

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 81**

[LA-58-1-7522; FRL-7236-1]

**Proposed Effective Date Modification for the Determination of Nonattainment as of November 15, 1999, and Reclassification of the Baton Rouge Ozone Nonattainment Area****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed delay of effective date.

**SUMMARY:** EPA is proposing to delay the effective date of its final rule entitled "Determination of Nonattainment as of November 15, 1999, and Reclassification of the Baton Rouge Nonattainment Area," published elsewhere in today's **Federal Register**, until October 4, 2002. As promulgated, the rule states that it is effective 60 days after publication in the **Federal Register**. EPA believes that the proposed additional delay of the effective date until October 4, 2002, is necessary, in part, to allow regulated entities in the Baton Rouge area to prepare for compliance with the new requirements that would become applicable in the area upon the effective date of the nonattainment determination and reclassification.

During the pre-effective date period, EPA would also continue to work on completing a separate rulemaking on the issue of whether Baton Rouge should be granted an extension of its attainment date pursuant to EPA's Guidance on "Extension of Air Quality Attainment Dates for Downwind Transport Area," (64 FR 14441, March 25, 1999) (hereinafter referred to as extension policy) and continue to retain its serious classification. In this action, EPA is also stating its intent to propose to withdraw its final determination of nonattainment and notice of reclassification, published elsewhere in this issue if EPA approves an attainment date extension before the effective date of that final action.

**DATES:** Comments must be received on or before July 24, 2002.

**ADDRESSES:** Written comments should be mailed to Mr. Thomas H. Diggs, Chief, Air Planning Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733.

**FOR FURTHER INFORMATION CONTACT:** Ms. Maria L. Martinez, Air Planning Section (6PD-L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, telephone (214) 665-2230.

**SUPPLEMENTARY INFORMATION:****Background**

In a Judgment entered on March 7, 2002, the United States District Court for the Middle District of Louisiana Court, ordered EPA to determine, by June 5, 2002, whether the Baton Rouge area had attained the applicable ozone standard under the Clean Air Act (hereinafter referred to as the CAA or Act). *Louisiana Environmental Action Network (LEAN) v. Whitman*, 00-879-A. The Court also ordered EPA to publish in the **Federal Register** a notice of a final action reflecting both the determination and any reclassification of the area required as a result of the determination. EPA's final rulemaking notice responding to the Court's Judgment is published elsewhere in today's **Federal Register**. The Court also held that it was not acting to restrict the effective date that EPA selects for its action.

Throughout this document whenever "we, us, or our" is used, we mean EPA.

On May 10, 2000, the Governor of Louisiana submitted a request for an attainment date extension for the Baton Rouge area pursuant to EPA's extension policy. On November 22, 2000, LEAN filed a complaint in the United States District Court for the Middle District of Louisiana against EPA (*LEAN v. Whitman*, No 00-879-A), alleging that EPA failed to discharge its duty to make and publish a determination that the Baton Rouge Ozone Nonattainment Area, (as defined at 56 FR 56,694, 56,768), did not attain the National Ambient Air Quality Standard for ozone by November 15, 1999. The state of Louisiana, the City of Baton Rouge/Parish of East Baton Rouge, Entergy Gulf States, Inc. and Entergy Gulf South, Inc., Louisiana Chemical Association, and Louisiana Mid-Continent Oil & Gas Association were intervenors in the litigation. On May 9, 2001, EPA published a proposal to determine that the Baton Rouge area did not attain the 1-hour ozone NAAQS or in the alternative allow Louisiana an opportunity to qualify for an attainment date extension pursuant to EPA's extension policy.

Additionally, Louisiana submitted its Attainment Plan and Transport State Implementation Plan (Attainment Plan/Transport SIP) on December 31, 2001. Louisiana is in the concluding stage of a process that could culminate in EPA final action on the Attainment Plan/Transport SIP that was submitted on December 31, 2001, and on a possible attainment date extension. This extension, if granted, would allow the area to remain classified as a serious nonattainment area.

During court proceedings, LEAN argued for the Court to order EPA to issue a determination with a restricted effective date. As part of its February 27, 2002, decision, the United States District Court for the Middle District of Louisiana acknowledged its limited authority under 42 U.S.C. 7604, ruling that it lacked the authority to issue an order restricting the effective date that EPA selects for its action. *LEAN v. Whitman*, No. 00-879-A.<sup>1</sup>

On March 7, 2002, the Court entered a Judgment compelling EPA to determine, by June 5, 2002, whether the Baton Rouge 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 the determination and any reclassification of the area required as a result of the determination. Our rule entitled "Determination of Nonattainment as of November 15, 1999, and Reclassification of the Baton Rouge Ozone Nonattainment Area," published elsewhere in today's **Federal Register** is in response to the Court's Judgment.

