

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[PA138-4098a; FRL-7562-6]

Approval and Promulgation of Air Quality Implementation Plans; Removal of Direct Final Rule; Federally Enforceable State Operating Permit Program; Allegheny County, PA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Removal of final rule.

SUMMARY: Because EPA received adverse comments, we are removing our approval of the revision to the Allegheny County portion of the Commonwealth of Pennsylvania State Implementation Plan which consists of Allegheny County's state operating permit program. EPA is removing the language of the rule which was to approve the revision in accordance with the requirements of sections 110 and 112 of the Clean Air Act. The original action was published in the **Federal Register** on June 26, 2003 as a direct final rule. We will address the comments received in a future final action based on the proposed rule which was also published on June 26, 2003.

DATES: This rule is effective on November 25, 2003.

FOR FURTHER INFORMATION CONTACT: Paul T. Wentworth, Permits and Technical Assessment Branch at (215) 814-2183 or by e-mail at wentworth.paul@epa.gov.

SUPPLEMENTARY INFORMATION: Please see the information provided in the direct final action published in the **Federal Register** on June 26, 2003 (68 FR 37973) and in the companion proposed rule which was also published on June 26, 2003 (68 FR 37993).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

■ 40 CFR part 52 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.*

■ 2. Section 52.2020 is amended by removing paragraph (c)(209).

Dated: September 10, 2003.

Donald S. Welsh,

Regional Administrator, Region III.

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 81**

[GA-57-200341; FRL-7563-4]

Determination of Nonattainment as of November 15, 1999, and Reclassification of the Atlanta 1-Hour Ozone Nonattainment Area; State of Georgia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to issue a determination that the Metropolitan Atlanta 1-hour serious ozone nonattainment area (hereinafter referred to as the Atlanta area) did not attain the 1-hour ozone national ambient air quality standard (NAAQS) by the November 15, 1999, Clean Air Act (CAA) deadline for serious ozone nonattainment areas. As a result, the Atlanta area is reclassified by operation of law as a severe ozone nonattainment area on the effective date of this rule. The Georgia Environmental Protection Division (GAEPD) must submit by July 1, 2004, a State Implementation Plan (SIP) revision for the Atlanta area that meets the severe area 1-hour ozone nonattainment area requirements of CAA section 182(d). The due date for the section 185 enforcement rule is July 1, 2005, due to the need for the State to acquire the necessary statutory authority to implement this rule. Finally, EPA is adjusting the dates by which the area must achieve a Rate of Progress plan (ROP) to cover an average of 3 percent per year reduction in ozone precursor emissions from 1999 to the attainment year and adjusting contingency measure requirements as this relates to the ROP milestone. In an Order entered on June 16, 2003, the United States Court of Appeals for the Eleventh Circuit granted EPA's motion for voluntary vacatur of the EPA's extension of the 1-hour ozone attainment date for the Atlanta area and EPA's approval of the 1-hour ozone attainment demonstration SIP submitted by the GAEPD on July 17, 2001, and remanded the matter to the agency for further proceedings consistent with the court's order. This final determination and this notice are in direct response to and comply with the court's order.

DATES: This final rule is effective January 1, 2004.

ADDRESSES: Copies of documents relevant to this action are available for public inspection during normal business hours at the following addresses: U.S. EPA, Region 4 Air

Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

Air Protection Branch, Georgia Environmental Protection Division, Georgia Department of Natural Resources, 4244 International Parkway, Suite 120, Atlanta, Georgia 30354. Telephone (404) 363-7000.

FOR FURTHER INFORMATION CONTACT:

Scott M. Martin, EPA Region 4, (404) 562-9036 or email: martin.scott@epa.gov.

