

classified for the first time today, the classification applicable to the area's design value would be "marginal." However, section 181(b)(2)(A)(1) requires that an area be reclassified to the higher of its current design value or the next higher classification (with the exception that no area can be reclassified to "extreme"). "Severe," not "marginal," is the next higher nonattainment classification from "serious" under CAA. Therefore, we make the determination pursuant to section 181(b)(2)(B) of the CAA that the Washington area did not attain the one-hour ozone standard by the November 15, 1999, attainment date, and that the area is reclassified by operation of law to severe nonattainment on the effective date of this rule.

F. Why Is This Action Necessary?

On November 13, 2002, the Sierra Club filed a complaint in the United States District Court for the District of Columbia against EPA (*Sierra Club v. Whitman*, No. 1:02CV02235(JR)) regarding, among other things, the attainment status and classification of the Washington area. On December 18, 2002, the United States District Court for the District of Columbia issued an order directing EPA to publish, by January 27, 2003, a determination of whether the Washington area had attained the applicable ozone standard under the CAA. The Court also ordered EPA to publish in the **Federal Register** a notice of a final action reflecting both this determination and any reclassification of the area required as a result of the determination. Our final determination and this notice comply with the Court's Order.

II. What Does This Action Do?

In this action, EPA is issuing a final determination that the Washington area did not attain the 1-hour ozone NAAQS by November 15, 1999, as prescribed in section 181 of the CAA, in fulfilling our nondiscretionary duty pursuant to the CAA. As a result of this final determination, the Washington area is reclassified by operation of law to severe ozone nonattainment pursuant to section 181(b)(2) of the CAA. In addition, this action sets the dates by which the District of Columbia (the District), Maryland and Virginia (collectively referred to as "the States") each must submit SIP revisions addressing the CAA's pollution control requirements for severe ozone nonattainment areas (the "severe area SIP") and to attain the 1-hour NAAQS for ozone. The required post-1999 ROP nine percent reduction originally was

required by November 15, 2002 under the CAA. However, that date has elapsed. Therefore, in this action EPA is allowing the District, Maryland and Virginia to demonstrate that the first required post-1999 nine percent ROP is achieved as expeditiously as practicable after November 15, 2002, but in any case no later than November 15, 2005. EPA is allowing the District, Maryland and Virginia to key contingency measures for the 2002 ROP milestone to this new date.¹

III. What Public Comments Were Received and What are EPA's Responses?

In the November 13, 2002, notice of proposed rulemaking (67 FR 68805) for this action, EPA proposed: (1) To find that the Metropolitan Washington, DC serious ozone nonattainment area has failed to attain the one-hour ozone NAAQS by November 15, 1999, and, as a consequence, the Washington area would be reclassified as a severe nonattainment area; (2) to require the District of Columbia, the State of Maryland and the Commonwealth of Virginia to submit revisions to their State Implementation Plan (SIP) that adopt the severe area requirements by the earlier of one year after the effective date of a final action on the attainment determination or March 1, 2004; and (3) to allow the District, Maryland and Virginia to adjust the dates by which the area must achieve a nine percent reduction in ozone precursor emissions to meet the 2002 rate-of-progress requirement to a date as expeditiously as practicable (but in no case any later than November 15, 2005), and to adjust the contingency measure requirement as this relates to the 2002 rate-of-progress requirement accordingly.

We solicited public comments on these issues discussed in the notice of proposed rulemaking as well as other relevant matters. We received comment letters from Earth Justice Legal Defense Fund (on behalf of the Sierra Club), the Virginia Department of Transportation, Dominion Energy and three residents of the Washington area.

In this document, EPA is responding to adverse comments that are germane to this final action and which were submitted in response to the November 13, 2002, notice of proposed rulemaking (67 FR 68805).

EPA received no adverse comments pertaining to the data used for our

nonattainment determination, and therefore we are making the determination that Washington did not attain by its attainment deadline.

A. Finding of Failure to Attain and Reclassification to Severe

Summary of Comments in Support of EPA's Proposed Action

EPA received comments supporting the determination of nonattainment and the change in the classification from serious to severe. One resident of the District expressed concern about personal health effects of breathing air in the District which the commenter believes is not as clean as in more rural areas. Another commenter stated support for the proposed finding of failure to attain and stated concurrence that the resulting reclassification by operation of law should result in a severe classification.

Comments Adverse to EPA's Proposed Action

Comment #1: We received one comment that stated the major reason that the Washington, area is being reclassified from serious to severe is because of transport from outside the area. The commenter claimed that other States and industries in the "Ohio Valley" have not reduced emissions soon enough to enable the Washington area attain by 1999.

Response #1: While EPA agrees that the Washington area is significantly affected by transport from outside the area, the U.S. Court of Appeals for the D.C. Circuit ruled on July 2, 2002 that EPA is precluded from extending the Washington area's attainment date unless the extension qualifies under CAA section 181(a)(5) or it involves reclassification to a higher classification. With respect to attainment date extensions, the D.C. Circuit also ruled that the plain language of the Clean Air Act "sets a deadline without an exception for setbacks owing to ozone transport." Therefore, the Court held that EPA is without authority to extend the attainment deadline for the Washington area unless we also reclassify the area as a severe nonattainment area. *See Sierra Club v. Whitman*, 294 F.3d 155, 163 (D.C. Cir. 2002).

EPA is issuing a final finding that the Washington area failed to attain the 1-hour ozone NAAQS and is reclassified by operation of law to severe nonattainment.

¹ The severe area ROP plan will also have to provide for the second increment of post-1999 ROP for the period 2002 to 2005 and thus must achieve a minimum of 18 percent emission reduction from base line emissions by November 15, 2005.