

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[RME NO. R03-OAR-2004-DC-0009, R03-OAR-2004-DC-0010; FRL-7910-3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; 1-Hour Ozone Attainment Plans, Rate-of-Progress Plans, Contingency Measures, Transportation Control Measures, VMT Offset, and 1990 Base Year Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** EPA is approving State Implementation Plan (SIP) revisions submitted by the District of Columbia (the District), the State of Maryland and the Commonwealth of Virginia. These revisions include the 1996–1999 and 1999–2005 rate-of-progress (ROP) plans, changes to the 1990 base year inventory, a contingency measures plan, certain transportation control measures (TCMs), and a demonstration that each SIP contains any necessary transportation control measures to offset any growth in emissions from growth in vehicle miles traveled (VMT) and to demonstrate ROP and attainment of the 1-hour national ambient air quality standard (NAAQS) for ozone. These revisions also include the District’s and Virginia’s attainment plan for the Washington, DC severe 1-hour ozone nonattainment area (the Washington area). The intended effect of this action with respect to the following SIP revisions, all of which were submitted to satisfy the SIP

requirements of 1-hour ozone nonattainment areas classified as severe, is to: approve the District’s, Maryland’s and Virginia’s modeling demonstration, which includes the analysis based upon photochemical grid modeling, that the Washington area will attain the 1-hour ozone NAAQS; approve the District’s, Maryland’s and Virginia’s post-1996 ROP plans, 1990 base year inventory revisions, TCMs, VMT offset and contingency measures SIP revisions; approve the District’s and Virginia’s attainment plans for the Washington area; and, determine that Maryland’s SIP for the Washington area contains adopted control measures and determine that these measures fully satisfy the emission reductions relevant to attainment of the 1-hour ozone NAAQS.

**DATES:** *Effective Date:* This final rule is effective on June 13, 2005.

**ADDRESSES:** EPA has established a docket for this action under Regional Material in EDocket (RME) ID Number R03-OAR-2004-DC-0010. All documents in the docket are listed in the RME index at <http://www.docket.epa.gov/rmepub/>. Once in the system, select “quick search,” then key in the appropriate RME identification number. Although listed in the electronic docket, some information is not publicly available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or

in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002; the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

**FOR FURTHER INFORMATION CONTACT:** Christopher Cripps, (215) 814–2179, or by e-mail at [cripps.christopher@epa.gov](mailto:cripps.christopher@epa.gov).

SUPPLEMENTARY INFORMATION:

I. Background

A. Summary

On January 12, 2005 (70 FR 2085), EPA published a notice of proposed rulemaking (NPR) for the District, the State of Maryland and the Commonwealth of Virginia (the States). The NPR proposed approval of the 1996–1999 and 1999–2005 ROP plans, changes to the 1990 base year inventory, a contingency measures plan, certain TCMs, and a demonstration that each SIP contains sufficient transportation control measures to offset any growth in emissions from growth in VMT as necessary to demonstrate ROP and attainment of the 1-hour NAAQS for ozone.

Tables 1 and 2 identify the initial submittal dates and the dates on which the States’s submitted amendments for these plans and measures covered by our January 12, 2005 NPR:

TABLE 1.—POST 1996–1999 ROP PLANS FROM THE STATES

	DC	MD <sup>1</sup>	VA
Initial submittal dates .....	November 10, 1997 .....	December 24, 1997 .....	December 19, 1997.
Amended submittal dates .....	May 25, 1999 .....	May 20, 1999 .....	May 25, 1999.

The post 1996–1999 ROP Plan SIP revisions also include certain TCMs, specifically those TCMs identified in Appendix H of the States submittals.

TABLE 2.—ATTAINMENT PLAN, 1999–2005 ROP PLANS, CONTINGENCY MEASURES PLAN, AMENDMENTS TO THE 1990 BASE YEAR INVENTORY, AND VMT OFFSET PLANS

	DC	MD <sup>2</sup>	VA
Initial submittal dates .....	September 5, 2003 .....	September 2, 2003 .....	August 19, 2003.
Amended submittal dates .....	February 25, 2004 .....	February 24, 2004 .....	February 25, 2004.

<sup>1</sup> Maryland SIP revision submittals labeled as 97–04 and 99–12.

<sup>2</sup> Maryland’s identifiers for these SIP revision submittals are SIP revisions numbers 03–05 and 04–01.

Hereafter, the SIP revisions listed in Table 2 of this document will be called the "February 2004 SIP revisions." The States' February 2004 SIP revisions include the post 1999–2005 ROP plans, the VMT Offset SIPs, revisions to the 1990 base year emissions inventory, and the contingency measures plans for ROP and attainment for the Washington

area.<sup>3</sup> The February 2004 SIP revisions additionally include certain TCMs, namely those TCMs identified in Appendix J of the SIP revision submittals.

The February 2004 SIP revisions also included the States' revised attainment plans for the Washington area. The States had initially submitted an attainment plan for the Washington area

in 1998 with later supplements. These initial attainment plans were the subject of two earlier rulemaking actions, 66 FR 586, January 3, 2001, and 68 FR 19106, April 17, 2003. The dates of submittal are shown in Table 3 which repeats the information found in Table 2 of both the January 3, 2001 and April 17, 2003 final rules.

TABLE 3.—PREVIOUS ATTAINMENT DEMONSTRATIONS SUBMISSIONS

	DC	MD <sup>4</sup>	VA
Initial submittal dates .....	April 24, 1998 .....	April 29, 1998 .....	April 29, 1998.
Amendment dates .....	October 27, 1998 .....	August 17, 1998 .....	August 18, 1998.
Supplemental dates .....	February 16, 2000 .....	February 14, 2000 .....	February 9, 2000.
Supplemental dates .....	March 22, 2000 .....	March 31, 2000 .....	March 31, 2000.

Hereafter those revisions listed in Table 3 will be called the "pre-2001 SIP revisions" attainment plan."<sup>5</sup> Hereafter we refer to the collective grouping of those SIP revisions listed in Tables 1 and 3 of this document as the "pre-2001 SIP revisions."

In their February 2004 SIP revisions, each of the States resubmitted to EPA the attainment plan contained in its prior SIP revisions' attainment plan along with additional elements required for a severe area attainment plan, such as a post-1999 ROP plan and the VMT offset SIPs, a contingency measures plan to augment the previously submitted 1996–1999 ROP plan and contingency measures plan, respectively, as well as other SIP elements not included in the previous SIP revisions' attainment plan.

We proposed action on these attainment plans in a separate NPR published in the **Federal Register** on February 9, 2005 (70 FR 6796). In our February 9, 2005, NPR, we also proposed approval of the attainment plan SIP revisions submitted by the District and Virginia.

In our February 9, 2005, NPR, with respect to the State of Maryland's attainment plan for the Washington area, we proposed approval contingent upon the State submitting an approvable SIP revision for certain penalty fees, required by the Clean Air Act (the Act), prior to the time EPA would issue a final rule on Maryland's attainment plan. In the alternative, we proposed to disapprove the attainment plan SIP revision submitted by the State of Maryland for the Washington area and to issue a protective finding for the

attainment plan which would allow the motor vehicle emissions budgets (MVEBs) identified in the attainment plan SIP to be used for demonstrating transportation conformity purposes.

EPA has taken a final action on the Maryland's attainment plan for the Washington area in a separate final rule which is published elsewhere in today's **Federal Register**. In that final rule, EPA is disapproving the Maryland's attainment plan for the Washington area because Maryland failed to submit the required fee program, and, pursuant to 40 CFR 93.120(a), and issuing a protective finding to the February 2004 SIP revisions' attainment plan. As we explain in that rule, the protective finding will allow Maryland to use the MVEBs contained in the disapproved SIP for transportation conformity purposes pursuant to 40 CFR 93.120. In this rule we are approving the modeling demonstration, which includes an analysis based upon photochemical grid modeling (the modeled demonstration of attainment and adjunct weight-of-evidence (WOE) analysis), contained in the District's, Maryland's and Virginia's February 2004 SIP revisions. We also determine that based upon this modeled demonstration of attainment and adjunct WOE analysis Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements relevant to the Washington area attaining the 1-hour ozone NAAQS by November 15, 2005. This determination supports issuance of the protective finding for transportation

conformity purposes pursuant to 40 CFR 93.120.

#### *B. Relationship to Past SIP Revisions and Litigation*

##### 1. Prior SIP Revisions

During 1998, the States submitted an attainment plan for the Washington area and supplemented these submittals on the dates listed in Table 3 of this document. These 1998 and 2000 calendar year revisions cumulatively constituted the attainment plan for the Washington area which at the time was classified as being in "serious" nonattainment of the 1-hour ozone NAAQS. In the aggregate these attainment plans consisted of a photochemical modeling demonstration and adjunct WOE analyses that demonstrated attainment of the ozone NAAQS; projected emissions inventories showing that the States collectively had adopted sufficient measures to support the demonstration of attainment; attainment year MVEBs; and a commitment to conduct and submit a mid-course review to EPA by a date certain. As noted previously, the March 2000 SIP revisions consisted of a commitment to revise the MVEBs one-year after EPA released the MOBILE6 model and the outyear budgets. These pre-2001 SIP revisions' attainment plans were submitted to demonstrate that the Washington area would attain the 1-hour ozone NAAQS by no later than November 15, 2005. On January 3, 2001, EPA approved the pre-2001 SIP revisions and extended the attainment date for the Washington area (then a

<sup>3</sup> In this document a SIP revision which demonstrates the state's SIP contains any necessary transportation control measures to offset any growth in emissions from growth in VMT needed to demonstrate ROP and attainment of the 1-hour NAAQS for ozone is termed a "VMT offset SIP."

<sup>4</sup> Maryland's identifiers for the February 14, 2000 and March 31, 2002 submittals are SIP revisions numbers 00–01 and No. 00–02.

<sup>5</sup> Only a commitment to revise the motor vehicle emissions budgets (MVEBs) found in the March 2000 SIP revisions listed in Table 3 of this

document were subject to the January 3, 2001 and April 17, 2003 final rules. The portion of these SIP revisions related to MVEBs for years after 2005 ("outyear budgets") was not subject to these actions.

serious nonattainment area) until November 15, 2005.

## 2. January 3, 2001 Final Rule Vacated

A petition for review challenging the January 3, 2001 final approval was filed by the Sierra Club. The petition alleged, among other things, that EPA could not lawfully extend the attainment date of a serious ozone nonattainment area past November 15, 1999 without reclassifying the area as severe nonattainment, could not approve a SIP for an area with a 2005 attainment date unless the plan provides for ROP reductions after 1999 and could not approve a SIP that does not include contingency measures. On July 2, 2002, the U.S. Court of Appeals for the District of Columbia Circuit (the Court of Appeals) issued an opinion to vacate our rule extending the attainment date and approving the attainment plans and 1996–1999 ROP plans. Among other things, the Court of Appeals found that EPA had no authority to extend the attainment date of a serious ozone nonattainment area without reclassifying the area as severe nonattainment, and could not approve a SIP for an area with a 2005 attainment date unless the plan provides for ROP reductions until the attainment date. *See Sierra Club v. Whitman*, 294 F.3d 155, 160–163 (D.C. Cir. 2002). The Court of Appeals also found that EPA could not approve the pre-2001 SIP revisions because a contingency measures plan, which is required under section 172(c)(9) of the Act, is one of the elements listed under section 172(c) as a requirement for a revised SIP for an area in nonattainment. *See Id.* at 164.

## 3. Nonattainment Area Plan Requirements

Under section 172(c) of the Act, a revised SIP for an area in nonattainment must also include elements such as an attainment demonstration and all reasonably available control measures (RACT), reasonable further progress toward attainment, an emissions inventory, and new source permitting programs. Under section 182(d), a revised SIP for an area in *severe* ozone nonattainment must include reasonably available control technology (RACT) on, and new source review (NSR) permitting of, major stationary sources of nitrogen oxides (NO<sub>x</sub>) emissions and volatile organic compound (VOC) emissions with a potential to emit of 25 tons per year (TPY) or greater; new source permitting offset ratios of 1.3 to 1 or greater; a VMT Offset SIP; a ROP plan to achieve a 15 percent reduction in VOC emissions by 1996; plans for achieving an average of a 3 percent per

year ROP reductions after 1996 through the attainment date; and a SIP revision to impose the penalty fees specified in section 185 of the Act.

EPA believes *Sierra Club v. Whitman*, 294 F.3d 155, can be read to require that before we can approve the overall revised SIP for the nonattainment area we must approve all of the elements applicable to the area under sections 172(c) and 182 of the Act. In this document, the overall SIP for the nonattainment area will be termed the “attainment plan.”

Under section 182 of the Act, a demonstration that the SIPs for a nonattainment area, as revised, will provide for attainment of the 1-hour ozone NAAQS by November 15, 2005 is a separate component of the overall attainment plan. *See* 42 U.S.C. 7511a(c)(2)(A). Such a demonstration for a severe ozone nonattainment area must be based upon photochemical grid modeling (or similarly effective method) and must show that the submitted demonstration relies upon or contains adopted control measures that fully satisfy the emission reduction requirements relevant to demonstrating attainment of the 1-hour ozone NAAQS by November 15, 2005. *Id.*

## 4. Washington Area Reclassified to Severe Nonattainment

On January 24, 2003 (68 FR 3410), EPA reclassified the Washington area to severe nonattainment because the area failed to attain 1-hour ozone NAAQS by the November 15, 1999 statutory attainment date for serious areas. This action made the area subject to the additional requirements applicable to severe areas under section 182(d) of the Act. On April 17, 2003 (68 FR at 19107), EPA conditionally approved the pre-2001 SIP revisions (the history of litigation on the April 17, 2003 conditional approval will be discussed in a later paragraph of this document titled “April 17, 2003 Final Rule Vacated and Withdrawn”).

## 5. Recent SIP Revision Actions

In the months that followed the January 24, 2003 reclassification of the Washington area to severe nonattainment and the April 17, 2003 conditional approval, the States submitted the SIP revisions necessary to satisfy the requirements of section 182(d) of the Act for severe areas and EPA’s conditional approval, with the exception of Maryland which failed to submit a SIP revision for the section 185 penalty fee program. These SIP revisions included February 2004 SIP revisions. The February 2004 SIP revisions contained the attainment plan

which consists of: (1) A photochemical modeling demonstration and adjunct WOE analyses to demonstrate attainment of the ozone NAAQS by no later than November 15, 2005; (2) projected emissions inventories showing that the States, including Maryland, collectively had adopted sufficient measures to support the demonstration of attainment; (3) attainment year MVEBs; and (4) a commitment to conduct and submit a mid-course review to EPA by a date certain.<sup>6</sup> In their February 2004 SIP revisions, each of the States resubmitted to EPA the attainment plan contained in the State’s pre-2001 SIP revisions’ attainment plan along with additional elements required for a severe area attainment plan, such as a 1999–2005 ROP plan, and a contingency measures plan to augment the previously submitted 1996–1999 ROP plan and contingency measures plan, respectively, as well as other SIP elements not included in the pre-2001 SIP revisions’ attainment plan.

## 6. April 17, 2003 Final Rule Vacated and Withdrawn

A petition for review challenging the April 17, 2003 final conditional approval was filed by the Sierra Club. The petition alleged, among other things, that EPA could not lawfully conditionally approve the SIPs due to a lack of specificity in the States’ commitment letters, that EPA should require the 1996–1999 ROP to be revised to use the latest mobile sources emission factor model and that the photochemical grid modeling supporting the attainment plan did not meet the requirements of the Act. On February 3, 2004, the Court of Appeals issued an opinion to vacate our rule conditionally approving the attainment plans and 1996–1999 ROP plans insofar as that Court found that our grant of conditional approval was defective. The Court of Appeals denied the petition for review in all other respects. *See Sierra Club v. EPA*, 356 F.3d 296, 301–07 (D.C. Cir. 2004). On April 23, 2004, the Court of Appeals issued its mandate thereby relinquishing jurisdiction over the 1996–1999 ROP plans and the attainment plan SIP revisions, and remanding them back to EPA.<sup>7</sup>

<sup>6</sup> The February 2004 SIP revisions did not need to contain a commitment to revise the MVEBs one-year after EPA released the MOBILE6 model because the MVEBs in these plans were developed using MOBILE6.

<sup>7</sup> On April 16, 2004, the Court of Appeals issued an order revising the February 3, 2004, opinion to address a petition for rehearing filed by the Sierra Club, but otherwise leaving its decision to vacate and remand the conditional approval to EPA intact.

