

(d) *Documentation.* (1) The Agreements Officer will need to provide information to the Contracting Officer from the agreement and award file that the conditions set forth in paragraph (b) of this section have been satisfied.

(2) The information shall contain, at a minimum:

- (i) The competitive procedures used;
- (ii) How the production quantities and target prices were evaluated in the competition;
- (iii) The percentage of cost-share; and
- (iv) The production quantities and target prices set forth in the OT agreement.

(3) The Project Manager will provide evidence of successful completion of the prototype project to the Contracting Officer.

Dated: March 12, 2004.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04-7044 Filed 3-29-04; 8:45 am]

BILLING CODE 5001-06-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[TX-122-1-7612; FRL-7641-2]

Determination of Nonattainment as of November 15, 1996 and Reclassification of the Beaumont/Port Arthur Ozone Nonattainment Area; State of Texas; Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the U.S. Court of Appeals for the Fifth Circuit's (the Court) reversal, the EPA is withdrawing its final action that extended the attainment date to November 15, 2007, and approved the transport demonstration (66 FR 26914) for the Beaumont/Port Arthur 1-hour ozone nonattainment area (the BPA area). The EPA finds that the BPA area has failed to attain the 1-hour ozone national ambient air quality standard (NAAQS or standard) by November 15, 1996, the attainment date for moderate nonattainment areas set forth in the Federal Clean Air Act (Act or CAA). As a result, the BPA area is reclassified by operation of law as a serious 1-hour ozone nonattainment area. The new serious area attainment date for the BPA area is as expeditiously as practicable but no later than November 15, 2005. The State of Texas must submit a State Implementation Plan (SIP) revision that

meets the serious area 1-hour ozone nonattainment area requirements of the Act on or before one year after the effective date of this final action. We are adjusting the dates by which the area must meet the rate-of-progress (ROP) requirements and adjusting contingency measure requirements as they relate to the ROP requirements. These final actions are in direct response and to comply with the Court's reversal.

In response to the Court's remand, we are withdrawing our final approval of BPA's 2007 attainment demonstration SIP, the Mobile Vehicle Emissions Budget (MVEB), the mid-course review commitment (MCR), and our finding that BPA implemented all Reasonable Available Control Measures (RACM). The required revised SIP must include, among other things, a revised attainment demonstration SIP, a new MVEB, and a re-analysis of RACM that complies with the Court's order.

DATES: This final rule is effective on April 29, 2004.

ADDRESSES: Copies of documents relevant to this action are available for public inspection during normal business hours at the following locations. Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733; and, the Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT:

Karla Ann Richardson, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733. Telephone Number (214) 665-8555, e-Mail Address: richardson.karla@epa.gov.

SUPPLEMENTARY INFORMATION:

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I. What Is the Background for This Action?

The BPA area was classified as a moderate 1-hour ozone nonattainment area and, therefore, was required to attain the 1-hour ozone standard of 0.12 ppm by November 15, 1996. On April 16, 1999, EPA proposed to reclassify the BPA area to a serious ozone nonattainment area, or, in the alternative to extend BPA's attainment date if the State submitted a SIP consistent with the criteria of the Transport Policy. 64 FR 18864. As part of the proposed alternative reclassification of the area to serious, the EPA proposed to find that the BPA area did not attain the 1-hour ozone NAAQS by November 15, 1996, as required by the CAA. The proposed finding was based on 1994-1996 air quality data that showed the area's air quality violated the standard and the area did not qualify for an attainment date extension under the provisions of section 181(a)(5).¹ EPA also proposed that the appropriate reclassification of the area would be from moderate to serious.

Although the area was not eligible for an attainment date extension under

¹ Section 181(a)(5) specifies that a state may request, and EPA may grant, up to two one-year attainment date extensions. EPA may grant an extension if: (1) the state has complied with the requirements and commitments pertaining to the applicable implementation plan for the area, and (2) the area has measured no more than one exceedance of the ozone standard at any monitoring site in the nonattainment area in the year in which attainment is required.

CAA section 181(a)(5), the April 16, 1999, proposal included a notice of the BPA area's eligibility for an attainment date extension, pursuant to the Transport Policy, which was published in a March 25, 1999, **Federal Register** notice (64 FR 14441). This policy addressed circumstances where pollution from upwind areas interferes with the ability of a downwind area to attain the 1-hour ozone standard by its attainment date. EPA proposed to finalize its action on the determination of nonattainment and reclassification of the BPA area only after the area had received an opportunity to qualify for an attainment date extension under the Transport Policy.

The State of Texas submitted a request for an extension of the attainment date for the BPA area, a transport demonstration, an attainment demonstration SIP and MVEB, an MCR enforceable commitment, and RACM analysis. We proposed on December 27, 2000, to approve the transport demonstration and to extend the attainment date without reclassifying the area, to approve the attainment demonstration SIP and MVEB, to approve the MCR commitment, and to find that BPA was implementing all RACM. (65 FR 81786)

On May 15, 2001, EPA issued a final rule (66 FR 26914) in which EPA approved the transport demonstration and extended the attainment date for the BPA area to November 15, 2007, while retaining the area's classification as "moderate." The rule also approved the attainment demonstration for the BPA area and MVEB, approved the State's enforceable commitment to perform a mid-course review and submit a SIP revision by May 1, 2004, found that the area was implementing all RACM, and took one other non-related action. The attainment demonstration SIP is addressed in the State of Texas submittals dated November 12, 1999, and April 25, 2000. Thus, the area would have had until no later than November 15, 2007, the attainment date for the upwind Houston-Galveston (HG) nonattainment area, to attain the 1-hour ozone standard. The final rule contains EPA's responses to the comments. (We

also took one final action not relevant to today's action and the Court's remand: the finding that BPA met the Reasonably Available Control Technology (RACT) requirements for major sources of Volatile Organic Compounds (VOC) emissions.)

A petition for review of the May 15, 2001, rulemaking was filed in the U.S. Court of Appeals for the Fifth Circuit. On December 11, 2002, the Court issued a decision in *Sierra Club v. EPA*, 314 F.3d 735 (5th Cir. 2002), reversing the portion of EPA's approval that extended BPA's attainment date to 2007 under the Transport Policy without reclassifying the area.² The Court also remanded to EPA the final actions related to the reversal: our approval of the attainment demonstration SIP and MVEB, the MCR commitment, and our finding that the area was implementing all RACM. The Court affirmed the portion of EPA's final action that requires implementation only of control measures that contribute to attainment as expeditiously as practicable and considers implementation costs in rejecting control measures, but remanded EPA's specific determination regarding RACM in the BPA area so that any conclusions about the control measures may be adequately explained.

