

stationary sources must submit a timely Title V permit application. "A timely application for a source applying for a part 70 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish." See 40 CFR 70.5(a)(1). The 12 month (or earlier date set by the applicable permitting authority) time period to submit a timely application will commence on the effective date of the reclassification.

#### XV. Vacatur of Previous Approval

On May 7, 2002, EPA granted final approval to the 1-hour ozone attainment demonstration for the Atlanta area and extended the attainment date to November 15, 2004, (see 67 FR 30574). Subsequently, the Southern Organizing Committee for Economic and Social Justice, the Georgia Coalition for the People's Agenda and the Sierra Club petitioned for review of the agency's action to the 11th Circuit Court of Appeals alleging that EPA exceeded its authority because the CAA precludes extension of attainment dates. Due to a series of prior rulings, in other cases, which held that EPA's attainment date extension policy was an invalid exercise of EPA's authority, on February 20, 2003, EPA filed, with the 11th Circuit, a motion for voluntary vacatur of the attainment date extension for the Atlanta area and of EPA's approval of the attainment demonstration. On June 16, 2003, the 11th Circuit granted the request for voluntary vacatur and remanded the matter to the agency for further proceedings consistent with this order.

One result of vacating the attainment demonstration for the Atlanta area is that the MVEBs contained in that approval were vacated as well. The vacatur of the MVEB resulted in reverting to the previously approved MVEBs for the purposes of transportation conformity. These budgets can be found in the approval of the 15 Percent Rate of Progress plan and the Post 1996 Rate of Progress Plan. These plans were granted final approval on April 26, 1999, (see 64 FR 20186) and March 18, 1999, (see 64 FR 13348), respectively.

#### XVI. Comment and Response

In the December 11, 2001, notice of supplemental proposed rulemaking (66 FR 63972) for this action, EPA proposed to find that the Atlanta area had failed to attain the 1-hour ozone NAAQS by November 15, 1999, the date set forth in the CAA for serious nonattainment areas and that if EPA finalized this finding,

the Atlanta area would be reclassified, by operation of law, as a severe nonattainment area. EPA also solicited comment on the schedule for submittal of the SIP revisions required for severe areas should the area be reclassified.

In this document, EPA is responding to adverse comments that are germane to this final action and which were submitted in response to the December 11, 2001 (66 FR 63972), supplemental proposed rulemaking. EPA received no adverse comments pertaining to the data used for our nonattainment determination, and therefore we are making the determination that the Atlanta area did not attain by its attainment deadline.

*Comment:* Reclassification to severe nonattainment would not shorten the time for meeting Atlanta's air quality goals. In fact, it would extend the time for compliance to at least 2005. Regardless of whether EPA grants an extension pursuant to the downwind extension policy, EPA is prohibited from reclassifying the Atlanta area under Subpart 2 of the federal CAA. Under 42 U.S.C. 7509(c), an area can be reclassified only if EPA makes a formal finding "[w]ithin 6 months following the applicable attainment date" that the area failed to attain the ozone NAAQS. EPA did not make such a determination within six months of the nominal 1999 attainment deadline for the Atlanta area, and thus is now prohibited from doing so.

*Response:* EPA agrees that reclassification must be based on a notice and comment rulemaking. See D.C. Circuit Slip opinion *Sierra Club v. Whitman* No. 01-5123 and 015299 April 5, 2002, Slip Opinion (D.C. Cir). EPA does not agree, however, that missing a mandatory deadline means that EPA loses the power to act to discharge the duty to which the deadline applied. EPA retains the power to act to discharge the duty after the deadline has passed. *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106, 113-114 (3d Cir. 1997). (EPA does not lose power to perform mandatory duty to act on redesignation request after 18-month statutory period has elapsed).

#### XVII. Final Action

For the reasons set forth in the notice of proposed rulemaking and in this final rulemaking notice, EPA has determined that the Atlanta 1-hour ozone nonattainment area failed to attain the 1-hour ozone NAAQS by November 15, 1999, as required by section 181(a) of the CAA, and the Atlanta 1-hour ozone nonattainment area is reclassified by operation of law to severe ozone

nonattainment pursuant to section 181(b)(2) of the CAA.

#### XVIII. Statutory and Executive Order Reviews

##### A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA is required to determine whether regulatory actions are significant and therefore should be subject to Office of Management and Budget (OMB) review, economic analysis, and the requirements of the Executive Order. The Executive Order defines a "significant regulatory action" as one that is likely to result in a rule that may meet at least one of the four criteria identified in section 3(f), including, under paragraph (1), that the rule may "have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities."

The Agency has determined that the finding of nonattainment would result in none of the effects identified in section 3(f) of the Executive Order. Under section 181(b)(2) of the CAA, determinations of nonattainment are based upon air quality considerations and the resulting reclassifications must occur by operation of law. They 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 classifications that, in turn, are triggered by air quality values, determinations of nonattainment and reclassification cannot be said to impose a materially adverse impact on state, local, or tribal governments or communities.

##### B. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards