

an amendment to State Rule 326 IAC 11–7 that was adopted by Indiana on February 7, 2007.

#### **§ 62.3651 Identification of sources.**

The plan applies to all existing MWCs with the capacity to combust greater than 250 tons per day of municipal solid waste, and for which construction, reconstruction, or modification was commenced on or before September 20, 1994, as consistent with 40 CFR Part 60, subpart Cb.

#### **§ 62.3652 Effective Date.**

The effective date of Phase I of the approval of the Indiana State plan for MWCs with the capacity to combust greater than 250 tons per day of municipal solid waste was January 18, 2000.

Phase II of the State plan revision is effective December 1, 2008.

[FR Doc. E8–22952 Filed 9–30–08; 8:45 am]

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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 81**

[EPA–R06–OAR–2007–0554; FRL–8721–8]

### **Clean Air Act Reclassification of the Houston/Galveston/Brazoria Ozone Nonattainment Area; Texas; Final Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is granting a request by the Governor of the State of Texas to voluntarily reclassify the Houston/Galveston/Brazoria (HGB) ozone nonattainment area from a moderate 8-hour ozone nonattainment area to a severe 8-hour ozone nonattainment area. EPA is also setting April 15, 2010, as the date for the State to submit a revised State Implementation Plan (SIP) addressing the severe ozone nonattainment area requirements of the Clean Air Act (CAA).

**DATES:** This final rule is effective on October 31, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2007–0554. All documents in the docket are listed at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., 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://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 Freedom of Information Act (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) 665–6645; fax number 214–665–7263; e-mail address [young.carl@epa.gov](mailto:young.carl@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

Throughout this document, whenever “we”, “us”, and “our” are used, we mean the EPA.

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#### **I. What Is the Background for This Action?**

The HGB area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller counties. On April 30, 2004, we classified the area as a moderate nonattainment area for the 1997 8-hour ozone standard, with an attainment date no later than June 15, 2010 (69 FR 23858). On June 15, 2007, we received a request from the Governor of Texas seeking voluntary reclassification of the HGB area from a moderate nonattainment area to a severe nonattainment area under the 1997 standard. On December 31, 2007, we proposed to reclassify the HGB area to a severe nonattainment area for the 1997 8-hour ozone standard (72 FR 74252). In our proposal we discussed the consequences of reclassification. We

also proposed and solicited comment on a range of dates, from December 15, 2008 to April 15, 2010, for the State to submit a revised SIP addressing the severe ozone nonattainment requirements. In this final rulemaking, for the reasons set forth below in Section II and in the responses to comments, we are (1) reclassifying the HGB area as a severe nonattainment area for the 1997 8-hour ozone standard and (2) selecting April 15, 2010 as the deadline by which the State must submit a revised SIP addressing the applicable severe area requirements.<sup>1</sup>

## **II. What Action Is EPA Taking?**

### **A. Reclassification of the HGB Area**

After fully considering all comments received on the proposed rule and pursuant to CAA section 181(b)(3), the HGB area is reclassified as a severe nonattainment area for the 1997 8-hour ozone standard. The new severe area attainment date for the HGB area is as expeditiously as practicable, but no later than June 15, 2010. The plain language of CAA section 181(b)(3) mandates that we approve the request to reclassify the area to severe, as requested by the Governor of Texas, and that we have no discretion to deny the request. Section 181(b)(3) provides in relevant part that “[t]he Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) of this section to a higher classification.”

A revised SIP for the HGB area must include all the requirements for serious ozone nonattainment area plans, such as: (1) Enhanced ambient monitoring (CAA section 182(c)(1)); (2) an enhanced vehicle inspection and maintenance program (CAA section 182(c)(3)); (3) a clean fuel vehicle program or an approved substitute (CAA section 182(c)(4)), and (4) gasoline vapor recovery for motor vehicle refueling emissions (CAA section 182(b)(3)<sup>2</sup>). The revised SIP must also meet the severe area requirements, including: (1) An attainment demonstration (40 CFR 51.908); (2) provisions for reasonably available control technology (RACT) and reasonably available control

<sup>1</sup> In our December 31, 2007 proposal we stated that a revised 8-hour SIP submittal must contain fees on major sources if the area fails to attain the standard (CAA 182(d)(3) and 185). Currently EPA is developing regulations and guidance to address section 185 fees. The regulations and guidance will supersede any conflicting requirements in this final action.

<sup>2</sup> Under CAA section 202(a)(6) gasoline vapor recovery remains a requirement for serious and above nonattainment areas but is no longer a requirement for moderate nonattainment areas. Please see 59 FR 16262, April 6, 1994.

measures (RACM) (40 CFR 51.912); (3) reasonable further progress (RFP) reductions in volatile organic compound (VOC) and nitrogen oxide (NO<sub>x</sub>) emissions (40 CFR 51.910); (4) contingency measures to be implemented in the event of failure to meet a milestone or attain the standard (CAA sections 172(c)(9) and 182(c)(9)); (5) transportation control measures to offset emissions from growth in vehicle miles traveled (CAA section 182(d)(1)(A)); (6) reformulated gasoline (CAA section 211(k)(10)(D)); and (7) NSR permits (40 CFR part 165). See also the requirements for serious and severe ozone nonattainment areas set forth in CAA sections 182(c), 182(d) and 185. Because the HGB area was classified as severe under the 1-hour ozone standard, many of these requirements are currently being implemented.

#### *B. Deadline for Submission of Revised SIP*

In our proposal to this final rule, we identified a range of dates and requested supporting information to consider in setting the appropriate severe classification submittal date. We received a number of comments discussing the full range of dates offered. We considered each comment carefully before setting a submission date. Since CAA section 181(b)(3) does not establish a precise timeframe for submitting an attainment plan under a voluntary reclassification request, we reviewed the information provided by commenters and other information in the record before us and the particular set of circumstances related to HGB to establish a deadline that is consistent with and that will ensure that the 8-hour ozone standard will be attained as expeditiously as practicable but no later than June 15, 2019. After fully considering all comments received on the proposed rule and pursuant to CAA section 181(b)(3) we find that April 15, 2010, is the appropriate SIP submittal date for a revised SIP.

In selecting the April 15, 2010 date, we considered that this would allow the amount of time necessary to incorporate more recently available information into the photochemical modeling and provide time for control strategy development. The new information includes improved meteorological information available from the Texas Air Quality Study II (TexAQS II study) which took place in the 2005 and 2006 time period, improved emissions data from the HRVOC source monitoring rules that took effect in 2006, greater ambient data available from the TexAQS II study and incorporation of more advanced modeling techniques. An

earlier date for submissions would have required the use of existing modeling episodes without the benefit of this more recent data. EPA believes, with this more robust data set, a more reliable control strategy can be developed. We discuss the points in more detail below.

Historically, the Houston area meteorology has been very difficult to model due to a combination of issues. The Houston area meteorology is very complex and is impacted by both a land/sea breeze interaction and a bay breeze function that make meteorological modeling of the area difficult. Modeling of other meteorological phenomena such as frontal passages/weak fronts, nocturnal jets, convergence zones, etc.; are also difficult to model and made even more difficult by the land/sea/bay breeze influences. TexAQS II data includes meteorological observations from numerous surface sites, two towers, hundreds of balloons, five aircraft, a research vessel and an offshore platform. These data will help to characterize important meteorological phenomena affecting ozone in the HGB area, including land/sea/bay breeze, nocturnal jets, stagnation, frontal passages, dispersion and mixing of ozone precursors, and transport.

Photochemical modeling of the Houston Area is also complicated by the significant difference between reported emissions from industrial sources and emissions estimated from actual monitored emissions from ambient concentrations. Previous 1-hour modeling included in a 2004 HGB 1-hour ozone SIP showed the benefit of modeling episodes that had more data collected than normal, such as in a field study. In the past, adjustments to reported emissions have been necessary to resolve the discrepancy between the emissions inventory and emissions estimated from ambient measurements. The field study data from 2005 and 2006 will help identify and quantify any continuing discrepancies between reported and actual emissions. During 2006, intensive monitoring was conducted that included monitoring from aircraft, intensive monitoring from a ship based platform, additional ground monitoring, collection of hourly specific emission inventory information for over 100 industrial facilities, and numerous additional meteorological monitoring sites. TCEQ has chosen to include episodes from 2006 that will benefit from the additional data and will result in higher confidence in any emission inventory adjustments that are done and the resulting photochemical modeling.