EPA published a Supplemental Proposed rule dated June 19, 2003 (68 FR 36756). In response to the Court's reversal, EPA proposed to withdraw its final action that extended the attainment date to November 15, 2007, and approved the transport demonstration. We also proposed to issue a finding that BPA failed to attain the 1-hour ozone national ambient air quality standard (NAAQS or standard) by November 15, 1996, the attainment date for moderate nonattainment areas set forth in the Act, and to reclassify BPA as a serious 1-hour ozone nonattainment area. EPA also proposed that should we take final action on the reclassification to serious, we would also take one of two alternative options for identifying the appropriate attainment date for the area. Under Option 1, EPA proposed further to find that the area failed to attain the 1-hour ozone standard by November 15, 1999,

the attainment date for serious nonattainment areas. If EPA took final action on that finding, the area would be reclassified as a severe 1-hour ozone nonattainment area, with an attainment date of no later than November 15, 2005. Alternatively, under Option 2, if the area were reclassified as a serious 1-hour ozone nonattainment area, EPA proposed that it would retain that classification, but that it would have an attainment date of no later than November 15, 2005. Under either alternative, we proposed that the State of Texas submit the required SIP revision on or before one year after the effective date of a final action on this notice. We further proposed to adjust the dates by which the area must meet the rate-of-progress (ROP) requirements and adjust contingency measure requirements as they relate to the ROP requirements.

In response to the Court's remand, we also proposed to withdraw our final approval of BPA's 2007 attainment demonstration SIP, the MVEB, the mid-course review commitment (MCR), and our finding that BPA implemented all RACM. We also proposed the schedule for Texas to submit a revised SIP, a new MVEB, and a re-analysis of RACM meeting the Court's order.

II. What Are the National Ambient Air Quality Standards?

Since the CAA's inception in 1970, EPA has set NAAQS for six common air pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. The CAA requires that these standards be set at levels that protect public health and welfare with an adequate margin of safety. These standards present state and local governments with the air quality levels they must meet to achieve clean air. Also, these standards allow the American people to assess whether or not the air quality in their communities is healthful.

III. What Is the NAAQS for Ozone?

The NAAQS for ozone is expressed in two forms called the 1-hour and 8-hour³ standards. Table 1 summarizes the 1-hour ozone standards.

² Two other United States Circuit Courts of Appeals had previously issued decisions rejecting transport-based attainment date extensions that EPA had granted in other areas. *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002) and *Sierra Club v. EPA*, 311 F.3d 853 (7th Cir. 2002). In the wake of these decisions, EPA issued final rulemakings reclassifying the Washington, DC ozone nonattainment area, 68 FR 3410 (January 24, 2003), and the St. Louis ozone nonattainment area, 68 FR

4835 (January 30, 2003). (EPA subsequently redesignated the St. Louis area to attainment for the ozone standard 68 FR 25418 and 68 FR 25442 (May 12, 2003).) In addition, in light of the three circuit court decisions, EPA issued final rules withdrawing transport-based attainment date extensions and reclassifying the Baton Rouge and the Atlanta ozone nonattainment areas, (68 FR 20077 (April 24, 2003), and 68 FR 55469 (September 26, 2003), respectively).

³ The 8-hour ozone standard value is 0.08 ppm and is the primary and secondary standard. The standard requires that the average of the annual fourth highest daily maximum 8-hour average ozone concentration measured at each monitor over any three-year period, be less than or equal to 0.08 ppm. EPA intends to designate areas under the 8-hour standard by April 15, 2004.

TABLE 1.—SUMMARY OF 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 | 0.08 ppm | Primary and Secondary | Three year average of the annual fourth highest value at any specific monitor must not exceed the standard. |

(Primary standards are designed to protect public health and secondary standards are designed to protect public welfare and the environment.) Eventually the 8-hour standard will replace the one hour standard. EPA is currently developing a transition policy from the one hour standard to the eight hour standard that will explain which one hour requirements must remain in place (68 FR 32802).

At this time the 1-hour ozone standard continues to apply to the BPA area, and it is the classification of the BPA area with respect to the 1-hour ozone standard addressed in this document.

IV. What Is a SIP and How Does It Relate to the NAAQS for Ozone?

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. 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.

V. What Is the Beaumont/Port Arthur Nonattainment Area?

The Beaumont/Port Arthur 1-hour ozone nonattainment area is located in Southeast Texas, and consists of Hardin, Jefferson, and Orange Counties.

VI. What Is the Additional Context for This Rulemaking?

The Transport Policy provided for an extension of an area's attainment date if it was adversely affected by transport, without having to reclassify the affected area. Consequently, when we granted the extension of the attainment date for BPA based upon the transport demonstration, we did not take action to finalize the April 16, 1999, proposed finding that BPA had not attained the 1-hour ozone standard by November 15, 1996. We therefore did not reclassify

BPA from "moderate" to "serious." The Court's ruling means that BPA's attainment date extension while retaining the "moderate" classification, using the Transport Policy, is no longer valid.

VII. Application of the CAA Provisions Regarding Determinations of Nonattainment and Reclassifications

A. Serious Classification

Section 181(b)(2) of the Act requires that we determine, based on the area's design value (as of the attainment date), whether an ozone nonattainment area attained the one-hour ozone standard by that date. If we find that the nonattainment area has failed to attain the one-hour ozone standard by the applicable attainment date, the area is reclassified by operation of law to the higher of the next higher classification for the area, or the classification applicable to the area's design value as determined at the time of the required **Federal Register** notice.

We make attainment determinations for ozone nonattainment areas using available quality-assured air quality data. For the BPA ozone nonattainment area, the attainment determination is based on 1994–1996 air quality data. The data show that for 1994–1996, four monitoring sites averaged more than one exceedance day per year. This data calculates to a design value of .157 ppm. Therefore, pursuant to section 181(b) of the CAA, we find that the BPA area did not attain the 1-hour ozone NAAQS by the November 15, 1996, deadline for moderate areas. Additional background for this finding may be found in the April 16, 1999, proposal (64 FR 18864), the December 27, 2000, proposal (65 FR 81786), and the May 15, 2001, final rule (66 FR 26914). A summary and discussion of the air quality monitoring data for the BPA area for 1994 through 1996 can be found in the April 16, 1999, proposal and its technical support document (TSD). We received no adverse comments on our findings regarding these air quality data.

Section 181(b)(2)(A) of the Act requires that, when we find that an area failed to attain by the applicable date, the area is reclassified by operation of law to the higher of: the next higher

classification or the classification applicable to the area's ozone design value at the time the required notice is published in the **Federal Register**. The classification applicable to BPA's ozone design value at the time of today's notice is "moderate" since the area's 2003 calculated design value, based on quality-assured ozone monitoring data from 2001–2003, is 0.129 ppm. By contrast, the next higher classification for BPA is "serious." Because "serious" is a higher nonattainment classification than "moderate" under the statutory scheme, BPA is reclassified by operation of law as "serious," for failing to attain the standard by the moderate area applicable attainment date of November 15, 1996.

B. Selection of Option 2—Reclassification to Serious

In EPA's Supplemental Proposed rule dated June 19, 2003 (68 FR 36756), we proposed two options for identifying the appropriate attainment date following a final action on the reclassification of the BPA area to serious. Under Option 1, EPA would make an additional determination of whether BPA attained the standard by November 15, 1999. If we made a final determination that the area failed to attain by the 1999 date, the area would be reclassified as severe with an attainment date of no later than November 15, 2005. Under Option 2, if the area were reclassified as a serious area, EPA would retain the serious classification for the area but the attainment date would be no later than November 15, 2005.

