlines (other than the attainment date) such as those for submission of a SIP to meet a new classification or achievement of rate-of-progress, but EPA cannot delay the date by which the Washington area must submit the severe area SIP revision submissions past the attainment date.

With regard to the influence of speeds on emissions, EPA concludes that MOBILE6 provides the best estimates of mobile source emissions currently available including consideration of the effects of speed on emissions. Thus EPA believes it is appropriate for the Washington area to use MOBILE6 for current SIP planning. This is for the

reasons discussed in the preceding paragraphs: (1) MOBILE6 is the best model currently available and has been officially released; (2) EPA believes it is unlikely a new model will become available within the time period before the severe area SIPs are due; and (3) because the release date of any successor model cannot be forecast at this time, EPA cannot delay the submittal date indefinitely.

Comment #2: One commenter agreed with EPA that the July 2, 2002, Court ruling vacated approval of the commitment to revise the transportation conformity budgets within one year of the official release of MOBILE6. This commenter urged EPA to set the date by which the area must set transportation conformity budgets using MOBILE6 to coincide with the date by which the severe area plan elements must be submitted.

Response #2: In the November 13, 2002, notice of proposed rulemaking, we discussed the MOBILE6 release to interpret and reiterate application of our guidance affiliated with the January 29, 2002, official release of the MOBILE6 emission factor model to the SIP revisions that would become due if the Washington area was reclassified to severe. Given the time that has now elapsed since the release of the MOBILE6, EPA believes that application of our policy and guidance related to the release of the MOBILE6 model means that MOBILE6 is the only proper model to be used for any motor vehicle emissions budgets submitted to fulfill the severe area requirements.⁵

EPA did not propose action on any SIP revision or on any enforceable commitment in the November 13, 2002, notice of proposed rulemaking for this action. Any action EPA takes on the SIP revisions formerly covered by the now vacated January 3, 2001, final rule will be the subject of separate rulemaking action(s). EPA will establish in a forthcoming notice of proposed rulemaking in the **Federal Register** a separate public comment period on these SIP revisions. EPA anticipates it would not set any different date for submittal of the budgets than the date for submittal of the ROP and attainment demonstration SIP revisions.

G. Need for Mid-Course Review

Summary of Public Comments Received

One commenter agreed with EPA that the July 2, 2002, Court ruling vacated

⁵ The applicable guidance and policy can be found in the January 18, 2002, joint memorandum from John S. Seitz and Margo Tsigirigot Oge entitled "Policy Guidance for the Use of MOBILE6 in SIP Development and Transportation Conformity."

approval of the commitment to perform a mid-course review (MCR). The commenter contended that the schedule for submittal of the severe area SIP might well negate the need for a MCR and asked EPA to specify whether the severe area SIP needs to include a MCR.

EPA's Response

EPA disagrees that the schedule set in this final rule fully negates the need for a commitment to a MCR.

Our 1996 modeling guidance recognizes a need to perform a MCR review as a means for addressing uncertainty in the modeling results.⁶ Because of the uncertainty in long term projections, EPA believes a viable attainment demonstration that relies on WOE needs to contain provisions for periodic review of monitoring, emissions, and modeling data to assess the extent to which refinements to emission control measures are needed.

On March 28, 2002, EPA issued further guidance on the performance of the MCR.⁷ In this memorandum covered the overall MCR process and timing, including the potential consequences of findings that progress toward attainment is, or is not, being made; guidance for situations where failure to make progress is due to transport; and a special schedule for other (e.g., moderate or serious) ozone nonattainment areas with attainment dates of 2004 or earlier. This memorandum revised some of the earlier policy related to areas in the east significantly affected by transport. Originally we required the Washington area to provide an enforceable commitment to perform the MCR following the 2003 ozone season and to submit the results to EPA by the end of the review year (i.e., December 31, 2003). We chose the end of calendar year 2003 because at the time we had thought that an analysis in 2003 would be most robust since some or all of the regional NO_x emission reductions should be achieved by that date.

In our January 2002, guidance we noted that if a State's implementation plan relies on regional control measures, for a MCR to be useful, a substantial portion of these measures need to have

⁶ See "Guidance on Use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS", EPA-454/B-95-007, June 1996.

