

Dated: March 3, 2008.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. Section 52.770 is amended by adding paragraph (c)(186) to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

(186) The Indiana Department of Environmental Management submitted revisions to Indiana's State Implementation plan on July 20, 2007, as revised on December 19, 2007, to amend 326 IAC 1-1-3, "References to the Code of Federal Regulations"; 326 IAC 1-2-48, "nonphotochemically reactive hydrocarbons" or "negligibly photochemically reactive compounds" defined; and 326 IAC 1-2-90, "volatile organic compound" or "VOC" defined. The revision to 326 IAC 1-1-3 updates the references to CFR from the 2005 edition to the 2006 edition. In 326 IAC 1-2-48, and 326 IAC 1-2-90, the SIP revision deletes references to outdated **Federal Register** citations.

(i) *Incorporation by reference.* The following sections of the Indiana Administrative Code (IAC) are incorporated by reference.

(A) 326 IAC 1-1-3, "References to the Code of Federal Regulations". Filed with the Secretary of State on April 26, 2007, and effective on May 26, 2007. Published in the Indiana Register, on May 23, 2007 (DIN: 20070523-IR-326060412FRA).

(B) 326 IAC 1-2-48, "nonphotochemically reactive hydrocarbons" or "negligibly photochemically reactive compounds" defined; and 326 IAC 1-2-90, "volatile organic compound" or "VOC" defined. Filed with the Secretary of State on April 26, 2007, and effective on May 26, 2007. Published in the Indiana Register, on May 23, 2007 (DIN: 20070523-IR-326060412FRA).

(ii) *Additional Materials.* A December 19, 2007, letter from Daniel Murray, Assistant Commissioner of the Indiana Department of Environmental Management, Office of Air Quality, which limits the July 20, 2007, SIP

revision request to the following definitions: 326 IAC 1-1-3, "References to the CFR"; 326 IAC 1-2-48, "nonphotochemically reactive hydrocarbons" or "negligibly photochemically reactive compounds" defined; and 326 IAC 1-2-90, "volatile organic compound" or "VOC" defined.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA-R06-OAR-2007-0969; FRL-8543-5]

Determination of Nonattainment and Reclassification of the Beaumont/Port Arthur 8-Hour Ozone Nonattainment Area; State of Texas; Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule finalizes EPA's finding of nonattainment and reclassification of the Beaumont/Port Arthur 8-hour ozone nonattainment area (BPA area). EPA finds that the BPA area has failed to attain the 8 hour ozone national ambient air quality standard ("NAAQS" or "standard") by June 15, 2007, the attainment deadline set forth in the Clean Air Act (CAA) and Code of Federal Regulations (CFR) for marginal nonattainment areas. As a result, on the effective date of this rule, the BPA area is reclassified by operation of law as a moderate 8-hour ozone nonattainment area. The new moderate area attainment date for the reclassified BPA area is "as expeditiously as practicable," but no later than June 15, 2010. The State of Texas must submit a SIP revision that meets the requirements of the CAA on or before January 1, 2009.

DATES: This final rule is effective on April 17, 2008.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R06-OAR-2007-0969. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [http://](http://www.regulations.gov)

www.regulations.gov or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214-665-7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Carl Young, Air Planning Section, (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7247; fax number 214-665-7263; e-mail address young.carl@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document "we," "us," and "our" means EPA.

Table of Contents

- I. What Is the Background for This Action?
- II. What Comments Did EPA Receive on the October 30, 2007 Proposal and How Has EPA Responded to Them?
- III. What Is the Effect of This Action?
 - A. Determination of Nonattainment, Reclassification of the BPA Area To Moderate and the New Attainment Date for the BPA Area
 - B. What Is the Date for Submitting a Revised SIP for the BPA Area?
- IV. Final Action
- V. Statutory and Executive Order Reviews

I. What Is the Background for This Action?

The BPA area was classified as a marginal 8-hour ozone nonattainment area and, therefore, was required to attain the 8-hour ozone standard by June 15, 2007 (69 FR 23858). On October 30, 2007, we proposed to find that the BPA ozone nonattainment area did not attain the 8-hour ozone NAAQS by June 15, 2007, the applicable attainment date, (72 FR 61310). The proposed finding was based upon ambient air quality data from the years 2004, 2005, and 2006 that showed the area's air quality violated the standard. In addition, as explained in the proposed rule, the area did not qualify for an attainment date extension under the provisions of section 181(a)(5) and 40 CFR 51.907, because the area's 4th highest daily maximum 8-hour

average ozone value in the attainment year of 2006 was greater than 0.084 parts per million (ppm). In the October 30, 2007, proposal, we also proposed that the appropriate reclassification of the BPA area would be from "marginal" to "moderate" nonattainment, in accordance with CAA Section 181(b)(2). We further proposed that the State of Texas submit the required SIP revision by January 1, 2009.