In addition, a large amount of federal, state, and scientific community resources have been enlisted to refine and analyze the data collected for use in the new 2005 and 2006 modeling. Analyses from the TexAQS II study only recently have become available in 2007 and 2008, and are critical to guiding the TCEQ modeling development and validating the results. Texas should be allowed time to incorporate these results, since otherwise the modeling would then likely need to be redone to incorporate these findings. We expect the TexAQS II data will contribute to better understanding of the adequacy of emissions inventories in several key areas, including shipping, onroad mobile sources, industrial VOCs and formaldehyde. It should also aid in the representation of chemical pathways in the models, since key parameters controlling the formation and destruction of ozone in the HGB area were investigated. Texas is also engaged in a number of activities to improve the model's ability to replicate the complex interactions leading to high ozone, including model enhancements to incorporate temperature variations, better land use and land cover data, improved information on biogenic emissions, better data for emissions and monitored concentrations, and advanced modeling techniques. See TCEQ Comments, page 3. TCEQ is modeling more than 50 episode days while making improvements in the modeling process and incorporating TexAQS II results.

TCEQ estimates it will take until March 2009 to complete the modeling work and associated quality assurance and peer review to support a proposed modeling and attainment demonstration. An April 15, 2010 submission date will allow a little more than a year for control strategies to be proposed and adopted. EPA believes that a year's period of time is as expeditious as practical for the development of the necessary control strategies given the complexity and difficulty of the HGB area ozone problem. The HGB area has one of the most severe ozone problems in the country. High ozone results from emissions both from the large industrial sector and the large urban population. The necessary controls to reach attainment are likely to be far reaching and technology forcing. Texas has already initiated a stakeholder process for strategy development so that they will be well positioned when the modeling work is completed.

An earlier date would mean the TCEQ would have to rely on a less reliable 2000 modeling episode that would yield

more uncertainty to the modeling analysis, and suspend work on the new modeling episodes. At best, a June 2009 date may have included initial work with the 2005 and 2006 episodes in addition to the 2000 episode, but would not have incorporated much of the data that was collected during TexAQS II, and thus, would have more uncertainties and would be less representative. A deadline for submission of the attainment demonstration that is earlier than April 2010 would inhibit the development of effective attainment strategies based upon new modeling of ozone episodes that occurred in 2005 and 2006, the more recent 2006 emissions inventory, and incorporation of findings from TCEQ's most recent field study of ozone formation, TexAQS II. Relying on the 2000 episode likely would result in the need to subsequently revise the SIP, and would delay the development of effective and defensible control strategies. Overall, it is EPA's judgment that the longer submittal date will give TCEQ the necessary time to develop the modeling and control strategies using the 2005 and 2006 episodes with the TexAQS II field study data resulting in a more representative and accurate attainment demonstration.

In addition to modeling, TCEQ must also analyze emissions data to develop ozone control strategies. To do so, TCEQ must incorporate the findings from TexAQS II into its SIP planning, and must also rely on the 2006 NO<sub>x</sub> and VOC emissions inventory, which was not expected to be complete until early 2008 and would therefore not allow for some early aspects of control strategy development until 2008. It is important to use the 2006 inventory since it will provide the most accurate VOC emissions data, in part as a result of monitoring and testing requirements established in the HRVOC rules for flares, vents and cooling towers. The 2006 point source inventory represents years of efforts to improve emissions data, including more accurate speciation and reporting of VOC emissions.

In summary, the April 15, 2010 is appropriate as the submission date due to: (1) The complexity in developing and implementing effective emission reductions for the area; and (2) the opportunity for a more robust attainment demonstration plan that relies on better data and modeling. Developing and implementing effective emission reductions for the area is complex due to its: (1) Complex coastal meteorology; (2) large urban population; (3) large industrial area; and (4) the current underestimation issues of industrial emissions. With this

submission, more recent data and modeling episodes may be used to identify control strategies and demonstrate attainment of the standard. In our December 31, 2007, proposal, we stated that the new attainment demonstration should be based on the best information available (72 FR 74252, 74254). A SIP revision submission date of April 15, 2010, allows for the best information to be used to produce an attainment demonstration that is representative, robust and accurate. This date is most likely to ensure that the 8-hour ozone standard will be attained as expeditiously as practicable but no later than June 15, 2019.

### III. What Comments Did EPA Receive on the December 31, 2007, Proposal and How Has EPA Responded to Them?

We received 35 comments on our December 31, 2007 proposal from citizens, public interest groups, business groups, elected officials and governmental organizations. The comments we received on our proposal 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-2007-0554, or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph above. The discussion below addresses the comments we received on our proposed action. The discussion addresses comments received on (1) reclassification of the area to severe, (2) the date for a revised SIP submittal, and (3) relief of CAA attainment demonstration and related requirements.

#### A. Reclassification of the Area to Severe

*Comment:* Comments were received that EPA should not reclassify the area to severe. Comments were submitted that (1) EPA is limited by language in CAA section 181(b)(3) that EPA “\* \* \* shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) to a higher classification” (emphasis added); (2) table 1 had been superseded by the 8-hour ozone standard table at 40 CFR 51.903; and (3) the appropriate 8-hour ozone design value range for table 1 is 0.107–0.199 parts per million (ppm), which would make the area's classification “serious”. Comments were also submitted that reclassification to severe, which is two levels higher than moderate, conflicts with other CAA provisions for ozone nonattainment areas (CAA Title I, Part D, Subpart 2), and EPA's action on the State's reclassification request must be reasonable.

*Response:* We reiterate our position that the plain language of section 181(b)(3) mandates that we approve the request to reclassify the area to severe, as requested by the Governor of Texas, and that we have no discretion to deny the request. Section 181(b)(3) provides in relevant part that “[t]he Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) of this section to a higher classification.” Several commenters agreed with EPA's position on this matter as well as the position that the State could select the higher classification best suited to its needs. EPA agrees with these commenters.

One commenter cited to our Phase 1 final rule to implement the 8-hour ozone national ambient air quality standard (NAAQS) response to comments section for EPA's rationale for voluntary reclassifications (69 FR 23951, 23962). We agree with this commenter. In the response to comments on that rule, we stated that voluntary reclassification is the mechanism defined in the CAA for states to obtain additional time for attainment when necessary. In the Phase 1 rule responses to comments, we stated:

A State can receive more time to attain by voluntarily submitting a request to EPA for a higher classification—including the classification they had under the 1-hour NAAQS. The CAA (Section 181 (b)(3)) directs EPA to grant a State's request, and to publish notice of the request and EPA's approval.

This is precisely the situation in HGB. It was designated severe under the 1-hour standard and under the 8-hour standard it was designated as moderate. Texas is now asking for the area to be reclassified to severe under the 8-hour standard. We further stated that we recognized that voluntary reclassification is a legitimate option under the CAA, and may be an attractive option if the State is unable to develop a plan that demonstrates that an area will attain within the time period for its assigned classification.

Table 1 of CAA section 181(a) (for the 1-hour ozone standard) and table 1 of 40 CFR 51.903 (for the 8-hour ozone standard) list classifications for nonattainment designations, the ozone design values used for initial designations, and the maximum period for attainment of the standard. Table 1 from 40 CFR 51.903 is reprinted below. Table 1 refers to classifications ranging from marginal to extreme. For the reasons set forth below, in acting on a request for voluntary reclassification, we are not constrained by the 8-hour design values for initial classifications

set forth in table 1. Therefore the request by Texas to reclassify the area from moderate to severe is in accordance with table 1.

