

Giving the submission deadlines retroactive effect would also be inconsistent with the Administrative Procedure Act, 5 U.S.C. 553(d), which requires that before a rule takes effect, persons affected will have advance notice of its requirements. A failure to meet an obligation, especially one accompanied by sanctions, cannot occur in advance of the imposition of that obligation. The obligation to submit requirements to meet the severe area classification did not exist for the Washington area prior to the final action that reclassifies the area. Giving retroactive effect to the old SIP submission deadlines would also preclude EPA from exercising the discretion with respect to setting the deadlines for these submissions that is specifically afforded by section 182(i).

In *Sierra Club v. Whitman*, 130 F. Supp.2d 78 (D.D.C. 2001), *aff'd*, 285 F.3d 63 (D.C. Cir. 2002), a case involving the reclassification of the St. Louis nonattainment area, the District Court refused to interpret the reclassification provisions as authorizing relief that would treat submission deadlines as having lapsed prior to EPA having issued a reclassification rulemaking. The court stated that such an interpretation “could ‘create * * * an injustice at the hands of the court itself.’” 130 F. Supp.2d at 94. Such relief “could throw the [area] into extreme noncompliance.” *Id.* The court refused to impose such relief when it “could effectively penalize the state and local entities that are required to comply with EPA findings.” *Id.* In the St. Louis case, the Sierra Club demanded not only retroactive reclassification, but also demanded that the district court declare that “the State of Missouri has failed to file a SIP revision that comports with the requirements of section 7511a(c) by the statutory deadline of May 15, 1998,” *id.* at 87, a date that had long since passed. The district court refused to do so, recognizing that this would unfairly penalize the States, which are entitled to rely on EPA’s actions in anticipating the burdens that will be imposed pursuant to the CAA. Imposition of sanctions would also have unfair adverse consequences for emissions sources.

The Court of Appeals upheld the District Court’s ruling. “In any event, what Sierra Club sought—to have the effective date of EPA’s court-ordered determination converted to the date the statute envisioned, rather than the actual date of EPA’s action—was a form of relief the district court quite properly rejected.” *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002). The Court

of Appeals continued: “Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club’s proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time.” *Id.* See also *NRDC v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994).

EPA acknowledges that it cannot fully approve an attainment demonstration that has an outside attainment date of November 15, 2005, for the Washington area in the absence of a demonstration of ROP after 1999. See *Sierra Club v. Whitman*, 294 F.3d 155, 163 (D.C. Cir. 2002) (“[W]ith an attainment date in 2005, ‘the rate-of-progress plan for the Washington area had to demonstrate a 9% reduction in emissions from 1996 to 1999, another 9% from 1999 to 2002, and another 9% from 2002 to 2005’”). However, EPA believes that in the current circumstances where the States for an area that has been recently reclassified to severe have submitted the 1996–1999 ROP plan through the 1999 milestone year and an attainment demonstration for 2005 in advance of the date set forth in the final reclassification rule, EPA can issue a conditional approval of the attainment demonstration if EPA has a commitment from the States to submit the 1999–2005 ROP plan by April 2004. EPA believes this does not contravene the Circuit Court’s rulings and does not produce the absurd result of retroactive application of requirements and inconsistencies with the Administrative Procedure Act, 5 U.S.C. 553(d) discussed in the preceding paragraphs. On April 7 and 8, 2003, EPA received commitments from the States to submit by April 17, 2004, all of the elements, including the post-1999 ROP plan, required for a severe area SIP and EPA is conditionally approving the SIP revisions listed in Tables 1 and 2 in section I of this document based upon the conditions that the States submit all the severe area SIP elements. These are the same elements needed to fulfill the new severe area requirements that became applicable to the area when the area was reclassified on March 25, 2003, (68 FR 3210, January 24, 2003).

b. ROP and MOBILE6.

Comment: The commenter asserted that because the 1996–1999 ROP plan does not account for MOBILE6 modeling EPA cannot approve the 1996–1999 ROP plan even with respect to the 1999 milestone year. The commenter claimed that initial

MOBILE6 results are significantly higher than that in the plan and that EPA must first evaluate the impact of the MOBILE6 results on the required level of reductions to determine if the plan achieves that level of reduction.²⁵

Response: EPA acknowledges that emissions factors, as well as inventory calculation methodologies, are continually being improved. In general, EPA has not required changes to submitted SIPs that result from changes in factors and methodologies that occur after the SIP is submitted. With respect to the 15 percent plan due in November 1993, in section 2.4 of “Guidance on the Adjusted Base Year Emissions Inventory and the 1996 Target for 15 Percent Rate-of-Progress Plans” (EPA–452/R–92–005) EPA stated: “If other significant changes occur in emissions factors or methodologies before which time it is impossible for states to make adjustments to their 15 percent calculations and associated control strategies, then EPA may require states to make corrections to the base year emissions inventory, as well as to the adjusted base year inventory and the 1996 target level of emissions.” This guidance discussed the then pending transition from the MOBILE4.1 model to the MOBILE5 model but only prospectively, by requiring that emissions values calculated using MOBILE4.1 would have to be recalculated using MOBILE5 before submittal of the final rate-of-progress plan in November 1993.

Likewise with respect to the 1996–1999 plan, EPA has advised the states when changes in emissions factors or in methodologies for developing emissions inventories would force revisions to the inventories or plans. Changes would be necessary if they occurred before the plan was submitted. “However, if such changes occur after November 15, 1991, but prior to November 15, 1994, a serious or above area may be required to make corrections to the base year inventory and attainment year projection inventory for purposes of developing the 3 percent rate-of-progress demonstration. If such changes occur after November 15, 1994, EPA will advise on when it would be appropriate for the states to make corrections in future supplements to this General Preamble.” 57 FR at 13517 (April 16, 1992).

EPA established a policy to require that certain attainment demonstrations

²⁵ The comments referenced a Meeting Notice for the February 27, 2003 Meeting Notice of the Metropolitan Washington Air Quality Committee and provided the comments solely by reference to its URL (<http://www.mwcog.org/uploads/event-documents/WV2003022711708.pdf>).