Effective as of the April 23, 2004 date the Court of Appeals issued its mandate for its February 3, 2004 ruling, all three States withdrew their pre-2001 SIP revisions' attainment plan which had been submitted during 1998 and 2000, specifically the SIP revisions listed in Table 2 of the April 17, 2003, final rule (68 FR 19107). By the time the three States withdrew the pre-2001 SIP revisions' attainment plan, they had already submitted revised attainment plan SIP revisions with an analysis that the SIPs contained all RACM, post-1999 ROP plans demonstrating ROP for 2002 and 2005, VMT offset plans and contingency measures plans that superceded the earlier submissions. The States, in their February 2004 SIP submissions, submitted not only this new material, but resubmitted all of the previously withdrawn pre-2001 SIP revisions' attainment plan.<sup>8</sup> The newly submitted materials along with the resubmitted pre-2001 SIP revisions' attainment plan, form a single comprehensive package. EPA is taking final action today on both the newly submitted and resubmitted materials, which we collectively refer to as the February 2004 SIP revisions.

#### 7. District Court Action

The Sierra Club filed a complaint in the United States District Court for the District of Columbia (District Court) claiming that because the Court of Appeals vacated and remanded the conditional approval of the pre-2001 SIP revisions' attainment demonstration and the 1996–1999 ROP plans, EPA had an unfulfilled nondiscretionary duty to complete final action on those SIP revisions. On April 7, 2005, the District Court issued an order enjoining EPA to “complete final approval and disapproval action, in accordance with 42 U.S.C. 7410(k)(2), (3), on the state implementation plan submittals for the Washington area identified at 66 FR 586, 586 (January 3, 2001).” *Sierra Club v. Johnson*, C.A. No. 04–2163 (JR) (April 7, 2005). The District Court's decision took note “that the states formally withdrew their pre-2001 submissions (except for the [ROP plans]) after the D.C. Circuit's *Sierra Club III* remand,” *Id.*, slip op. at 7, but disputed that “these withdrawals removed EPA's duty to act,” stating that “‘withdrawal’ of pre-2001 SIPs could [not] push back the deadlines established by Congress.”

EPA does not dispute that withdrawal of a SIP cannot push back a statutory deadline established by Congress. However, EPA disagrees that it can act on a SIP submittal formally withdrawn by a state. We note, however, that such a withdrawal is not without consequence, as withdrawal of required SIP revision puts a state in jeopardy of sanctions predicated upon a failure to submit the required SIP. However in this case, as described in this document, the States resubmitted the materials comprising their withdrawn pre-2001 SIP revisions' attainment plan as part of the February 2004 SIP submissions. EPA therefore will take action on what the District Court termed the “pre-2001 submissions,”<sup>9</sup> as follows:

- (1) In this final rule which
  - (a) approves all of the control measures and other constituents needed to approve Maryland's severe area attainment plan (except for a Section 185 fee program), including all control measures need to fully satisfy the emissions reductions relevant to attainment of the 1-hour ozone NAAQS;
  - (b) approves all of the control measures and other constituents needed to approve the District's and Virginia's severe area attainment plan;
  - (c) approves the 1996–1999 ROP plan for the District, Maryland and Virginia;
  - (d) approves Maryland's modeled demonstration of attainment and adjunct weight of evidence analyses; and
  - (e) approves the District's and Virginia's modeled demonstrations of attainment and adjunct weight of evidence analyses and the District's and Virginia's attainment plans, which include their pre-2001 SIP revisions' attainment plan, as resubmitted and subsumed by their February 2004 SIP revisions;
- (2) Another final rule, which is published elsewhere in today's **Federal Register**, which disapproves Maryland's pre-2001 SIP revisions' attainment plan as resubmitted and subsumed by Maryland's February 2004 SIP revisions' attainment plan based upon Maryland's failure to submit the required 185 fee program, and issues a protective finding on the SIP, based upon our determination that the SIP contains all of the control measures necessary to demonstrate attainment. That protective finding will allow Maryland to use the MVEBs contained in the disapproved SIP for transportation conformity purposes pursuant to 40 CFR 93.120.

## II. The Relationship of Past SIP Revisions, February 2004 SIP Revisions and the April 17, 2003 Conditional Approval

### A. The Twelve Conditions for Approval

On April 17, 2003, EPA had conditionally approved the pre-2001 SIP revisions subject to the following 12 conditions:

- (1) Revise the 1996–1999 portion of the ROP plans to include a contingency plan containing adopted measures;
- (2) Revise the contingency plan containing those adopted measures implemented for the failure of the Washington area to attain the one-hour ozone standard for serious areas by November 15, 1999;
- (3) Revise the ROP plans to include a contingency plan containing adopted measures for the post-1999 ROP plans;
- (4) Revise the attainment demonstration to include a contingency plan containing adopted measures to be implemented if the Washington area does not attain the one-hour ozone standard by November 15, 2005;
- (5) Revise the ROP plans to demonstrate emission reductions of ozone precursors of an average of 3 percent per year from November 15, 1999 to the November 15, 2005;
- (6) Revise the attainment demonstration to include a revised RACM analysis;
- (7) Revise the major stationary source threshold to 25 tons per year;
- (8) Revise RACT rules to include the lower major source applicability threshold;
- (9) Revise new source review offset requirements to require an offset ratio of at least 1.3 to 1.
- (10) Submit a SIP revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or number of vehicle trips if required under section 182(d)(1) of the Act;
- (11) Submit the section 185 penalty fee SIP consisting of the penalty fee requirement of Act sections 182(d)(3) and 185 for major sources of VOC and NO<sub>x</sub> should the area fail to attain by November 15, 2005;
- (12) Update the Washington area severe attainment demonstration to reflect revised MOBILE6-based motor vehicle emissions budgets, including revisions to the attainment modeling/weight of evidence demonstration and adopted control measures, as necessary, to show that the SIP continues to demonstrate attainment by November 15, 2005.

*Sierra Club v. EPA*, No. 03–1084, 2004 WL 877850 (DC Cir. Apr. 16, 2004).

<sup>8</sup> With one exception: the “outyear budgets,” which were contained in the March 31, 2002 SIP revision on which EPA had never proposed to take action, were not resubmitted.

<sup>9</sup> The District Court used the term “pre-2001 submissions” and “pre-2001 SIPs” which consists of what in this document we call “the pre-2001 SIP revisions' attainment demonstration” and “the 1996–1999 ROP plan.”

In the February 3, 2003 (68 FR 5246) proposed rule for the April 17, 2003 final conditional approval, we proposed conditional approval of the pre-2001 SIP revisions if the State committed to correct condition numbers (1) through (3), (6) and (12). EPA revised the conditional approval to include condition numbers (4), (5), and (7) through (11) in response to comment which stated that EPA could not fully approve the pre-2001 SIP revisions because the pre-2001 SIP revisions did not cover all of the required severe area SIP components. EPA agreed with the comment to the extent that condition numbers (4), (5), and (7) through (11) were applicable severe area requirements that precluded full approval. *See* 68 FR at 19121, April 17, 2003.

Conditions (1) and (2) were elements needed to correct deficiencies in the SIP required for a serious nonattainment area.

Conditions (4) through (11) are SIP elements required as a consequence of the reclassification of the Washington area to severe nonattainment.

Conditions (3) through (6) were required to correct deficiencies in the pre-2001 SIP revisions because the pre-2001 SIP revisions included a demonstration that the Washington area would attain the 1-hour ozone standard by November 15, 2005.

We conditioned approval on item (12) under EPA's policy related to the transition from our prior mobile source emissions factor model, MOBILE5, to the newer model, MOBILE6.

#### *B. How the States Have Addressed the Twelve Conditions*

In this section we will discuss how the States have addressed the twelve conditions. EPA had already approved many of the States' SIP revisions for the control measures needed to support the attainment plan, the ROP plans and the contingency measure plan by the time we published the NPRs on January 12, 2005 (70 FR 2085) and February 9, 2005 NPR (70 FR 6796) for the States' 1996–1999 ROP plans and the February 2004 SIP revisions including the resubmitted pre-2001 SIP revisions' attainment plan. In this document we will not reiterate the specifics of such approvals but will provide details on the approval of control measures which were not approved at the time of the January 12, 2005 and February 9, 2005 NPRs.

#### 1. Conditions 1 to 4—Contingency Measures

At the time of the January 12, 2005 NPR for the contingency measures plan, EPA had approved all the contingency

measures except each of the States' architectural and industrial maintenance coatings rules (AIM coatings rules), and the District's motor vehicle refinishing, consumer products, solvent cleaning and portable fuels container rules.

On May 2, 2005, the Regional Administrator signed final rules approving the District's, Maryland's and Virginia's AIM coatings rules. Those final actions have been published in a recent **Federal Register** or shortly will be published in the **Federal Register**.

On December 23, 2004 (69 FR 76855), December 28, 2004 (69 FR 77642), December 29, 2004 (69 FR 77906) and December 29, 2004 (69 FR 77903), EPA approved, respectively, the District's motor vehicle refinishing, consumer products, solvent cleaning and portable fuels container rules.

In this final rule, EPA is approving the States's contingency measures plans for the Washington area. These contingency measure plans provide sufficient contingency measures to meet our 3 percent (relative to baseline emissions for the Washington area) reduction for all of the relevant years for which the States need contingency measures. Our basis for determining that the States' contingency measures plans get the required reductions is discussed in detail in section V. "Contingency Measures Plans" of the January 12, 2005 NPR (70 FR at 2087–2095) and in our response to comments under sections III. D. "Comment on the Contingency Measures Plans" of this document.

EPA finds that the actions cited in the preceding four paragraphs fulfilled conditions (1) through (4).

#### 2. Condition 5—Post-1999 ROP

At the time of the January 12, 2005 NPR for the ROP plans and the February 9, 2005 NPR on the attainment demonstration, EPA had approved all the control measures except each of the States' AIM coatings rules, the District's portable fuels container rule, the TCMs submitted with the 1996–1999 and post-1999 ROP plans and Maryland's and Virginia's nonregulatory measures SIP revisions.

As noted previously, EPA has approved the States' AIM coatings rules and the District's portable fuel containers rule. In this action, EPA is approving the TCMs submitted with the 1996–1999 and post-1999 ROP plans.

On May 2, 2005, the Regional Administrator signed a final rule approving Maryland's and Virginia's nonregulatory measures SIP revision. That final action has been published in a recent **Federal Register** or shortly will be published in the **Federal Register**.

In this final rule EPA is approving the States' 1996–1999 and post-1999 ROP plans. Our basis for determining that the States' ROP plans get the required post-1996 ROP reductions of 3 percent per year (averaged over consecutive 3-year periods) is discussed in detail in section IV. "Post 1996–1999 and Post 1999–2005 ROP Plans" of the January 12, 2005 NPR (70 FR at 2087–2095) and in our response to comments under sections III. A. "Comment on the ROP Plans and NO<sub>x</sub> Substitution" and B. "Comment on the Transportation Demand Model (TDM) Used in the Plans" of this document.

EPA finds that the actions cited in the preceding four paragraphs fulfilled condition (5).

#### 3. Condition 6—RACM

For the reasons cited in our February 9, 2005 NPR, EPA believes that the States' attainment demonstration in the February 2004 SIP revisions demonstrated that no remaining RACM remain to be adopted for the Washington area. We received no adverse comment on this aspect of the proposal and find that the States have fulfilled condition 5 by adoption of all the measures necessary to demonstrate attainment as expeditiously as practicable.

#### 4. Conditions 7 to 9—New Source Review and RACT Thresholds

EPA has approved a SIP revision to implement the severe area NSR requirements in the Washington area for both VOC and NO<sub>x</sub> including an offset ratio of 1.3:1 and a major source applicability definition of 25 tons/year. *See* 69 FR 77647, December 28, 2004; 69 FR 56170, September 20, 2004; and 69 FR 48150, August 9, 2004, for the District, Maryland, and Virginia, respectively. For each of the three States, EPA has fully approved a SIP revision to implement RACT for major sources of VOC and NO<sub>x</sub> with major source size definition of 25 tons/year. *See* 69 FR 77647, December 28, 2004; 69 FR 56170, September 20, 2004; and 69 FR 48150, August 9, 2004, for the District, Maryland, and Virginia, respectively. EPA finds that the States have fulfilled conditions (7) through (9).

#### 5. Condition 10—VMT Offset SIP

In this final rule EPA is approving the States' VMT Offset SIP revisions which fulfill condition (10). Our basis for determining that the States' VMT Offset SIP meets the Act's requirements is discussed in detail in section VI. "Vehicle Miles Traveled (VMT) Offset SIP and Transportation Control Measures (TCMs)" of the January 12,

2005 NPR (70 FR at 2098) and in our response to comments under section III. C. "Comment on the VMT Offset SIP" of this document.

6. Condition 11—the Section 185 Penalty Fee SIP

On December 28, 2004 (69 FR 77639) and on December 29, 2004 (69 FR 77909), EPA approved the District's and Virginia's section 185 penalty fee SIP revisions, respectively, and thus, believes that the District and Virginia have fulfilled condition (11). To date, Maryland has not submitted a section 185 penalty fee SIP revision. For the lack of a section 185 penalty fee SIP revision, EPA is disapproving Maryland's attainment plan with a protective finding which will allow the MVEBs contained in Maryland's 2004 SIP revisions to be used for transportation conformity purposes pursuant to 40 CFR 93.120. That disapproval is published elsewhere in today's **Federal Register**.

7. Condition 12—MOBILE6-Based Attainment Plan Budgets

In their February 2004 SIP revisions, the States adopted MOBILE6-based 2005 attainment year MVEBs. The final version of the 2005 attainment year MVEBs was contained in the February 2004 SIP revisions identified in Table 2 of this document. These MVEBs are area-wide MVEBs which cover the entire Washington area.

In this final rule EPA is approving the District's and Virginia's attainment plan for the Washington area, namely the attainment plans contained in the February 2004 SIP revisions which subsumes the resubmitted pre-2001 SIP revisions' attainment plan. We are also approving the final revision of the 2005 attainment year MVEBs for the District and Virginia found in the February 2004 SIP revisions identified in Table 2 of this document. EPA would have been able to approve Maryland's attainment plan for the Washington area had Maryland submitted a section 185 penalty fee program. We could not approve the District's and Virginia's attainment plan without determining that the three States collectively have adopted enough measures in their SIPs to demonstrate that the area as a whole will attain the 1-hour ozone NAAQS by no later than November 15, 2005. Such a finding is necessary because this is an interstate area and any potential emissions shortfall would have to be addressed collectively before any State's attainment plan could be approved.

For the reasons stated in our February 9, 2005 NPR, the recently approved control measures discussed previously

in this final action and given in our responses in this final action to comments received on that proposed rule, EPA believes that the States collectively have adopted enough measures in their SIPs to demonstrate that the area will attain the 1-hour ozone NAAQS by no later than November 15, 2005 with the MVEBs found in the February 2004 SIP revisions identified in Table 2 of this document. EPA believes that Maryland, in combination with the District and Virginia, adopted sufficient measures and have fully satisfied the emissions reduction requirements necessary to ensure that attainment of the 1-hour ozone NAAQS will be attained by no later than November 15, 2005. EPA believes that the States, including Maryland, have satisfied condition (12) since they have demonstrated that the attainment plans have been revised to reflect MOBILE6-based MVEBs and have included the necessary revisions to the modeled demonstration of attainment and adjunct WOE analyses and have adopted control measures showing that the SIP continues to demonstrate attainment by November 15, 2005.

Therefore, in this final rule, EPA is approving the District's, Maryland's, and Virginia's modeled demonstrations of attainment and adjunct WOE analyses and the District's and Virginia's attainment plans. EPA is also determining that the attainment plan for Maryland contains adopted control measures that fully satisfy the emission reduction requirement relevant to attainment of the 1-hour ozone NAAQS. EPA is therefore approving the modeled demonstration of attainment and adjunct WOE analyses contained in Maryland's February 2004 SIP revisions which includes the analysis based upon photochemical grid modeling demonstrating timely attainment of the 1-hour ozone standard. In addition, EPA is therefore issuing Maryland's 2004 SIP revisions' attainment plan—a protective finding which will allow the MVEBs contained in Maryland's 2004 SIP revisions to be used for transportation conformity purposes pursuant to 40 CFR 93.120.

EPA concludes that once we issue our approval of the District's and Virginia's February 2004 SIP revisions the District and Virginia will have cured the deficiencies we identified in their pre-2001 SIP revisions through the various SIP revisions that they have submitted since April 17, 2003. In the case of Maryland, EPA concludes that all of the deficiencies except the section 185 penalty fee SIP revision will have been cured for Maryland's pre-2001 SIP

revisions by the various SIP revisions submitted since April 17, 2003 once we issue our approval of:

(1) Maryland's 1996–1999 and 1999–2005 ROP plans,

(2) the changes to the 1990 base year inventory, the contingency measures plan, TCMs,

(3) the modeled demonstration of attainment which includes the analysis based upon photochemical grid modeling and adjunct WOE analyses that Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements to provide for attainment of the 1-hour ozone NAAQS in the Washington area by November 15, 2005.

**III. Comment Received on the ROP plans, VMT Offset SIP and Contingency Measures Plan and EPA's Response**

We received comments adverse to the proposed approval of the ROP, VMT offset, contingency measures, and attainment plans. A summary of these adverse comments, and our responses, follows.

