

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), *affirmed*, 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 D.C. Circuit 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 D.C. Circuit 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 believes that it has provided an adequate rationale for its exercise of discretion in setting the applicable submission deadlines, and that it would be unreasonable and inappropriate to make the “immediate findings of incompleteness” that the commenter suggests.

Response to Comment on ROP Submissions

The Commenter’s contention that the ROP submissions are inadequate also ignores the fact that reclassification is occurring in 2003, and thus it is impossible for the State to meet the 2002 milestone date. See the discussion in the preceding paragraphs regarding the impossibility of meeting deadlines that have already passed, and the ROP discussion in the following paragraphs.

The commenter claims that “the rate of progress plans for the Washington area are already deficient because they fail to provide for the post-1999 progress mandated by section 182(c)(2)(B).” *Sierra Club v. Whitman*, 294 F.2d 155, 163 (D.C. Cir. 2002).” The commenter claims plans to fulfill the post-1999 ROP obligation we due to EPA by November 15, 1994, and that because such plans were never submitted, EPA must therefore “disapprove those plans immediately.”

With respect to the claim that EPA must disapprove these previously submitted ROP plans, this claim is not relevant to the proposed action, which was for the reclassification of the Washington area concurrent with the establishment of a reasonable deadline for submitting SIP revisions. EPA will be taking a separate action on the submitted ROP plans, which will address their approvability.

With respect to the claim that the area was required to submit to EPA a plan to fulfill post-1999 ROP by November 15, 1994, the commenter ignores the context of the Circuit Court’s decision with respect to post-1999 ROP obligations. The Circuit Court was merely agreeing with an observation made by the plaintiff that “with 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’” (emphasis added).

However, the Circuit Court vacated as contrary to the statute EPA’s approval of a 2005 attainment date for the Washington area to attain as serious area. 294 F.2d at 164. Consequently, until the effective date of final action to reclassify the Washington area as a severe nonattainment area with an attainment date of November 15, 2005, the attainment date for the Washington area remained the November 15, 1999 date for serious areas. Indeed, it is the failure of the Washington area to attain the one-hour ozone NAAQS by November 15, 1999 that results in the area being reclassified as a severe area.

As a serious area with a lapsed attainment date of November 15, 1999, the Washington area had no legal obligation to provide for post-1999 ROP. As noted by the Circuit Court, only an area with an attainment date of 2005 has a legal obligation to provide for post-1999 ROP. The Washington area will not have an attainment date of 2005 until the effective date of its reclassification as a severe area. A serious area has an obligation to provide for ROP until its attainment date, which is 1999. See section 182(c)(2)(B) and section 181(a)(1). Not until it is reclassified to severe does an area have a later attainment date and a consequent obligation to provide for ROP until that later attainment date (2005 in the case of the Washington area). See section 182(d). As explained elsewhere in this section of this document in the responses regarding application of section 182(i), the Administrative Procedure Act requires that new obligations, such as the one to demonstrate post-1999 ROP for an area reclassified to severe nonattainment, cannot be imposed retroactively.

Response to Comment on Findings of Incompleteness

One commenter suggests that because EPA has not provided a rationale why the proposed schedule is necessary and appropriate the SIP is past due (under the schedule provisions of section 182(b)–(d)) and thus EPA must make immediate “findings of incompleteness” under section 110(k)(1)(B). As discussed in previous paragraphs of this document, EPA disagrees with the commenter that section 182(i) prohibits EPA from providing the state with time to submit a SIP consistent with its reclassification from serious to severe. As provided in the preceding paragraphs, EPA has concluded that it is reasonable and appropriate to provide the state until March 1, 2004, to submit