TABLE 1—CLASSIFICATION FOR 8-HOUR OZONE NAAQS FOR AREAS SUBJECT TO § 51.902(a) (FROM 40 CFR 51.903)

Area class		8-hour design value (ppm ozone)	Maximum period for attainment dates in state plans (years after effective date of nonattainment designation for 8-hour NAAQS)
Marginal .....	From up to <sup>1</sup> .....	0.085	3
		0.092	
Moderate .....	From up to <sup>1</sup> .....	0.092	6
		0.107	
Serious .....	From up to <sup>1</sup> .....	0.107	9
		0.120	
Severe-15 .....	From up to <sup>1</sup> .....	0.120	15
		0.127	
Severe-17 .....	From up to <sup>1</sup> .....	0.127	17
		0.187	
Extreme .....	Equal to or above .....	0.187	20

<sup>1</sup> But not including.

Some commenters contended that a severe classification is not justified by the HGB area's air quality design value as interpreted by table 1, and thus the request is not in accordance with table 1 and EPA is not mandated to grant the request. This contention misreads section 181(b)(3).

The plain meaning of CAA section 181(b)(3) is clear, and, in addition, if one compares it with the other provisions of section 181(b) of the CAA it supports our position that Congress meant there to be no discretion on the part of EPA in approving a voluntary reclassification, and the State can request any higher reclassification it deems appropriate. The authority to seek a reclassification beyond the next highest classification is evident when one contrasts the statutory language governing voluntary reclassification in section 181(b)(3) with statutory language governing reclassification upon failure to attain in the previous paragraph of the CAA. In section 181(b)(2), Congress specified that:

Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by [the attainment date] shall be reclassified by operation of law in accordance with the table 1 of subsection (a) of this section to the higher of—

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

(ii) The classification applicable to the area's design value at the time of the [reclassification] notice \* \* \*

The specific direction in section 181(b)(2) that, upon failure to attain, a nonattainment area shall be reclassified to the higher of "the next higher classification" or "the classification

applicable to the area's design value" contrasts with the language of section 181(b)(3), which states that a voluntary reclassification may be to "a higher classification." In section 181(b)(3), there is no reference to the area's design value or limitation that the reclassification must be equivalent to the area's design value. Under section 181(b)(3), reference to "in accordance with table 1" means in accordance with the area classification categories of marginal to extreme, not air quality design values used for initial classifications. Section 181(b)(3), unlike section 181(b)(2), does not direct comparison to the area's air quality design value. As in section 181(b)(2), Congress also referred explicitly to design values in section 181(a), providing that an ozone nonattainment area's initial classification should be "based on the design value of the area." No such limitation is placed on a voluntary reclassification under section 181(b)(3). As one commenter pointed out, reclassification from "moderate" to "severe" is in accordance with table 1, since it defines the range of what is a "higher classification" and the associated attainment dates. If Congress had meant to restrict or specifically direct what classification a State could choose, it would have written similar limiting language into section 181(b)(3), and would have included, as it did in section 181(b)(2), a specific time for determining the design value of the area. (Without such a timeframe being defined, it is not possible to determine the area's design value). While both sections 181(b)(2) and 181(b)(3) provide

that reclassification shall be "in accordance with table 1 of subsection (a)", section 181(b)(3) does not direct that the design value of the area being reclassified fall within the range of design values corresponding to a particular classification. Even under section 181(b)(2), reclassification is not required to be equivalent to the air quality of the area at the time of classification. Under section 181(b)(2), an area being reclassified is not required to match its design value to the design value for the classification category in table 1, but rather to the "higher" of the next classification or its design value at the time of reclassification. It would be illogical for Congress, as it did, to require areas to be reclassified to classifications higher than their design value under the mandatory provisions of section 181(b)(2), while prohibiting such reclassification under the voluntary provision of 181(b)(3). Nor is there any basis, as a commenter suggests, to construe the reference in section 181(b)(3) to reclassification to "a higher classification" to be limited to "the next higher classification" or a single classification level. Therefore EPA's approval of the voluntary reclassification from moderate to severe is reasonable and in keeping with the statutory provisions, which provide EPA no discretion to deny a request for voluntary reclassification to a higher classification.

A commenter's argument that, in order to be "in accordance with table 1," the area's design value at the time of reclassification must match the design value for initial classification in

table 1, contradicts the commenters' own position that the area should be reclassified to serious, since, according to the commenter, the more recent design values do not match the severe area concentrations. The area's most recent design values are 103 parts per billion (ppb) in both 2005 and 2006, and 96 ppb in 2007—these levels match the design value for initial classification for moderate areas. Of course, as pointed out above, section 181(b)(3) makes no reference to design values nor any timeframe for determining them—thus there is confusion in the commenters' discussions about the appropriate dates for determining the area's design value, with one commenter arguing that “the HGB area's design value is most consistent with 0.107–0.119 ppm,” the serious range, EDF Comments at 8, while another notes that the “2005 eight-hour design value was 103 ppb”. GHASP Comments, at 2. Thus the commenters' argument that a voluntary reclassification can only be to a classification that matches the area's design value, is further undermined by the indeterminacy of the relevant design value with regard to section 181(b)(3). To the extent that the most recent design values match the initial classification levels for moderate areas, this also conflicts with the commenters' assertions that the area should be reclassified to serious and not severe.

Other provisions in the CAA do not conflict with our action to reclassify the area to severe. Sections 181(a)(4) and (5) were cited in a comment. Neither section has anything to do with the voluntary reclassification provision in section 181(b)(3). CAA section 181(a)(4) gives the Administrator discretion, within 90 days of an original classification, to “adjust” that initial classification upwards or downward if an area's design value places it within 5 percent of the next classification. It has no bearing on the circumstances for granting a request for voluntary reclassification as set forth in section 181(b)(3). For more information, please see our September 22, 2004, action reclassifying certain 8-hour ozone nonattainment areas from moderate to marginal under section 181(a)(4) (69 FR 56697). CAA section 181(a)(5) simply sets forth the criteria for granting attainment date extensions if an area is *not being reclassified*, and it does not affect or shed light on the criteria for granting voluntary reclassifications. It provides for a maximum of two 1-year extensions of the attainment date for the 1-hour ozone NAAQS. The attainment date can be extended—without reclassifying the area—if the State has

complied with all requirements and commitments pertaining to the area in the applicable implementation plan and there was no more than 1 exceedance of the 1-hour ozone NAAQS preceding the extension year. CAA section 181(a)(4) contains very specific language regarding how to make immediate, minor adjustments to initial classifications, and section 181(a)(5) contains specific language on how to extend an attainment date when an area is not being reclassified. Congress addressed separately and equally specifically voluntary reclassifications in section 181(b)(3). Thus EPA interprets the voluntary reclassification differently from these other provisions. Based on the language in CAA section 181(b)(3), our action is consistent with the CAA, and it is reasonable. Section 181(a)(4) applies only in limited circumstances to initial designations, and is not applicable here. Section 181(a)(5) applies to circumstances for extending attainment dates without changing the classification of the area, and is not applicable here. Neither provision conflicts with or limits the scope of section 181(b)(3).

*Comment:* Several comments were received stating that HGB had never attained any standard and that further delay in attaining the standard by granting the reclassification is not warranted. Comments were received that the goal of the SIP is attainment of the 8-hour ozone standard, not simply a reduction in ozone precursors. Comments contended that TCEQ has repeatedly failed to reach this goal and to implement adequate control measures, and that sanctions should be imposed and that it should not be rewarded with extra time. One commenter cited an April 2007 letter from the Mayor of Houston and Harris County Judge Emmett, stating that they opposed the idea of a double “bump-up” and that the resulting delay in attainment was unacceptable.

*Response:* As stated above, voluntary reclassification is a legitimate option under the CAA, and it is an appropriate option if the State is unable to develop a plan that demonstrates that an area will attain within the time period for its assigned classification. Texas' 8-hour submittal demonstrated that the State could not model attainment by its moderate attainment date. Moreover, under the Act, EPA does not have discretion to deny a request for voluntary reclassification.