*A. Comment on the ROP plans and NO<sub>x</sub> Substitution*

*Comment:* We received a comment asserting that the ROP plans do not meet the requirement of demonstrating a nine percent reduction in VOC emissions from 1999 to 2002 and a further nine percent from 2002 to 2005 because the NO<sub>x</sub> substitution in the ROP plans is impermissible. The comment asserts that the ROP plans do not meet section 182(c)(2)(c) of the Act because they do not show that a nine percent reduction in NO<sub>x</sub> emissions will result in the same reduction in ozone concentration as a nine percent reduction in VOC emissions. The comment claims that EPA's own guidance requires photochemical grid modeling to show equivalent changes in ozone concentrations.

The comment also asserts that EPA's reliance on our December 1993 NO<sub>x</sub> Substitution Guidance is flawed because the plain language of the Act requires proof of equivalent benefits of NO<sub>x</sub> substitution. The comment also asserts that because the 1999–2005 ROP plan relies solely upon NO<sub>x</sub> reductions the plans do not meet the requirement of section 182(c)(2)(C) because the plan does not provide for some percentage of VOC reduction during each period. The comment claims that the Act requires some non-zero percentage reduction in VOC emissions for any ROP period.

The comment asserts that the Act requires the ROP plans to have VOC reductions by November 15, 2002 to

prevent a net increase in VOC emissions by the 2002 milestone date, which would offset the progress achieved by the nine percent NO<sub>x</sub> reductions. The comment asserts that while the ROP plans do provide for such reductions, EPA cannot approve the 1999–2005 ROP plans because they do not provide for all of these reductions by the 2002 milestone date.

*Response:* NO<sub>x</sub> Substitution in General. The EPA believes States have the opportunity to substitute NO<sub>x</sub> reductions for required VOC reductions under certain circumstances. The opportunity for NO<sub>x</sub> substitution originates in section 182(c)(2)(C) of the Act which specifically allows NO<sub>x</sub> emissions reductions to be substituted for VOC reductions required under section 182(c)(2)(B) for reasonable further progress (RFP), sometimes called ROP.

EPA issued guidance to the States on how to implement the NO<sub>x</sub> substitution provisions for the post-1996 ROP plans in December 1993 (the December 1993 NO<sub>x</sub> Substitution Guidance). The guidance allows States to substitute NO<sub>x</sub> emission reductions for VOC emission reductions if that substitution is consistent with the demonstration of attainment in the SIP. The modeled demonstration of attainment in the SIP establishes the overall reductions of VOC and/or NO<sub>x</sub> reductions required for attainment in the attainment year. The ROP plan is a tool to phase in emission reductions between the time the plan is prepared and the attainment date. When substituting NO<sub>x</sub> for VOC in post-1996 ROP plans, we are mindful that if too many NO<sub>x</sub> reductions are substituted for VOC reductions, the modeled demonstration of attainment may no longer be valid. Our December 1993 NO<sub>x</sub> Substitution Guidance allows substitution on a percentage basis (*i.e.*, one percent of NO<sub>x</sub> emissions reductions can be substituted for one percent of VOC emissions reductions).

*Results of the Application of EPA's December 1993 NO<sub>x</sub> Substitution Guidance in the Washington Area.* EPA believes that NO<sub>x</sub> substitution as applied to the Washington area based on our December 1993 NO<sub>x</sub> Substitution Guidance yields ROP plans that result in reductions in ozone concentrations that are better than those which would have resulted from ROP plans relying upon an equal percent of VOC reductions.

Applying our December 1993 NO<sub>x</sub> Substitution Guidance to the Washington area we substitute one percent of VOC ROP reductions with one percent of NO<sub>x</sub> reductions. One percent of NO<sub>x</sub> represents a larger quantity of emissions reduction than does one percent of VOC. This is the case because ROP reductions are computed from baseline emissions, which are defined in section 182(b)(2)(B) of the Clean Air Act to be “the total amount of actual VOC or NO<sub>x</sub> emissions from all anthropogenic sources in the area during the calendar year 1990,” excluding the emissions that would be eliminated by the programs specified in sections 182(b)(1)(C) and (D) of the Act. The reduction of baseline emissions by the programs specified in sections 182(b)(1)(C) and (D) yields the adjusted 1990 base year inventory for each milestone year (which is discussed further in the January 5, 2005 technical support document (TSD)<sup>10</sup>). The adjusted 1990 base year inventory is the baseline from which the necessary ROP reductions are computed. Section 182(c)(2) of the Act requires that a set percentage of reductions in baseline emissions be achieved every three years after 1996 until the area's attainment date. To determine the reductions in tons required for any given ROP milestone year, the percentage is multiplied by the adjusted 1990 base year inventory for that milestone year. For example, in the case of the Washington area, the “Adjusted 1990 Base Year Inventory for 2005” for VOC is 412.1 tons per day (TPD), and, thus, a one percent ROP reduction equates to 4.1 TPD. For NO<sub>x</sub> emissions the “Adjusted 1990 Base Year Inventory for 2005” is 735.6 TPD, and, thus, a one percent ROP reduction equates to 7.4 TPD.

The States only modeled changes in anthropogenic (man-made) emissions to see how sensitive the Washington area was to changes in VOC and to NO<sub>x</sub> emission reductions. They did not model changes in biogenic emissions which are VOC emissions from plants. The air quality model responds to changes in emission between the 1990 base year inventory and the emissions resulting from the control strategy to be modeled.<sup>11</sup>

The States used the results of this sensitivity modeling to determine that a

one ton reduction in NO<sub>x</sub> emissions within the Washington area would result in a peak ozone concentration reduction of 0.114 parts per billion (ppb) (0.114 ppb/ton of NO<sub>x</sub>); a similar analysis for VOC emissions indicated that a one ton reduction in VOC emissions would result in a peak ozone concentration reduction of 0.029 ppb (0.029 ppb/ton of VOC reduced). The States concluded that emissions reductions of 34.0 tons/day of VOC or 8.8 tons/day NO<sub>x</sub> would have to be required within the Washington area would reduce ozone concentrations by 1 ppb. That is, NO<sub>x</sub> reductions in the Washington area have greater ozone reducing potential than an equivalent amount of VOC reductions. Therefore, substituting a percentage of VOC reductions with an equal percentage of NO<sub>x</sub> reductions should result in greater ozone concentration reduction than if the substitution were not done.

The 1990 base year VOC inventory for the Washington area is comprised of 578.7 TPD of anthropogenic emissions and of 376.5 TPD biogenic emissions for a total of 955.2 TPD of VOC. The 1990 base year NO<sub>x</sub> inventory (all of which is anthropogenic) for the Washington area is 869.3 TPD of NO<sub>x</sub>. Given that 39 percent (376.5/955.2) of the VOC emissions inventory is biogenic emissions, it is not surprising that reductions in anthropogenic VOC emissions would show less ozone response than an equal percentage reduction in anthropogenic NO<sub>x</sub> emissions. The NO<sub>x</sub> emissions are all anthropogenic, and, a one percent reduction in NO<sub>x</sub> emissions equates to more tons of emission reduction than does one percent reduction of the anthropogenic VOC emissions.

This is not to say VOC reductions are not beneficial towards attainment, but rather that reductions in anthropogenic VOC emissions are not as effective on a TPD or ROP percentage basis as NO<sub>x</sub> reductions. However, the States are free to fashion their attainment demonstrations and ROP plans to include whatever mix of VOC and NO<sub>x</sub> reductions they choose, so long as the plans demonstrate timely attainment and timely ROP in accordance with the requirements of the Clean Air Act.

The following table compares a 9 percent reduction in baseline VOC emissions by each post-1996 milestone year to the chosen levels of NO<sub>x</sub> substitution in the ROP plans in terms

<sup>10</sup> Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the

Metropolitan Washington, DC Nonattainment Area, January 5, 2005

<sup>11</sup> For a summary of the photochemical grid modeling for the Washington area refer to the February 9, 2005 (70 FR 6796) NPR, and, for a discussion in depth, see Technical Support

Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area, dated January 31, 2005.

of TPD reductions and of ozone concentration decreases resulting from these reductions.

TABLE 4.—RESULTS OF NO<sub>x</sub> SUBSTITUTION IN THE WASHINGTON AREA

Milestone year	1999	2002	2005
9 percent reduction in VOC baseline emissions (TPD) .....	39	37.8	37.1
Ozone Concentration Change to 9 percent VOC (at 0.029 ppb/ton rounded to nearest tenth) .....	1.1	1.1	1.1
Percent NO <sub>x</sub> reduction Substituted (percent of baseline NO <sub>x</sub> emissions) .....	8	9	9
Substituted NO <sub>x</sub> Reductions (TPD) .....	62.8	68.1	66.2
Ozone Concentration Change to Substituted NO <sub>x</sub> Reductions (0.114 ppb/ton rounded to nearest tenth) .....	7.2	7.8	7.5

*Technical and Practical Reasons for our December 1993 NO<sub>x</sub> Substitution Guidance.* The modeling performed for demonstration of attainment basically establishes the relationship between emission reductions—either of VOC, NO<sub>x</sub>, or both—and ozone reductions. This relationship is established for the attainment year. As noted previously, the modeled attainment demonstration establishes the overall VOC and/or NO<sub>x</sub> emission targets that are consistent with attainment of the standard in the attainment year. When EPA determines that a demonstration of attainment is approvable, *i.e.*, it demonstrates that the relevant area will timely attain the NAAQS, we are making an implicit corollary conclusion that the mix of VOC and/or NO<sub>x</sub> control measures included in the area's demonstration of attainment is sufficient for timely attainment.

The post-1996 ROP plan requirement is used to phase-in emission reductions between the time of plan adoption and the attainment date. EPA does not require modeling of interim years for the purpose of trying to update the NO<sub>x</sub>/VOC/ozone relationship for a number of reasons, including the following that are provided in our December 1993 NO<sub>x</sub> Substitution Guidance:

a. The strong likelihood that optimum “exchange” rates vary from year to year and across a geographic area as an area's emissions distribution and atmospheric chemistry change over time;

b. Uncertainty in modeling analyses, particularly when attempting to ascertain responses from small percentage perturbations in emissions; and

c. Resource limitations associated with modeling specific control measures during interim years before attainment dates.

EPA continues to believe in the validity of this guidance and in the reasoning set forth therein as it relates to NO<sub>x</sub> substitution under the post-1996 ROP plan requirements.

*Legal Rationale for EPA's December 1993 NO<sub>x</sub> Substitution Guidance.* The

comment focuses exclusively upon the phrase “result in a reduction in ozone concentrations at least equivalent to that which would result from the amount of VOC emission reductions required \* \* \*” to the exclusion of remaining language of section 182(c)(2)(C). The comment would completely “write-out” of the statutory text provisions such as “in lieu of the demonstration required under subparagraph (B), a demonstration to the satisfaction of the Administrator \* \* \*” and “in accord with such guidance [the substitution guidance required by section 182(c)(2)(C)] a lesser percentage of VOCs may be accepted as an adequate demonstration \* \* \*” (emphases added). In the plain text of the statute Congress explicitly and affirmatively granted EPA broad discretion as to what sort of demonstration is acceptable on this technical and science-driven issue. *See, e.g., Sierra Club v. EPA*, 294 F.3d at 162–163.

In addition, EPA still stands behind its legal rationale underlying the interpretation of “equivalency” that appears in our December 1993 NO<sub>x</sub> Substitution Guidance in section 4. In that guidance, the basis for equivalency is the ability of a given control strategy (*i.e.*, any particular mix of NO<sub>x</sub> and VOC emission reductions) to effect attainment of the ozone NAAQS by the designated attainment year (December 1993 NO<sub>x</sub> Substitution Guidance, p. 2). Further, as we previously set out, the NO<sub>x</sub> emission reductions credited toward ROP may be limited to the amount of NO<sub>x</sub> reductions required in the demonstration of attainment.

In allowing a combination of NO<sub>x</sub> and VOC controls or the substitution of NO<sub>x</sub> emissions reductions for VOC emissions reductions, section 182(c)(2)(C) of the statute states that the resulting reductions “in ozone concentrations” must be “at least equivalent” to that which would result from the 3 percent VOC reductions required as a demonstration of ROP under section

182(c)(2)(B).<sup>12</sup> The second sentence of section 182(c)(2)(C) requires EPA to issue guidance “concerning the conditions under which NO<sub>x</sub> control may be substituted for [or combined with] VOC control.” In particular, the Agency has been authorized by Congress to address in the guidance the appropriate amounts of VOC control and NO<sub>x</sub> control needed, in combination, “in order to maximize the reduction in ozone air pollution.” Further, the Act explicitly provides that the guidance may permit ROP demonstrations that allow a lower percentage of VOC emission reductions as long as compensating NO<sub>x</sub> reductions are achieved. In light of the language in the Act evidencing Congressional intent under this subsection to maximize the opportunity for ozone reductions, EPA believes that section 182(c)(2)(C) confers on the Agency the discretion to select, for purposes of determining “at least equivalent” reductions, a percentage of NO<sub>x</sub> emission reductions that is reasonably calculated to achieve the statutorily required ozone reduction and attainment progress goals intended by Congress. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984), *Sierra Club v. EPA*, 294 F.3d at 162–163.

As we have previously stated, when we determine that a demonstration of attainment is approvable, we are making an implicit corollary conclusion that the mix of VOC and/or NO<sub>x</sub> control measures included in the area's demonstration of attainment is sufficient for timely attainment.

As additional evidence that Congress was concerned with getting more than minimal reductions in ozone concentrations through substitution, EPA notes that the ROP demonstration described in section 182(c)(2)(B) focuses on reductions of a specified quantity of VOC emissions per year (similarly, the 15 percent ROP reductions required for

<sup>12</sup> Equivalent means: “equal in value, force, amount, effect or significance,” or “corresponding in effect or function; nearly equal; virtually identical.” *Black's Law Dictionary*, Eighth Edition, 2004. (emphasis added).

moderate ozone nonattainment areas focuses on reductions of that specific quantity of VOC emissions per year). By contrast, the alternative ROP demonstration in section 182(c)(2)(C) allows flexible VOC/NO<sub>x</sub> emission reduction strategies, but only so long as the overall quantitative reduction in ozone concentrations is equivalent to the amount which, for serious ozone nonattainment areas, Congress initially determined must be met (*i.e.*, the ozone concentrations achieved by VOC reductions of 3 percent per year) in order to ensure expeditious progress towards attainment. In this regard the House Committee Report states: "NO<sub>x</sub> reductions may not be substituted for VOC reductions in a manner that delays attainment of the ozone standard or that results in lesser annual reductions in ozone concentration than provided for in the demonstration of attainment." H.R. Rep. No. 490, 101st Cong., 2d Sess. 239 (1990).

Additional support for EPA's view that our December 1993 NO<sub>x</sub> Substitution Guidance's focus on the NO<sub>x</sub> and VOC reductions necessary for attainment is consistent with Congressional intent is found in section 182(g), which waives the requirement for a milestone demonstration for a milestone that coincides with an area's attainment date for an area that attains the standard by that date.

EPA disagrees with the comment that EPA's "Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration" (corrected version as of 2/18/94) specifies a different test, that is, a modeled showing of equivalency, than does EPA's December 15, 1993 NO<sub>x</sub> Substitution Guidance. In section 4.1 of the "Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration," EPA restated the equivalency test set forth in sections 2 and 3 of our December 1993 NO<sub>x</sub> Substitution Guidance.

With regard to the photochemical grid modeling, section 4.1 of the "Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration" reads:

Section 182(c)(2)(C) states that actual NO<sub>x</sub> emission reductions which occur after 1990 can be used to meet post-1996 emission reduction requirements, provided that such reductions meet the criteria outlined in EPA's December 15, 1993 NO<sub>x</sub> Substitution Guidance. The condition for meeting the rate-of-progress requirement is that the sum of all creditable VOC and NO<sub>x</sub> emission reductions must equal 3 percent per year averaged over each applicable milestone period. The percent VOC reduction is determined from the VOC rate-of-progress inventory and the percent NO<sub>x</sub> reduction is determined from the NO<sub>x</sub> rate-of-progress inventory. In addition, the overall VOC and NO<sub>x</sub>

reductions must be consistent with the area's modeled attainment demonstration. In other words, the NO<sub>x</sub> emission reductions creditable toward the rate-of-progress plan cannot be greater than the cumulative reductions dictated by the modeled attainment demonstration.