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

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I. Background

In a **Federal Register** notice published on December 11, 2001, (66 FR 63972) EPA proposed to approve the 1-hour ozone attainment demonstration for the Atlanta 1-hour ozone nonattainment area which was submitted by the GAEPD on July 17, 2001, and extend the attainment date to November 15, 2004. Additionally, in the alternative, EPA proposed to find that the Atlanta area had failed to attain the 1-hour ozone NAAQS by November 15, 1999, the date set forth in the CAA for serious nonattainment areas. Subsequently, in a **Federal Register** notice published on May 7, 2002, (67 FR 30574) EPA granted final approval to the 1-hour ozone attainment demonstration for the Atlanta area as submitted on July 17, 2001, the Reasonably Available Control Measures (RACM) analysis, commitment to perform an early attainment assessment, contingency measures, the 2004 motor vehicle emissions budget (MVEB), and the Partnership for a Smog Free Georgia (PSG) program, and EPA extended the area's attainment date to November 15, 2004. At that time, EPA did not finalize the finding of failure to attain and the

Atlanta area remained classified as a serious nonattainment area.

EPA cited its July 16, 1998, guidance memorandum entitled "Extension of Attainment Dates for Downwind Areas" which was published in a notice of interpretation on March 25, 1999, (64 FR 14441) as justification for the extension of the attainment date without reclassification. On July 2, 2002, the D.C. Circuit Court, *Sierra Club v. EPA*, 294 F.3d 155, determined that the CAA precluded the attainment date extension policy as a matter of law. The Seventh Circuit, *Sierra Club v. EPA*, 311 F.3d 853 (7th Cir. Nov. 25, 2002), and the Fifth Circuit, *Sierra Club v. EPA*, 314 F.3d 735 (5th Cir. Dec. 11, 2002) subsequently issued opinions that reached the same conclusion with respect to extensions granted to St. Louis, MO and Beaumont, TX¹. In light of the decisions of these circuits, on February 20, 2003, the EPA filed a

motion for voluntary vacatur of its extension of the attainment date deadline for the Atlanta 1-hour ozone nonattainment area and its approval of the Atlanta area 1-hour ozone attainment demonstration SIP. The Eleventh Circuit Court of Appeals granted EPA's request on June 16, 2003, and the Court remanded the matter to EPA for further proceedings consistent with the court's order.

II. Atlanta 1-Hour Ozone Nonattainment Area

The Atlanta 1-hour ozone nonattainment area consists of the following counties: Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Paulding, and Rockdale.

III. Explanation of a SIP

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

control strategies to ensure that state air quality meets the NAAQS established by EPA. These ambient standards are established under section 109 of the CAA, and they currently address six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. Each state must submit these regulations and control strategies to us for approval and incorporation into the Federally-enforceable SIP. Each Federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin. These SIPs can be extensive. They may contain state regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

IV. The NAAQS For Ozone

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.

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

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

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

On December 11, 2001, EPA proposed its finding that the Atlanta area did not attain the 1-hour ozone standard by the applicable date (66 FR 63972). In that notice of proposed rulemaking we discussed how we believed the provisions of section 181(b)(2), the relevant sections of the CAA regarding determinations of attainment and

reclassifications for failure to attain, would apply to the Atlanta area. The proposed finding was based upon ambient ozone concentration data for the period 1997 through 1999, from the monitoring sites in the Atlanta area, several of which recorded an average of more than one exceedance per year.

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

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

Even if a serious area's design value at the time of reclassification is lower than the design value for serious areas that serious area cannot be reclassified to a lower classification because the minimum statutory classification resulting from a failure to attain is severe. No area can be reclassified to a category higher than severe. Extreme is the only classification higher than severe, but the statute does not permit reclassification to this level.

The air quality data upon which we made the proposed finding of failure to attain the ozone NAAQS were available for comment in our December 11, 2001, notice of proposed rulemaking. We received no adverse comments pertaining to that air quality data and the proposed determination of nonattainment.