With respect to the April letter from the Mayor of Houston and Judge Emmett, subsequent comments from them on EPA's proposed reclassification were more supportive of EPA's

proposed action than the April 2007 letter indicated. These comments stated that “whether the EPA determines that a single or double bump up in classification for the HGB is appropriate, our concern remains the timely attainment of the NAAQS. The control measures included in the SIP must ensure that the NAAQS is attained as expeditiously as practicable as required by the Clean Air Act.” The comments noted that “[w]hile the City and County are concerned that the SIP submittal date of 2010 could delay achieving attainment, the TCEQ believes that this extended period will allow TCEQ to develop the most effective SIP possible. This up front investment of time should result in a SIP that will not have to be significantly changed or corrected to include revised data. Developing a quality SIP should avoid delays in implementation.” EPA notes that, under the Clean Air Act, when an area is reclassified, it must still attain the standard as expeditiously as practicable. Thus the concerns expressed in the comment should be alleviated by an appropriate attainment demonstration.

As set forth in other responses to comments, EPA does not believe it appropriate to impose sanctions for attainment demonstration-related moderate area SIP requirements, where the area has been unable to demonstrate attainment by the moderate area deadline, is being reclassified to severe, and is in the process of developing a severe area attainment demonstration and related requirements. As set forth in the proposal, Texas has submitted other non-attainment demonstration-related moderate area requirements, and as a former 1-hour severe ozone nonattainment area, is already implementing other severe area requirements. Once reclassified the area is no longer required to submit an attainment demonstration for the prior classification, so sanctions for failure to submit such a SIP would be inappropriate. The area has demonstrated that it could not develop a reasonable attainment demonstration for a moderate area deadline so sanctions could never be cured in the area, if applied.

*Comment:* A comment was received that if we grant Texas' reclassification request of the area to severe that the approval should be conditioned upon adoption by Texas of further control measures within 12 months of approval of the reclassification.

*Response:* CAA section 181(b)(3) directs EPA to grant a State's request to reclassify a nonattainment area in that State to a higher classification. Section

181(b)(3) does not authorize EPA to attach conditions (such as additional control measures) upon our granting of such a request, but there are consequences to being reclassified. Reclassification to a severe designation will result in the HGB ozone nonattainment area being subjected to severe 8-hour ozone nonattainment area requirements, including New Source Review (NSR) and Title V permit requirements, in addition to applicable 1-hour requirements. For example, Texas will have to meet the more stringent reasonable further progress (RFP) reductions in VOC and NO<sub>x</sub> emissions required by a severe classification (40 CFR 51.910).

In addition, TCEQ has already initiated stakeholder meetings addressing additional control measures. CAA section 172(c)(1) requires SIPs for all nonattainment areas to provide for the implementation of all reasonably available control measures (RACM) as expeditiously as practicable. When we receive the HGB attainment demonstration for the 1997 ozone standard, we will review it to determine whether it provides for all RACM necessary to attain the standard as expeditiously as practicable and provides for implementation of those measures as expeditiously as practicable. For more information on RACM, please see our "Guidance on Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas," (Memorandum from John Seitz, Director, Office of Air Quality Planning and Standards, November 30, 1999, available at <http://www.epa.gov/ttn/oarpg/t1/memoranda/revracm.pdf>). With respect to the commenter's suggestion that additional controls be adopted and submitted within 12 months, please see Section II above, as well as EPA's responses to comments on the timing of submission for the revised SIPs that are due as a result of reclassification to severe.

*Comment:* A comment was received that reclassification of the area to severe subjects the action to review under Executive Order 12866 (Regulatory Planning and Review, 58 FR 51735, October 4, 1993) as a significant regulatory action. The commenter also noted that protecting children from environmental health risks is a priority concern, as expressed in Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks, 62 FR 19885, April 23, 1997).

*Response:* We continue to believe that reclassification of the area to severe is not a "significant regulatory action"

under Executive Order 12866, and therefore is not subject to Executive Order 12866. Voluntary reclassifications to a higher classification under section 181(b)(3) of the CAA are based solely on requests by the State, and we are required under the CAA to grant them. As we explained in response to comments above, EPA's approval of the State's request for reclassification is mandatory and is in accordance with the requirements of section 181(b)(3) of the CAA. Contrary to commenter's contention, the reclassification of HGB from moderate to severe is consistent with the statutory provisions. With respect to the commenter's concern regarding E.O. 13045, EPA interprets that provision as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the E.O. has the potential to influence the regulation. This action is not subject to E.O. 13045 because it grants a voluntary reclassification, and EPA's approval is mandatory. Moreover, regardless of its classification, the HGB area remains subject to the obligation to attain as expeditiously as practicable.

#### *B. Date for a Revised SIP Submittal*

*Comment:* Comments were received opposing April 15, 2010, the date requested by TCEQ, as the submission date for a SIP revision. One commenter stated that: (1) There is no precedent for such a long timeframe; (2) for the San Joaquin Valley area voluntary reclassification, EPA allowed only 7 months to submit a new attainment plan and 12 months to incorporate new extreme area SIP elements; (3) EPA should treat these two voluntary "bump-up" requests similarly and apply an equally short SIP submission date to the HGB area; and (4) EPA should not reward delay by Texas in implementing all RACM and completing an attainment demonstration with a protracted timeframe in which to develop a new SIP.

One commenter stated that: (1) A state is generally provided 12 months to modify and revise the applicable SIP if there was a failure to meet an attainment date; (2) when EPA finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant NAAQ standard, it has the authority to require the state to revise the plan and submit a new plan no later than 18 months after notice to the state of the need for revision; (3) the initial SIP submission deadline when drafting a plan for the first time "from scratch" is a maximum of three years; and (4) it seems unreasonable to need 34 months to

revise a SIP that was revised in May 2007. Another commenter stated that it was unacceptable that TCEQ would be allowed to delay until April 2010 before it had to adopt further control measures. Other commenters stated that the sooner we reach the point when planning stops and action starts, the sooner we will all enjoy the benefits of cleaner, healthier air.

*Response:* In our proposal to this final rule, we identified a range of dates and requested supporting information to consider in setting the appropriate severe classification submittal date. Many of these factors were discussed by the commenters who advocated a shorter timeframe than requested by Texas. We considered each comment carefully before setting a submission date. Since CAA section 181(b)(3) does not establish a precise timeframe for submitting an attainment plan under a voluntary reclassification request, we must review the record before us and each particular set of circumstances to establish a deadline that is consistent with and that will ensure that the 8-hour ozone standard will be attained as expeditiously as practicable but no later than June 15, 2019. See section 182(i), which provides that when reclassifying areas under section 181(b)(2), EPA may adjust applicable deadlines for requirements other than attainment dates to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions. EPA believes that, by analogy, it would be logical to assume that EPA has this same authority in granting reclassifications under section 181(b)(3). We requested in the proposal that commenters state their choice of a submittal date and justify their selection. After reviewing all the justifications before us, we have determined the April 15, 2010, date is appropriate and reasonable based on the totality of the information. As we set forth in Section II above, and in our responses to comments, we believe that TCEQ and the other commenters supporting an April 15, 2010, date presented compelling support for this submission deadline.

Historically, the Houston area has been very difficult to model due to a combination of issues. The Houston area meteorology is very complex and is impacted by both a land/sea breeze interaction and a bay breeze function that make meteorological modeling of the area difficult. Modeling of other meteorological phenomena such as frontal passages/weak fronts, nocturnal jets, convergence zones, etc. are also difficult to model and made even more difficult by the land/sea/bay breeze

influences. TexAQS II data includes meteorological observations from numerous surface sites, two towers, hundreds of balloons, five aircraft, a research vessel and an offshore platform. These data will help to characterize important meteorological phenomena affecting ozone in the HGB area, including land/sea/bay breeze, nocturnal jets, stagnation, frontal passages, dispersion and mixing of ozone precursors, and transport.