⁷ See "Mid-Course Review Guidance for the 1-Hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstration," from Lydia N. Wegman, Director, Air Quality Strategies & Standards Division, OAQPS and J. David Mobley, Acting Director, Emissions, Monitoring and Analysis Division, OAQPS, dated March 28, 2002, and see "Recommended Approach For Performing Mid-course Review of SIP's To Meet The 1-hour NAAQS For Ozone," January 2002.

been implemented prior to the most recent ozone season in the nonattainment area for which the MCR is being performed. For example, if NO_x SIP call measures are implemented by the spring of 2004, and those measures are an important part of the strategy for meeting the NAAQS in a particular nonattainment area, the MCR should include data from the Summer of 2004.⁸ EPA has already concluded that the Washington area is significantly affected by transport and issued the NO_x SIP call to prohibit specified amounts of emissions of one of the main precursors of ground-level ozone, NO_x, to reduce ozone transport across State boundaries in the eastern half of the United States. See 63 FR 57356, October 27, 1998).

While the District, Maryland and Virginia may be able to perform some aspects of the MCR before submission of the severe area SIP, they will not be able to incorporate 2004 air quality data into the analysis. The 2004 air quality data should be the first to reflect control of NO_x throughout the entire eastern half of the United States. EPA believes that the appropriate submission date for the MCR for the Washington area is no later than December 31, 2004, in order to include air quality data that reflects at least one full season of regional NO_x controls. Given that the schedule set in this final rule requires submission of the severe area SIP before December 31, 2004, EPA believes that the Washington area needs to revise its commitment to perform a MCR as part of its severe area SIP. The revised commitment would not have to provide an administrative review of additional measures adopted after reclassification to severe, but would have to address other aspects of a MCR.

H. Guidance on Offsetting Growth in Emissions Due to Growth in Vehicle Miles Traveled (VMT)

Summary of Public Comments Received

One commenter asked for clarification regarding a statement made regarding the enforceable transportation control strategies requirement of section 182(d)(1). The text at issue in the proposal was found in item number four in section XII of the proposed rule (67 FR at 68810) which was entitled "What would a Reclassification Mean for the Washington Area?", November 13, 2002). The commenter noted a discrepancy between the description in the notice of proposed rulemaking and the language found in the statute. The commenter stated that section 182(d)(1) of the CAA requires a State to submit a

⁸ *Ibid.*

revision “that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection (b)(2)(B) and (c)(2)(B) (pertaining to periodic emissions reduction requirements). The State shall consider measures specified in section 108(f), and choose from among and implement such measures as necessary to demonstrate attainment.” In contrast the notice of proposed rulemaking stated “[e]nforceable transportation control strategies and measures to offset projected growth in vehicle miles traveled or number of vehicle trips as necessary to demonstrate attainment and to achieve periodic emissions reduction requirements”.

The commenter asserted that if EPA was changing the requirement for the Washington area from a requirement for measures to offset growth in vehicle emissions due to VMT growth or number of vehicle trips as necessary to attain or achieve ROP to one requiring measures to offset VMT growth or number of vehicle trips then EPA needs to conduct formal notice and comment rulemaking.

EPA's Response

EPA intent in section XII entitled “What would a Reclassification Mean for the Washington Area” of the notice of proposed rulemaking was not to change any requirement or any change current guidance or policy. In section XII of the notice of proposed rulemaking we merely outlined some of the major planning elements that the Washington area would have to include in a severe area SIP. EPA agrees that the summary description provided in the notice of proposed rulemaking would have better reflected the statutory requirement if it had said “enforceable transportation control strategies and measures to offset any growth in emissions due to projected growth in vehicle miles traveled or number of vehicle trips as necessary to demonstrate attainment and to achieve periodic emissions reduction requirements.”

I. 2002 Air Quality Data and Air Quality Improvement Since 1990

Summary of Public Comments Received

One commenter does not agree with EPA's statement in the notice of proposed rulemaking that the air quality

in the Washington area has improved significantly since 1990. The commenter claims the notice failed to consider air quality data for the 2002 ozone season and that the 2002 ozone season was the worst in a decade because there were nine days during which at least one monitor exceeded the 1-hour ozone NAAQS.

EPA's Response

Some of the air quality data trends presented in the notice of proposed rulemaking were for informational purposes only and do not form the basis for the action we announce in this document. The data relevant for purposes of making the statutory determination of whether the area attained by its deadline is that which shows the area did not attain by November 15, 1999.

As explained elsewhere in this document, section 181(b)(2)(A) of the Clean Air Act requires that when EPA determines that an area has not attained the standard by its statutorily required date the area shall be reclassified by operation of law to the higher of—

(1) The next higher classification for the area, or

(2) The classification applicable to the area's design value as determined at the time EPA publishes its notice that the area failed to attain.