EPA believes that the proposed delay of the effective date is necessary to allow regulated entities in the Baton Rouge area a period of time to prepare for the new requirements that are applicable to severe nonattainment areas. For example, on the effective date of the reclassification to severe, under the Baton Rouge SIP, the threshold for "major sources" will be reduced from 50 tons of emissions on an annual basis to 25 tons. Thus, a number of facilities with volatile organic compound (VOC) or nitrogen oxide (NO<sub>x</sub>) emission levels between 50 and 25 tons per year may become subject to major source requirements for the first time.<sup>2</sup> Preliminary information provided by the Louisiana Department of Environmental Quality (LDEQ) indicates that approximately 20 to 50 sources will be subject to these new requirements for the first time. EPA believes it is reasonable to delay the effective date of our rule entitled "Determination of Nonattainment as of November 15, 1999, and Reclassification of the Baton Rouge Ozone Nonattainment Area" by six weeks to provide such sources

<sup>1</sup> For additional information on other court rulings on the issue of the effective date for such an action, see, *Sierra Club v. Browner*, 130 F. Supp. 2d 78 (D.D.C. 2001), aff'd., 285 F. 3d 63 (D.C. Cir. 2002).

<sup>2</sup> See section 182(d) in conjunction with section 182(f) of the Clean Air Act for the severe area major source thresholds for these pollutants.

additional time to prepare for the impact of these new requirements.<sup>3</sup>

EPA will continue to work on completing a separate rulemaking on the issue of whether Baton Rouge should be granted an extension of its attainment date pursuant to EPA's extension policy, and remain classified as a serious nonattainment area. Louisiana is in the final stages of completing the actions necessary to be considered for an attainment date extension under EPA's extension policy. EPA believes that it is in the public interest to move forward to complete a rulemaking regarding Louisiana's Attainment Plan/Transport SIP. Completion of the rulemaking prior to the effective date of today's action would allow EPA to assess and take into consideration the role of transported pollution in Baton Rouge's nonattainment problems, and to provide for an equitable distribution of responsibility for achieving attainment of the ozone standard in the area. Such a course would harmonize the need to allow the Agency to fulfill its duty to take into account upwind transport, while adhering to a fixed and very near-term schedule. It would also allow EPA to apply the attainment date extension policy which EPA has applied in other areas affected by transport to the Baton Rouge area. EPA has issued final rulemakings granting requests for attainment date extensions based on its policy in six ozone nonattainment areas: Washington, DC (66 FR 585, January 3, 2001), Greater Connecticut (66 FR 633, January 3, 2001), Springfield, Massachusetts (66 FR 665, January 3, 2001), Beaumont, Texas (66 FR 26913, May 15, 2001), St. Louis, Missouri (66 FR 33996, June 26, 2001), and Atlanta, Georgia (67 FR 30574, May 7, 2002).

If EPA takes final action to delay the effective date for the nonattainment determination, EPA could be in a position to take action to approve an extension of the attainment date for Baton Rouge before the nonattainment determination becomes effective. Section 181(b)(2)(A) of the Act requires that EPA determine whether an area has attained within six months of its attainment date. If the attainment date were extended, there would be a new future attainment date. Thus, if the attainment date were extended, EPA's obligation to determine attainment would not yet have occurred. If EPA were to extend the attainment date for Baton Rouge, EPA would withdraw the published nonattainment determination and the consequent reclassification,

which would not yet have gone into effect.

EPA is seeking public comment on whether it would be appropriate to delay the effective date of its final rulemaking until October 4, 2002, in order to allow area sources to prepare to meet new severe requirements. The public comment period on delaying the effective date will run for 30 days after publication of this document. EPA expects to propose an action with respect to this submission, and to take final action on this submission and an attainment date extension by October 4, 2002, the delayed effective date proposed herein.

**PROPOSED ACTION:** For the reasons state above, EPA proposes to delay to October 4, 2002, the effective date of the final rule entitled "Determination of Nonattainment as of November 15, 1999, and Reclassification of the Baton Rouge Ozone Nonattainment Area," published elsewhere in today's **Federal Register**.

#### Administrative Requirements

##### A. Executive Order 12866

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 this proposed effective date modification would result in none of the effects identified in section 3(f) of the Executive Order. This proposal would merely delay the effective date of EPA's determination of nonattainment and would not impose any new requirements on any sectors of the economy, or on state, local, or tribal governments or communities.

##### B. Executive Order 13045

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically

significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This proposed action is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866.

##### C. Executive Order 13175

On November 6, 2000, the President issued Executive Order 13175 (65 FR 67249) entitled, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 took effect on January 6, 2001, and revokes Executive Order 13084 (Tribal Consultation) as of that date. This proposal does not affect the communities of Indian tribal governments. Accordingly, the requirements of Executive Order 13175 do not apply.

##### 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.

This proposal to delay the effective date of EPA's nonattainment determination does not create any new requirements. Instead, this rulemaking would only delay the effective date of a factual determination, and would not regulate any entities. Therefore, pursuant to 5 U.S.C. 605(b), I certify that today's proposal would 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

<sup>3</sup> EPA has taken a similar action for the St. Louis Nonattainment Area (66 FR 27306, May 16, 2001).

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 above, that the delay of the effective date of a determination of nonattainment would not constitute a Federal mandate, as defined in section 101 of the UMRA, because it would not impose an enforceable duty on any entity.

#### *F. Executive Order 13132*

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 proposed delay of the effective date of a nonattainment determination would 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 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 this proposed action.

#### *G. 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 proposed action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements.

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

Dated: June 5, 2002.

**Gregg A. Cooke,**

*Regional Administrator, Region 6.*

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