This portion of the 1994 guidance merely summarizes, and does not alter, the guidance provided in our December 1993 NO<sub>x</sub> Substitution Guidance. With regard to the photochemical grid modeling, section 2 of our December 1993 NO<sub>x</sub> Substitution Guidance specifies that the provision for NO<sub>x</sub> substitution recognizes that a VOC-only control pathway may not be the most effective approach for effecting attainment in all areas. Consequently, NO<sub>x</sub> reductions are placed on a near equal footing with VOC through substitution. The December 1993 NO<sub>x</sub> Substitution Guidance establishes two conditions pursuant to both the substitution and RFP provisions in the Act. The first condition requires that control strategies incorporating NO<sub>x</sub> emission reduction measures must demonstrate that the ozone NAAQS will be attained within time periods mandated by the Act. This condition reflects the Title I provision for photochemical grid modeling demonstrations (section 182(c)). The second condition, addressed in section 3 of the guidance, maintains the requirement for periodic emission reductions in order to realize progress toward attainment. Flexibility is introduced by allowing VOC and NO<sub>x</sub> reductions rather than VOC reductions alone. A third condition exists in which the periodic emission reductions must be consistent with the modeled demonstration of attainment.

In both cases, the guidance refers to the photochemical grid modeling that is necessary for the modeled demonstration of attainment and that establishes the NO<sub>x</sub>/VOC/ozone relationship at the attainment date. Neither our December 1993 NO<sub>x</sub> Substitution Guidance nor the "Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration" require a modeled demonstration of equivalence for an interim period for the reasons discussed previously.

*The 1999–2005 ROP Plans Provide for Any Required NO<sub>x</sub> and VOC Reductions by 2002 in a Timely Manner.* Section 182(c)(2)(C) of the Act states that "[t]he revision may contain, in lieu of the demonstration required under subparagraph (B), a demonstration to the satisfaction of the Administrator that the applicable implementation plan, as revised, provides for reductions of VOCs

and [NO<sub>x</sub>] (calculated according to the creditability provisions of subsection (b)(1)(C) and (D) of this section) \* \* \* that would result in reduction in ozone concentrations equivalent to that which would result from the amount of VOC reductions required under subparagraph (B)." The salient provisions of the demonstration of "subparagraph B", that is, section 182(c)(2)(B) of the Act, are: (1) The requirement to reduce baseline emissions by an average of 3 percent per year averaged over each three-year period after 1996, and (2) the reductions creditable towards ROP must meet the same creditability requirements as for the 15 percent reduction by 1996 requirement of section 182(b)(1)(A).

Our post-1996 guidance implements section 182(c)(2)(B) by requiring that the area demonstrate that milestone year emissions with the ROP control strategies will be less than the target level of emissions.<sup>13</sup> Because the target level is determined by reducing 1990 baseline emissions and because the future year projected inventory with all the ROP control strategies must reflect estimated growth in emissions activities, this demonstration accounts for growth between 1990 and the milestone year. Section 182(c)(2)(B) does not contain the phrase "accounting for growth after 1990" which is found in section 182(b)(1)(A). Nevertheless, EPA has inferred that the 3 percent reduction requirement of section 182(c)(2)(B) must be net of growth. EPA's interpretation is sound when considering relevant provisions of the statute as a whole because: (1) Section 182(b)(1)(A) contains a statement, "accounting for growth after 1990," of Congressional intent regarding ROP and growth under section 182; and (2) the last sentence of section 182(c)(2)(B) allows creditable VOC reductions between 1990 and 1996 that are in excess of those needed to meet the 15 percent reduction by 1996 requirement to count towards post-1996 ROP. Reductions under section 182(b)(1)(A) are excess only to the extent they are net of growth.

EPA believes that in section 182(c)(2)(C) Congress granted EPA even greater discretion as to the composition of the demonstration required by section 182(c)(2)(C). As noted previously in other portions of this response, section 182(c)(2)(C) allows a post-1996 ROP demonstration "in lieu of" that required under section 182(c)(2)(B). This demonstration must be "to the

<sup>13</sup> "Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration" (Corrected version of February 18, 1994).

satisfaction of EPA,” and allows that a “lesser percentage of VOCs may be accepted” in accordance with the guidance that the EPA was required to issue.

Thus, EPA was granted discretion regarding the content of the ROP demonstration allowable under section 182(c)(2)(C). For instance, section 182(c)(2)(C) does not use the phrase “accounting for growth after 1990.” However, EPA’s December 1993 NO<sub>x</sub> Substitution Guidance is based upon the use of the future inventories used in the photochemical grid modeling to account for growth in emissions related activities, and thus reflect emissions reductions that are net of growth. Furthermore, section 182(c)(2)(C) does not require that the plan providing for reductions of VOC and NO<sub>x</sub> provide for reductions in “baseline emissions.” EPA’s guidance for demonstrations of ROP under section 182(c)(2)(C) reflects many of the same features in our guidance implementing section 182(c)(2)(B): A ROP plan calculates target levels by reducing 1990 baseline emissions by a set percentage for each ROP period; and, EPA chose to require that NO<sub>x</sub> substitution be net of growth.<sup>14</sup> EPA believes that these features are reasonable in order to address a scenario where the demonstration of post-1996 ROP for an area for one ROP milestone year, say 1999, relies a mixture of VOC and NO<sub>x</sub> control and then relies upon all VOC reductions for the subsequent 2002 milestone. EPA believes that the claim that the Act requires some non-zero percentage of reductions in VOC baseline emissions in ROP demonstrations pursuant to section 182(c)(2)(C) or provides, that such a percentage reduction net of growth requirements required by section 182(c)(2)(B) is not supported by the plain text of the statute. The Act allows NO<sub>x</sub> substitution with lesser VOC reductions and doesn’t prohibit 9 percent NO<sub>x</sub> substitution and zero percent VOC. Therefore, we believe that we can approve a ROP plan which provides for 9 percent NO<sub>x</sub> reductions and no specific level of VOC reductions. EPA’s interpretation is reasonable given the broad discretion afforded by section 182(c)(2)(C) on these matters.

EPA’s December 1993 NO<sub>x</sub> Substitution Guidance focuses on progress towards reducing the levels of NO<sub>x</sub> and VOC needed for attainment. In that guidance, EPA caps the NO<sub>x</sub>

emission reductions to be consistent with those in the modeled demonstration of attainment.

For the reasons discussed previously in this response, EPA believes that the Act allows approval of a ROP Plan even when a ROP milestone is met with out any reduction in VOC baseline emissions for the milestone year. The Act allows EPA to accept a “lesser percentage of VOC.” EPA believes that “lesser percentage” can mean, consistent with the plain language of the Act, any percentage less than the average 3 percent per year prescribed by section 182(c)(2)(B), including zero percent. EPA previously has approved ROP plans under section 182(c)(2) that relied solely upon NO<sub>x</sub> reductions without regard to VOC reductions. See 69 FR 42880, July 19, 2004 (proposed at 69 FR 25348, May 6, 2004) and 64 FR 13348, March 18, 1999 (proposed by 63 FR 45172, August 25, 1998).

As to the growth in VOC emissions “offsetting” the 9 percent NO<sub>x</sub> reductions, the comment fails to realize that a ROP plan meeting the 9 percent reduction requirement for some milestone year, say 1999, prior to the attainment date, say 2005, using only VOC reductions, would not be required to offset any growth in NO<sub>x</sub> emissions. EPA believes that such a ROP plan would meet the requirements of section 182(c)(2)(B), even if the area needed significant NO<sub>x</sub> reductions for attainment, as long as all the reductions were creditable and the ROP plan otherwise met the Act and EPA’s guidance. Nothing in section 182(c)(2)(C) requires the converse—that the ROP plan must ensure that a 9 percent NO<sub>x</sub> reduction is not “offset” by changes in VOC emissions.

It is worthwhile to note that the 1999–2005 ROP plans in the February 2004 SIP revisions *do* in fact provide for a reduction in VOC emissions. The 1999–2005 ROP plans in the February 2004 SIP revisions project that controlled VOC emissions by November 15, 2002 will be 372.3 TPD. This is significantly less than both the 1990 VOC ROP Inventory of 578.7 TPD and the 1990 baseline emissions, reduced by reductions from noncreditable measures (the “Adjusted 1990 Base Year Inventory for 2002”), of 420.5 TPD. The 1999–2005 ROP plans in the February 2004 SIP revisions project that controlled VOC emissions by November 15, 2005 will be 331.6 TPD. This is significantly less than the 1990 baseline emissions, reduced by reductions from noncreditable measures (the “Adjusted 1990 Base Year Inventory for 2005”), of

412.1 TPD.<sup>15</sup> Therefore, the 1999–2005 ROP plans do provide for VOC reductions by the 2002 and 2005 milestone years, and, provide for a net reduction in VOC emissions by these dates. However, EPA has concluded that the States’ 1999–2005 ROP plans meet section 182(c)(2) of the Act because the States’ 1999–2005 ROP plans demonstrate a 9 percent reduction in baseline NO<sub>x</sub> emissions by 2002 and a further 9 percent reduction in baseline NO<sub>x</sub> emissions by 2005 and can be approved based upon these reductions in baseline NO<sub>x</sub> emissions.

EPA has concluded that the States’ NO<sub>x</sub> measures are sufficient to achieve a 9 percent reduction in NO<sub>x</sub> baseline emissions by November 15, 2002. Because ROP is demonstrated through the use of a 9 percent reduction in NO<sub>x</sub> emissions by 2002, EPA believes that there is no requirement for the plan to have a target level of VOC emissions for the 2002 milestone year for the reasons discussed previously in this response. Therefore, EPA believes that the plan *cannot* be deficient for not achieving any set reduction in VOC baseline emissions (net of growth) by November 15, 2002—no such requirement exists.

#### *B. Comment on the Transportation Demand Model (TDM) Used in the Plans*

*Comment:* We received a comment asserting that the TDM used to project the mobile source emissions does not properly predict traffic volumes in the Washington area on roadways. The comment alleges that the inaccuracies are significant enough that the results cannot form a basis for predicting future motor vehicle emissions or the emission cuts needed to meet ROP targets, or to show that the SIP contains sufficient transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in the nonattainment area.

*Response:* EPA disagrees with this comment. EPA’s conformity regulation requires that for serious, severe, and extreme ozone nonattainment areas (if their metropolitan planning area contains an urbanized area population over 200,000), the estimates of regional transportation-related emissions, which support conformity determinations, must be made at a minimum using network-based TDMs according to

<sup>15</sup> Table IX. A–1 “Demonstration of ROP” and 2002 and Table V. D–3 “2005 ROP Target Levels” of “Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area,” dated January 5, 2005.

<sup>14</sup> Section 1.1 of “Guidance on the Post ‘96 Rate-of-Progress Plan (RPP) and Attainment Demonstration” (Corrected version of February 18, 1994).

procedures and methods that are available and in practice, and which are supported by current and available documentation. 40 CFR 93.122(b). These network-based travel models must at a minimum satisfy the certain requirements, including a requirement that network-based travel models must be validated against observed counts (peak- and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented. 40 CFR 93.122(b)(1)(i); 62 FR 43793, August 15, 1997.

Even though this regulation applies to network-based travel models used for conformity determinations, it represents EPA's determination as to acceptable practices and was issued through notice and comment rulemaking. The conformity regulation's adequacy provisions (40 CFR 93.118(e)) require that MVEBs in control strategy SIP revisions be the product of interagency consultation between air quality planning agencies and transportation planning agencies. Therefore, EPA believes that it is reasonable to assume that the transportation planning agencies will want the MVEBs to be developed using the same network models currently in use at the time the MVEBs are developed. This is indeed the case for the February 2004 SIP revisions. The TDM model used for development of the February 2004 SIP revisions was based upon the execution of the COG/TPB's Version 2.1/TP+ travel forecasting process.<sup>16</sup> See page B-10 of Appendix B to the February 2004 SIP revisions.<sup>17</sup>

EPA believes that only one of the six modeling criteria of section 93.122 of the conformity rule is implicated by the comment. This criterion is that validation must be against observed counts for base year not more than 10 years prior to conformity determination. The comment does not allege that the validation of the model was made against data that was more than 10 years old. Rather, the commenter alleges the model results are not "reasonable."

EPA disagrees with this comment, and, we specifically disagree with certain factual allegations made therein. For instance, on page 15 of the

supporting documentation to the comment, the commenter claimed that "the [Transportation Research Board (TRB) review] committee found that 8 of 33 facility type traffic volume classes had percent Root Mean Square Error (RMSE) values that were unacceptable." The TRB review committee actually stated that "for 8 of 33 facility type traffic volume classes, RMSE values were marginally acceptable \* \* \*"<sup>18</sup> EPA concludes that the claim that the review committee found the model results unacceptable is not borne out by the factual record.

The supporting documentation for this comment asserted that the TDMs on average underestimated traffic on the 20 highest volume freeway links by 26 percent, and on the 10 highest volume arterials by 41 percent as demonstrated by "the comparison of simulated to observed traffic data for over 11,000 links grouped by traffic volume class and facility type." The same claim was made to the TPB during the development of the FY 2005–2010 Transportation Improvement Program for the Washington Metropolitan Region. The TPB responded by concluding that the analysis in the comment did not support the conclusion. Specifically the TPB stated: (1) That the commenter did not understand the TPB's data upon which the conclusion was made; (2) that there are many factors which lead to differences between observed data and model outputs; (3) that the RMSE for the model declines with volume, i.e., there is less error associated with higher volumes; (4) that the "20 highest freeway links" actually represent only five roadway segments in the region because freeway links are directionally coded and these links are split between interchanges resulting in four links per these five highway segment; (5) that the comment focuses only on a few values at the high-end of the volumes ranges, but draws the mistaken conclusion that the model underestimates volumes for the regional highway network links with the highest "observed" volumes; (6) that the "observed data" for the 11,000 link segments of the regional highway network, do not represent actual traffic counts but rather represent factored *estimates* of average daily traffic volumes based on continuous traffic counts taken at a very limited number of permanent counting stations, and; (7)

that "observed" volumes on the "20 highest freeway links" are either factored *estimates* of average daily or are "uncounted manual" *estimates*.<sup>19</sup>

EPA notes that the supporting documentation cited by the comment is for the COG/TPB Travel Forecasting Model, Version 2.1D Draft #50. The TDM model actually used for development of the February 2004 SIP revisions actually was the COG/TPB's Version 2.1/TP+ travel forecasting process. See Appendix B to the February 2004 SIP revisions, p. B-10. Version 2.1/TP+ model was validated using year 2000 data. See "COG/TPB Travel Forecasting Model Version 2.1/TP+, Release C Calibration Report," Metropolitan Washington Council of Governments, December 23, 2002, p. 9–1. The conclusion in the validation report was that VMT is shown to be overestimated by about 8 percent, screenlines estimates are high by 17 percent overall, and the RMSE is about 51 percent, but the model performs well in other capacities (transit estimation, restrained speeds, trip distribution pattern. COG/TPB's Version 2.1 travel forecasting process represented the continuation of a multi-year models development plan that was formulated in FY-93 in response to the Federal Clean Air Act Amendments of 1990 and the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991. *Id.*, p. 1–1. For instance, the validation report states that the ratio of estimated to observed transit trips was 0.95 which means that overall the TDM predictions were only 5 percent less than the observed values. For transit trips, the ratio was 0.93 or 7 percent less. The overall ratio of estimated to observed VMT for the entire model domain was 1.08 which is equivalent to the TDM over-predicting VMT by 8 percent. For the Washington area, the TDM over predicted VMT by 9 percent overall. Overall, the Version 2.1/TP+ TDM model used for the February 2004 SIP revisions over predicted VMT by facility type by 13 percent. See "COG/TPB Travel Forecasting Model Version 2.1/TP+, Release C Calibration Report," Metropolitan Washington Council of Governments, December 23, 2002, Ex. 9–1 through 9–12.

While the Version 2.1/TP+ TDM model under-predicts VMT on some highway segments it over predicts on most others. EPA believes that the claim made in the comment that the TDM

<sup>16</sup> COG is the Metropolitan Washington Council of Governments. The TPB is the National Capital Region Transportation Planning Board.

<sup>17</sup> The "Version 2.1/TP+" model is also called Version 2.1/TP+, Release C in "COG/TPB Travel Forecasting Model Version 2.1/TP+, Release C Calibration Report," Metropolitan Washington Council of Governments, December 23, 2002.

<sup>18</sup> Letter from David J. Forkenbrock, Chair, Transportation Research Board's Committee for Review of Travel Demand Modeling by the Metropolitan Washington Council of Governments to Peter Shapiro, Chairman, National Capital region Transportation Planning Board, dated, September 3, 2003.

<sup>19</sup> "FY 2005–2010 Transportation Improvement Program for the Washington Metropolitan Region National Capital Region," Transportation Planning Board and the Metropolitan Washington Council of Governments, dated November 17, 2004, pp. 260 to 262.

systematically *underestimates traffic* and therefore that the SIP revisions “necessarily understate emission reductions needed” to achieve required rates of progress, attainment or the VMT offset requirements is not supported by the facts. In actuality, the model generally *overestimated* VMT, as we have noted.