TABLE 2.—AIR QUALITY MONITORING DATA FOR THE ATLANTA AREA 1997–1999

Site ID	County	Total exceedances 97–99	Annual average design expected exceedances	Design value (ppm)
13–089–0002	DeKalb	16	6.7	0.142
13–089–3001	DeKalb	10	4.4	0.135

¹ 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 Fifth Circuit's decision on Beaumont, EPA recently issued a final rule withdrawing a transport-based attainment date

extension and reclassifying the Baton Rouge ozone nonattainment area (68 FR 20077 (April 24, 2003)) and has proposed to do the same for the Beaumont area (68 FR 36756 (June 19, 2003)).

TABLE 2.—AIR QUALITY MONITORING DATA FOR THE ATLANTA AREA 1997–1999—Continued

Site ID	County	Total exceedances 97–99	Annual average design expected exceedances	Design value (ppm)
13–097–0004	Douglas	9	3.5	0.131
13–121–0055	Fulton	28	10.8	0.156
13–135–0002	Gwinnett	7	2.9	0.138
13–223–0003	Paulding	3	1.1	0.124
13–247–0001	Rockdale	28	10.3	0.153

*Only monitors with three complete years of data were used for these calculations.

EPA has determined that the relevant air quality data for the period of 1997 through 1999, inclusive, for the Atlanta area shows that the Atlanta area contained at least one monitor with an average annual number of expected exceedances that was greater than the 1.0 allowed by the 1-hour ozone NAAQS. Therefore, we make the determination pursuant to section 181(b)(2)(B) of the CAA that the Atlanta area did not attain the 1-hour ozone standard by the November 15, 1999, attainment date, and that the area is reclassified by operation of law to severe nonattainment on the effective date of this rule.

VI. Necessity for This Action

On May 7, 2002, EPA granted final approval to the 1-hour ozone attainment demonstration for the Atlanta area and extended the attainment date to November 15, 2004. Subsequently, the Southern Organizing Committee for Economic and Social Justice, the Georgia Coalition for the People's Agenda and the Sierra Club petitioned for review of the agency's action to the 11th Circuit Court of Appeals. Due to a series of prior rulings in other circuits that EPA's attainment date extension policy was invalid as a matter of law, EPA filed a motion for voluntary vacatur with the 11th Circuit Court of Appeals on February 20, 2003. The 11th Circuit granted the request for voluntary vacatur on June 16, 2003, and remanded the matter to the agency for further proceedings consistent with the court's order.

VII. Results of This Action

In this action, EPA is issuing a final determination pursuant to section 181(b)(2) of the CAA, that the Atlanta area did not attain the 1-hour ozone NAAQS by November 15, 1999. In doing so, EPA is fulfilling our nondiscretionary duty pursuant to the CAA. As a result of this final determination, the Atlanta area is reclassified by operation of law to severe ozone nonattainment pursuant to section 181(b)(2) of the CAA. In

addition, this action sets the dates by which the Atlanta area must submit a SIP revision addressing the CAA's pollution control requirements for severe ozone nonattainment areas (the "severe area SIP") and to attain the 1-hour NAAQS for ozone.

Section 182(i) states that the Administrator may adjust applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency for submission of the requirements applicable to the reclassified area. An area reclassified to severe is required to submit SIP revisions addressing the severe area requirements for the 1-hour ozone NAAQS in section 182(d) and the penalty requirement in section 185.

In the December 11, 2001, (66 FR 63972) supplemental proposed rule EPA requested comment on the time frame for the State to submit the severe area SIP requirements. The proposal requested comment on two potential time frames of 12 months and 18 months. No comments were received by EPA on this issue. Due to the short time frames, GAEPD in a letter dated September 8, 2003, agreed to submit all SIPs, with one exception, by July 1, 2004, which is less than the proposed time frames. The one exception is the section 185 penalty rule. This SIP is due 18 months after the effective date of this action, July 1, 2005, because the State will need the full 18 months to acquire the necessary statutory authority to implement this rule.

VIII. Reclassification

Section 181(b)(2)(A) of the CAA requires that, when an area is reclassified for failure to attain, its reclassification be the higher of the next higher classification or the classification applicable to the area's ozone design value at the time the notice of reclassification is published in the **Federal Register**. Section 181(b)(2)(A)(ii) provides that no area shall be reclassified as Extreme. The Atlanta area is a serious nonattainment area with a design value of 0.156 ppm

based on monitoring data for the years 1997 to 1999. Therefore, the Atlanta area is reclassified, by operation of law, as a severe nonattainment area.