We have concluded that Option 2 is the better choice. We therefore have chosen not to finalize the additional determination of whether the BPA area attained the standard by November 15, 1999. We believe it is appropriate in these special BPA circumstances to retain the serious classification but with a prospective attainment date. Through discussions with representatives from the State, Industry, Environmental Groups, and commenting parties it seems that they agree Option 2 is the better choice considering the BPA area's particular circumstances, history, and facts.

VIII. What Is the New Attainment Date for the Beaumont/Port Arthur Area?

The new attainment date for the BPA area is as expeditiously as practicable but no later than November 15, 2005. The as expeditiously as practicable attainment date will be determined as part of the action on the required SIP submittal.

IX. What Is the Date for Submitting a Revised SIP for BPA?

EPA must address the schedule by which Texas is required to submit the SIP revision. We proposed the required SIP revision be submitted as expeditiously as practicable but no later than one year after the effective date of our final action. No adverse comments were received by the EPA on this issue. Today, we are requiring that Texas submit the SIP revision as expeditiously as practicable but no later than one year after the effective date of this final action.

Additionally, the implementation of the failure to attain contingency measures in the current SIP is triggered automatically upon the effective date of this rule. Further, Texas is required to submit a revision to the SIP containing contingency measures under sections 172(c)(9) and 182(c)(9) to meet ROP requirements and for failure to attain.

The State's SIP revision submitted for an attainment date of 2007 contained a commitment to perform and submit a mid-course review (MCR) by May 1, 2004. Due to the new time frame for SIP submittal and the attainment date of November 15, 2005, Texas is not required to submit an MCR for the BPA area.

X. Why Are We Withdrawing the Attainment Demonstration, MCR and MVEB Approvals and the RACM Finding, and What Are the Potential Impacts of the Withdrawals?

We are withdrawing our final approval of BPA's 2007 attainment demonstration and the accompanying Motor Vehicle Emission Budget (MVEB), the MCR enforceable commitment, and the Reasonably Available Control Measures (RACM) finding. Having an attainment date earlier than 2007 requires the submission of a revised attainment demonstration SIP, a new MVEB, and a re-analysis of the RACM determination.

To be consistent with the Court's reversal of the 2007 attainment date extension, and to respond to the remand, we are withdrawing our May 15, 2001, approval of the 2007 attainment demonstration and MVEB, the MCR enforceable commitment, and

the finding that the area was implementing all RACM. They are no longer applicable as they were based on a 2007 attainment date. A new attainment demonstration with a new MVEB, and a new RACM analysis, are required to be submitted for the BPA area. All are due on or before one year from the effective date of this Final Rule.

As discussed in the June 19, 2003, supplemental proposal, the Court affirmed the portion of our May 15, 2001, final action that treats as potential RACMs only those measures that would advance the attainment date and considers implementation costs when rejecting certain control measures in its December 11, 2002, decision. However, the Court remanded the analysis and conclusions regarding RACM in the BPA area to the EPA. According to the Court's order, the analysis must: (1) demonstrate an examination of all relevant data; and (2) provide a plausible explanation for the rejection of proposed RACMs including why the measures, individually and in combination, would not advance the BPA area's attainment date.

The State is responsible for performing and submitting a new RACM analysis for EPA use in determining SIP approval. Even though the State is responsible for developing the new analysis, when evaluating the use of RACM in the SIP approval process EPA will only consider as adequate an RACM analysis by the State containing the factors outlined in the Court's December 11, 2002, ruling. The RACM analysis is due on or before the attainment demonstration due date.

Withdrawing approval of the MVEB results in reverting to the previously approved MVEBs for the purposes of transportation conformity. This would be the 1996 budget which was for VOCs only and did not include a NO_x budget. Therefore, there will be no valid NO_x budget in effect until a new NO_x MVEB is submitted and found adequate. In order for transportation projects to proceed in the absence of an adequate NO_x budget, an area must: (1) pass a "build/no-build" emissions test, meaning that projected future regional emissions from the transportation system after making proposed changes must be lower than the projected emissions from the existing transportation system; and (2) demonstrate that the estimated future emissions will not exceed 1990 levels. See 40 CFR 93.119(b).

XI. How Does the Recent Release of MOBILE6 Interact With Reclassification?

A. What Is the Relationship Between MOBILE6 and the Attainment Year Motor Vehicle Emissions Budgets?

In addition to the fact that the motor vehicle emissions budgets contained in the State's November 12, 1999, and April 25, 2000, submittals are based on the year 2007, which is no longer an allowable attainment date under the Court's decision, the current MVEB is not based upon the most recent mobile source emission factors model, MOBILE6.

The motor vehicle emissions budgets submitted to fulfill the SIP revision requirements, including those of the attainment demonstration, must be prepared using the latest approved emissions model. See 40 CFR 51.112. EPA approved the MOBILE6 emissions factor model in January 2002. As a result, any new attainment SIP planning must now be based on the MOBILE6 model. The State should refer to applicable guidance and policy, such as "Policy Guidance for the Use of MOBILE6 in SIP Development and Transportation Conformity" (memorandum from John S. Seitz and Margo Tzirigotis Oge, January 18, 2002) in preparing the budgets. The revised SIP must contain budgets based on MOBILE6 modeling.

B. What Is the Relationship Between MOBILE6 and the Post-1996 Rate-of-Progress Requirement?

The section 182(c)(2)(B) reasonable further progress requirement requires volatile organic compounds (VOC) or nitrogen oxides (NO_x) reductions of 3 percent per year, averaged over a 3-year period, until the attainment date, for serious and above ozone nonattainment areas designated and classified under the 1-hour ozone NAAQS. The EPA refers to these reductions as the rate-of-progress (ROP) requirement.

The January 18 MOBILE6 policy indicates, among other things, that the motor vehicle emissions budgets in the post-1996 rate-of-progress plans will have to be developed using MOBILE6. In this policy we said:

In general, EPA believes that MOBILE6 should be used in SIP development as expeditiously as possible. The Clean Air Act requires that SIP inventories and control measures be based on the most current information and applicable models that are available when a SIP is developed.⁴

Texas has not submitted ROP plans other than the original 15% ROP plan

⁴ See Clean Air Act section 172(c)(3) and 40 CFR 51.112(a)(1).

required for the BPA area as a moderate area, since under the Transport Policy the BPA area was not required to meet the post-1996 ROP requirements. The post-1996 until the attainment date ROP plans will need to be based upon MOBILE6.