Therefore, even if a serious area's design value at the time of reclassification is lower than the design value for serious nonattainment, that serious area cannot be reclassified to a lower classification because the minimum reclassification resulting from a failure to attain is severe. Likewise, the maximum reclassification is severe because even if an area's design value is beyond the extreme threshold section 181(b)(2) prohibits an area failing to attain from being reclassified to extreme nonattainment.

Therefore, unlike a marginal or moderate nonattainment area where the design value at the time of the reclassification could have a bearing on the final classification resulting from a failure to attain, a serious area can only be reclassified under section 181(b)(2) to severe nonattainment upon a finding of failure to attain because the only operative provision is that which requires reclassification to the next higher classification.

The design value data in the notice of proposed rulemaking was presented mainly as an indicator that had the area been classified for the first time, the area would have been classified as marginal.

The relevant air quality data for EPA's final determination of a failure to attain is that which shows the area contained

at least one monitor with an average annual number of expected exceedances for the 1997 through 1999, inclusive, period.

With respect to the 2002 air quality data, we did not present it in the notice of proposed rulemaking for the simple reason that insufficient final data was available for us to make a proper comparison with prior years data at the time the notice of proposed rulemaking was drafted.

Even taking into account the 2002 data, the Washington area's design value corresponds to that of a marginal area. The Washington area's air quality has by this measure improved from the time it was classified as a serious area based upon its design value.

J. Adequacy of Current SIP Submittals

Summary of Public Comments Received

One commenter does not agree that the Washington area states had ever submitted a modeled demonstration of attainment for the area.

EPA's Response

This comment is not germane to this action. EPA did not propose action on any SIP revision in the November 13, 2002, notice of proposed rulemaking. What action EPA takes on the SIP revisions formerly covered by the now vacated January 3, 2001, final rule will be the subject of separate rulemaking action(s). EPA will establish in a forthcoming notice of proposed rulemaking in the **Federal Register** a separate public comment period on these SIP revisions.

IV. What Is the Impact of Reclassification on Title V Operating Permit Programs?

In the November 13, 2002, notice of proposed rulemaking, EPA noted that additional sources would become subject to the Title V major stationary source operating permit program as a collateral consequence of a reclassification of the Washington area to severe. The affected sources are those with a potential to emit of more than 25 tons per year of either VOC or NO_x or both VOC and NO_x. Any newly major stationary sources must submit a timely Title V permit application. “A timely application for a source applying for a part 70 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish.” See 40 CFR 70.5(a)(1) and see 40 CFR 71.5(a)(1). On the effective date of this action that can be found in the **DATES** section of this final rule, the

12 month (or earlier date set by the applicable permitting authority) time period to submit a timely application will commence in accordance with the state Title V program regulations applicable to that source.⁹

V. Final Action

For the reasons set forth in the notice of proposed rulemaking and in this final rulemaking notice, EPA has determined that the Washington ozone nonattainment area failed to attain the 1-hour ozone NAAQS by November 15, 1999, as required by section 181(a) of the CAA, and the Washington ozone nonattainment area is reclassified by operation of law to severe ozone nonattainment pursuant to section 181(b)(2) of the CAA.

A. What Is the New Attainment Date for the Washington Area?

Under section 181(a)(1) of the CAA, the new attainment deadline for the Washington area as a serious ozone nonattainment areas reclassified to severe under section 181(b)(2) is to attain the 1-hour ozone NAAQS as expeditiously as practicable but no later than November 15, 2005, which is the date applicable to the new severe nonattainment classification.

B. When Must District of Columbia, Maryland and Virginia Submit SIP Revisions Fulfilling the Requirements for Severe Ozone Attainment Areas?

Under section 181(a)(1) of the Act, the attainment deadline for serious ozone nonattainment areas reclassified to severe under section 181(b)(2) is as expeditiously as practicable but no later than November 15, 2005. Under section 182(i), such areas are required to submit SIP revisions addressing the severe area requirements for the 1-hour ozone NAAQS. Under section 182(d), severe area plans are required to meet all the requirements for serious area plans plus the requirements for severe areas, including, but not limited to: (1) A 25 ton per year major stationary source threshold; (2) additional reasonably available control technology (RACT) rules for sources subject to the new lower major applicability cutoff; (3) a new source review (NSR) offset requirement of at least 1.3 to 1; (4) a post-1999 rate-of-progress plan with on-road mobile source emission budgets in emission reductions of ozone precursors of at least 3 percent per year from November 15, 1999 until the attainment date; and (5) a fee requirement for major

sources of volatile organic compounds (VOC) and nitrogen oxides (NO_x) should the area fail to attain by 2005.¹⁰ We have issued a "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" that sets forth our preliminary views on these section 182 requirements and how we will act on SIPs submitted under Title I. See 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992).