IX. Effective Date of Reclassification

EPA is setting the effective date of this action as January 1, 2004, because the GAEPD has calendar year contracts for sampling for the Georgia fuel rule, as well as, calendar year reporting requirements. The same suppliers and importers for the Georgia fuel rule will be impacted by the requirement, beginning one year after the effective date of the reclassification, to supply gasoline that complies with the federal reformulated gasoline standards. Therefore, this effective date will minimize complications regarding reporting and compliance with both the State and federal fuel requirements.

X. Severe Area Attainment Date

Under section 181(a)(1) of the CAA, the new severe area attainment deadline for the Atlanta area as reclassified pursuant to section 181(b)(2) is as expeditiously as practicable but no later than November 15, 2005. The expeditiously as practicable attainment date will be determined as part of the approval of the severe area attainment demonstration.

XI. Severe Area Requirements SIP Submittal

Under section 181(a)(1) of the CAA, the attainment deadline for serious ozone nonattainment areas reclassified to severe under section 181(b)(2) is as expeditiously as practicable but no later than November 15, 2005. Under section 182(i), such areas are required to submit SIP revisions addressing the severe area requirements for the 1-hour ozone NAAQS. Under section 182(d), severe area plans are required to meet all the requirements for serious area plans plus the requirements for severe areas, including, but not limited to: (1) A 25 ton per year major stationary source threshold; (2) additional reasonably available control technology (RACT) rules for sources subject to the new lower major applicability cutoff; (3) a

new source review (NSR) offset requirement of at least 1.3 to 1; (4) a post-1999 rate-of-progress plan containing emission reductions of ozone precursors of at least 3 percent per year from November 15, 1999, until the attainment date; and (5) additional transportation control measures (TCMs) needed to offset growth in emissions due to growth in vehicle miles traveled (VMT); and (6) a fee requirement for major sources of volatile organic compounds (VOC) and nitrogen oxides (NO_x) should the area fail to attain by 2005. Additionally, section 211 "Reformulated Gasoline and Oxygenated Gasoline" of CAA requires any area reclassified from "serious" to "severe" to implement reformulated gasoline. We have issued a "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" that sets forth our preliminary views on these section 182 requirements and how we will act on SIPs submitted under Title I. See 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992). Further, Georgia is required to submit a revision to the SIP containing contingency measures under sections 172(c)(9) and 182(c)(9) for its severe area SIP to meet ROP requirements and for failure to attain.

The GAEPD's severe SIP for the Atlanta area must also contain adopted regulations, and/or enforceable commitments to adopt and implement control measures in regulatory form by specified dates, sufficient to make the required rate-of-progress and to attain the 1-hour ozone NAAQS as expeditiously as practicable but no later than November 15, 2005. These adopted regulations must include, at a minimum, the regulations to meet the specific requirements listed above and any other emission reductions necessary to achieve attainment.

XII. Rate-of-Progress (ROP) Schedule

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 ROP requirement.

The first required post-1999 ROP 9 percent reduction originally was required by November 15, 2002 under the CAA. However, that date has elapsed prior to the time Atlanta was redesignated and first became subject to the requirement. Therefore, in this action EPA is allowing the Atlanta area

to demonstrate that the first required post-1999 9 percent ROP is achieved as expeditiously as practicable after November 15, 2002, but in any case no later than November 15, 2005. EPA is also allowing the Atlanta area to link contingency measures for the 2002 ROP milestone to this new date.