In a letter to the TPB, the TRB noted that in the four decades of experience with the use of travel demand models in transportation planning there are few universally accepted guidelines or standards of practice for these models and their application, and any assessment of these models, their performance, and the current state of transportation demand modeling practices relies primarily upon professional experience and judgement.<sup>20</sup> Given that TDMs are constantly undergoing refinement, and that models can always be improved, EPA believes we need not hold up the approval process until a hypothetical “best model” is eventually, if ever, developed. For these reasons, EPA disagrees with the comment. We conclude that the TDM model used in the SIP revisions is acceptable and that the SIP revisions can be approved.

### C. Comment on the VMT Offset SIP

**Comment:** We received a comment asserting that the SIP revisions are deficient because they do not contain sufficient TCMs to offset growth in emissions from growth in VMT or in trip numbers. The comment alleges that the Act requires the SIP to offset any growth in emissions due to growth in VMT or in trip numbers be offset rather than a showing that overall motor vehicle emissions are expected to decline. The comment implies that the VMT offset provisions apply to both VOC and NO<sub>x</sub> emissions.

**Response:** *The VMT Offset Provision Applies Only to VOC Increases.* As an initial matter EPA believes that the VMT offset provision applies only to increases of VOC emissions. As explicitly stated in the proposed rulemaking for the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 FR 13498 at 13521, Apr. 16, 1992, EPA has consistently interpreted the VMT offset requirements of the Act, set forth in section 182, to apply only to VOC emissions. *See, e.g.,* 60 FR 38718 at 38721, July 28, 1995; 60 FR 48896 at 48898–48899, September 21, 1995. As

we explain, EPA disagrees with the commenter's assertion that the VMT offset SIP revisions are deficient because these revisions do not address growth in NO<sub>x</sub> emissions.

Section 182(d)(1)(A) of the Act provides that “any growth in emissions” from growth in VMT must be offset. EPA believes that in the plain language of the Act Congress intended that this offset requirement be limited to VOC emissions. First, section 182(d)(1)(A)'s requirement that a State's adopted TCMs comply with the “periodic emissions reduction requirements” of subsections 182(b) and (c) the Act, indicates that the VMT offset SIP requirement is VOC-specific, and NO<sub>x</sub> emissions are not required to be offset.

Section 182(c)(2)(B), which requires reasonable further progress demonstrations for serious ozone nonattainment areas, provides that such demonstrations will result in VOC emissions reductions; thus, the only “periodic emissions reduction requirement” of section 182(c)(2)(B) is VOC-specific. In fact, it is only in section 182(c)(2)(C)—a provision not referenced in section 182(d)(1)(A)—that Congress provided States the authority to submit demonstrations providing for reductions of VOC and NO<sub>x</sub> emissions in lieu of the SIP otherwise required by section 182(c)(2)(B).

Moreover, the 15 percent periodic reduction requirement of section 182(b)(1)(A)(i) applies only to VOC emissions, while only the separate “annual” reduction requirement applies to both VOC and NO<sub>x</sub> emissions. We believe that Congress did not intend the terms “periodic emissions reductions” and “annual emissions reductions” to be synonymous, and that the former does not include the latter. In section 176(c)(3)(A)(iii) of the Act, Congress required that conformity SIPs “contribute to annual emissions reductions” consistent with section 182(b)(1) (and thus achieve NO<sub>x</sub> emissions reductions), but did not cross reference the 15 percent periodic reduction requirement. Conversely, section 182(d)(1)(A) refers to the periodic emissions reduction requirements of the Act, but does not refer to annual emissions reduction requirements that require NO<sub>x</sub> reductions. Consequently, we interpret the requirement that VMT Offset SIPs comply with periodic emissions reduction requirements of the Act to mean that only VOC emissions are subject to section 182(d)(1)(A) in severe ozone nonattainment areas.

Finally, we note that where Congress intended section 182 ozone SIP requirements to apply to NO<sub>x</sub> as well as

VOC emissions, it specifically extended applicability to NO<sub>x</sub>. Thus, references to ozone or emissions in general in section 182 do not on their own implicate NO<sub>x</sub>. For example, in section 182(a)(2)(C), the Act requires States to issue preconstruction permits for new or modified stationary sources “with respect to ozone.” Congress clearly did not believe this reference to ozone alone was sufficient to subject NO<sub>x</sub> emissions to the permitting requirement, since it was necessary to enact section 182(f)(1) of the Act, which specifically extends the permitting requirement to major stationary sources of NO<sub>x</sub>. Since section 182(d)(1)(A) does not specifically identify NO<sub>x</sub> emissions requirements in addition to the VOC emissions requirements identified in the provision, EPA does not believe States are required to offset NO<sub>x</sub> emissions from VMT growth in their section 182(d)(1)(A) SIPs.

*The VMT Offset Provision in Section 182 Does Not Apply as Claimed in Comments.* EPA has consistently explained that the purpose of the VMT offset requirement is to maintain motor vehicle VOC emissions beneath a “ceiling level” established through modeling of mandated transportation-related controls, so that VOC emission reductions resulting from such measures are not cancelled out by growth in motor vehicle emissions. *See, e.g.,* 57 FR 13498 at 13521–13523, April 16, 1992; 61 FR 51214, October 1, 1996; 61 FR 53624, October 15, 1996; and 66 FR 57247 at 57247–57248, November 14, 2001.

The VMT offset provision of section 182(d)(1) of the Act requires that states submit by November 15, 1992 specific enforceable TCMs and transportation control strategies to offset any growth in emissions from growth in VMT or number of vehicle trips and to attain reductions in motor vehicle emissions sufficient, in combination with other measures, to allow total emissions in the severe nonattainment area to comply with the ROP and attainment requirements of the Act.

As discussed in the General Preamble, EPA believes that section 182(d)(1)(A) of the Act requires the State to “offset any growth in emissions” from growth in VMT, but not, as the comment suggests, all emissions resulting from VMT growth. *See* 57 FR at 13522–13523. As we explained in response to similar comments objecting to our application of the General Preamble's approach when approving other SIPs, the purpose is to prevent a growth in motor vehicle emissions from canceling out the emission reduction benefits of the federally mandated programs in the Act.

<sup>20</sup> Letter from David J. Forckenbrock, to Christopher Zimmerman, Chairman, National Capital Region Transportation Planning Board, dated, May 10, 2004.

See 60 FR at 48898; 60 FR at 38720–38721. The baseline for emissions is the 1990 level of vehicle emissions and the subsequent reductions in emission levels required to reach attainment with the NAAQS for ozone. Thus, the anticipated benefits from the mandated measures such as the Federal motor vehicle pollution control program, lower Reid vapor pressure, enhanced inspection and maintenance and all other motor vehicle emission control programs are included in the ceiling line calculations used by the States in the VMT Offset SIP. Chapter 10 of the February 2004 SIP revisions, shows how emissions will decline substantially and will not begin to rise over the ceiling established by the mandated controls. Emission reductions are expected every year through the year 2005.

Our approach is consistent with the purposes Congress had in enacting section 182(d)(1)(A). The ceiling line level decreases from year to year as the state implements various control measures, and the decreasing ceiling line prevents an upturn in mobile source emissions. Dramatic increases in VMT that could wipe out the benefits of motor vehicle emission reduction measures will not be allowed and will trigger the required implementation of TCMs. This prevents mere preservation of the status quo, and ensures emissions reductions despite an increase in VMT or number of vehicle trips. To prevent future growth changes from adversely impacting emissions from motor vehicles, states are required under section 182(c)(5) of the Act to track actual VMT and to periodically demonstrate that the actual VMT is equal to or less than the projected VMT, with TCMs required to offset VMT that is above the projected levels. Under the commenter's approach to section 182(d)(1)(A), the States would have to offset VMT growth even while vehicle emissions are declining. Although the statutory language could arguably be read to require offsetting any VMT growth, EPA believes that the language can also be reasonably and appropriately read so that only actual emissions increases resulting from VMT growth need to be offset. The statute by its own terms requires offsetting of "any growth in emissions from growth in [VMT]." 42 U.S.C. 7511a(d)(1). EPA has reasonably and consistently interpreted the VMT offset provision of the Act to require that states adopt, and submit to EPA for approval into their SIPs, TCMs or transportation control strategies sufficient to at least offset "growth in [VMT] or numbers of vehicle trips," but only if the VMT growth would result in

actual emissions increases from mobile sources. Our consistent historic interpretation of the language of section 182(d)(1)(A) is entitled to deference. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984). See also *U.S. v. Mead*, 533 U.S. 218, 227–35 (2001).

Given the susceptibility of the statutory language to these two alternative interpretations, EPA believes it is the Agency's role in administering the statute to take the interpretation most reasonable in light of the practical implications of such interpretation, and the purposes and intent of the statutory scheme as a whole. In the context of the intricate planning requirements Congress established in title I to bring areas towards attainment of the ozone standard, and in light of the absence of any discussion of this aspect of the VMT Offset provision by the Congress as a whole (either in floor debate or in the Conference Report), EPA has consistently concluded that the appropriate interpretation of section 182(d)(1)(A) requires offsetting VMT growth only when such growth would result in actual emissions increases.<sup>21</sup>

When growth in VMT and vehicle trips would otherwise cause an upturn in emissions from motor vehicles, this upturn must be prevented. The emissions level at the point of upturn becomes a ceiling on motor vehicle emissions. This requirement applies to projected emissions in the years between the submission of the SIP revision and the attainment demonstrations. The ceiling level is defined, therefore, up to the point of upturn, as motor vehicle emissions that would occur in the ozone season of that year, with VMT growth, if all measures for that area in that year were implemented by the Act. When this curve begins to turn up due to growth in VMT or vehicle trips, the ceiling becomes a fixed value. The ceiling line would include the effects of federal measures such as new motor vehicle standards, phase II Reid vapor pressure (RVP) controls, and reformulated gasoline, as well as the statutorily-mandated SIP requirements. For the reasons outlined in the February 9, 2005 NPR (70 FR 2085), EPA believes that the February 2004 SIP revisions fulfill the first element.

<sup>21</sup> As noted previously, EPA has applied this interpretation since the enactment of the 1990 amendments to the Clean Air Act adding section 182(d)(1)(A), and in response to adverse comments submitted on other rulemaking actions. See, e.g., 60 FR 48898 (final approval of Illinois' SIP) and 60 FR 39720–39721 (final approval of Indiana's SIP); 66 FR 57247 at 57247–57248, November 14, 2001 (final approval of Texas SIP).

Under EPA's approach, the second element, which requires the VMT offset SIP to comply with the 15 percent ROP requirement of the Act, was due on November 15, 1993 for areas initially classified as severe nonattainment. November 15, 1993 is the same date on which the 15 percent ROP SIP itself was due under section 182(b)(1) of the Act. For areas initially classified as severe nonattainment, EPA believes it was reasonable to extend the deadline for this VMT offset element from November 15, 1992 to the date on which the entire 15 percent SIP was due, as this allows states to develop the comprehensive strategy to address the 15 percent requirement and assure that the TCMs elements required under section 182(d)(1)(A) are consistent with the remainder of the 15 percent demonstration. Indeed, EPA believes that only upon submittal of the broader 15 percent plan can a state have had the necessary opportunity to coordinate its VMT strategy with its 15 percent plan. In the case of the Washington area, the second element has been fulfilled because the 15 percent ROP plans were approved long before the area was reclassified to severe nonattainment. See 64 FR 42629, August 5, 1999; 65 FR 44686, July 19, 2000; and, 65 FR 59727, October 6, 2000.

The third element, which requires the VMT offset SIP to comply with the post-1996 ROP and attainment requirements of the Act, was due on November 15, 1994, the statutory deadline for those broader submissions. For areas initially classified as severe nonattainment, EPA believes it is reasonable to similarly extend the deadline for this VMT element to the date on which the post-1996 ROP and attainment SIPs are due for the same reason it is reasonable to extend the deadline for the second element.<sup>22</sup> First, it is arguably impossible for a state to make the showing required by section 182(d)(1)(A) for the third element until the broader demonstrations have been developed by the State. Moreover, allowing states to develop the comprehensive strategy to address post-1996 ROP plans and attainment by providing a fuller opportunity to assure that the TCMs elements comply with the broader ROP plans and attainment demonstrations, will result in a better program for reducing emissions in the long term. In the case of the Washington area, EPA believes the third element has

<sup>22</sup> In the case of the Washington area, the post-1999 portions of the post-1996 ROP plan required under section 182(c)(2) were in fact due on the same as the VMT offset SIP. See 68 FR 3410, January 24, 2003.

been fulfilled for the reasons outlined in the February 9, 2005 NPR (70 FR 2085) and this document because EPA is approving the 1996–1999 and 1999–2005 ROP plans and the modeled demonstration of attainment. EPA thus finds that the SIPs contain all measures necessary to provide for timely attainment and ROP, and therefore that no additional TCMs will be necessary to meet those requirements.

#### *D. Comment on the Contingency Measures Plans*

*Comment 1:* We received a comment asserting that EPA cannot approve the contingency measures which were identified in the SIP revisions to address the Washington area's the failure to attain by November 15, 1999. The comment claims that, because these measures in the plan required further action by the States, these contingency measures do not meet the CAA's requirement that the measures take effect without further action by the State or EPA after the failure to attain. The comment also claims the contingency measures do not meet EPA's own guidance which requires contingency measures to achieve reductions no later than the year after the one in which the failure is identified because these contingency measures identified by the SIP revision were not implemented until 5 to 6 years after the failure to attain.

*Response 1:* EPA disagrees with the comment that the contingency plan for the failure of the Washington serious ozone nonattainment area to attain by November 15, 1999 cannot be approved. The comment does not address the factual situation for the Washington area where the SIP did not contain a contingency measures plan consisting of fully adopted measures until the submission of the February 2004 SIP revisions and submission of the various adopted rules identified as the contingency measures that is the contingency measures implemented in response to the failure of the Washington area to attain the 1-hour ozone NAAQS by November 15, 1999.

Prior to our January 12, 2004 NPR (70 FR 2085), EPA had recognized that the SIP of each of the Washington area States did not contain contingency measures to address the failure to attain (FTA) the ozone NAAQS by November 15, 1999 (the "contingency measures for 1999 FTA"). In the January 12, 2004 NPR (70 FR at 2087), we provided a brief history of the severe area SIP revisions by noting that EPA had previously conditionally approved the post-1996 ROP plans and those versions of the attainment plans submitted

during 1998 and 2000, contingent upon the States fulfilling commitments they made to submit the additional elements required of SIPs for a severe area within one year. One of the conditions for approval in the April 17, 2003 final conditional approval (68 FR 19106) was that the States had to revise the Washington area severe attainment plan to include a contingency plan containing those adopted measures that qualify as contingency measures to be implemented for the failure of the Washington area to attain the one-hour ozone standard for serious areas by November 15, 1999; that is, the States had to submit SIP revisions to add the contingency measures for 1999 FTA. 68 FR at 19106. In the NPR for the April 17, 2003 final conditional approval, EPA noted that the States in the Washington area had committed to submit to the EPA those measures that qualify as contingency measures due to the failure of the Washington area to attain the ozone standard for serious areas by November 15, 1999. 68 FR at 5248, February 3, 2003. In the February 3, 2003 NPR, EPA also recounted that our January 3, 2001 approval (66 FR 586) of the post-1996 ROP plans and those versions of the attainment plans submitted during 1998 and 2000 had been vacated by the Court of Appeals. The Court of Appeals determined that EPA lacked the authority to approve attainment plan and ROP SIPs without contingency measures. *Sierra Club v. Whitman*, 294 F.3d at 164. EPA had noted that the post-1996 ROP plans and those versions of the attainment plans submitted during 1998 and 2000 covered by the January 3, 2001 final rule "[did] not specify any specific measures as contingency measures." 66 FR at 615–616, January 3, 2001. EPA also agreed with comment that the lawn/garden measure identified in the contingency plan as a contingency measure was insufficient. Therefore, EPA believes that prior to submittal of the February 2004 SIP revisions and the SIP revisions containing the adopted rules for the contingency measures the Washington area States had not submitted the necessary SIP revisions for the contingency measures for 1999 FTA.

EPA has interpreted the requirement that contingency measures must "take effect without further action by the State or the Administrator" to mean that no further rulemaking activities, such as public hearings or legislative review, by the State or the EPA should be needed to implement the contingency measures. See 57 FR at 13512, April 16, 1992; section 9.0 of "Guidance for Growth

Factors, Projections, and Control Strategies for the 15 Percent Rate-of-Progress Plans," (EPA-452/R-93-002, March 1993). EPA has required that contingency measures must be fully adopted rules or measures but do not have to be implemented unless and until they are triggered by a failure to either meet a milestone or attain the NAAQS. See section 5.6 of "Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration" (Corrected version of February 18, 1994).