II. What Comments Did EPA Receive on the October 30, 2007 Proposal and How Has EPA Responded to Them?

We received 18 comment letters on our proposal to find the BPA ozone nonattainment area failed to attain the 8-hour ozone NAAQS by June 15, 2007 and to reclassify the area from marginal to moderate and on our proposed schedule for the required SIP revision submittal (72 FR 61310). Comments were received from: Beaumont City Council Member; ChevronPhillips Chemical Company's Orange Plant; ChevronPhillips Chemical Company's Port Arthur Plant; Clean Air and Water, Inc.; Entergy Texas; Gerdau Ameristeel Beaumont; Goodyear Tire and Rubber Company; Greater Port Arthur Texas Chamber of Commerce; Hardin County Commissioner's Court; Huntsman Petrochemical Corporation; Jefferson County Commissioner for Precinct 1; Jefferson County Commissioner for Precinct 4; Jefferson County Judge; LANXESS Corporation; Port Arthur City Manager; Southeast Texas Chapter of Texas Association of Business; South East Texas Regional Planning Commission; and the Texas Commissions on Environmental Quality (TCEQ).

Comments can be found on the Internet in the electronic docket for this action. To access the comments, please go to <http://www.regulations.gov> and search for Docket No. EPA-R06-OAR-2007-0969, or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph above. A summary of the relevant comments and EPA's response to the comments received is presented below.

Comment: Sixteen of the commenters requested that EPA postpone finalizing the reclassification because current monitoring data are showing attainment and requested that EPA instead allow the area the opportunity to file for redesignation to attainment for the 8-hour ozone standard. To support their request for EPA to not finalize the reclassification, many discussed the status of the air quality in the BPA area, noting that it is much cleaner today than it was in 1990 at the time the CAA amendments were finalized: (1)

Monitored levels of nitrogen oxides and volatile organic compounds are at least 40–50% lower than 10 years ago, (2) major reductions in monitored air toxic levels continue and after 17 years of monitoring, there is no evidence of air toxic hot spots, (3) ozone has been improving in the area in both design value and number of exceedances and (4) this improvement is due to the tremendous amount of work done by local industry, businesses, and community.

Response: We recognize the efforts taken by TCEQ, the Southeast Texas Planning Commission, local industry, businesses, and the community to improve air quality. EPA acknowledges that the area's air quality data has improved, but the area did not meet the 8-hour ozone standard by the applicable June 15, 2007 attainment date. TCEQ, itself, agreed the BPA area's air quality was not below the 8-hour ozone standard for the years 2004, 2005, and 2006. These three years of air quality data provide the area's design value "as of the attainment date." This value shows that the area did not attain the standard by the applicable attainment date. The Act requires EPA to make an attainment determination within six months following the attainment date. Reclassification upon a determination of failure is not a discretionary power and EPA cannot waive reclassification after it has determined that the area has failed to attain by its attainment date.

In our October 30, 2007, proposed rule (72 FR 61310), we cited section 181(b)(2)(A) of the CAA, which provides that, for reclassification upon failure to attain, "within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) (of Section 181) to the higher of—(i) the next higher classification for the area, or (ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B)." Pursuant to section 181(b)(2), we have determined that the BPA area failed to attain the 8-hour ozone NAAQS by June 15, 2007, the attainment deadline set forth in the CAA and CFR for marginal nonattainment areas. Because the area is not classified as Severe or Extreme, the area shall be reclassified by operation of

law to the next higher classification. The next higher classification for the area (moderate) is higher than the classification applicable to the area's design value (marginal). Therefore, in accordance with the CAA, the BPA area must be reclassified by operation of law to a moderate nonattainment area. 72 FR 61312.

As EPA noted above, under section 181(b)(2)(A), the attainment determination is made solely based on air quality, and any reclassification is by operation of law. Thus, the resulting requirements apply regardless of how the nonattainment came about, and the CAA requires EPA to consider only the air quality data occurring as of the attainment date (including any extension thereof), in making the mandatory attainment determination.