In light of the fact that the statutory deadline has passed, it is impossible for the State to demonstrate any progress by a date that passed before the time the area became classified as a severe area and thus first became subject to the requirement to demonstrate post-1999 ROP. EPA agrees that the Atlanta area must now demonstrate such progress, but reasonably concludes that the State must have some time in which to actually develop and implement the measures to achieve such ROP. EPA has addressed similar issues on several occasions in the past when areas for various reasons have not timely submitted progress SIPs, and when the date for achieving progress had passed prior to EPA action on a progress SIP. EPA has routinely concluded in these circumstances that the area should demonstrate the required ROP as expeditiously as practicable once the statutory date for achieving such ROP had passed. See, e.g., 65 FR 31485 (May 18, 2000), 63 FR 28898 (May 27, 1998), 62 FR 31343 (June 9, 1997). Even though there is no provision in the statute expressly addressing the situation where an area has failed to timely submit a progress SIP, EPA must fill the statutory gap where such SIPs are submitted after the date for achieving progress, and EPA has reasonably done so in this case by following its past practice of requiring such SIPs to demonstrate ROP as expeditiously as practicable. Although no court has directly addressed the issue of the propriety of this "as expeditious as practicable" standard, courts have addressed other issues concerning ROP plans submitted after the statutory date for achieving ROP, which have demonstrated ROP as expeditiously as practicable, without expressing any concern with that standard. See, e.g., *Sierra Club v. EPA*, 252 F.3d 943 (8th Cir. 2001) (Court upheld calculation methods used in 15 percent ROP plan submitted three years after statutory date demonstrating achievement of ROP seven years after statutory date).

For the reasons set forth in this final rulemaking notice and pursuant to section 182(i) of the CAA, EPA is allowing the Atlanta area to demonstrate the first required post-1999 9 percent ROP, due under the CAA by November 15, 2002, as expeditiously as practicable after that date (but in any case no later

than November 15, 2005) in the event that control measures currently in the Atlanta area SIP or already promulgated by EPA did not achieve the required 9 percent reduction by November 15, 2002.

The severe area SIP will have to provide for a total of a 3 percent per year reduction from base line emissions between November 15, 1999, and the attainment year. Because the 2002 ROP deadline is now past, the ROP reduction requirement for the period 1999 to 2002 will have to be achieved as expeditiously as practicable after November 15, 2002. EPA understands that the GAEPD would likely submit one ROP plan which includes all the ROP required until the attainment date, and will demonstrate that the 1999–2002 increment is achieved as expeditiously as practicable. The State must submit by July 1, 2004, an ROP plan to achieve a three percent reduction in the precursor emissions per year until the as expeditiously as practicable attainment year. Additionally, the area must submit adequate on-road mobile source emission budgets consistent with that plan.

Because EPA is allowing the GAEPD to demonstrate the first required post-1999 9 percent ROP, due under the CAA by November 15, 2002, as expeditiously as practicable after that date (but in any case no later than November 15, 2005), EPA is also allowing the GAEPD to adopt contingency measures keyed to this new date. Thus, the GAEPD must submit contingency measures to take effect if the area fails to achieve the first post 1999 9 percent ROP by the as expeditiously as practicable date.

XIII. Use of MOBILE6 in SIP Submittals

The January 18, 2002, memorandum from John S. Seitz and Margo Tsigotis Oge "Policy Guidance for the Use of MOBILE6 in SIP Development and Transportation Conformity" indicates, among other things, that newly developed SIPs, including the motor vehicle emissions budgets in the post-1999 rate-of-progress plans, will have to be developed using MOBILE6. Using MOBILE6 may require a revision to the 1990 base year inventory and ROP targets.

XIV. Impacts on the Title V Program

Upon reclassification to severe, the major stationary source threshold will be lowered. Consequently, the State's Title V operating permits program regulations need to cover existing sources that will become subject to the appropriate lower major stationary source threshold. Any new 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 earlier date set by the applicable permitting authority) time period to submit a timely application will commence on the effective date of the reclassification.