Photochemical modeling of the Houston Area is also complicated by the significant difference between reported emissions from industrial sources and emissions estimated from ambient concentrations. Previous 1-hour modeling included in a 2004 HGB 1-hour ozone SIP highlights the benefit of using modeling episodes that had more data collected than normal, such as in a field study. In the past, adjustments to reported emissions have been necessary to resolve the discrepancy between the emissions inventory and emissions estimated from ambient measurements. The field study data from 2005 and 2006 will help identify and quantify any continuing discrepancies between reported and actual emissions. During 2006 intensive monitoring was conducted that included monitoring from aircraft, intensive monitoring from a ship based platform, additional ground monitoring, collection of hourly specific emission inventory information for over 100 industrial facilities, and numerous additional meteorological monitoring sites. TCEQ has chosen to include episodes from 2006 that will benefit from the additional data and will result in higher confidence in any emission inventory adjustments that are done and also in the resulting photochemical modeling.

In addition, a large amount of federal, state, and scientific community resources have been enlisted to refine and analyze the data collected for use in the new 2005 and 2006 modeling. Analyses from the TexAQS II study only recently have become available in 2007 and 2008, and are critical to guiding the TCEQ modeling development and validating the results. Texas should be allowed time to incorporate these results, since otherwise the modeling would likely need to be redone to incorporate these findings. We expect the TexAQS II data will contribute to better understanding of the adequacy of emissions inventories in several key areas, including shipping, onroad mobile sources, industrial VOCs and formaldehyde. It should also aid in the representation of chemical pathways in the models, since it investigated key

parameters controlling the formation and destruction of ozone in the HGB.

Overall, it is EPA's judgment that the longer submittal date will give TCEQ the necessary time to develop the modeling and control strategies using the 2005 and 2006 episodes with the TexAQS II field study data resulting in a more representative and accurate attainment demonstration. It will take time to incorporate the field study data collected in 2005 and 2006 into the meteorological and photochemical modeling for the area. This includes processing of radar data (available in mid-2008), compilation and review of 2006 emission inventory data (mid-2008), inclusion of additional meteorological data (2007–2008), inclusion of Continuous Emission Monitoring (CEM) data from the HRVOC sources that have CEMs (mid-2008), analysis and inclusion of data from ground, ship, and aircraft data collected (2007–2009).

With regard to the commenter's contention that the SIP was revised in May 2007, it is important to note that the 2007 SIP revision did not demonstrate attainment and that extensive additional work would be required to do so and to adopt new requirements as appropriate.

Even with an April 15, 2010, submission date, we expect the area to continue to reduce VOC and NO<sub>x</sub> emissions through Federal, State and local controls. Provisions for reasonable further progress (RFP) reductions in these ozone precursor emissions is a requirement for a severe area SIP (40 CFR 51.910). For the HGB area where 15% VOC reductions have already been achieved, required severe area reductions are an average of 3 percent per year of VOC and/or NO<sub>x</sub> for: (1) The 6-year period following the baseline emissions inventory year (2002); and (2) all remaining 3-year periods after the first 6-year period out to the area's attainment date (40 CFR 51.910(a)(1)(B)). These reductions will lead to lower ozone levels. As noted above, TCEQ has already conducted stakeholder meetings on additional control measures. TCEQ is also implementing the Texas Emission Reduction Program (TERP) and the AirCheckTexas program to reduce emissions. TERP provides funding for reducing NO<sub>x</sub> emissions from diesel engines. AirCheckTexas provides funding for replacing older, higher polluting automobiles with newer less polluting ones.

With respect to the comments supporting submission dates earlier than April 2010, see the responses to comments below. With respect to the

comment concerning the 7-month submission deadline for the San Joaquin Valley voluntary reclassification, EPA notes that contrary to commenter's contention, EPA's actions in setting the submittal date and the timeframes in the voluntary reclassification of San Joaquin are consistent with the deadline set here. Although in its April, 2004 notice EPA set a submittal date of November 15, 2004 (and some months later for Title V and NSR requirements), EPA noted that additional time was not warranted "because the District has been working on the extreme area plan since 2002, and has indicated that they can meet the November 15, 2004 deadline." 69 FR 20550, 20551. (April 16, 2004). Thus the time period for work on the plan in San Joaquin is comparable to that being afforded the State here, and, as in San Joaquin, is consistent with what the State has requested. Moreover, as set forth in detail elsewhere in this notice, under the circumstances presented here, the complex challenges confronting the HGB area justify the length of time provided for submittal of the plan.

*Comment:* Comments were received supporting dates earlier than April 15, 2010, as the submission date for a SIP revision. One comment stated that the submission date for a revised SIP should be as expeditiously as practicable but no later than December 15, 2008, which would be 18 months from the reclassification request. Other comments supported a June 2009 date by which the SIP revision should be submitted. Commenters stated that a June 15, 2009, date allows Texas much more time than normal, but less than requested. One commenter stated that a June 2009 date would ensure that sufficient work can be completed on the plan while respecting the need for urgent action.

*Response:* As stated above, we believe that TCEQ and the other commenters who supported the April 15, 2010, date have presented compelling arguments and information, and that this date is as soon as practicable. If December, 2008 were set as the deadline, TCEQ would have to rely on a 2000 modeling episode instead of newer, more comprehensive and representative modeling episodes. Due to the limitations of the 2000 episode (since the 2000 episode large reductions in NO<sub>x</sub> and HRVOCs with the Cap and Trade program have occurred which add uncertainty to future year modeling projections and the 2000 episode had some periods of unrepresentative meteorological conditions), reliance on it would likely result in less accurate and representative projections of future



design values (especially when weighed against using the more recent field study data collected in 2005 and 2006 and the modeling of more recent episodes). See the Comments of the TCEQ, pages 1–2. Thus, TCEQ is modeling a number of episodes from 2005 and 2006, in order to develop an adequate basis for developing an attainment strategy. This allows for the episodes to include the effects of earlier reductions of NO<sub>x</sub> and HRVOCs in the base inventories and also base the episodes on periods with more intensive data collection to further lessen the uncertainties in modeling projections. The episodes from 2005 and 2006 are more representative of the typical conditions that lead to high ozone levels. Due to complicated source-receptor relationships and meteorology in the HGB, this modeling requires an intensive effort, involving six–twelve months more time than when modeling more typical urban areas. These complex relationships are in large part due to the complicated meteorological characteristics of the HGB area, including land/bay/sea breeze and their interaction with other meteorological features that impact the dispersion and mixing of ozone precursors; and also the complex mixture of industrial emissions of VOCs (including HRVOCs) and NO<sub>x</sub> that make modeling the HGB area much different than most other areas of the country. The additional field study data and detailed emission inventory data collected during the 2005 and 2006 period will improve the accuracy of the base case modeling (meteorology, emissions, and chemistry) and help to yield more representative SIP modeling demonstration.

A large amount of federal, state, and scientific community resources have been enlisted to refine and analyze the data collected for use in the new 2005 and 2006 modeling. Analyses from the TexAQS II study only recently have become available in 2007 and 2008, and are critical to guiding the TCEQ modeling development and validating the results. Texas should be allowed time to incorporate these results, otherwise the modeling would then likely need to be redone to incorporate these findings. We expect the TexAQS II data will contribute to better understanding of the adequacy of emissions inventories in several key areas, including shipping, onroad mobile sources, industrial VOCs and formaldehyde. It should also aid in the representation of chemical pathways in the models, since key parameters controlling the formation and destruction of ozone in the HGB area

were investigated. TexAQS II data includes meteorological observations from numerous surface sites, two towers, hundreds of balloons, five aircraft, a research vessel and an offshore platform. These data will help to characterize important meteorological phenomena affecting ozone in the HGB area, including land/sea/bay breeze, nocturnal jets, stagnation, frontal passages, dispersion and mixing of ozone precursors, and transport. In addition, Texas is engaged in a number of activities to improve the model's ability to replicate the complex interactions leading to high ozone, including model enhancements to incorporate temperature variations, better land use and land cover data, improved information on biogenic emissions, better data for emissions and monitored concentrations, and advanced modeling techniques. See TCEQ Comments, page 3. TCEQ is modeling more than 50 episode days while making improvements in the modeling process and incorporating TexAQS II results. TCEQ estimates it will take until March 2009 to complete the modeling work and associated quality assurance and peer review to support a proposed modeling and attainment demonstration.