The post-1996 rate-of-progress requirement flows from section 182(c)(2)(B) which requires serious and above areas to achieve a 3 percent per year reduction in baseline VOC emissions (or some combination of VOC and NO_x reductions from baseline emissions pursuant to section 182(c)(2)(C)) averaged over each consecutive three-year period after November 15, 1996, until the attainment date.⁵ Baseline emissions are the total amounts of actual VOC or NO_x emissions from all anthropogenic sources in the area during the calendar year 1990, excluding emissions that would be eliminated under certain Federal programs and Clean Air Act mandates: phase 2 of the Federal gasoline Reid vapor pressure regulations (Phase 2 RVP) promulgated on June 5, 1990 (*see* 55 FR 23666); the Federal motor vehicle control program in place as of January 1, 1990 (1990 FMVCP); and certain changes and corrections to motor vehicle inspection and maintenance (I/M) programs and corrections and reasonably available control technology (RACT) required under section 182(a)(2).⁶ We have issued guidance that provides detailed information for implementing the rate-of-progress provisions of section 182.⁷ Basically our guidance requires the calculation of a target level of emissions for each rate-of-progress milestone year. The target level for any rate-of-progress milestone year is the 1990 baseline emissions decreased by the amount of baseline emissions that would be reduced by the 1990 FMVCP, the Phase 2 RVP program, and RACT fix-ups⁸ by

that year and reduced by the amount of the mandated minimum reductions (15 percent VOC by 1996, and an additional nine (9) percent VOC, or VOC and NO_x, by 1999, an additional 9 percent VOC, or VOC and NO_x, by 2002, and an additional 9 percent VOC, or VOC and NO_x, by 2005). Under our guidance, the first rate-of-progress milestone year target level, for example, the 15 percent VOC reduction by 1996, starts with the 1990 base year emissions and then subtracts the effects of the 1990 FMVCP and Phase 2 RVP and RACT fix-ups through 1996 and also subtracts the required 15 percent VOC reduction. The 1999 VOC target level starts with the 1996 target level and subtracts the effects between 1996 and 1999 of the 1990 FMVCP and Phase 2 RVP and RACT fix-ups and subtracts the required 9 percent post-1996 reduction. For each target level, our guidance requires the preparation of a 1990 base year inventory "adjusted" to the milestone year (the "1990 adjusted base year inventory") to account for the effects of the 1990 FMVCP and Phase 2 RVP and RACT fix-ups by the milestone year. The adjusted inventory uses 1990 motor vehicle activity levels but emission factors computed by MOBILE6 for the applicable milestone year. For example, preparation of a rate-of-progress plan for the ROP milestone year of 1999, with NO_x substitution, requires a 1990 base year inventory for both VOC and NO_x, a 1990 base year VOC inventory adjusted to 1996, and 1990 base year VOC and NO_x inventories adjusted to 1999. Preparation of a rate-of-progress plan for 2005 with NO_x substitution requires a 1990 base year inventory for both VOC and NO_x plus the following seven "adjusted" inventories: 1996 VOC; 1999 VOC and NO_x; 2002 VOC and NO_x; and 2005 VOC and NO_x.

One consequence of the need to use MOBILE6 emission factors in the post-1996 rate-of-progress plans is that the area must recompute the 1990 baseline emissions using the MOBILE6 emissions factor model to update the 1990 on-road mobile sources' portion of the 1990 base year emission inventory. The area must also calculate post-1996 rate-of-progress target levels by reiterating the target levels for rate-of-progress requirements for the 1996 milestone year.

Thus, in addition to vehicle emissions budgets for any applicable milestone year, the post-1996 rate-of-progress requirement will also require the development of a revision to the 1990

populations less than 200,000 for 1990 (such as Beaumont/Port Arthur) are not mandated to participate in the I/M program (60 FR 48033, September 18, 1995).

base year emissions inventories and development of up to seven 1990 adjusted inventories (VOC for 1996, VOC and NO_x for 1999, VOC and NO_x for 2002, plus VOC and NO_x for 2005).

XII. What Will Be the Rate-of-Progress and Contingency Measure Schedules?

A. Rate-of-Progress Milestones

Section 182(c)(2)(B) requires serious and above areas to achieve a 3 percent per year reduction in baseline VOC emissions (or some combination of VOC and NO_x reductions from baseline emissions pursuant to section 182(c)(2)(C)) averaged over each consecutive three-year period after November 15, 1996, until the attainment date. Under the new attainment date, attainment must be achieved as expeditiously as practicable but no later than November 15, 2005.

Under the schedule for submittal of the new SIP, the rate-of-progress plans for the 1999 and 2002 milestone years will be due well after the November 15, 1999, and November 15, 2002, milestone dates. If sufficient actual reductions occurring by the November 15, 1999, and November 15, 2002, milestone dates do not now exist, then Texas can only get reductions after the two milestone dates because, at this point, the State does not have the ability to require additional reductions for a period that has already passed. The passing of the deadlines does not relieve Texas from the requirement to achieve the 18 percent reduction in emissions, but simply means that the 18 percent reduction must be achieved as expeditiously as practicable but no later than November 15, 2005.

The approved SIP for the BPA area contains measures that generate additional benefits after November 15, 1996. Such measures include reduction requirements on large sources of NO_x.

As discussed elsewhere in this document in the section titled "What is the Relationship Between MOBILE6 and the Post-1999 Rate-of-Progress," the CAA specifies the emissions "baseline" from which each emission reduction milestone is calculated. Section 182(c)(2)(B) states that the reductions must be achieved "from the baseline emissions described in subsection (b)(1)(B)." This baseline value is termed the "1990 adjusted base year inventory." Section 182(b)(1)(B) defines baseline emissions (for purposes of calculating each milestone VOC/NO_x emission reduction) as "the total amount of actual VOC or NO_x emissions from all anthropogenic sources in the area during the calendar year of enactment" and excludes from the

⁵ As a moderate area, BPA was not required to submit a ROP plan for a nine (9) percent reduction for the 3-year period November 15, 1996, through November 15, 1999. However, the BPA area now is required to submit an ROP plan through November 15, 2005, the new attainment date.

⁶ These requirements under section 182(a)(2) are known as I/M and RACT corrections or I/M and RACT "fix-ups." For further explanation of these *see* 57 FR at 13503-13504, April 16, 1992.

⁷ This includes: Guidance on the Post-1996 Rate-of-Progress Plan (RPP) and Attainment Demonstration, EPA-452/R-93-015 (Corrected version of February 18, 1994). An electronic copy may be found on EPA's Web site at <http://www.epa.gov/ttn/oarpg/t1pgm.html> (file name: "post96_2.zip").

⁸ The BPA area has no I/M program and so has no I/M fix-ups to consider. A vehicle I/M program would normally be listed as a requirement for a 1-hour ozone moderate or above nonattainment area. However, the Federal I/M Flexibility Amendments of 1995 determined that urbanized areas with

baseline the emissions that would be eliminated by certain specified Federal programs and certain changes to state I/M and RACT rules.⁹ The 1990 adjusted base year inventory must be recalculated relative to each milestone and attainment date because the emission reductions associated with the FMVCP increase each year due to fleet turnover.¹⁰

Therefore, since there are federal and state rules requiring reductions after November 15, 1996, EPA concludes that the BPA area has already implemented measures creditable toward the 1999 and 2002 rate-of-progress milestones. However, we are not able to conclude that the area has sufficient measures to achieve the required 9 percent reduction by November 15, 1999, and an additional 9 percent reduction by November 15, 2002, in the absence of the rate-of-progress plans for both the 1999 and 2002 milestone years that document the calculations of the 1999 and 2002 target levels of emissions, account for expected growth in emissions related activities, and contain the requisite demonstration that sufficient creditable reductions have or were projected to occur by November 15, 1999, and November 15, 2002, respectively. We have insufficient data concerning what the levels of reductions would have been in the area by 1999 and 2002, since we do not know what the 1990 adjusted base year inventory for 1996, 1999, and 2002 will be or the projected emissions growth for the periods of November 15, 1996, through November 15, 1999 and November 15, 1999, through November 15, 2002. Nor do we have sufficient information to allow us to determine what will be an expeditiously as practicable date for achievement of this post-1996 18 percent rate-of-progress requirement.