The District's, Maryland's and Virginia's severe ozone SIP for the Washington area 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, 2005. Section 182(i) further provides that we may adjust the CAA deadlines for submitting these severe area SIP requirements. In addition to establishing a new attainment date, EPA must also address the schedule by which the District, Maryland and Virginia are required to submit SIP revisions meeting the CAA's pollution control requirements for severe areas.

For the reasons set forth in the notice of proposed rulemaking and this final rulemaking notice and pursuant to section 182(i) of the CAA, EPA is requiring the District of Columbia, Maryland and Virginia to submit SIP revisions addressing the CAA's pollution control requirements for severe ozone nonattainment areas by March 1, 2004.

C. What Will Be the Rate-of-Progress (ROP) and Contingency Measure Schedules?

For the reasons set forth in the notice of proposed rulemaking and this final rulemaking notice and pursuant to section 182(i) of the CAA, EPA is allowing the District, Maryland and Virginia to demonstrate the first required post-1999 nine percent ROP, due under the CAA by November 15, 2002, as expeditiously as practicable after that date (but in any case no later than November 15, 2005) in the event that control measures currently in the SIPs of the District, Maryland and Virginia or already promulgated by EPA do not achieve the required nine percent reduction by November 15, 2002.

¹⁰ Section 182(d)(3) sets a deadline of December 31, 2000, to submit the plan revision requiring fees for major sources should the area fail to attain. This date can be adjusted pursuant to CAA section 182(i). We proposed to adjust this date to coincide with the submittal deadline for the rest of the severe area plan requirements.

The severe area SIP will have to provide for a total of a 18 percent reduction from base line emissions between November 15, 1999, through November 15, 2005. Because the 2002 ROP deadline is now past, the first 9 percent reduction requirement for the period 1999 to 2002 will have to be achieved as expeditiously as practicable after November 15, 2002. The second 9 percent reduction in base line emissions must be achieved by November 15, 2005, to address the 2002 through 2005 ROP requirement. Additionally, the area must submit adequate on-road mobile source emission budgets consistent with the 2002 and 2005 ROP plans.

Because EPA is allowing the District, Maryland and Virginia to demonstrate the first required post-1999 nine percent ROP, due under the CAA by November 15, 2002, as expeditiously as practicable after that date (but in any case no later than November 15, 2005), EPA is also allowing the District, Maryland and Virginia to adopt contingency measures keyed to this new date.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA is required to determine whether regulatory actions are significant and therefore should be subject to Office of Management and Budget (OMB) review, economic analysis, and the requirements of the Executive Order. The Executive Order defines a "significant regulatory action" as one that is likely to result in a rule that may meet at least one of the four criteria identified in section 3(f), including, under paragraph (1), that the rule may "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."

The Agency has determined that the finding of nonattainment would result in none of the effects identified in section 3(f) of the Executive Order. Under section 181(b)(2) of the CAA, determinations of nonattainment are based upon air quality considerations and the resulting reclassifications must occur by operation of law. They 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

⁹Or, in the absence of an applicable state permit program covering the affected source, see 40 CFR 71.5(a)(1).

requirements are automatically triggered by classifications that, in turn, are triggered by air quality values, determinations of nonattainment and reclassification cannot be said to impose a materially adverse impact on state, local, or tribal governments or communities.

B. 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 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 final action to reclassify the Washington, DC area as a severe ozone nonattainment area and to adjust applicable deadlines does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

C. Paperwork Reduction Act

This final action to reclassify the Washington, DC area as a severe ozone nonattainment area and to adjust applicable deadlines does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions.

Determinations of nonattainment and the resulting reclassification of nonattainment areas by operation of law under section 181(b)(2) of the CAA do not in and of themselves create any new requirements. Instead, this rulemaking only makes a factual determination, and does not directly regulate any entities. See 62 FR 60001, 60007-8, and 60010 (November 6, 1997) for additional

analysis of the RFA implications of attainment determinations. Therefore, pursuant to 5 U.S.C. 605(b), I certify that this final action does not have a significant impact on a substantial number of small entities within the meaning of those terms for RFA purposes.

E. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to state, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA believes, as discussed previously in this document, that the finding of nonattainment is a factual determination based upon air quality considerations and that the resulting reclassification of the area must occur by operation of law. Thus, EPA believes that the proposed finding does not constitute a Federal mandate, as defined in section 101 of the UMRA, because it does not impose an enforceable duty on any entity.