Today's action, however, does not preclude TCEQ from developing and submitting the appropriate documentation for redesignation of the area from nonattainment to attainment. The appropriate documentation would be the submittal after public notice, public comment period, and public hearing of a complete redesignation request that meets the requirements of the Act and the Phase 1 8-hour ozone implementation rule, and an approvable plan for maintenance of the 8-hour ozone standard.¹ The September 4, 1992 Calcagni memorandum and the 1993 Shapiro memorandum describe EPA's interpretation of section 107(d)(3)(E) with respect to the timing of applicable requirements. Under this interpretation, to qualify for redesignation, States requesting redesignation to attainment must meet the relevant Clean Air Act requirements that came due prior to the submittal of a complete redesignation request. Applicable requirements of the Act that come due subsequent to the

¹ For more information on redesignation to attainment, please see, among other things, the General Preamble for the Implementation of Title I of the CAA Amendments of 1990, published on April 16, 1992 (57 FR 13498), and supplemented on April 28, 1992 (57 FR 18070); "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (available at: <http://www.epa.gov/ttn/oarpg/t5/memoranda/redesignmem090492.pdf>); "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992," Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993 (available at: <http://www.epa.gov/ttn/caaa/t1/memoranda/redesig.pdf>); the redesignation of Detroit-Ann Arbor published on March 7, 1995 (60 FR 12459, 12465–12466, and EPA's Final Rule to Implement the 8-Hour Ozone NAAQS—Phase 1 and the Notice of Reconsideration at 69 FR 23951 (April 30, 2004) and 70 FR 30592, 30604 (May 26, 2005).

area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the Act. *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004). See also, 68 FR at 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

Comment: One commenter stated that (1) the area did miss the June 15, 2007 attainment date; (2) action on this matter should be based on real data, not speculation of attainment in the near future; and (3) the area's petrochemical industry is currently undergoing expansions which will result in more air emissions. Consequently, the recommendation was that the area be classified as moderate until attainment is actually achieved.

Response: EPA agrees with the commenter supporting the proposal. As quality-assured data for the area shows the area did not attain the 8-hour ozone standard by the June 15, 2007 attainment date, the area is being reclassified by operation of law as moderate nonattainment. Regarding the commenter's concern about industry expansions and more air emissions, the State's Nonattainment New Source Review (NNSR) permitting requirements apply to new major sources or major modifications at existing air pollution sources, such as the petrochemical industry expansions. The NNSR permit issued by the State must require that the emissions increase from the new source or modification be offset. The NNSR permit also requires the source to reduce emissions consistent with the application of lowest achievable emission rate as defined in 40 CFR 51.165(a)(1)(xiii). The State's permitting rules provide that the TCEQ will assure that emissions from a new minor source or minor modification will not interfere with attainment or maintenance of a national ambient air quality standard.

Comment: The State's concern was that the schedule for submittal of the SIP revision would require use of existing and somewhat outdated technical data due to the short timeframe. TCEQ commented that for any SIP revision, the most current and robust technical work is optimal, but due to the short timeframe for submittal, if they are required to submit an attainment demonstration SIP revision for the area by January 1, 2009, use of existing and somewhat outdated technical work will be necessary.

Response: With respect to any potential burden imposed by the new planning requirements, EPA notes that the moderate area requirements are imposed by section 182(b) of the CAA

and the impact of a reclassification is not a consideration in making the attainment determination under section 181(b)(2). When an area is reclassified, the EPA has the authority under section 182(i) of the Act to adjust the Act's submittal deadlines for any new SIP revisions that are required as a result of reclassification. Although some may argue that January 1, 2009 provides a short timeframe for submittal of a revised SIP, pursuant to 40 CFR 51.908(d), the State must provide for implementation of all control measures needed for attainment no later than January 1, 2009, the beginning of the attainment year ozone season for the BPA area. See 40 CFR 51.900(g) and 40 CFR part 58, Appendix D, section 4.1, Table D-3 (71 FR 61236).

Establishing the date for submittal as January 1, 2009 will help the State to optimize, to the extent possible, its public consultation and rulemaking process to choose control strategies, adopt, and implement them swiftly in order to avoid the possibility of the area failing to attain again and being reclassified to serious. Given the submittal deadline, the State should use the best and most up-to-date information available in the allotted timeframe. For more discussion of the SIP submittal date, please see the section titled "Proposed Date for Submitting a Revised SIP for the BPA Area" in our proposed action (72 FR 61310, October 30, 2007).