A December 2008 date would mean the TCEQ would have to rely on the less reliable 2000 modeling episode, and suspend work on the new modeling episodes. At best a June 2009 date may have included initial work with the 2005 and 2006 episodes in addition to the 2000 episode, but would not have incorporated much of the data that was collected during TexAQS II, and thus would have more uncertainties and would be less representative. A deadline for submission of the attainment demonstration that is earlier than April 2010 would inhibit the development of effective attainment strategies based upon new modeling of ozone episodes that occurred in 2005 and 2006, the more recent 2006 emissions inventory, and incorporation of findings from TCEQ's most recent field study of ozone formation, TexAQS II. Relying on the 2000 episode would likely result in the need to subsequently revise the SIP, and would delay the development of effective control strategies.

In addition to modeling, TCEQ must also analyze emissions data to develop ozone control strategies. To do so, TCEQ must incorporate the findings from TexAQS II into its SIP planning, and must also rely on the 2006 NO<sub>x</sub> and VOC emissions inventory, which was not complete until the middle of 2008, and would therefore not allow for some early aspects of control strategy

development until late 2008. It is important to use the 2006 inventory since it will provide the most accurate VOC emissions data, as a result of monitoring and testing requirements established in the HRVOC rules for flares, vents and cooling towers. The 2006 point source inventory represents years of efforts to improve emissions data, including more accurate speciation and reporting of VOC emissions. For details of these improvements, see TCEQ Comments at 5.

Due to the extensive controls already required for major sources in the HGB area, TCEQ may need to consider more stringent strategies that will require time for conducting more inventory and survey work on area sources, as well as for researching control technologies on sources that have not historically been regulated for ozone, or that are smaller than what has previously been regulated. More evaluation and stakeholder outreach may also be needed for control strategies that impact small businesses and sources not historically regulated for ozone. Issues being studied that could have an affect on control strategies include the role of ozone levels aloft in model performance and control strategy assessment, differences between measured on-road mobile source CO-to-NO<sub>x</sub> ratios and those predicted by the national mobile source emissions model, MOBILE6, and indications that a great degree of variability exists in VOC emissions, with some sources emitting large quantities within a short period of time and also the general underestimation for many industrial sources of VOCs (recent field study information indicates VOCs may still be under-reported by a factor of 2 or more). As one commenter has pointed out, in the past when results and insights from field studies were not included in the development of attainment plans, the plans subsequently had to be revised. Moreover, if an earlier deadline is imposed, it would result in the loss of the full complement of modeled episode days, and diminish confidence that the control strategies would work under a range of meteorological conditions. Since different control strategies were being introduced in 2005 and 2006, eliminating the 2006 episodes would result in the loss of information about the effectiveness of these controls. A deadline prior to April, 2010 also would not allow sufficient time for rule development after identification of control strategies. The rulemaking process under the Texas Administrative Procedure Act, combined with TCEQ rulemaking practice, typically takes



about one year. Texas has also commented that sensitivity analyses to assess the benefits of selected controls also are not currently available.

In developing control measures, an extensive public participation process is needed, since emissions reductions will be required from all source categories. A shorter timeline would not allow sufficient input by community stakeholders and outside scientists, on such issues as data, modeling, and other analyses, as well as emissions factors. This input is important for the development of effective control strategies and their implementation. Thus, EPA finds that the April 2010 deadline is necessary to provide sufficient time to allow adequate modeling episodes and control strategies based on best available data.

*Comment:* A comment was received that if EPA is convinced that it will legitimately take until 2010 to complete the technical work to support the required demonstration of attainment, EPA should require TCEQ to work with local stakeholders to adopt available control measures on an expedited schedule.

*Response:* As noted above: (1) TCEQ has already initiated stakeholder meetings on additional control measures, and is implementing the Texas Emission Reduction Program and the AirCheckTexas program to reduce emissions; and (2) control measures will be adopted as expeditiously as practicable, and will be submitted with the attainment demonstration in 2010. Given the time necessary for updating the emissions inventory, episode modeling, and control strategy development adoption of significant numbers of new control measures cannot be expected earlier than April 2010.

*Comment:* We invited comments on a range of dates from December 15, 2008 to April 15, 2010 for a revised SIP submittal. Comments were received supporting April 15, 2010 as the submission date for a SIP revision. One commenter (TCEQ) recommended this date due to: (1) The extraordinarily complex nature of ozone formation in the HGB area; (2) the need to successfully model a large number of ozone days; (3) the new scientific information beginning to emerge from the Texas Air Quality Study II; (4) complicated issues associated with developing and implementing emission reduction measures; and (5) the need for extensive stakeholder involvement. TCEQ further stated that: (1) Requiring the state to submit an attainment demonstration any time before April 2010 does not change the attainment

date nor does it advance the protection of public health; (2) an earlier submission date is counterproductive to protecting public health; (3) a December 2008 deadline would mean that all initial technical work on the HGB SIP would be discontinued; and (4) the SIP revision would contain little more than previous modeling and a control strategy package that relies on fleet turnover from federal rules. Texas also provided detailed justification for the April 15, 2010 submission date addressing: (1) Modeling, (2) control strategy development, (3) the stakeholder process, and (4) the reasonable further progress SIP.

Another commenter stated that: (1) The timeline requested by Texas is necessary in order to integrate recent field study data, new episodes, and state-of-the-art modeling; (2) imposing artificial deadlines would mean that key components would be omitted, which would all but guarantee a flawed plan; and (3) the result (of a flawed plan) would be a costly and wasteful regulatory re-work, which could delay, rather than accelerate attainment.

*Response:* We agree with these commenters that April 15, 2010 is appropriate as the submission date for a SIP revision due to: (1) The complexity in developing and implementing effective emission reductions for the area; and (2) the opportunity for a more robust attainment demonstration plan that relies on better data and modeling. Developing and implementing effective emission reductions for the area is complex due to its: (1) Complex coastal meteorology; (2) large urban population; and (3) large industrial area (4) the current underestimation issues of industrial emissions. With a SIP submission date of April 15, 2010, more recent data and modeling episodes may be used to identify control strategies and demonstrate attainment of the standard. In our December 31, 2007, proposal, we stated that the new attainment demonstration should be based on the best information available (72 FR 74252, 74254). A SIP revision submission date of April 15, 2010, allows for the best information to be used. See also section II above, and responses to comments above.

#### *C. Relief of CAA Attainment Demonstration and Related Requirements*

*Comment:* Several commenters stated that reclassification should not be a means to avoid meeting fundamental CAA requirements, and that Texas is therefore still required to complete and submit, as components of its May 2007 SIP, an adequate RACM analysis, an

adequate attainment demonstration, supporting photochemical modeling, and contingency measures. Comments stated that "Congress intended the reclassification process to be used as a last resort, [to be undertaken] after all [RACM] have been implemented and all best efforts undertaken to reduce emissions."

*Response:* As we stated in the proposal, Texas has a continuing responsibility for certain elements of the moderate area requirements. EPA has stated that reclassification does not provide a basis for extending submission deadlines for SIP elements unrelated to the attainment demonstration that were due for the area's moderate classification. In June 2007, Texas submitted an 8-hour SIP to EPA that included the requirements of (1) a moderate area reasonable further progress demonstration (40 CFR 51.910), which includes contingency control measures if the area fails to meet reasonable further progress (CAA section 172(c)(9)); (2) a reasonably available control technology (RACT) demonstration (40 CFR 51.912); and (3) a 2002 emissions inventory (40 CFR 51.915). Other moderate area SIP requirements are currently being implemented. These include NSR rules (40 CFR part 165) and a vehicle inspection and maintenance program (40 CFR 51.905(a)(1)(i)). Also, as stated above, reclassification is not without consequences for the area. Reclassification to a severe designation will result in the HGB ozone nonattainment area being subjected to severe 8-hour ozone nonattainment area requirements, including New Source Review (NSR) and Title V permit requirements, in addition to applicable 1-hour requirements. For example, Texas will have to meet the more stringent reasonable further progress (RFP) reductions in VOC and NO<sub>x</sub> emissions required by a severe classification (40 CFR 51.910). For other serious and severe area requirements, see section 182(c) and (d).