EPA finds that the 1999 and 2002 rate-of-progress requirements are that Texas must submit a rate-of-progress plan that demonstrates that the SIP has sufficient measures to achieve the required 18 percent reductions by a date as expeditiously as practicable.¹¹ This approach was recently upheld by the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. EPA*, DC. Cir. No. 03-1084 (Feb. 3, 2004), slip opinion at page 22 note 11.

⁹ These are the 1990 FMVCP, Phase 2 RVP, and the I/M and RACT fix-ups.

¹⁰ See U.S. EPA, (1994), Guidance on the Post-1996 Rate-of-Progress Plan (RPP) and Attainment Demonstration, EPA-452/R-93-015 (Corrected version of February 18, 1994). An electronic copy may be found on EPA's web site at <http://www.epa.gov/ttn/oarpg/t1pgm.html> (file name: "post96_2.zip").

¹¹ EPA believes that such date cannot be any later than November 15, 2005.

Texas must identify sufficient data and show why they meet the "as expeditiously as practicable" requirement. Such SIP revision will have to demonstrate that any date after November 15, 1999, by which the 1999 9 percent ROP reduction is achieved, as well as any date after November 15, 2002, by which the first post-1999 9 percent ROP reduction is achieved, is as expeditious as practicable.

B. 2005 Rate-of-Progress

There is no change to the date by which the 2003-2005 9 percent increment of the rate-of-progress must be achieved. If the currently adopted and approved SIP measures and the current suite of Federal measures will not achieve the required rate-of-progress reductions, we believe the State has sufficient time to adopt and implement measures to achieve the required reductions in the BPA area by November 15, 2005.

C. Contingency For Failure To Achieve Rate-of-Progress by November 15, 1999 and November 15, 2002

The contingency measures' plan must identify specific measures to be undertaken if the area fails to meet any applicable milestone, to make rate-of-progress, or to attain the NAAQS. With respect to the November 15, 1999, and November 15, 2002, milestones, the EPA believes that the contingency plan will need to account for any adjustment to the milestone dates.

With this final action determining that BPA has failed to attain the standard by November 15, 1996, the presently-approved 1996 ROP/attainment contingency plan is automatically invoked. (See 63 FR 6659 for the contingency measures.) Therefore, the State is required to "backfill" these contingency measures. Since the BPA area did not attain by the moderate area attainment date, and in order to fulfill the contingency measures' plan requirements of sections 172(c)(9) and 182(c)(9) of the CAA, implementation of the failure-to-attain contingency measures' plan in the current SIP is triggered automatically upon the effective date of this Final rule. Further, Texas is required to submit a revision to the SIP containing additional contingency measures to meet post-1996-2005 ROP requirements and for failure to attain by the 2005 attainment date. See 57 FR 13498, 13511 (1992).

XIII. What Are the Impacts on the Title V Program?

In accordance with a serious classification, the major stationary

source threshold will now be lower than it was as a moderate classification. Consequently, the State's Title V operating permits program regulations need to cover existing sources that are now subject to the lower major stationary source threshold of serious (50 tons per year for volatile organic compounds (VOCs) and nitrogen oxide compounds (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). The 12 month (or an earlier date set by the applicable permitting authority) time period to submit a timely application will commence on the effective date of this reclassification action.

XIV. What Comments Were Received on the Supplemental Proposal, and How Has the EPA Responded to Those?

EPA received comments from the public on the Notice of Supplemental Proposed Rulemaking (NPR) published on June 19, 2003 (66 FR 36756). Comments were received from: South East Texas Regional Planning Commission; Clean Air and Water, Inc.; Orange County Judge, Carl K. Thibodeaux; Goodyear Tire and Rubber Company; Nederland Economic Development Corp.; City of Orange; Bridge City Chamber of Commerce; City of Lumberton; City of Vidor; City of Nederland; City of West Orange; Greater Orange Area Chamber of Commerce; City of Bridge City; City of Beaumont; Greater Port Arthur Chamber of Commerce; City of Port Neches; Beaumont Chamber of Commerce; City of Port Arthur; Golden Triangle Business Roundtable; Jefferson County Judge Carl R. Griffith, Jr.; City of Pinehurst; Southeast Texas Plant Managers' Forum; Texas Commission on Environmental Quality; A joint letter from Sierra Club, Clean Air and Water, Inc., and Community InPowerment Development Association; and twelve individuals.

The following discussion summarizes and responds to relevant comments.

A. Comments in Support of Option 1: About Half of Comments From Private Citizens Supported Reclassification to Severe, Including Comment Letters From Two of the Three Litigants in the 5th Circuit *Sierra Club v. EPA Court Case*

The following summarizes these comments and EPA's responses.

Comment 1: Commenters believe that the air must be cleaned up and that the EPA and industry should take the steps necessary to protect the life, health, welfare, safety and environment for citizens. They argued that classification to severe is required by the CAA in this circumstance and is long overdue. More monitoring, better regulations, and specific measures required for BPA will protect the public.

Response 1: The EPA agrees that it is necessary to reclassify the BPA area to ensure that the court ruling regarding our extension of the BPA attainment date based upon the Transport Policy is adequately addressed. We do not, however, agree that it is necessary to reclassify the area as severe to ensure the BPA area attains in the most timely manner. Option 1 or Option 2 both result in attainment as expeditiously as practicable but no later than November 2005. Therefore, as explained in later comments we believe that the choice of Option 2 will yield air quality that complies with the NAAQS for ozone as expeditiously as Option 1.

Comment 2: Some of the commenters voiced skepticism that there is a HG transport problem and believe the pollution problem is created within the BPA area. Others commented that the State must account for and overcome problems caused by intrastate air pollution. Texas has the duty under the Act to ensure that its overall statewide SIP (*i.e.*, the amalgamation of regional and area SIPs) quantifies and compensates, through additional emissions reductions, for the effects of upwind areas' air pollution on downwind areas, as the State explains is one reason compromising the BPA area's ability to demonstrate attainment.

Response 2: The Court's December 11, 2002, decision invalidated the EPA's application of the Transport Policy to the BPA area and Texas' ability to rely on it. As a result, the State will need to take whatever measures are required for the BPA area to attain no later than November 15, 2005. This will include measures to address any transport from the HG area and any measures required to address the local sources in the BPA area. Since the EPA believes that both situations, local emissions or transport from the HG area, can result in exceedances in the BPA area, we will expect the State's attainment modeling demonstration to encompass both types of events.

Comment 3: The BPA area's emissions inventory must be updated to reflect current actual emissions, including incorporation of MOBILE6 emissions factors, consideration of the effect of the failure of the heavy duty diesel engine

manufacturers' settlement agreement to accomplish the anticipated levels of diesel engine retrofits (*EMA v. EPA*, DC Cir. Nos. 01-1129 and 02-1080), the State's awareness of considerably higher actual emissions from many refineries and chemical plants from malfunctions and other conditions. Moreover, the EPA should identify in this final rulemaking BPA's planning inventory, versus the "overall" emissions inventory described in the Supplemental Proposal notice.