Comment: TCEQ also asked for clarification regarding the following sentences in the proposal notice at page 61321: "The BPA area may attain the 8-hour ozone standard at the end of 2007, based on data from 2005, 2006 and 2007. If EPA determines, after notice and comment rulemaking, that the area has attained the standard at the end of 2007, the requirement to submit SIPs related to attainment of the standard shall be suspended until such time as (1) the area is redesignated to attainment, at which time the requirements no longer apply; or (2) EPA determines that the area has violated the 8-hour ozone NAAQS (40 CFR 51.918)."

The State asked in particular whether EPA would set a new SIP submittal deadline after notice and comment rulemaking.

Response: The staffs of both agencies have been in contact to discuss various potential legal avenues available to the State of Texas. The State staff is considering the pros and cons of the potential legal avenues.

One of the potential legal avenues is the use of our clean data regulation for the 8-hour ozone standard (40 CFR

51.918). This is the legal avenue alluded to in the proposal. Under this regulation, if after EPA makes a clean data determination that results in the suspension of the requirement to submit certain SIPs, and EPA later determines that the area violates the 8-hour ozone NAAQS, EPA would establish a new SIP submittal deadline for these SIP requirements after notice and comment rulemaking. As EPA stated in its May 10, 1995 Memorandum "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard for the 1-hour NAAQS", "[i]f EPA subsequently determines that an area has violated the standard * * *. EPA would notify the State of that determination and would also provide notice to the public in the **Federal Register**. Such a determination would mean that the area would thereafter have to address the pertinent SIP requirements within a reasonable amount of time, which EPA would establish taking into account the individual circumstances surrounding the particular SIP submissions at issue." (pp. 6-7).

A potential consequence of relying upon this avenue is that depending on the timing of a violation and of an EPA rulemaking determining that a violation had occurred, it is possible that the BPA area would not be able to attain by its new moderate area attainment date, and therefore may be subject to another determination of nonattainment and reclassification to a higher classification than moderate.

III. What is the Effect of This Action?

A. Determination of Nonattainment, Reclassification of the BPA Area to Moderate and the New Attainment Date for the BPA Area

Pursuant to section 181(b)(2), we find that the BPA area failed to attain the 8-hour ozone NAAQS by the June 15, 2007, attainment deadline prescribed under the CAA and 69 FR 23858 (April 30, 2004) for marginal ozone nonattainment areas. When this finding is effective, the BPA area is reclassified by operation of law from marginal nonattainment to moderate nonattainment. The reclassification to the next higher classification is mandated by Section 181(b)(2)(A) of the CAA. Moderate areas are required to attain the standard "as expeditiously as practicable" but no later than 6 years after designation or June 15, 2010. The "as expeditiously as practicable" attainment date will be determined as part of the action on the required SIP

submittal demonstrating attainment of the 8-hour ozone standard. Also in this action, we are establishing a schedule by which Texas will submit the SIP revision necessary for the reclassification to moderate nonattainment of the 8-hour ozone standard.

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

We must address the schedule by which Texas is required to submit the SIP revision addressing the requirements for the BPA area. When an area is reclassified, we have the authority under section 182(i) of the CAA to adjust the CAA's submittal deadlines for any new SIP revisions that are required as a result of the reclassification. Pursuant to 40 CFR 51.908(d), for each nonattainment area, a state must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season. The attainment year ozone season is the ozone season immediately preceding a nonattainment area's attainment date, in this case 2009 (40 CFR 51.900(g)). The ozone season is the ozone monitoring season as defined in 40 CFR part 58, Appendix D, section 4.1, Table D-3 (October 17, 2006, 71 FR 61236). For the purposes of this reclassification for the BPA area, January 1, 2009 is the beginning of the ozone monitoring season. As a result, we are requiring that the required SIP revision be submitted by Texas as expeditiously as practicable, but no later than January 1, 2009.

A revised SIP must include, among other things, all the moderate area requirements in section 182(b) of the Act: (1) An attainment demonstration (40 CFR 51.908), (2) provisions for reasonably available control technology and reasonably available control measures (40 CFR 51.912), (3) reasonable further progress reductions in volatile organic compound (VOC) and nitrogen oxide (NO_x) emissions (40 CFR 51.910), and (4) contingency measures to be implemented in the event of failure to meet a milestone or attain the standard (CAA 172(c)(9)).² See also the requirements for moderate ozone nonattainment areas set forth in CAA section 182(b). Since the BPA area also is a 1-hour ozone nonattainment area, the anti-backsliding requirements of 40

CFR 51.900 and 51.905 apply also. See also *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), mod. (June 8, 2007).