EPA disagrees with the commenters to the extent they believe that a full attainment demonstration plan including modeling, attainment contingency measures and RACM needs to be submitted and approved by the moderate area deadline. Once an area is reclassified it retains the SIP due date for certain SIP elements that applied for the area's initial classification. However it can receive a new date for the attainment demonstration and related elements, in addition to the SIP elements required under its new (higher) classification. It is EPA's belief that the CAA provides that, upon

reclassification, relief can be granted from the submittal deadline for the requirements of the lower classification related to the attainment demonstration. As a reclassified area the area is no longer obligated to demonstrate attainment by the date previously required for the prior classification. The area must then provide an attainment demonstration for the new classification, but must still demonstrate attainment as expeditiously as practicable. Such deadlines are determined on a case-by-case basis for each area and proposed and finalized through rulemaking. As discussed previously, we believe it is appropriate in this case to allow time to develop an attainment demonstration based on more complete information available through additional episode days and the TexAQs II study. This approach is balanced by the fact that the CAA provides for additional more stringent requirements to be placed upon a nonattainment area when it is given a higher classification. In addition, we expect that the additional time will provide for a more robust attainment demonstration. In the meantime, the State has made submittals to meet and/or is implementing the moderate area requirements not related to an attainment demonstration. When a nonattainment area is reclassified, the CAA attainment demonstration requirements of the new classification supersede those of the previous classification. In other words, once a nonattainment area has been reclassified and as a result has a new attainment deadline, the deadline applicable to the attainment demonstration under the previous classification no longer has any logical, practical or legal significance. The State has already demonstrated its inability to meet the moderate area deadline for attainment, and is preparing its new demonstration under the severe classification. Therefore, EPA is not evaluating the sufficiency of the attainment demonstration or RACM submissions made pursuant to the area's moderate classification, or imposing sanctions for insufficiency. EPA's conclusion not to require a moderate area attainment demonstration is logical, since the State is unable to demonstrate attainment by the moderate area attainment date, and the area is being reclassified. It is also consistent with its action in the voluntary reclassification of San Joaquin Valley, 69 FR 20550 (April 16, 2004).

As noted in EPA's proposal, Texas submitted contingency measures to be triggered if the area fails to meet reasonable further (RFP) progress under

the moderate area requirements. 72 FR 74253. A commenter contends that the State's failure to include an attainment demonstration under its moderate area classification makes an attempt to include contingency measures impossible, arguing that such contingency measures can only be determined if they are surplus to the measures needed for attainment. For contingency measures to meet RFP, however, EPA will be able to evaluate and, if appropriate, approve these measures in advance of an attainment demonstration. If, when the attainment demonstration is submitted, it is determined that additional contingency measures are required to meet severe area RFP or attainment, EPA will require such measures. A commenter cited to the February 12, 2007 Thomas Diggs (Chief, Air Planning Section, EPA Region 6) letter to Joyce Spencer (TCEQ), which stated: "EPA cannot approve any contingency measures unless and until the state makes an adequate demonstration that they are surplus to the measures needed for attainment." In response, EPA is clarifying Mr. Diggs statement to make explicit that it is limited to the context of contingency measures for failure to attain. Contingency measures for failure to meet RFP are only those surplus to the RFP demonstration, and, as noted above, unlike contingency measures for attainment, EPA can evaluate such contingency measures in advance of the attainment demonstration.

One commenter contended that in the General Preamble EPA stated that when an area is reclassified it must submit and implement RACM consistent with the moderate area schedule. 57 FR 13537.

"[I]f an area that fails to submit a timely moderate area SIP is reclassified, this does not obviate the requirement that the area submit and implement RACM consistent with the moderate area schedule. Accordingly, the area could be subject to sanctions for its delay in submitting the RACM SIP requirement."

EPA notes that the passage quoted above by the commenter is contained in the section of the General Preamble addressing the PM-10 standard, and does not relate to the ozone standard. In addition, this statement is at odds with statements elsewhere in the General Preamble about RACM being a component of an area's attainment demonstration under section 172(c)(1) (57 FR 13560), and is superseded by a much more extensive discussion of PM-10 RACM and Best Available Control Measures (BACM) in the Addendum to General Preamble for State Implementation Plans for Serious PM-

10 Nonattainment Areas. 59 FR 41998, 42008-42011, (August 16, 1994). The Addendum makes clear that RACM, as distinguished from BACM, is to be analyzed "according to what is reasonable in light of the overall attainment needs of the area." 59 FR 42011. The Addendum notes that the "pronounced difference in timing for the serious area submittals \* \* \* is to be contrasted with the timing for submittal of similar provisions for moderate areas. Under section 189(a)(2), both the RACM plans and the attainment demonstration for moderate PM-10 areas must as a general matter be submitted at the same time." The Addendum explains that the fact that BACM, unlike RACM, requires adoption and implementation before the attainment demonstration, shows that Congress intended BACM to be based on the feasibility of implementation rather than, as for RACM, the attainment needs of the area. 59 FR 42012. Thus it is clear that, for RACM for ozone, for the same reason that the deadline for an attainment demonstration should be extended when an area is reclassified, the deadline for RACM should also be extended. This is buttressed by EPA's interpretation, upheld by the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. EPA*, 314 F.3d 735, 743-745 (5th Cir. 2002)) and by the U.S. Court of Appeals for the D.C. Circuit (*Sierra Club v. EPA*, 294 F.3d 155, 162-163 (D.C. Cir. 2002)), that the statute requires only implementation of RACM measures that would advance attainment. Thus RACM can only be determined in conjunction with an attainment demonstration. A commenter's contention that "areas that are not attaining the NAAQS must implement all technologically and economically feasible control measures" is at odds with the statute as interpreted by EPA and the courts. Moreover, the commenter's reliance for support on *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990), is misplaced. *Delaney* was decided before the 1990 Amendments to the Clean Air Act were enacted and the General Preamble was issued, and it does not reflect the current statute and guidance. (See *Ober v. EPA*, 84 F. 3d 304 (9th Cir. 1996), noting that *Delaney* was decided before the 1990 Amendments and before EPA changed its guidance with respect to transportation control measures and RACM.) *Delaney* focused on a specific set of circumstances, applying requirements for attainment under a previous version of the statute and guidance, and it did not require attainment as expeditiously as

practicable with reasonably available control measures but rather attainment as soon as possible with all possible measures. It is not pertinent to evaluating the RACM requirement under the current version of the Act in the circumstances presented by HGB.

EPA believes it would be unreasonable to require the implementation of RACM before a determination can be made of what is "reasonably" available based on whether implementation will expedite attainment. EPA's statements in the General Preamble are consistent with this approach. In the General Preamble EPA repeatedly stated, that it would be unreasonable to require a plan to include the implementation of all technologically and economically available control measures even though such measures would not expedite attainment. General Preamble, 57 FR 13498, 13543, 13560 (April 16, 1992). Texas is in the process of developing an attainment demonstration that will ascertain which measures will expedite attainment. It would be unreasonable, in the meantime, to require implementation of all measures before a determination of their usefulness and necessity can be determined. Texas is not being excused from adopting RACM; Texas will make its RACM submission at the time it submits its attainment demonstration under the severe area classification. EPA will review the State's submission at that time.

A commenter cites *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996), for the proposition that a moderate area that is reclassified as serious must comply with moderate area SIP requirements, and that reclassification does not delay or supersede existing SIP requirements. But *Ober*'s discussion of the obligation to meet SIP requirements was not based on section 181(b)(3), but rather was in the context of the provisions governing the PM-10 standard, and was explicitly based on the consideration that there were separate requirements for the 24-hour and annual PM-10 standards. The Court concluded that given these two standards, the inability of the area to attain the annual PM-10 standard by the moderate area deadline, and resulting reclassification to serious, did not relieve the State of the obligation to meet the moderate area requirements of the separate 24-hour standard. The passage cited by the commenter, from footnote 2 of the opinion, makes clear that the moderate area PM-10 requirements referred to relate to the 24-hour standard. In the case of HGB, which involves the ozone standard, there is no such separate standard. In addition, the passage the commenter

quotes from *Ober* cites section 7513a(b)(1), which merely states that a serious PM-10 nonattainment area must comply with moderate as well as serious area requirements. It does not address the issue of whether an area that has been voluntarily reclassified under the ozone standard must submit an attainment demonstration by a deadline that has been rendered obsolete by reclassification.