Response 3: The EPA agrees that the required attainment demonstration SIP revision and the revised MVEB, as well as the ROP plans, must incorporate MOBILE6 emissions factors. Further, the State must consider the impact of revised or current information, *e.g.*, the most accurate mobile source emissions estimates (including any variation due to underestimations such as those for the long-haul truck reflashing), present growth predictions, effectiveness of control measures, etc., when developing the revised SIP for BPA. Whatever data is presently available to the State concerning the impact of upset/malfunctions and other conditions on the emissions from refineries and chemical plants must also be addressed.

The motor vehicle emissions budgets submitted by the State with the BPA transport attainment demonstration are no longer valid as they were based on a November 15, 2007, attainment date. Therefore, the budgets submitted for the new SIP must be prepared using the MOBILE6 emissions factor model and the revised SIP must contain budgets based on MOBILE6 modeling. The Clean Air Act section 172(c)(3) and 40 CFR 51.112(a)(1) require that the inventories and control measures be based on the most current information available when a SIP is developed.

We agree that the planning inventory the State uses in developing the required SIP revision must include all sources of emissions, including biogenic emissions. In our supplemental notice, we did not mean to imply the figures in our supplemental notice were acceptable for SIP planning purposes. Our comment accurate estimates of biogenic emissions generally are not available, and that rough estimates typically relied on can inflate and distort SIP emissions inventories, is not relevant to this rulemaking. Texas will need to incorporate the best available estimate of biogenic emissions in its revised SIP. There will be an opportunity for the public to comment on the State's estimates during the State's comment period. There will also be the opportunity to comment on the EPA's action approving or disapproving

the State's Plan including any emissions estimates.

Comment 4: The EPA failed adequately to explain the basis for its RACM conclusion in the rulemaking. The prior RACM analysis is now stale and must be completely revised, both to address changed circumstances (*i.e.*, newly available control measures) and the advanced attainment date and concomitant additional emissions reductions.

Response 4: We agree that the previous RACM analysis must be revised. As a result of the Fifth Circuit's decision, the RACM analysis associated with the State's 2007 attainment date demonstration is no longer applicable since it was based on a 2007 attainment date. A new RACM analysis will be required to be submitted for the BPA area that addresses the 2005 attainment date and any other changed circumstances.

The Court affirmed the portion of our May 15, 2001, final action that treats as potential RACMs only those measures that would advance the attainment date and that considers implementation costs when rejecting certain control. The Court agreed, however, with the commenters that the EPA failed adequately to explain the basis for its RACM conclusion, and remanded it to EPA. According to the Court's order, the EPA's analysis must: (1) demonstrate an examination of all relevant data; and (2) provide a plausible explanation for the rejection of proposed RACMs including why the measures, individually and in combination, would not advance the BPA area's attainment date.

The State is responsible for performing and submitting a new RACM analysis for EPA use in determining SIP approval. EPA will consider as adequate an RACM analysis by the State containing the factors outlined in the Court's December 11, 2002, ruling, when evaluating the use of RACM in the SIP approval process.

Comment 5: A Commenter asserted that Texas must expedite its one hour ozone SIP submittal to accomplish improved air quality as expeditiously as practicable. The commenter contended that if EPA had acted legally, there would already be an approved SIP with implementation of control measures. It appears that rather than expediting revision of the SIP, Texas is prolonging the period of unhealthy air quality by delaying action to identify and adopt necessary further controls to improve the area's air quality to meet the one hour ozone standard.

Response 5: In this final action, the EPA finds a one year deadline is appropriate for the State of Texas to

submit the required revised SIP, a new MVEB, and a re-analysis of RACM. The State has already started efforts for re-analysis using MOBILE6, initiated other emission inventory and modeling activities, and intends to propose the new SIP this Spring, and the EPA believes that on or before one year after the effective date of this rule is as expeditiously as practicable and a reasonable time for submittal. Moreover, many of the more stringent NO_x control measures in the current SIP were implemented in 2003. Therefore, local controls are continuing to be imposed in the area to reduce the ozone concentration levels.

Comment 6: A commenter urged that EPA must not further delay issuing a SIP call for a revised one hour ozone SIP in accordance with the Court's direction. The 8-hour ozone standard will require a separate planning effort.

Response 6: Today's final action serves a function similar to that of a SIP call in that it requires a revised 1-hour ozone SIP that must be submitted within one year of the effective date of this final action. Since we have not yet promulgated a final rule for implementation of the 8-hour ozone standard, we cannot speculate whether a state may combine its 1-hour ozone serious area CAA requirements with an 8-hour ozone planning effort. Please see Section XIV, B, response to comment 5 for further information.

Comment 7: A commenter urges EPA to impose offset sanctions as a result of the inadequacy of the BPA area's submitted SIP.

Response 7: EPA does not believe that discretionary sanctions are appropriate in this instance where the State has made submissions in reliance on EPA policies, and mandatory sanctions would not be imposed unless EPA disapproves a SIP submission. New SIP submission schedules for the requirements imposed as a result of the failure to attain determination for Beaumont, are just now being made. The State should have an opportunity to meet these new obligations before sanctions are imposed.

Comment 8: A commenter argues that Congress provided EPA with authority to require the BPA SIP to "include such additional measures as the Administrator may reasonably prescribe." 42 U.S.C. 7509(d)(2). The commenter asserts that EPA should require, among other things, control of flaring. See, for example, Santa Barbara County Air Pollution Control District Rule 359.

Response 8: As long as the State submits a SIP that demonstrates attainment of the 1-hour ozone standard

in the BPA area as expeditiously as practicable but no later than November 15, 2005, and meets all of the Act's requirements, Texas may select whatever mix of control measures it desires. *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976). With this rule, it is now the responsibility of the State of Texas to identify and adopt measures to enable attainment as expeditiously as practicable but no later than November 15, 2005, and meet the other requirements of the Act, including the serious area classification requirements, the requirements for the rate of progress, and RACM, contingency measures plan, demonstrating attainment as expeditiously as practicable, etc. EPA does not have the authority to require specific measures for the State at this time. If control of flares from source categories is not required for expeditious attainment or to meet RACT, the State must evaluate whether control of flares from source categories is a RACM. It is the role of the State, not EPA, to be the first to identify specific measures consistent with the BPA area's particular emissions inventory. The EPA will provide assistance and guidance to Texas in this effort.

Comment 9: Commenters question whether Texas has already implemented measures creditable toward the 1999 and 2002 ROP milestones. Texas must make a detailed showing of what control measures are creditable for past ROP obligations, and for exactly what quantity of emissions reductions.

Response 9: EPA agrees that Texas must submit 1999 and 2002 ROP plans that contain specifics and details to demonstrate clearly whether previously implemented control measures meet these ROP obligations. See Section XII for our discussion on these requirements.

B. Comments in Support of Option 2: The Remaining Letters From Private Citizens, and 23 other Letters From BPA Area Cities, Judges, Chambers of Commerce, Business/Industry Groups, Metropolitan Planning Organizations, and the Texas Commission on Environmental Quality (TCEQ) Commented in Opposition to Option 1

These comments are summarized and discussed here.