IV. Final Action

Pursuant to CAA section 181(b)(2), we are making a final determination that the Beaumont/Port Arthur "marginal" 8-hour ozone nonattainment area failed to attain the 8 hour ozone NAAQS by June 15, 2007. Upon the effective date of this rule, the area is reclassified by operation of law as a moderate 8-hour ozone nonattainment area. Pursuant to section 182(i) of the CAA, we are establishing the schedule for submittal of the SIP revision required for moderate areas once the area is reclassified. The required SIP revision for the BPA area shall be submitted by the State of Texas as expeditiously as practicable, but no later than January 1, 2009.

V. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO. The Agency has determined that the finding of nonattainment would result in none of the effects identified in 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.

B. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This action to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines does not establish any new information collection burden. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of

information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards. (See 13 CFR part 121.); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Determinations of nonattainment and the resulting reclassification of nonattainment areas by operation of law under section 181(b) (2) of the CAA do not in and of themselves create any new requirements. Instead, this rulemaking only makes a factual determination, and does not directly regulate any entities. After considering the economic impacts of today's action on small entities, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local,

² A vehicle inspection and maintenance (I/M) program would normally be listed as a requirement for an ozone moderate or above nonattainment area. However, the Federal I/M Flexibility Amendments of 1995 determined that urbanized areas with populations less than 200,000 for 1990 (such as BPA) are not mandated to participate in the I/M program (60 FR 48027, September 18, 1995).

and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation as to why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This action does not include a Federal mandate within the meaning of UMRA that may result in expenditures of \$100 million or more in any one year by either State, local, or Tribal governments in the aggregate or to the private sector, and therefore, is not subject to the requirements of sections 202 and 205 of the UMRA. Also, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments and therefore, is not subject to the requirements of section 203. EPA believes, as discussed previously in this document, that the finding of nonattainment is a factual determination based upon air quality considerations and that the resulting reclassification of the area must occur by operation of law. Thus, EPA believes that the finding does not constitute a Federal mandate, as defined in section 101 of the UMRA, because it does not impose an enforceable duty on any entity.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure

"meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This rule does not have federalism implications. It 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. This action merely determines that the BPA area had not attained by its applicable attainment date, and to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This action does not have "Tribal implications" as specified in Executive Order 13175. This action merely determines that the BPA area has not attained by its applicable attainment date, and to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines. The Clean Air Act and the Tribal Authority Rule establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and this rule does nothing to modify that relationship. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045: "Protection of Children From Environmental Health 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 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 action is not subject to Executive Order 13045 because it is not economically significant as defined in E.O. 12866, and because the Agency does not have reason to believe the environmental health risks or safety risks addressed by this rule present a disproportionate risk to children. This action merely determines that the BPA area has not attained the standard by the applicable attainment date, and to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, "Actions That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) 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 VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS. This action merely determines that the BPA nonattainment area has not attained by its applicable attainment date, and to reclassify the BPA "marginal" nonattainment area as a "moderate" ozone nonattainment area and to adjust applicable deadlines. It does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action merely determines that the BPA nonattainment area has not attained by its applicable attainment date, and to reclassify the BPA nonattainment area as a moderate ozone nonattainment area and to adjust applicable deadlines.

K. 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).

L. 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 May 19, 2008. 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 moderate 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 in 40 CFR Part 81

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

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

Dated: March 6, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

■ Part 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 81—[AMENDED]

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

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

■ 2. In § 81.344 the table entitled "Texas—Ozone (8-hour Standard)" is amended by revising the entries for Beaumont/Port Arthur, TX to read as follows:

§ 81.344 Texas.

* * * * *

TEXAS—OZONE
[8-hour standard]

Designated area	Designation ^a		Classification	
	Date ¹	Type	Date ¹	Type
Beaumont/Port Arthur, TX:				
Hardin County		Nonattainment	(3)	Subpart 2/Moderate.
Jefferson County		Nonattainment	(3)	Subpart 2/Moderate.
Orange County		Nonattainment	(3)	Subpart 2/Moderate.
* * * * *				

^a Includes Indian Country located in each county or area, except as otherwise specified.

¹ This date is June 15, 2004, unless otherwise noted.

³ April 17, 2008.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 080311419-8426-01]

RIN 0648-XG33

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,370 nm² (4,699 km²), northeast of Boston, Massachusetts for 15 days. The purpose of this action is to provide protection to