*Comment:* Comments were received that EPA has correctly deferred submittal requirements, as CAA attainment demonstration requirements of the new classification supersede requirements of the previous classification.

*Response:* We agree with the commenters that certain attainment-demonstration related requirements of the lower classification are superseded. See Responses above.

*Comment:* Comments were received that a reclassification to severe will release Texas from sanctions for failing to submit a proper SIP or meet the attainment deadlines of the former moderate classification. Comments stated that Texas should not be able to avoid any penalties for noncompliance by virtue of "an improper reclassification". A commenter stated that Congress intended the reclassification process to be used as "a last resort".

*Response:* Congress placed no limitations on a State's ability to request reclassification to a higher classification, and provided for no discretion for EPA to deny such a request. EPA believes that a voluntary reclassification is a legitimate method provided by the CAA to deal with the circumstances of HGB, as discussed earlier in these Responses. Since Texas submitted its request for reclassification in a timely fashion, EPA sees no reason to make any finding regarding whether or not Texas' moderate attainment plan demonstrated attainment or to apply sanctions at this time. Upon reclassification, the moderate area attainment demonstration-related requirements are superseded by the severe area attainment demonstration requirements. See Responses to Comments above. Texas has not been released from the obligation to comply with SIP submission deadlines for other moderate area requirements not related to the attainment demonstration.

*Comment:* A commenter stated that EPA contends that more stringent requirements accompanying the higher classification removes the incentive for states to request an improper reclassification with a later attainment date. The commenter states, however,

that EPA acknowledges that because HGB was classified as severe under the 1-hour standard, many of the more stringent requirements are already being implemented. The commenter asserts that with the increased compliance burden removed, reclassification appears to be an effort by Texas to postpone attainment and sanctions.

*Response:* EPA does not agree that reclassification relieves Texas's compliance burden. Texas still confronts additional and more stringent requirements under a severe classification for the 8-hour standard, and must still attain the standard as expeditiously as practicable, and meet the requirements under its severe classification for RACM and RFP. These are important consequences of reclassification, and Texas's obligation to comply with these requirements under the 8-hour ozone standard is a significant one.

#### IV. Final Action

After fully considering all comments received on the proposed rule and pursuant to CAA section 181(b)(3): (1) The HGB area is reclassified as a severe nonattainment area for the 1997 8-hour ozone standard; and (2) we find that April 15, 2010, is the appropriate SIP submittal date for a revised SIP meeting the requirements for the severe area classification and demonstrating that the HGB area will attain the 1997 8-hour standard as expeditiously as practicable, but no later than June 15, 2019.

A revised SIP for the HGB area must include all the requirements for serious ozone nonattainment area plans, such as: (1) Enhanced ambient monitoring (CAA section 182(c)(1)); (2) an enhanced vehicle inspection and maintenance program (CAA section 182(c)(3)); (3) a clean fuel vehicle program or an approved substitute (CAA section 182(c)(4)), and (4) gasoline vapor recovery for motor vehicle refueling emissions (CAA section 182(b)(3)). The revised SIP must also meet the severe area requirements, including: (1) An attainment demonstration (40 CFR 51.908); (2) provisions for reasonably available control technology (RACT) and reasonably available control measures (RACM) (40 CFR 51.912); (3) reasonable further progress reductions in volatile organic compound (VOC) and nitrogen oxide (NO<sub>x</sub>) emissions (40 CFR 51.910); (4) contingency measures to be implemented in the event of failure to meet a milestone or attain the standard (CAA sections 172(c)(9) and 182(c)(9)); (5) transportation control measures to offset emissions from growth in vehicle miles traveled (CAA section 182(d)(1)(A)); (6) reformulated gasoline

(CAA 211(k)(10)(D)); and (7) NSR permits (40 CFR part 165). See also the requirements for serious and severe ozone nonattainment areas set forth in CAA sections 182(c), 182(d) and 185. Because the HGB area was classified as severe under the 1-hour ozone standard, many of these requirements are currently being implemented.

The revised SIP for the HGB area must also contain adopted measures sufficient to achieve required reasonable further progress in emission reductions and to attain the 8-hour ozone NAAQS as expeditiously as practicable but not later than June 15, 2019. The new attainment demonstration should be based on the best information available.

## V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to Executive Order 12866. Voluntary reclassifications under section 181(b)(3) of the CAA are based solely on requests by the State, and EPA is required under the CAA to grant them. These actions 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 reclassification, reclassification does not impose a materially adverse impact under Executive Order 12866. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001).

In addition, I certify that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). And these actions do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), because EPA is required to grant requests by states for voluntary reclassifications and such reclassifications in and of themselves do not impose any federal intergovernmental mandate. This 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).

This action also does not have Federalism implications because it does 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). This action does not alter the relationship or the distribution of power and responsibilities established in the CAA.

This rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because EPA interprets E.O. 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it grants a voluntary reclassification, and EPA’s approval is mandatory.

As discussed above, a voluntary reclassification under section 181(b)(3) of the CAA is based solely on the request of a state, and EPA is required to grant such a request. In this context, it would be inconsistent with applicable law for EPA, when it grants a state’s request for a voluntary reclassification, to use voluntary consensus standards. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) also do not apply. In addition, this rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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. As stated earlier in this Notice, EPA is taking final action granting the State’s request for a voluntary reclassification. The plain language of section 181(b)(3) of CAA mandates that we “shall” approve such a request if it is made in accordance with the requirements of the Act, and, as such, does not provide the Agency with the discretionary authority

to address concerns raised outside the Act, including those contained in Executive Order 12898.

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).

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 December 1, 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 HGB 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, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 18, 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 Houston-Galveston-Brazoria, TX to read as follows:

## § 81.344 Texas.

\* \* \* \* \*

## TEXAS—OZONE (8-HOUR STANDARD)

Designated area	Designation <sup>a</sup>		Classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
* * * * *				
Houston-Galveston-Brazoria, TX:				
Brazoria County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
Chambers County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
Fort Bend County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
Galveston County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
Harris County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
Liberty County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
Montgomery County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
Waller County .....		Nonattainment .....	(4)	Subpart 2/Severe 15.
* * * * *				

<sup>a</sup> Includes Indian Country located in each county or area, except as otherwise specified.<sup>1</sup> This date is June 15, 2004, unless otherwise noted.<sup>4</sup> October 31, 2008.

\* \* \* \* \*

[FR Doc. E8-22685 Filed 9-30-08; 8:45 am]

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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 180**

[EPA-HQ-OPP-2008-0381; FRL-8383-9]

**Aspergillus flavus NRRL 21882; Exemption from the Requirement of a Tolerance****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of the fungal active ingredient *Aspergillus flavus* NRRL 21882 on the food and feed commodities of corn: Corn, field, forage; corn, field, grain; corn, field, stover; corn, field, aspirated grain fractions; corn, sweet, kernel plus cob with husk removed; corn, sweet, forage; corn, sweet, stover; corn, pop, grain; and corn, pop, stover when applied/used as an anti-fungal agent to displace aflatoxin-producing *Aspergillus flavus* from treated commodities. Circle One Global, Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Aspergillus flavus* NRRL 21882.

**DATES:** This regulation is effective October 1, 2008. Objections and requests for hearings must be received on or before December 1, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2008-0381. All documents in the docket are listed in the docket index available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) 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 in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

**FOR FURTHER INFORMATION CONTACT:** Shanaz Bacchus, Biopesticides and Pollution Prevention Division (7511P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number:

(703) 308-8097; e-mail address: [bacchus.shanaz@epa.gov](mailto:bacchus.shanaz@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 code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

*B. How Can I Access Electronic Copies of this Document?*

In addition to accessing electronically available documents at <http://www.regulations.gov>, you may access this **Federal Register** document