Comment 1: Many commenters supported Option 2, a reclassification to serious with an attainment date of November 15, 2005. Some of the commenters stated that the area should not be reclassified at all. Commenters argued that extensive emission reduction activities have already been implemented, and that since 1972 there

has been a clear downward trend in ambient ozone measurements for the BPA area.

Response 1: The EPA is required by the Fifth Circuit's decision to make a determination as to whether BPA attained by November 15, 1996. Since the BPA area failed to attain by 1996, BPA cannot remain classified as "moderate."

While there has been general improvement in the ozone design values throughout the years, the area has yet to attain the one hour NAAQS. This final rule is making a final determination that the BPA area failed to attain by November 15, 1996, thereby reclassifying by operation of law the BPA area to serious, and is establishing an attainment date of as expeditiously as practicable but no later than November 15, 2005.

Comment 2: EPA is authorized to adopt Option 2 and should do so because it is fair. Commenters contended that because EPA did not timely issue a determination for attainment, it is empowered to extend the attainment date when it reclassifies an area. Commenters also asserted that a second reclassification to severe would unfairly punish an area, whose air quality has improved over the years. A commenter argued that the Clean Air Act contemplates that states will have a prospective opportunity to bring reclassified areas into attainment. A petitioner stated that "where EPA's failure to meet its own deadline impacts the lead time Congress intended to provide states to obtain the standard after reclassification, then EPA may also extend the attainment date."

Response 2: EPA believes that a further determination for failure to attain by November 25, 1999 and reclassification by operation of law to severe is not appropriate in light of the specific history, facts, and circumstances for the BPA area. Option 2 is fair for the unique circumstances presented by the BPA area. From discussions we believe that a unique plan will be developed for the BPA area that will still expeditiously attain the standard yet not unduly "punish" the area.

Comment 3: The BPA area should not be reclassified as severe, as this classification would create unnecessary economic burdens for the BPA area, as well as being unfair to the BPA area.

Response 3: Since the BPA area is not being reclassified to severe, the perceived unnecessary economic burdens will not occur. Nevertheless, under the provisions of the CAA the EPA does not have the authority to consider any potential economic

consequences arising from a reclassification for nonattainment of an NAAQS. Under section 181(b)(2)(A), the attainment determination is made solely on the basis of air quality data, and any reclassification is by operation of law. If an area is reclassified, the more stringent requirements apply irrespective of economic considerations.

It is, however, appropriate for a state to consider specific economic impacts in meeting the new requirements and in developing specific regulatory requirements for specific sources. For example, an entity proposed to be regulated by Texas to meet RACT, may seek a case-specific RACT determination by the State, based on economic or technical hardship. Texas may also consider implementation costs when rejecting certain control measures in its proposed RACM analysis. This consideration for RACM was specifically upheld in the Court's ruling. EPA must approve a SIP revision if it meets the requirements of the Act, even if it is more stringent. *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976). Additionally, actions (such as the approval of a SIP revision) that merely approve state law as meeting federal requirements and impose no additional requirements beyond those imposed by state law, are not subject to economic impact analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Such consideration is up to the state under applicable state administrative procedure laws. Details on the State's assessments of financial impact flowing from the required new SIP revision will be found in the Texas proposed SIP documents, and must be made available by Texas to the public when Texas conducts its public participation.

Comment 4: EPA should waive Texas' obligation to submit a 1-hour attainment demonstration SIP for BPA. This would be consistent with options EPA proposed in the June 2, 2003 **Federal Register** for transitioning from the 1-hour to the 8-hour ozone standard and would allow Texas to focus its limited air quality planning resources on the more protective 8-hour standard. If EPA requires Texas to submit a 1-hour attainment demonstration SIP, the SIP should be due no earlier than one year after EPA's final reclassification action.

Response 4: The June 2, 2003 **Federal Register** proposal notice for transitioning from the 1-hour to the 8-hour ozone standard solicits comment on whether to retain the 1-hour ozone attainment demonstration requirement for areas like BPA.

The June 2, 2003 **Federal Register** notice for transitioning from the 1-hour

to the 8-hour ozone standard is only a proposal. The EPA presently has no authority to waive the State's obligation to submit a 1-hour SIP and to meet the CAA requirements to attain the 1-hour ozone NAAQS. It is currently the State's responsibility to perform planning and SIP activities and submittals to meet the 1-hour NAAQS for ozone. EPA is in the process of evaluating comments on its June 2 proposal, and will address these issues in its final action.

Comment 5: A number of the commenters state that pollutants transported into Southeast Texas from the HG area, which cannot be locally controlled, are prohibiting the BPA area from attaining. Commenters believe that the BPA area already has sufficient controls in place, or that will take effect shortly (e.g., 44% NO_x controls), and due to transport it is unlikely that any new local control measures would lead to more expeditious attainment. They request the EPA to validate the transport of air from the HG area.

Response 5: While EPA agrees that the BPA area is affected by transport from outside the area by the upwind HG area, the U.S. Court of Appeals for the Fifth Circuit ruled on December 11, 2002 that EPA is precluded from extending the BPA area's attainment date using the Transport Policy. At the time the State's current SIP revision was submitted, the Transport Policy was used to analyze the SIP revisions, and EPA believes that Texas demonstrated that during some exceedances in the BPA area, ozone levels are affected by emissions from the HG area, and that the HG area emissions affect BPA's ability to meet attainment of the 1-hour ozone standard. The Court's ruling, however, invalidated the EPA's interpretation of the Act reflected in the policy by which an attainment date extension based on transport was granted to the BPA area.

XV. EPA Action

EPA is taking the following actions:

- We are withdrawing our final action that extended the attainment date to November 15, 2007, and approved the transport demonstration (66 FR 26914).

- We are withdrawing our final approval of BPA's 2007 attainment demonstration SIP, the Mobile Vehicle Emissions Budget (MVEB), the mid-course review commitment (MCR), and our finding that BPA implemented all Reasonable Available Control Measures (RACM).

- Pursuant to section 181 (b), we find that BPA has failed to attain the 1-hour ozone national ambient air quality standard (NAAQS or standard) by November 15, 1996, the attainment date

for moderate nonattainment areas set forth in the Act.

- The area is reclassified by operation of law as a serious 1-hour ozone nonattainment area,

- We are establishing an attainment date of as expeditiously as practicable but no later than November 15, 2005.

- The contingency measures plan for failure to attain is triggered upon the effective date of this final action.

- The State of Texas must backfill this contingency measures plan for failure to attain.

- We are adjusting the dates by which the area must meet the 1999 and 2002 rate-of-progress (ROP) requirements and adjusting contingency measure requirements as they relate to the ROP requirements.

- The State of Texas is no longer required to submit an MCR by May 1, 2004.

- The State of Texas is to submit the required revised SIP, a new MVEB, and a re-analysis of RACM, on or before one year after the effective date of this Final action.