The States did not have adopted contingency measures to implement without further action by the States on the effective date of EPA's determination that the Washington area failed to attain by 1999. If EPA were to now disapprove the contingency measures plan because the States needed to take further action after the 1999 FTA in order to implement the contingency measures to address the 1999 FTA, the States would have to adopt and submit SIP revisions consisting of a revised contingency measures plan and adopted control measures, and, EPA would have to approve those SIP revisions in order to prevent or lift sanctions required by section 179 of the Act. This would be an impossibility since the relevant 1999 date has long since passed. In short, the States and EPA would have to undertake rulemaking actions on those remedial SIP revisions, and those rulemakings would suffer the same fate that the commenter's claim make the measures we approve today supposedly defective—we would have to disapprove them because they were not implementable prior to the States' failure to attain in 1999. The commenter would have EPA produce an endlessly looping, absurd result, namely, the States would be left in a position where no SIP revision would be able to lift sanctions because the States cannot go back in time to adopt measures that were not adopted by a deadline in the past. The fact that the States failed to adopt and submit these measures in a timely fashion should not preclude EPA from approving them now that they have been adopted, implemented, and submitted.

EPA further disagrees with the comment that the contingency measures needed to address the contingency measures for 1999 FTA are inadequate because these measures do not meet EPA's guidance which requires contingency measures to achieve reductions no later than the year after the one in which the failure is identified. Once again, the commenter would have EPA produce an absurd

result. Because the States cannot go back in time to implement measures that were not implemented by a deadline in the past, if EPA were to disapprove the contingency measures for 1999 FTA for the reason advanced in the comment, the States again would be left in the situation where no SIP revisions or measures could be approved to halt or lift sanctions. Any further SIP revisions to address the contingency measures for 1999 FTA would suffer the same defect of timeliness. Given this impossibility EPA believes that it is appropriate and beneficial to the environment to belatedly get the reductions contemplated by the 1999 FTA contingency measures.

EPA agrees that our guidance and policy requires contingency measures, once triggered, to achieve reductions no later than the year after the one in which the failure is identified. However, this guidance applies to contingency measures that meet the requirement that the measures can be "implemented without further action" by the state or EPA. EPA expects that certain actions, such as notification of sources, modification of permits, etc., would probably be needed before a measure could be implemented effectively needed to affect full implementation of the contingency measures and expect such actions to occur within 60 days after EPA notifies the State of its failure. See 57 FR at 13512, April 16, 1992. EPA considers that in the case of a failure to attain, the State is notified of a failure to attain only once EPA has published the notice in the **Federal Register** pursuant to section 181(b)(2)(B) that EPA has determined that the area has failed to attain by the statutory attainment date, and that such notification is effective on the effective date of the **Federal Register** publication. Under section 181, such a notification can be published no later than May 15th of the year following the attainment date and still be timely under the Act. For a November 15, 1999 attainment date, the one-year period for implementation of the contingency measures for 1999 FTA could well have started May 15, 2000.

For the Washington area, EPA's determination that the area had failed to attain by the serious attainment date of November 15, 1999 was in fact effective March 24, 2003. 68 FR 3410, January 24, 2003. In the case of the Washington area, the States adopted and implemented by January 1, 2005 all the measures identified in the plan as addressing the contingency measures for 1999 FTA. See Table X. B-1 Summary of Benefits from Measures 7.4.11, 7.4.12

and 7.4.14 of the January 5, 2005 TSD.<sup>23</sup> Arguably, the one-year period after the States were notified of the failure to attain ended March 24, 2004, but as discussed previously, the States needed to first adopt the measures that would be used as the contingency measures for 1999 FTA before the measures could be implemented. The comment offers no suggestion on how the States might retroactively obtain emission reductions in 2004 (or for that matter 2000) for measures that the States did not adopt and implement until after that time.

As pointed out by the Court of Appeals in *Sierra Club v. EPA*, 356 F.3d 296, with respect to the reclassification of the area to severe nonattainment status due to the its failure to attain the 1-hour ozone NAAQS by November 15, 1999, this commenter "challenged EPA's decision to extend the States' final deadline for submitting revised SIPs complying with the Act's requirements for severe areas, including post-1999 ROP plans, to March 1, 2004." 356 F.3d at 308-09.

The Court of Appeals acknowledged that "the deadline for filing severe area SIP components including post-1999 ROP plans had already passed long before reclassification took place. Indeed, the statutory deadline for such submittals was November 15, 1994." *Id.* at 309. Citing to a prior decision, *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002), the Court reiterated that "The relevant provisions of the Clean Air Act \* \* \* contain no language suggesting that Congress intended to give EPA the unusual ability to implement rules retroactively," in upholding EPA's reliance on the discretion conferred by section 182(i) of the CAA to adjust applicable statutory deadlines, other than attainment dates, when it reclassifies an attainment area.

Similarly, EPA believes that it would be arbitrary and capricious to impose a retroactive obligation on the States that can never be fulfilled, resulting in sanctions that could never be lifted. It would be especially egregious for EPA to put the States in that position since the States' failure to submit contingency measures or to even realize that the November 15, 1999 attainment date pertained to the Washington area was due to their reliance on published EPA guidance.<sup>24</sup> The failure to begin

implementation of contingency measures in 2000, upon a March 24, 2003 EPA finding that the area failed to attain in November 1999, cannot be cured by a state rulemaking that occurred before March 24, 2003; there was no such rulemaking then, it does not exist now, and it never can be. After March 24, 2003, the States could complete their respective state rulemaking processes to develop the missing contingency measures. They have done so, and all those measures have been implemented.

In this action EPA is acting on SIP revisions that, with respect to the contingency measures for 1999 FTA, identify additional measures that the States have implemented subsequent to November 15, 1999 attainment date for serious areas. EPA concludes that in the circumstances of this case it is appropriate and consistent with the statute to approve these contingency measures that have now been implemented.

*Comment 2:* We received a comment asserting that the contingency plan for 2005 cannot rely on measures already adopted and in place or to be in place before the 2005 attainment and ROP deadline. The comment claims that the Act requires that contingency measures must be additional measures that will be triggered by the attainment or milestone failure, that is, the Act provision is prospective, not retrospective. In support of their argument, the comment cites language, "to be undertaken in the event the area fails," from the legislative history for the 1990 amendments to the Act.

*Response 2:* EPA believes that its interpretation of the contingency measure provisions of the Act applicable to severe nonattainment areas is a reasonable interpretation of the Act because reductions from these contingency measures are continuing in nature. Sections 172(c)(9) and 182(c)(9) of the Act direct that a state's revised SIP shall include "specific measures to be undertaken" if an ROP or attainment milestone is missed, and that the contingency measures are "to take effect in any such case without further action by the State or the Administrator." 42 U.S.C. 7502(c)(9), 7511a(c)(9) (emphasis added).

EPA has consistently stated that any rule or measure that meets the creditability requirements of section 182(b)(1)(C) and (D), that would achieve real, permanent, enforceable reductions, and that is not already required as a part of the relevant ROP or attainment

<sup>23</sup> "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area," dated January 5, 2005.

<sup>24</sup> See, Memorandum dated July 16, 1998, from Richard Wilson, Acting Assistant Administrator for

Air and Radiation, "Extension of Attainment Dates for Downwind Areas."

demonstration SIP, can be adopted as a contingency measure. See "Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration" (corrected version as of 2/18/94), section 5.6.

Congress, in the Act, did not define the terms "to take effect" and "to be undertaken." The terms "to take effect" and "to be undertaken" could imply a purely prospective action that excludes the possibility of contingency measure implementation prior to an area's failure to meet an ROP milestone or attainment date. If we were to read the CAA this way, the only acceptable contingency measure would be those that are adopted but not implemented. Under that reading, the states could adopt the contingency measures but hold their implementation in reserve to meet the contingency measure requirement. If we read the Act to allow adopted and implemented measures that continue to result in emissions reductions in years subsequent to their implementation to serve as contingency measures, provided that those measures' emission reductions are not needed to demonstrate expeditious attainment and/or ROP, the states could implement the contingency measures early and would achieve the environmental benefits prior to the triggering of the contingency requirement. Nothing in the language of sections 172(c)(1), 172(c)(9) or 182(c)(9) prohibits this interpretation. Implemented contingency measures achieve *continuing* emissions reductions. We reasonably interpret the term "to take effect" and "to be undertaken," as used in sections 172(c)(9) and 182(c)(9) of the Act, to allow as contingency measures, measures implemented prior to the failure to achieve an ROP or attainment milestone, that will continue to achieve emissions reductions after the plan fails, so long as those measures are not needed to demonstrate expeditious attainment and/or ROP. As noted previously, this interpretation is a longstanding exercise of EPA's authority to construe a statutory scheme it is entrusted to administer, by filling the gap left by Congress's failure to define the terms "to take effect" and "to be undertaken." See generally, *U.S. v. Mead Corp.*, 553 U.S. at 227–35; *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–45 (1984).<sup>25</sup>

EPA believes that allowing early reductions to be used as contingency measures comports with a primary purpose of the Act—the aim of ensuring

that nonattainment areas reach NAAQS compliance in an efficient manner and achieving additional emissions reductions that will improve air quality. The contingency plan allows the Washington area to include sufficient contingency measures to ensure that "upon implementation of such measures, additional emissions reductions of up to 3 percent of the emissions in the adjusted base year inventory (or such lesser percentage that will cure the identified failure) would be achieved in the year following the year in which the failure has been identified." See 57 FR at 13511, April 16, 1992.

The emissions reductions from the measures in the Washington area contingency plan are not available for any other use so long as the measures remain in the SIP as contingency measures. A failure to attain or failure to demonstrate ROP will result in these emissions reductions being applied toward attainment or ROP (depending on which milestone is not being met). Even though these measures are already implemented, the continuing reduction credits are, in effect, set aside to be applied in the event that attainment or ROP is not achieved. These credits are immediately available, without further action by the States. We note that measures that have already been implemented clearly meet CAA section 172(c)(9) requirement that contingency measures take effect without further action by the State or Administrator. EPA believes that it would be illogical and counterproductive to penalize nonattainment areas that are taking extra step of implementing contingency measures prior to a failure to achieve a ROP or attainment milestone, to further insure that the area will comply with the CAA's mandate that states attain the NAAQS as "expeditiously as practicable." 42 U.S.C. 7502(c)(1). As we have noted previously, "There are a number of benefits to allowing and even encouraging the early implementation of contingency measures. The chief benefit is that their emission reductions and thus their public health benefit are realized early. Another is that it allows states to build uncredited cushions into their attainment and RFP demonstrations, a cushion which makes actual failures to make progress or attain less likely." 67 FR 48718, 48731, July 25, 2002.

The standard advocated by the comment would allow EPA to approve the contingency measure plan only if the measures were scheduled for implementation in the event of a future failure to make a ROP target or attain the NAAQS. EPA believes that the States

could correct a disapproval issued pursuant the standard advocated by the comment by amending the contingency measure rules themselves to replace the current requirement for compliance by a date certain with a requirement to comply by some date(s) in future to be determined only upon a ROP or attainment failure. Such a revision would not interfere with ROP or attainment because EPA believes that the reductions from the measures in the contingency plan to address a ROP failure or a failure to attain by November 15, 2005 must go beyond the emissions reductions needed to demonstrate ROP and timely attainment (*i.e.*, they are "surplus"). Although this result might arguably comply with the statute as the commenter suggests, it would actually be detrimental for air quality as the measures would not be producing emissions reductions currently as under the submitted SIP.

The comment alleges that if an area fails to meet a progress or attainment deadline, the measures already in effect are insufficient, thus warranting the implementation of additional controls which the comment claims should be the contingency measures. Yet, the comment fails to recognize that if the area fails to attain on time, such failure would have been worse in the absence of the contingency measures. Likewise, if an area has an ROP shortfall, such shortfall would have been larger in the absence of the contingency measures.

EPA has approved many contingency measure plans relying upon early implementation of contingency measures. See, *e.g.*, 67 FR 60590, September 26, 2002. EPA's interpretation that early implemented contingency measures meet the requirements of the Act was upheld in *Louisiana Environmental Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004), though the court found that the particular measure at issue did not qualify as a contingency measure for other reasons.

*Comment 3:* We received a comment that the Act requires a set of contingency measures to address any failure to meet ROP requirements for the 2002–2005 period, that is separate from those required for failure to attain. The comment claims that the requirement for contingency measures to address post-1996 milestone failures is explicitly set out in the Act as an additional mandate in addition to the requirement for contingency measures to address attainment failures. The comment further claims that the 2005 ROP deadline here could precede the attainment date if, in the case of an area which qualifies for one or both of the 1-

<sup>25</sup> The commenter's appeal to the legislative history does not add to its argument, since the quoted language reiterates, but does not elaborate, explain or expound upon, the statutory text.

year attainment date extensions allowed by the Act.

*Response 3:* EPA disagrees that section 182(c)(9) of the Act necessarily adds anything substantive to the requirement of section 172(c)(9) other than a requirement that the contingency plan be able to address a milestone failure pursuant to section 182(g). EPA first notes that neither section 182(c)(9) nor 172(c)(9) of the Act specify how many contingency measures are needed or the magnitude of emissions reductions that must be provided by these measures. The Act is totally silent on this issue. EPA rejected the interpretation that the Act requires states to adopt sufficient contingency measures to make up for a shortfall resulting from the failure where none of the state measures produce any expected reductions. We thus rejected an interpretation where the state would have to adopt "double" the measures needed to satisfy the applicable emissions reduction requirements because EPA believes that this would be an unreasonable requirement given the difficulty many States will already have in identifying and adopting sufficient measures to meet ROP and other requirements, let alone contingency measures. See 57 FR at 13510–13512, April 16, 1992.

Instead, EPA believes that the contingency measures should, at a minimum, ensure that an appropriate level of emissions reduction progress continues to be made if attainment or ROP is not achieved and additional planning by the state is needed. Therefore, EPA has interpreted the Act to require states with moderate and above ozone nonattainment areas to include sufficient contingency measures so that, upon implementation of such measures, additional emissions reductions of up to 3 percent of the emissions in the adjusted base year inventory<sup>26</sup> (or such lesser percentage that will cure the identified failure) would be achieved in the year following the year in which the failure has been identified. This "additional" reduction would ensure that progress toward attainment occurs at a rate similar to that specified under the ROP requirements for moderate areas (*i.e.*, 3 percent per year), and that the state would achieve these reductions while conducting additional control measure development and implementation as necessary to correct the shortfall in emissions reductions and/or to adopt newly required measures resulting from

reclassification to a higher classification, in the case of a moderate or serious area, or to meet the 3 percent per year requirements specified by section 181(b)(4)(A) of the Act for severe areas that fail to attain. Under this approach, the State would have 1 year to modify its SIP and take other corrective action needed to ensure that milestones are achieved and that ROP toward attainment continues. See 57 FR at 13510–13512, April 16, 1992.

Section 182(c)(9) provides that "[i]n addition to the contingency provisions required under section [172(c)(9)] \* \* \* the plan revision [for serious and above nonattainment areas] shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone." Section 172(c)(9) requires contingency measures for failure of an area to "make reasonable further progress, or to attain" the NAAQS. As clarified by section 182(g)(1) of the Act, the "applicable milestones" for serious, and above, nonattainment areas, such as the Washington area, which is a severe nonattainment area, are those tied to the ROP plan percent emission reductions. The commenter urges EPA to interpret sections 172(c)(9) and 182(c)(9) to require not only that there be contingency measures in the SIP tied to the ROP milestones for the Washington area, but that these contingency measures must be different from the measures required under 172(c)(9).

We believe, however, that 182(c)(9) merely adds milestones for serious and above areas that must be included as triggers for contingency measures, and does not impose any requirement for a state to adopt contingency measures in addition to those being used in the contingency plan required by section 172(c)(9), provided that such measures will generate reductions in all the relevant years.<sup>27</sup> Thus a state may specify the same contingency measure to be used for failure to attain the NAAQS as for failure to meet an ROP milestone, in a year for which the measure produces emission reductions. Of course, if a measure is triggered for failure to meet a milestone in an early year the area would have to submit an additional measure to be available in the event of a later failure to meet a subsequent milestone or demonstrate attainment. Since the plain language of

the statute supports this interpretation, and nothing in the statute prohibits this interpretation, EPA's interpretation of how these two contingency measure provisions relate to each other is entitled to deference. See *U.S. v. Mead Corp.*, 553 U.S. 218 (2001); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

*Comment 4:* We received a comment asserting that the contingency plan does not meet EPA's guidance because the plan does not contain a commitment for timely adoption of additional measures if the 3 percent contingency plan is not adequate to correct a failure to attain or achieve an ROP milestone.

*Response 4:* While EPA's guidance does specify that the States to backfill a contingency measures plan after the need for the measures is triggered neither the statute nor the guidance contains the sort of commitment claimed by the comment.