XV. Vacatur of Previous Approval

On May 7, 2002, EPA granted final approval to the 1-hour ozone attainment demonstration for the Atlanta area and extended the attainment date to November 15, 2004, (see 67 FR 30574). Subsequently, the Southern Organizing Committee for Economic and Social Justice, the Georgia Coalition for the People's Agenda and the Sierra Club petitioned for review of the agency's action to the 11th Circuit Court of Appeals alleging that EPA exceeded its authority because the CAA precludes extension of attainment dates. Due to a series of prior rulings, in other cases, which held that EPA's attainment date extension policy was an invalid exercise of EPA's authority, on February 20, 2003, EPA filed, with the 11th Circuit, a motion for voluntary vacatur of the attainment date extension for the Atlanta area and of EPA's approval of the attainment demonstration. On June 16, 2003, the 11th Circuit granted the request for voluntary vacatur and remanded the matter to the agency for further proceedings consistent with this order.

One result of vacating the attainment demonstration for the Atlanta area is that the MVEBs contained in that approval were vacated as well. The vacatur of the MVEB resulted in reverting to the previously approved MVEBs for the purposes of transportation conformity. These budgets can be found in the approval of the 15 Percent Rate of Progress plan and the Post 1996 Rate of Progress Plan. These plans were granted final approval on April 26, 1999, (see 64 FR 20186) and March 18, 1999, (see 64 FR 13348), respectively.

XVI. Comment and Response

In the December 11, 2001, notice of supplemental proposed rulemaking (66 FR 63972) for this action, EPA proposed to find that the Atlanta area had failed to attain the 1-hour ozone NAAQS by November 15, 1999, the date set forth in the CAA for serious nonattainment areas and that if EPA finalized this finding,

the Atlanta area would be reclassified, by operation of law, as a severe nonattainment area. EPA also solicited comment on the schedule for submittal of the SIP revisions required for severe areas should the area be reclassified.

In this document, EPA is responding to adverse comments that are germane to this final action and which were submitted in response to the December 11, 2001 (66 FR 63972), supplemental proposed rulemaking. EPA received no adverse comments pertaining to the data used for our nonattainment determination, and therefore we are making the determination that the Atlanta area did not attain by its attainment deadline.

Comment: Reclassification to severe nonattainment would not shorten the time for meeting Atlanta's air quality goals. In fact, it would extend the time for compliance to at least 2005. Regardless of whether EPA grants an extension pursuant to the downwind extension policy, EPA is prohibited from reclassifying the Atlanta area under Subpart 2 of the federal CAA. Under 42 U.S.C. 7509(c), an area can be reclassified only if EPA makes a formal finding "[w]ithin 6 months following the applicable attainment date" that the area failed to attain the ozone NAAQS. EPA did not make such a determination within six months of the nominal 1999 attainment deadline for the Atlanta area, and thus is now prohibited from doing so.

Response: EPA agrees that reclassification must be based on a notice and comment rulemaking. See D.C. Circuit Slip opinion *Sierra Club v. Whitman* No. 01-5123 and 015299 April 5, 2002, Slip Opinion (D.C. Cir). EPA does not agree, however, that missing a mandatory deadline means that EPA loses the power to act to discharge the duty to which the deadline applied. EPA retains the power to act to discharge the duty after the deadline has passed. *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106, 113-114 (3d Cir. 1997). (EPA does not lose power to perform mandatory duty to act on redesignation request after 18-month statutory period has elapsed).

XVII. Final Action

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

nonattainment pursuant to section 181(b)(2) of the CAA.

XVIII. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA is required to determine whether regulatory actions are significant and therefore should be subject to Office of Management and Budget (OMB) review, economic analysis, and the requirements of the Executive Order. The Executive Order defines a "significant regulatory action" as one that is likely to result in a rule that may meet at least one of the four criteria identified in section 3(f), including, under paragraph (1), that the rule may "have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities."

The Agency has determined that the finding of nonattainment would result in none of the effects identified in section 3(f) of the Executive Order. Under section 181(b)(2) of the CAA, determinations of nonattainment are based upon air quality considerations and the resulting reclassifications must occur by operation of law. They do not, in and of themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because those requirements are automatically triggered by classifications that, in turn, are triggered by air quality values, determinations of nonattainment and reclassification cannot be said to impose a materially adverse impact on state, local, or tribal governments or communities.

B. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards

bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

C. Paperwork Reduction Act

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

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

Determinations of nonattainment and the resulting reclassification of nonattainment areas by operation of law under section 181(b)(2) of the CAA do not in and of themselves create any new requirements. Instead, this rulemaking only makes a factual determination, and does not directly regulate any entities. See 62 FR 60001, 60007–8, and 60010 (November 6, 1997) for additional analysis of the RFA implications of attainment determinations. Therefore, pursuant to 5 U.S.C. 605(b), I certify that this final action does not have a significant impact on a substantial number of small entities within the meaning of those terms for RFA purposes.

E. Unfunded Mandates Reform Act

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

Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

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

F. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

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

G. Executive Order 13132, Federalism

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure “meaningful and timely input by state and local officials in the development of regulatory policies that have Federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, EPA may not issue a regulation that has Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance

costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has Federalism implications and that preempts state law unless the Agency consults with state and local officials early in the process of developing the proposed regulation. This determination of nonattainment and the resulting reclassification of a nonattainment area by operation of law will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because this action does not, in and of itself, impose any new requirements on any sectors of the economy, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, the requirements of section 6 of the Executive Order do not apply to these actions.

H. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

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

also not subject to Executive Order 13211.

J. Congressional Review Act

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

K. Petitions for Judicial Review

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

Dated: September 15, 2003.

J.I. Palmer, Jr.,

Regional Administrator, Region 4.

■ 40 CFR part 81 is amended as follows:

PART 81—[AMENDED]

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

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

■ 2. In § 81.311 the table entitled "Georgia—Ozone (1-hour standard)" is amended by revising the entry for the Atlanta area to read as follows:

§ 81.311 Georgia.

* * * * *

GEORGIA—OZONE (1-HOUR STANDARD)

Designated area	Designation		Classification	
	Date ¹	Type	Date ¹	Classification
Atlanta Area:				
Cherokee County	11/15/1990	Nonattainment	1/01/2004	Severe.
Clayton County	11/15/1990	Nonattainment	1/01/2004	Severe.
Cobb County	11/15/1990	Nonattainment	1/01/2004	Severe.
Coweta County	11/15/1990	Nonattainment	1/01/2004	Severe.
DeKalb County	11/15/1990	Nonattainment	1/01/2004	Severe.
Douglas County	11/15/1990	Nonattainment	1/01/2004	Severe.
Fayette County	11/15/1990	Nonattainment	1/01/2004	Severe.
Forsyth County	11/15/1990	Nonattainment	1/01/2004	Severe.
Fulton County	11/15/1990	Nonattainment	1/01/2004	Severe.
Gwinnett County	11/15/1990	Nonattainment	1/01/2004	Severe.
Henry County	11/15/1990	Nonattainment	1/01/2004	Severe.
Paulding County	11/15/1990	Nonattainment	1/01/2004	Severe.
Rockdale County	11/15/1990	Nonattainment	1/01/2004	Severe.
* * * * *				

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

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-2003-0264; FRL-7321-4]

Imazapyr; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of imazapyr [2-[4,5-dihydro-4-methyl-4-(1-methylethyl)-5-oxo-1H-imidazol-2-yl]-3-pyridinecarboxylic acid] in or on grass, forage; grass, hay; fish; shellfish; fats of cattle, sheep, goats, and horses; kidney

of cattle, sheep, goats, and horses; meat byproducts (except kidney) of cattle, sheep, goats, and horses; meat of cattle, sheep, goats, and horses; and milk.. BASF requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective September 26, 2003. Objections and requests for hearings, identified by docket ID number OPP-2003-0264, must be received on or before November 25, 2003.

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

FOR FURTHER INFORMATION CONTACT: Jim Tompkins, Registration Division, 7505C,

Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-5697; e-mail address: tompkins.jim@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 282999)

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