XVI. 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 findings 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 requirements are automatically triggered by the resulting classifications that, in turn, are triggered by air quality values, determinations of nonattainment and reclassifications 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 BPA area as a serious 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 BPA area as a serious 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 reclassifications 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 findings of nonattainment are a factual determination based upon air quality considerations and that the resulting reclassifications occur by operation of law. Thus, EPA believes that the findings do not constitute a Federal mandate, as defined in section 101 of the UMRA, because they do 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. Determinations of nonattainment and the resulting reclassifications of nonattainment areas 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 such an 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 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, findings of nonattainment and the resulting reclassifications of nonattainment areas are 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 June 1, 2004. 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 BPA area as a serious ozone nonattainment 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

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

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

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

Dated: March 18, 2004.

Richard E. Greene,
Regional Administrator, Region 6.

■ Parts 52 and 81, chapter I, title 40 of the Code of Federal Regulations are 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 SS—Texas

§ 52.2270 [Amended]

■ 2. In § 52.2270(e), the table entitled "EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP" is amended by removing the following four entries for the Beaumont/Port Arthur, Texas, area approved by EPA 5/15/01, 66 FR 26939: Attainment Demonstration for the 1-hour Ozone NAAQS; Ozone Attainment Date Extension to 11/15/07; Commitment by Texas to perform a mid-course review and submit a SIP revision by 05/01/04; and Finding that BPA area is implementing all Reasonably Available Control Measures.

PART 81—[AMENDED]

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

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

■ 2. In § 81.344 the table entitled "Texas—Ozone (1-hour standard)" is amended by revising the entries for the Beaumont/Port Arthur area to read as follows:

§ 81.344 Texas.

* * * * *

TEXAS—OZONE (1-HOUR STANDARD)

| Designated area | Designation | | Classification | |
|----------------------------|-------------------|---------------------|-------------------|----------|
| | Date ¹ | Type | Date ¹ | Type |
| Beaumont/Port Arthur Area: | | | | |
| Hardin County | 11/15/1990 | Nonattainment | 4/29/2004 | Serious. |
| Jefferson County | 11/15/1990 | Nonattainment | 4/29/2004 | Serious. |
| Orange County | 11/15/1990 | Nonattainment | 4/29/2004 | Serious. |
| * * * * * | | | | |

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

[FR Doc. 04-6929 Filed 3-29-04; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 53

[WC Docket No. 03-228; FCC 04-54]

Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts rules eliminating the Commission's Operating, Installation, and Maintenance (OI&M) sharing prohibition. The Commission finds that, in light of the other existing section 272 non-structural requirements, eliminating the OI&M sharing prohibition would neither materially increase Bell operating companies' (BOCs) abilities or incentives to misallocate costs or discriminate against unaffiliated rivals, nor would it diminish the ability of the Commission to monitor and enforce compliance with the Act. The Commission finds that there is sufficient evidence to show that the OI&M sharing prohibition has increased the section 272 affiliates' operating costs, and that the elimination of the OI&M sharing prohibition would likely result in substantial cost savings to the affiliates and enable the affiliates to compete more effectively in the interexchange market. Therefore, the Commission concludes that the OI&M sharing prohibition poses significant adverse consequences that outweigh any potential benefits of enforcing structural separation of OI&M services, given the protections afforded to consumers and competitors by section 272's other non-structural safeguards.

DATES: Effective March 30, 2004.

FOR FURTHER INFORMATION CONTACT: Christi Shewman, Attorney-Advisor, Wireline Competition Bureau, at (202)418-1686 or via the Internet at christi.shewman@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O) in WC Docket No. 03-228, FCC 04-54, adopted March 11, 2004 and released March 17, 2004. The complete text of this R&O is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. This document

may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com. It is also available on the Commission's Web site at <http://www.fcc.gov>.

Synopsis of the Report and Order

1. *Background.* Sections 271 and 272 of the Communications Act, as amended, establish a comprehensive framework governing BOC provision of "interLATA service." Pursuant to section 271, neither a BOC nor a BOC affiliate may provide in-region, interLATA service prior to receiving section 271(d) authorization from the Commission. Section 272 requires BOCs, once authorized to provide in-region, interLATA services in a state under section 271, to provide those services through a separate affiliate until the section 272 separate affiliate requirement sunsets for that particular state. In addition, section 272 imposes structural and transactional requirements on section 272 separate affiliates, including the requirement to "operate independently" from the BOC.

2. Section 272(b)(1) directs that the separate affiliate required pursuant to section 272(a) "shall operate independently from the [BOC]." In 1996, the Commission adopted rules to implement the "operate independently" requirement that prohibit a BOC and its section 272 affiliate from (1) jointly owning switching and transmission facilities or the land and buildings on which such facilities are located; and (2) providing OI&M services associated with each other's facilities. The Commission's rules prohibit a section 272 affiliate from performing OI&M functions associated with the BOC's facilities. Likewise, they bar a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing OI&M functions associated with the facilities that its section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated. On November 3, 2003, the Commission adopted the *Notice of Proposed Rulemaking* (68 FR 65665, November 21, 2003) in this proceeding to seek comment on whether it should modify or eliminate the rules adopted to implement section 272(b)(1)'s "operate independently" requirement, including the OI&M sharing prohibition.

3. "Operate Independently." In this Order, the Commission rejects arguments that it must retain both the OI&M sharing prohibition and the joint facilities ownership restriction in order

to give meaning to section 272(b)(1)'s "operate independently" language. The Commission reaffirms the conclusion of the previous Commission that section 272(b)(1) is ambiguous. An agency is free to modify its interpretation of an ambiguous statutory provision when other reasonable interpretations may exist, provided that it acknowledges its change of course and provides a rational basis for its shift in policy. In fact, a reexamination of rules is particularly appropriate where, as here, the Commission has gained more experience over time and new ways of achieving regulatory goals have developed. In the instant situation, the Commission has chosen to reexamine the rules adopted to implement section 272(b)(1) in light of its eight years of experience in implementing the 1996 Act (including applicable cost allocation and nondiscrimination rules), its additional experience with monitoring section 272 affiliates, and, more generally, the growth of competition in all telecommunications markets. Thus, the Commission concludes that it should eliminate the OI&M sharing prohibition but retain the joint facilities ownership restriction under section 272(b)(1), consistent with its obligation to implement the statutory directive that the section 272 affiliate and the BOC "operate independently."

4. *Operating, Installation, and Maintenance Services.* The Commission finds that the OI&M prohibition is an overbroad means of preventing anti-competitive conduct and poses significant costs that outweigh any potential benefits. Because the prohibition on OI&M sharing is not directly compelled by section 272(b)(1), the Commission eliminates sections 53.203(a)(2) through (a)(3) of its rules. The Commission concludes that the remaining section 272 requirements, together with its other non-structural safeguards, will continue to serve as effective protections against anticompetitive conduct by BOCs following elimination of the OI&M sharing prohibition. In the context of OI&M functions, the Commission concludes that the existing non-structural safeguards are well-tailored and sufficient to provide effective and efficient protections against cost misallocation and discrimination by BOCs. Based on the record in this proceeding, the Commission does not expect that eliminating the OI&M sharing prohibition will materially increase BOCs' abilities or incentives to misallocate costs or discriminate against unaffiliated rivals in price or performance. Nor will eliminating the