"Any implemented measures (that are not needed for the rate-of-progress requirements or for the attainment demonstration) would need to be backfilled only to the extent they are used to meet a milestone \* \* \*. The State would be required to adopt new contingency measures as part of the process of developing their new SIP for their new classification." See section 5.6 of "Guidance on the Post '96 Rate-of-Progress Plan (RPP) and Attainment Demonstration" (Corrected version of February 18, 1994). "Within 1 year of the triggering of a contingency requiring the early implementation of control measures, the State must submit a revision to the SIP containing whatever additional measures will be needed to backfill the SIP with replacement measures to cure any eventual shortfall that would occur as the result of the early use of the contingency measure." See 57 FR at 13511, April 16, 1992.

The commitment discussed in the General Preamble (57 FR 13498 at 13511–13512, April 16, 1992) was to an annual tracking program—not a commitment to backfill the plan with new measures. As interpreted in the general preamble, EPA does not believe that contingency measures are required to completely fill any shortfall caused by a failure. This will be filled by the revised plan required to cure the failure.

*Comment 5:* We received a comment asserting that the contingency plan must contain some NO<sub>x</sub> reductions since the ROP and attainment plans rely upon NO<sub>x</sub> reductions as well as VOC reductions.

*Response 5:* With regard to the need for NO<sub>x</sub> contingency measures, EPA disagrees with the comment that the contingency plan must contain NO<sub>x</sub>

<sup>26</sup> The adjusted base year inventory is that inventory specified by the provisions under section 182(b)(1)(B).

<sup>27</sup> We note that if a serious or above nonattainment area fails to meet an applicable milestone, the contingency measures will not even necessarily be triggered. A state may opt to be reclassified to the next higher classification or to adopt an economic incentive program in lieu of implementing the measures in its contingency plan. 42 U.S.C. 7511a(g)(3).

contingency measures simply because the ROP and attainment plans rely upon NO<sub>x</sub> reductions. As to contingency measures to address a failure to in the ROP plans, the Act creates a clear command that VOC reductions presumptively meet the ROP requirements applicable to moderate, serious and worse areas. Section 182(b)(1)(A) requires a ROP plan for a 15 percent reduction in baseline VOC emissions. EPA has never interpreted the Act to allow NO<sub>x</sub> substitution in the 15 percent plan for an area which is subject to subpart 2 of part D to Title I of the Act and which is not already covered by a 15 percent ROP plan. *See*, section 1.1 of "Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration" (corrected version as of 2/18/94); *see*, 68 FR at 32826, June 2, 2003 (waiving the VOC reduction requirement would require "absurd results;" "We believe that absurd results will happen only rarely in those cases where application of the requirement in that area would thwart the intent of Congress in enacting the relevant provisions of the [Act].") Absurd results would require a showing that "future VOC reductions required under subpart 2 for a particular area would actually cause ozone to increase more than a *de minimis* amount," and, "it would not be sufficient for the area to show that VOC reductions would be less beneficial than NO<sub>x</sub> reductions.") *See* 68 FR at 32833, June 2, 2003. Section 182(c)(2)(B) requires ROP reductions averaging 3 percent per year reduction in baseline VOC emissions. Section 182(c)(2)(C) authorizes EPA to accept ROP plans containing a lesser percentage of VOC reductions plan if the that substitutes NO<sub>x</sub> reductions in accordance with EPA's guidance.

The comment claims EPA's policy and guidance requires SIPs to provide for contingency reductions in NO<sub>x</sub> where the SIP for the area relies on NO<sub>x</sub> substitution in lieu of or in addition to VOC reductions. In support of this position, the commenter quotes a footnote in the General Preamble, 57 FR 13498, April 16, 1992. However, EPA believes our interpretation of the Act set forth in later guidance allows just the opposite, namely, that the contingency measures for both ROP and attainment failures can provide for at least some VOC reductions where the attainment plan relies on VOC and NO<sub>x</sub> reductions even if the ROP plan relies on all NO<sub>x</sub> reductions. *See* "Guidance on Issues Related to 15 Percent Rate-of-Progress Plans," Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation to the Regional

Division Directors, August 23, 1993.<sup>28</sup> This later guidance provides that NO<sub>x</sub> contingency reductions *can be substituted* for VOC contingency reductions, but plainly does not preclude all of the contingency reductions from being achieved through VOC control.

Where a ROP plan relies upon 9 percent NO<sub>x</sub> reduction to demonstrate ROP pursuant to section 182(c)(2)(C) of the Act for one or more milestone years after 1996, EPA believes that a milestone failure caused by a shortage of NO<sub>x</sub> reductions can be filled by VOC reductions. Under EPA's guidance for NO<sub>x</sub> substitution, the VOC contingency reductions would in essence change the plan from one relying upon 9 percent NO<sub>x</sub> reductions to a plan relying upon a mixture of NO<sub>x</sub> and VOC percentage reductions. For instance, a 1 percent failure would change in such a ROP plan from 9 percent NO<sub>x</sub> to 8 percent NO<sub>x</sub> and at least 1 percent VOC.

EPA believes that the Washington area attainment plans demonstrate attainment through a strategy of VOC and NO<sub>x</sub> control. Therefore, inclusion of VOC measures in the contingency measures plan is proper to address a failure to attain.

*Comment 6:* We received a comment alleging that all of the emission reductions from the contingency measures are not "surplus" because neither EPA nor the States have quantified the total VOC and NO<sub>x</sub> reductions needed to attain by November 15, 2005. The comment further claims that the use of a WOE approach in the modeled demonstration of attainment is incapable of identifying the precise level of emission reductions needed for attainment and thus does not support the claim that there are "surplus" reductions in the SIP that can be used for "contingency" purposes.

*Response 6:* The photochemical grid modeling runs used in the SIP revisions which were the subject of the April 17, 2003 final rule (68 FR 19106) are the same as those photochemical grid modeling runs used in the February 2004 SIP revisions which are the subject of this final rule. The WOE analytical methods and/or analyses that support the modeled demonstration of attainment in the February 2004 SIP revisions, which are the subject of this final rule, include the same WOE analytical methods and/or analyses that supported the modeled demonstration of attainment which were the subject of the April 17, 2003 final rule (68 FR

19106). This issue has been litigated by the commenter and conclusively decided in EPA's favor. *See Sierra Club v. EPA*, 356 F.3d at 304–307. In addition, as noted in section IV. A. 2. of the January 31, 2005 TSD prepared for the February 9, 2005 NPR (70 FR 6796) the States provided additional WOE in the form of the results of EPA's photochemical grid modeling performed for the Tier 2 final rule. *See*, sections VI. A. 1. and 2. of "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area," dated January 31, 2005.

As discussed elsewhere in response to comment, EPA believes that the States' use of photochemical grid modeling with an adjunct WOE analysis demonstrates timely attainment and meets the statutory requirements of the Act and constitutes a modeled demonstration of attainment. Specifically, EPA incorporates by reference the responses to comment in section IV. A. "Comment on the Attainment Demonstration Modeling" of the preamble to this final rule. In the TSD prepared for the NPR for this final rule, EPA concluded that *without* the reductions from the contingency measures the SIP contained sufficient creditable measures to achieve emissions levels in the Washington area of 331 TPD of VOC emissions and 491 TPD of NO<sub>x</sub> emissions.<sup>29</sup>

These overall emissions levels of 331 TPD of VOC and 491 TPD of NO<sub>x</sub> are still less than the levels used in the photochemical grid modeling which assumed levels of 360 TPD of VOC emissions and of over 500 TPD of NO<sub>x</sub> emissions, and are sufficient to support the WOE demonstration.<sup>30</sup> The WOE demonstration builds upon the photochemical grid modeling by considering other photochemical grid modeling results, and the overall change in emissions from the 1990 base year to the 2005 attainment year. EPA concludes that attainment is

<sup>29</sup> Table IV.F–1 Relative Reductions on page A–27 of "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area," dated January 31, 2005.

<sup>30</sup> Table IV.F–1 Relative Reductions on page A–27 of "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area," dated January 31, 2005.

<sup>28</sup> Reissued in Appendix D to "Guidance on the Post-1996 Rate-of-Progress Plan and Attainment Demonstration" (corrected version as of 2/18/94).

demonstrated without reliance upon the reductions from the contingency measures and therefore the reductions from the contingency measures are surplus for the purposes of attainment.

*Comment 7:* We received a comment asserting that the SIP cannot rely on the reformulated gasoline (RFG) program as a "contingency" measure to address the area's failure to attain by 1999, because the RFG program became mandated by the Act once the Washington area missed the 1999 attainment deadline. The comment claims that contingency measures are measures that must be in addition to those mandated by the Act. The comment also claims that RFG was never intended as a contingency measure and, thus, contrary to EPA's assertion, it is hardly a "penalty" to the nonattainment area to disallow contingency credit for a measure that was never intended as a contingency measure, and that was implemented at a time when the area was already years behind schedule in adopting adequate ROP and attainment plans. The comment further asserts that if the RFG program is a permissible contingency measure the agency's guidance would obligate the states to "backfill" the measure with one year assuring equivalent reductions and that the states have not done so.

*Response 7:* EPA agrees with the comment to the extent that it raises questions about whether RFG can be used as a contingency measure after an area is reclassified to severe nonattainment. The RFG requirement is required under Title II of the Act once an area is reclassified to severe nonattainment. However, EPA believes that whether or not RFG is a contingency measure is not a deciding factor whether EPA approve the contingency measures plan in this case because the plan contains other sufficient measures to fulfill the requirement. EPA concludes that the contingency measures plan is approvable even without considering RFG to be a contingency measure and thus EPA is not responding to the allegations that RFG can not be considered a contingency measure in this case.

#### *E. Comment Received Regarding the TSD and EPA's Response*

We received the following comments on our evaluation of the credits from the States' AIM coatings rules which was in our January 12, 2005 TSD prepared for the January 12, 2005 NPR. A summary of these comments that we received on our evaluation of the credits from the States' AIM coatings rules for the

Washington area and our responses follows.

*Comment:* We received one set of comments that were critical of the baseline per capita emission factor EPA used to evaluate the States' emission reductions claims for the States' AIM coatings rules. Specifically, these comments took issue with the pre-control baseline value of 4.5 pounds per person per year (lbs/p/yr) that EPA used. These comments also took issue with the 6.7 lbs/p/yr emission factor which was used by the States and which is found in "Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone" (EPA-450/4-91-016), May 1991. These comments noted that EPA has issued another document under EPA's ongoing Emission Inventory Improvement Program with yet another per capita emission factor of 5.7 lbs/p/yr. In summary, the comments questioned if any of the baseline per capita emission factors (6.7, 5.7, or 4.5 lbs/p/yr) published by EPA is based upon the best currently available data. These comments supported EPA's use of the most recent California Air Resources Board (CARB) survey data for deriving the best estimate of the post-control per capita emission factor to be realized from the promulgation of the District's, Maryland's and Virginia's rules modeled upon the Ozone Transport Commission's Model AIM coatings rule. These comments advocate the position that the CARB surveys provide the best available data under federal data quality criteria and asserts that the California pre-control total emissions should be similar on a per person basis to the rest of the country. The commenter examined the pre-control baseline used by CARB and assert that the baseline per capita emissions factor for VOC emissions from AIM coatings in California before controls should be 6.3 lbs/p/yr. The commenter states that this 6.3 lbs/p/yr factor is based upon CARB's data for VOC emissions from AIM coatings for the years 1975 through 2004. The comments note that the first significant AIM controls were not adopted in California until 1984, and, conclude that 1980 is an acceptable year to use as a baseline year. The comments state: California reports that in 1980, according to its surveys, there were 148,579,090 pounds of VOC emitted from AIM coatings; the population of California in 1980 according to the U.S. Census Bureau was 23,668,000 people, and thus this yields a pre-control baseline of 6.3 lbs/p/yr. The commenter therefore urges EPA to evaluate the benefits from the States' AIM coatings

rules using a pre-control baseline of 6.3 lbs/p/yr.

We received a second set of comments supporting the States' analysis of the reduction credits from the States' AIM coatings rules but critical of EPA's reliance upon CARB data to determine a per capita emission factor after application of the States' AIM coatings rules. These comments assert that because California has had more restrictive VOC limits for architectural coatings for over a decade, VOC emissions for architectural and industrial maintenance coatings in California were already significantly lower than the States' pre-rule emissions.

*Response:* The States' Contingency Measures, ROP and Attainment Plans Are Still Approvable. EPA has considered both set of comments and analyzed the sufficiency of the contingency measures, ROP and attainment plans by considering the baseline emission factors and reduction calculation methodologies advocated by each set of comments, as well as the baseline emission factors and reduction calculation methodology contained in our January 5, 2005 TSD that was prepared for the January 12, 2005 (70 FR 2085) NPR.<sup>31</sup> EPA concludes that the contingency measures, ROP and attainment plans are approvable regardless of whether we use the baseline emission factor and reduction calculation methodology advocated by each set of comments, or whether we use the baseline emission factors and reduction calculation methodology contained in our January 5, 2005 TSD.

EPA has evaluated the effect that changing the 1990 per capita emission factor for the AIM coatings source category might have on the contingency measures implemented to address the failure of the Washington area to attain in 1999, the 1999–2005 ROP plans, and the attainment demonstration plans. EPA has determined that regardless of which of the 1990 per capita emission factors and reduction calculation methodologies—be it that advocated by the first set of comments, or that advocated by the second set of comments, or that found in our technical support for the January 12, 2005 (70 FR 2085) NPR—the States secure sufficient VOC reductions to meet the needs of the contingency

<sup>31</sup> "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area," dated January 5, 2005.

measures plan for failure to attain in 1999, the 1999–2005 ROP plans or attainment plans. As noted in the January 12, 2005 NPR, the States computed that the reductions needed to address the 1999 failure to attain contingency requirement was at least 13.0 TPD.<sup>32</sup> Of these 13.0 TPD, 11.4 would be filled by the solvent cleaning and portable fuels containers rules. The States' AIM coatings rules would thus have to provide at least 1.6 TPD of reductions to ensure that the contingency plan is approvable. EPA has evaluated the effects that changing the 1990 per capita emission factor and reduction methodologies for the AIM coatings source category might have on the contingency plan for failure to attain by 1999. The States ascribed 12.3 tons per day reduction from the States' AIM coatings rules. EPA arrived at a value of over 16 tons per day using the 4.5 pounds per capita emission factor.<sup>33</sup> EPA concludes that the States' contingency plans are still approvable.

There is no effect on the approvability of the 1999–2005 ROP plans because any change in the 1990 per capita emission factor for the AIM coatings source category or the method to determine reduction from the States' AIM coatings rules will only affect VOC emission reductions. EPA proposed approval of the 1999–2005 ROP plans based solely upon a showing that the plans provided for a minimum 9 percent reduction in baseline NO<sub>x</sub> emissions by the 2002 milestone and a further 9 percent by 2005. As discussed elsewhere in this document in response to comment, EPA is approving the 1999–2005 ROP plans based upon these NO<sub>x</sub> reductions alone.

With respect to the demonstration of attainment, EPA evaluated the overall change in VOC emissions relative to 1990 base year emissions which would result from using the 4.5 or the 6.3 pounds per capita emission factor. The results were an overall relative reduction in VOC emissions of 45 percent in 1990 VOC emissions by 2005 from all sources (point plus area plus nonroad plus on-road). The States' credit claims corresponded to a projected overall 42.8 percent reduction in 1990 VOC emissions by 2005 from all sources (point plus area plus nonroad

plus on-road). 70 FR at 6803, February 9, 2005. EPA concludes that the States' estimate of the overall relative reduction in VOC emissions is conservative relative to the use of either the 4.5 or the 6.3 emission factors. EPA concludes that using either baseline the States get at least the reductions they claimed and needed to demonstrate timely attainment, to meet the ROP requirements, and to provide for sufficient reduction for the contingency plan. EPA concludes that the issues raised in the comments do not change the approvability of the attainment plans.

After considering the comments received during the public comment period, EPA's analysis indicates that the reduction claims in the February 2004 SIP revisions are supported using the alternative per capita base line emission factors in the record in that the States' reduction claims are less than the other methods. EPA is neither approving nor disapproving the States' method nor promoting an alternative method. EPA's analysis in support of this rulemaking is to determine if any information received during the comment period would give cause for us to reconsider our proposed approval. Regardless of which of the baseline emission factors or methods that have been proffered by the commenters or by EPA is used to calculate VOC emission reductions for the States' AIM coatings rules, we have determined that the States' ROP, attainment and contingency measures plans for the Washington area demonstrate ROP, provide sufficient VOC reductions to satisfy the need for implemented contingency measures set by EPA's guidance and demonstrate attainment. Therefore, EPA is approving the States' SIP revisions.<sup>34</sup> Further details of EPA's analysis can be found in the supplemental TSD prepared for this final rule.<sup>35</sup>

A determination of the best baseline from which to estimate the reductions from the States' AIM rules is not essential for this final rule because, as stated earlier, regardless of whether those reductions are calculated as

proposed by EPA or as advocated by either of the commenters, the States' ROP, attainment and contingency measures plans demonstrate ROP, provide sufficient VOC reductions to satisfy the need for implemented contingency measures, and demonstrate attainment.