F. Executive Order 13045, Protection of Children From Environmental Health Risks 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 final action is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866.

G. 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." Under Executive Order 13132, EPA may not issue a regulation that has Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has Federalism implications and that preempts state law unless the Agency consults with state and local officials early in the process of developing the proposed regulation. This determination of nonattainment and the resulting reclassification of a nonattainment area by operation of law 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 (64 FR 43255, August 10, 1999), because this action does not, in and of itself, impose any new requirements on any sectors of the economy, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, the requirements of section 6 of the Executive Order do not apply to these actions.

H. Executive Order 13175, Coordination With Indian Tribal Governments

This final rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

I. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution, or Use

Under Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001), EPA must prepare for those matters identified as significant energy actions. A "significant energy action" is any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking that is a significant regulatory action under Executive Order 12866 and, and is likely to have a significant adverse effect on the supply, distribution, or use of energy. Under Executive Order 12866, this action is not a "significant regulatory action." For this reason, the proposed finding of nonattainment and reclassification is also not subject to Executive Order 13211.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 25, 2003. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition

for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to reclassify the Washington, DC area as a severe ozone attainment area and to adjust applicable deadlines may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: January 15, 2003.

Donald S. Welsh,
Regional Administrator, Region III.

Accordingly, 40 CFR part 81 is amended as follows:

PART 81—[AMENDED]

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

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

2. Section 81.309 is amended by revising the ozone table entry for the Washington area to read as follows:

§ 81.309 District of Columbia.

* * * * *

DISTRICT OF COLUMBIA—OZONE
[1-Hour Standard]

Designated area	Designation		Classification	
	Date ¹	Type	Date ¹	Type
Washington Area: Washington Entire Area	Nonattainment	3/25/03	Severe

¹ This date is November 15, 1990, unless otherwise noted.

* * * * *

3. Section 81.321 is amended by revising the ozone table entry for the Washington, DC area to read as follows:

§ 81.321 Maryland.

* * * * *

MARYLAND—OZONE
[1-Hour Standard]

Designated area	Designation		Classification	
	Date ¹	Type	Date ¹	Type
Washington, DC Area:				
Calvert County	Nonattainment	3/25/03	Severe
Charles County	Nonattainment	3/25/03	Severe
Frederick County	Nonattainment	3/25/03	Severe
Montgomery County	Nonattainment	3/25/03	Severe
Prince George's County	Nonattainment	3/25/03	Severe

* * * * *

¹ This date is October 18, 2000, unless otherwise noted.

* * * * *

4. Section 81.347 is amended by revising the ozone table entry for the Washington area to read as follows:

§ 81.347 Virginia.
* * * * *

VIRGINIA—OZONE
[1-Hour Standard]

Designated area	Designation		Classification	
	Date ¹	Type	Date ¹	Type
Washington, DC Area:				
Alexandria	3/25/03	Nonattainment	3/25/03	Severe
Arlington County	3/25/03	Nonattainment	3/25/03	Severe
Fairfax	3/25/03	Nonattainment	3/25/03	Severe
Fairfax County	3/25/03	Nonattainment	3/25/03	Severe
Falls Church	3/25/03	Nonattainment	3/25/03	Severe
Loudoun County	3/25/03	Nonattainment	3/25/03	Severe
Manassas	3/25/03	Nonattainment	3/25/03	Severe
Manassas Park	3/25/03	Nonattainment	3/25/03	Severe
Prince William County	3/25/03	Nonattainment	3/25/03	Severe
Stafford County	3/25/03	Nonattainment	3/25/03	Severe

¹ This date is October 18, 2000, unless otherwise noted.

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[FR Doc. 03-1515 Filed 1-23-03; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-2002-0086; FRL-7187-3]

Oxadiazon; Tolerance Revocations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document revokes all tolerances for residues of the herbicide oxadiazon. The regulatory actions in this document are part of the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996. By law, EPA is required by August 2006 to reassess the tolerances in existence on August 2, 1996. The regulatory actions in this document pertain to the revocation of 16 tolerances which were previously reassessed and counted.

DATES: This regulation is effective April 24, 2003. Objections and requests for hearings, identified by docket identification (ID) number OPP-2002-0086, must be received on or before March 25, 2003.

ADDRESSES: Written objections and hearing requests may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit IV. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Joseph Nevola, Registration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-8037; e-mail address: nevola.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer.

Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of

this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP-2002-0086. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>. A frequently updated electronic version of 40 CFR part 180 is available at http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr180_00.html, a beta site currently under development.