

(D) Revise the Washington area severe attainment demonstration to include a contingency plan containing those measures to be implemented if the Washington area does not attain the one-hour ozone standard by November 15, 2005.

(E) Revise the Washington area severe attainment demonstration to include a revised RACM analysis and any revisions to the attainment demonstration adopted control measures as necessitated by such analysis.

### III. What Comments Were Received on the Proposed Conditional Approvals and How Has EPA Responded to Them?

In EPA's Notice of Proposed Rulemaking published on February 3, 2003 (68 FR 5246) EPA proposed conditional approval of the Washington area's severe area attainment demonstration and the 1996–1999 portion of the severe area ROP obligation. EPA also proposed disapproval in the alternative to preserve the court-ordered schedule to issue a final rule by April 17, 2003 in the event that EPA could not issue a final conditional approval with respect to either or both the attainment demonstration and 1996–1999 ROP plan. EPA received comments from the Virginia Department of Transportation on March 5, 2003 supporting EPA's proposed conditional approval. These comments will not be addressed here. On March 5, 2003 EPA also received comments from the Sierra Club. The Sierra Club's March 5 comments specifically incorporate by reference comments submitted by the Sierra Club and others on February 14, 2000, October 30, 2000, November 15, 2000, November 20, 2000, September 9, 2002, and December 13, 2002.

To the extent that the previously submitted comments are germane to the current action, EPA generally incorporates by reference its prior responses to those comments published at 66 FR 586, January 3, 2001, and 68 FR 5246, February 3, 2003. We respond with particularity to many of the previously submitted comments (1) to the extent that events occurring after publication of EPA's prior responses require that our prior responses be updated and revised or (2) to the extent that we feel that consolidating prior responses helps create a more comprehensive record for the current rulemaking. The following discussion summarizes and responds to particular comments.

#### A. Comments in the March 5, 2003

##### 1. Conditional Approval

*Comment:* The commenter argues that EPA cannot conditionally approve the Washington area SIPs for various reasons. First, the commenter alleges that even EPA concedes that it cannot fully approve the SIPs based on various defects noted by the D.C. Circuit court in *Sierra Club v. Whitman*, 294 F.3d 155, 163 (D.C. Cir. 2002), therefore, EPA cannot conditionally approve the SIPs. The commenter further alleges that conditional approval cannot be used to circumvent or postpone statutory deadlines, and that conditional approval will prevent the Washington area from attaining the ozone standard as expeditiously as possible, prevent achievement of Post-1999 ROP and prevent timely implementation of contingency measures in the event the area fails to achieve timely rate-of-progress or attainment. The commenter also asserts that conditional approval cannot be used when a state has failed to submit a relevant substantive SIP component at all; that the SIP components at issue were due on November 15, 1994; that the States' commitments do not identify "specific enforceable measures" to be adopted by a date certain; that the commitments are to fix major components not minor details; that conditional approval is not allowable here because EPA has already allowed the States to defer submission of various required SIP components for more than one year; and finally, that all of the defects the commenter has identified means any conditional approval would violate section 110(l) of the Act.

*Response:* The commenter misconstrues the conditional approval mechanism. Conditional approval under section 110(k)(4) is quite different from full approval under section 110(k)(3) of the Act, which the Court of Appeals considered in *Sierra Club*. Conditional approval is a statutory technique that allows EPA to give a limited form of approval to SIPs that do not meet all of the standards for full approval, but where a substantive SIP also includes commitments made by the states to remedy limited, identified deficiencies through the adoption of specific enforceable measures by a date certain. 42 U.S.C. 7410(k)(4). Here, the States have committed to undertake various analyses and ultimately adopt specific enforceable measures as appropriate to remedy the deficiencies in the currently submitted SIP revisions. Based on the fact that the SIP contains most of the substantive components for the required plans as well as commitments to correct

limited deficiencies, which EPA received after the court ruling, the statute provides for EPA to conditionally approve the SIPs even though the court found that EPA could not fully approve them. The Court of Appeals did not address whether EPA could conditionally approve the SIPs as the issue of conditional approval was not before the court and the States had not made appropriate commitments at the time of the court ruling.

With respect to the assertion that EPA cannot use the conditional approval mechanism to allow areas to avoid a statutory deadline, and the complaint about SIP submittal deadlines that have long passed, EPA is dealing in this case with a SIP that was submitted by the States, reviewed by EPA and approved by EPA in January 2001 through notice-and-comment rulemaking. EPA's approval was then vacated by the Court of Appeals on July 2, 2002, after judicial review. Whatever the merits of any argument about delays that occurred previously, EPA must now take action on the SIPs under court order based on the submittal before the agency. That submittal consists of the previously submitted SIP and the recently submitted commitments by the States to conduct the appropriate analyses and submit any necessary measures to rectify certain limited defects in the SIPs. EPA believes it is appropriate to conditionally approve the SIPs that the States have recently committed to revise to satisfy deficiencies which were the basis for vacatur by the Court of Appeals. The States could not have been expected to remedy these deficiencies previously as EPA had in fact approved the SIPs without noting any such deficiencies prior to the court ruling. The States have now committed to revise the SIPs on an expeditious schedule that is no later than one year following EPA's final action. Furthermore, EPA notes that there is nothing in the statute that limits the use of conditional approval to SIP revisions that are submitted by the statutory due date. Nor does the statute link the period for conditional approval to the time by which the SIP was due. Finally, EPA has never before conditionally approved these SIPs nor have the States previously made commitments to submit all of these portions of the attainment demonstration within a year. For these reasons, EPA believes it is reasonable to use this tool in this case.

The commenter further claims that a conditional approval will delay timely attainment. However, the commitments are to submit any necessary additional measures by April 2004 while the attainment date for the area is not until