However, EPA recognizes the need to resolve conclusively how to determine the amount of VOC emission reductions achieved from the implementation of AIM coatings rules in a given ozone nonattainment area. This remains an issue of concern to the states, the regulated sector, and other interested parties. Therefore, EPA intends to conduct a separate process to solicit further comment, information and recommendations from all interested parties as to how to determine the amount of VOC emission reductions achieved from the implementation of AIM coatings rules in a given ozone nonattainment area.

*EPA's Policy on Changes in Inventory Methods.* EPA is clarifying its proposal in the NPR (70 FR 2085) that EPA was not proposing that the District, Maryland and Virginia change the ROP plans to reflect a new 1990 per capita emission factor for the AIM source category prepared for this action, but rather intended to verify that the ROP plans were adequate without using the reduction methodology upon which the States relied.

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

<sup>32</sup> See Table 12. Contingency Measures in the NPR for this action (70 FR 2085 at 2096, January 12, 2005).

<sup>33</sup> The comments advocating the 6.3 pounds per capita emission factor did not advocate by what percentage this value would be reduced by the 1998 Federal AIM coatings rule. EPA assumed for the purposes of this analysis that the Federal AIM coatings rule would result in the same post-rule per capita emission factor.

<sup>34</sup> As noted elsewhere in this document, EPA is not approving Maryland's attainment plan for the Washington area but is making a finding that Maryland's attainment plan, in conjunction with those of the District and Virginia, contains control measures that "fully satisfy the emission reduction requirements relevant to \* \* \* attainment."

<sup>35</sup> "Supplement to the Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; 1-Hour Ozone Attainment Plans, Rate-of-Progress Plans, Contingency Measures, Transportation Control Measures, VMT Offset, and 1990 Base Year Inventory," dated May 3, 2005.

submittal of the final ROP plans in November 1993.

Likewise with respect to the post-1996 ROP plans, 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). In the context of the guidance, "November 15, 1994" would mean the date by which the post-1996 plan was due. In the case of the Washington area, the 1996–1999 ROP plans were due on November 15, 1994 because the area was serious nonattainment area, and the 1999–2005 ROP plans were due by March 1, 2004, which was the date established in our final rule reclassifying the Washington area to severe nonattainment. See 68 FR 3410 at 3422, January 24, 2003.

From the States' perspective, the baseline per capita emission factor of 4.5 pounds per person per year (lbs/p/yr) for the AIM coatings source category could be seen as a change in factors and methodologies which occurred after the SIP is submitted. As for the 1996–1999 ROP plans, EPA notes that the plan was projected to have a surplus of 14 tons per day in VOC emission reductions. Nor did EPA propose that the States do so in the NPR (70 FR 2085) prepared for this action. Indeed, to require the States to revise completed plans every time a new emission factor or changed methodology is announced would lead to significant costs and potentially endless delays in the approval processes. In the case of the 1996–1999 ROP plans, any possible claim that EPA required a "changed methodology" would have to accept that the "changed methodology" came to light years after the 1996–1999 ROP plans were submitted. For the policy reasons stated previously, EPA has not required the States revise their 1996–1999 ROP plans for the Washington area.

*Additional Response to the Second Set of Comments.* EPA further believes that the second set of comments misstates the role CARB data played in

the EPA's estimate of the OTC rule reduction. EPA used data from CARB to ascertain an end point for the OTC rule (post-OTC rule per capita emission factor) not a 1990 baseline factor. EPA did so in order to evaluate the States' reduction claims using methods other than those used by the States for the reasons stated in the January 12, 2005 (70 FR 2085) NPR.

#### **IV. Comment Received on the Attainment Demonstration and EPA's Response**

We received the following additional comments adverse to the proposed approval of the attainment plans. In addition to comments that are unique to the attainment plan (set forth in sections IV. A. and IV. B of this document), we also received a number of comments identical to those submitted in relation to the ROP plans, VMT Offset SIPs, and contingency measure plans, to which we responded in section III of this document. We have set forth in this section of this document each comment we received relevant to the attainment demonstrations and plans and respond separately to it even if that comment is identical to a comment to which we responded in section III. A summary of these additional adverse comments that we received on our proposed action to approve the attainment plans for the Washington area and our responses follows.

##### *A. Comment on the Attainment Demonstration Modeling*

*Comment:* We received a comment asserting that the SIP does not demonstrate attainment as required by the Act. The comment alleges that attainment is not demonstrated using photochemical grid modeling, or other analytical tool which EPA has determined to be at least as effective, that the WOE approach does not satisfy the CAA's requirement to assure attainment as expeditiously as practicable or the CAA's requirement for a modeled demonstration of attainment, that EPA provides no evidence that the core assumption underlying its WOE approach—i.e., that ozone will be reduced in the same proportion as emissions—is valid. The comment alleges that such an assumption conflicts with EPA's own repeated findings that the relationship between ozone formation and precursor emissions is nonlinear, and cannot be accurately predicted by means other than photochemical grid models. The comment also asserts that the photochemical grid model used in the modeled demonstration of attainment and WOE analysis is not based upon a

photochemical grid model that represents sound science and that meets current regulations and guidance. Therefore, the comment claims EPA cannot approve the WOE determination.

*Response: Attainment Is Demonstrated Using Photochemical Grid Modeling, the Woe Approach Satisfies the Act Requirements.* The photochemical grid modeling runs used in the pre-2001 SIP revisions' attainment plan are the same as those photochemical grid modeling runs used in the February 2004 SIP revisions which are the subject of this final rule. The WOE analytical methods and/or analyses that support the modeled demonstration of attainment in the February 2004 SIP revisions, which are the subject of this final rule, include the same WOE analytical methods and/or analyses that supported the modeled demonstration of attainment which were the subject of the April 17, 2003 final rule (68 FR 19106). In addition, as noted in section IV. A. 2. of the January 31, 2005 TSD prepared for the February 9, 2005 NPR (70 FR 6796) the States provided additional WOE in the form of the results of EPA's photochemical grid modeling performed for the Tier 2 final rule. See, sections VI. A. of "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area," dated January 31, 2005.

EPA had received a comment from the same commenter alleging the same deficiencies of WOE for the same photochemical grid modeling runs and some of the same adjunct WOE analyses when EPA conditionally approved the pre-2001 SIP revisions' attainment plan. Specifically the commenter had alleged that photochemical grid modeling shows that the Washington area will not attain the ozone standard by the November 2005 attainment date and because the WOE analysis used by EPA to conclude that the Washington area has demonstrated attainment by November 2005 is not authorized by the Act or by EPA rules. The commenter had claimed that the modeling demonstration and WOE used in the attainment demonstration for the Washington area do not meet requirements of section 182(c) of the [Act] and EPA's own regulations for photochemical grid modeling and other analytical methods, that the WOE is an alternative method to photochemical grid modeling which has not been shown to be equally effective to the Urban Airshed Model (UAM), and that

WOE is a proscribed rollback method. See 68 FR 19106 at 19111/3, April 17, 2003.

The claim in the comment from the same commenter received during the public comment period for this rulemaking “that ozone will be reduced in the same proportion as emissions” merely restates the claim that the WOE approach relies upon “proportional” rollback. Likewise, the comment on this rulemaking assert that the modeled demonstration of attainment does not meet the CAA’s requirement for a modeled demonstration of attainment or that attainment is not demonstrated using a photochemical grid model and that WOE does not demonstrate timely attainment simply restate, with less specificity, comment made by the same commenter on our April 17, 2003 final rule, 68 FR 19106. See 68 FR 5246, February 3, 2003.

EPA provided responses to these comments in our April 17, 2003 final rule (68 FR 19106) and incorporates our responses in the April 17, 2004 final rule by reference, particularly those in response to “comment 1” on pages 19111 to 19112 of the April 17, 2003 final rule. See 68 FR 19112–19115, April 17, 2003.

Furthermore, this commenter’s assertions that EPA’s use of photochemical grid modeling with an adjunct WOE analysis does not demonstrate timely attainment, violates statutory requirements of the Act and does not constitute a “modeled demonstration of attainment,” encompasses all those issues related to WOE that the commenter has restated in this rulemaking, and were briefed and litigated to conclusion in a suit brought by the commenter against EPA. See *Sierra Club v. EPA*, 356 F.3d at 304–07; see also *Initial Opening Brief of Petitioner Sierra Club*, Docket No. 03–1084 (June 23, 2003), pp. 25–37; *Final Reply Brief of Petitioner Sierra Club*, Docket No. 03–1084 (September 22, 2003), pp. 8–19. The Court of Appeals’ decision upholding the very same photochemical grid modeling and WOE that is at issue herein (as resubmitted by the States and supplemented with an analysis of the effects of the Tier 2 rule that strengthened the conclusion of the WOE analysis), is binding on both EPA and the commenter. After extensively analyzing the record, the Court of Appeals resolved the commenter’s claims in EPA’s favor with respect to the Urban Airshed Model–IV (UAM–IV) and the WOE analysis, stating:

“[P]hotochemical modeling [using the UAM–IV] is the primary basis for the attainment demonstration,” while the [WOE] “is merely an adjunct for assessing the

photochemical grid modeling. \* \* \* [T]hat analysis was employed to ensure that the model achieved its statutory purpose: determining whether the SIPs actually “provide for attainment of the ozone national ambient air quality standard by the applicable attainment date.” 42 U.S.C. 7511a(c)(2)(A). And the adjustments appear well-suited to that end, as they do no more than correct for the model’s over-prediction of ozone levels as compared to actual observations, and for its reliance on a base day that appears to be a statistical outlier. See, *Sierra Club v. EPA*, 356 F.3d at 306.

Res judicata bars re-litigation not only of matters determined in a previous litigation but also ones that a party could have raised. \* \* \* Collateral estoppel further bars parties from re-litigating issues of law or fact resolved in prior cases between those parties. \* \* \* (When a court determines an issue of fact or law that is actually litigated and necessary to its judgment, that conclusion binds the same parties in a subsequent action.)” *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1033–34 (D.C. Cir. 2001) (internal citations and quotations omitted). While EPA believes that the commenter is precluded from re-litigating the binding holding of the court in *Sierra Club v. EPA* with respect to the validity of WOE analyses, EPA reiterates that, as articulated and explained in the April 17, 2004 final conditional approval rule at 68 FR 19112–19115, April 17, 2003, WOE in general as a supplement to photochemical grid modeling, and Washington Area WOE analysis in particular (as upheld by the Court of Appeals), is a valid tool for demonstrating attainment with the NAAQS. The Washington Area WOE analysis demonstrates that the Washington Area will timely attain the 1-hour ozone NAAQS for all the reasons previously explained in the April 17, 2004 final conditional approval.

EPA continues to believe that the commenter is wrong on the law, as EPA’s use of WOE as an analytical adjunct to photochemical grid modeling has been successfully litigated to conclusion several times. Each time the Court of Appeals has upheld both EPA’s interpretation of the Act to allow supplemental analysis to photochemical grid modeling to demonstrate attainment, and EPA’s determination that each of the WOE analyses at issue, including the core of the WOE analysis at issue in the conditional approval and in this current rulemaking, was valid. See 356 F.3d at 304–07; *Environmental Defense v. EPA*, 369 F.3d 193, 203–07 (2d Cir. 2004); *BCCA Appeal Group v. EPA*, 348 F.3d 817, 203–09 (5th Cir. 2003). *Accord*, 1000 Friends of

*Maryland v. Browner*, 265 F.3d 216, 234 (4th Cir. 2001).

*The Amendments to Appendix W Do Not Preclude Use of UAM–IV.* EPA disagrees that the use of the UAM–IV for photochemical grid modeling represents a reason to disapprove the attainment plan even though UAM–IV is no longer on the list of refined models that are preferred or recommended for use in regulatory applications. EPA notes that no other photochemical grid models for modeling urban areas are on the preferred list found in Appendix A to Appendix W to 40 CFR part 51, even though the Act reflects a clear preference, or, in the case of serious and worse areas, essentially mandates that a modeled demonstration of attainment be based on photochemical grid modeling. 42 U.S.C. 7511a(c)(2)(A); (j)(1)(B). All photochemical grid models for modeling ozone in urban areas are on EPA’s list of alternative models which is now posted on the internet as opposed to being issued as Appendix B to Appendix W to 40 CFR part 51.

Nothing in the Appendices to 40 CFR part 51 indicate that EPA may no longer rely on UAM–IV modeling, or that other photochemical grid models are mandated for use in lieu of UAM–IV. The “[s]imulation of ozone formation and transport is a highly complex and resource intensive exercise. Control agencies with jurisdiction over areas with ozone problems are encouraged to use photochemical grid models, such as the Models-3/Community Multi-scale Air Quality (CMAQ) modeling system \* \* \* to evaluate the relationship between precursor species and ozone.” See section 6.2.1.a. “Choice of Models for Multi-source Applications” in Appendix W to 40 CFR part 51 (emphases added); see also 68 FR at 18457–18458, April 15, 2003.

Explicitly, the “[d]etermination of acceptability of a model is a *Regional Office responsibility*. Where the Regional Administrator finds that an alternative model is more appropriate than a preferred model, that model may be used subject to the recommendations of this subsection. This finding will normally result from a determination that (1) a preferred air quality model is not appropriate for the particular application; or (2) a more appropriate model or analytical procedure is available and applicable. (emphasis added). See section 3.2.2 in Appendix W to 40 CFR part 51. See 68 FR at 18452, April 15, 2003.

In this case, the States had submitted the pre-2001 SIP revisions’ attainment plan which demonstrated that the States had sufficient measures in the SIP to demonstrate that the Washington area

would attain the 1-hour ozone NAAQS no later than November 15, 2005. EPA acknowledged that the SIP could not be fully approved at that time because the States had not demonstrated that all RACM had been adopted and the plan lacked certain other elements which we initially identified in our February 3, 2003 proposed conditional approval. See 68 FR 5246, February 3, 2003. All that adoption of additional rules as RACM would have done to the attainment plan would be to strengthen the WOE that the area would timely attain or advance the date by which the area would attain. Of the other elements noted as needing revision under the conditional approval, the only one which could possibly have implicated the modeling demonstration was a proposed condition that required the States to commit to revise and submit to the EPA by April 17, 2004, an updated attainment plan SIP that reflects revised MOBILE6-based MVEBs, including revisions to the attainment modeling and/or WOE demonstration, as necessary, to demonstrate that the SIP continues to demonstrate attainment by November 15, 2005. See 68 FR at 5253, 5258, 5260–5261, February 3, 2003. We included this condition in our April 17, 2003 (68 FR 19106) final rule conditionally approving the pre-2001 SIP revisions' attainment plan.

The States readily agreed to this condition because, in their pre-2001 SIP revisions' attainment plan, the States had included a commitment to revise the 2005 attainment MVEBs within one-year of the EPA's release of the MOBILE6 model. See 66 FR at 631–632 (regulatory text for 40 CFR 52.476(c), 52.1076(g) and 52.2428(d)), January 3, 2001. By the time we issued the April 17, 2003 conditional approval EPA had released the MOBILE6 model and its implementing guidance. That guidance does not mandate redoing the entire modeling demonstration due to a change in the MVEBs.<sup>36</sup> EPA reasonably believes that the Act does not mandate a revision to the photochemical grid modeling due to a change in the MVEBs, and, this interpretation has been upheld on review. See *1000 Friends of Maryland v. Browner*, 265 F.3d 216 (4th Cir. 2001). EPA concludes that where MVEBs are changed the state must analyze the impacts of such change on the modeled attainment demonstration,

but that the state need not rerun the entire model.

In this case EPA believes that disapproving the February 2004 SIP revisions based on alleged defects in the modeling demonstration for the reason cited in the comment would be arbitrary and capricious because in the February 3, 2003 notice of proposed rulemaking (68 FR 5246) EPA did not propose to require that the States redo the photochemical grid modeling. Because, as of February 3, 2003, the changes to Appendix W to 40 CFR part 51 had not been issued, only, proposed,<sup>37</sup> EPA believes that it would not have been appropriate to disapprove the SIP revisions in the April 17, 2003 final rule which was the final action issued pursuant to the February 3, 2003 NPR. We believe that it would not be appropriate to disapprove the SIP revisions now because the States have relied on the same photochemical grid modeling analysis for the February 2004 SIP revisions as they previously did.

In addition, the modeled demonstration of attainment does not depend solely upon the UAM-IV modeling results. The WOE contained in the February 2004 SIP revisions relied upon EPA's modeling conducted for the NO<sub>x</sub> SIP call and the Tier 2 rulemaking. These modeling rules relied upon photochemical grid modeling that used the UAM-V and/or the CAM<sub>x</sub> models. See, 63 FR 57356 at 57381, October 27, 1998; "Technical Support Document for the Tier 2/Gasoline Sulfur Ozone Modeling Analyses," EPA420-R-99-031, December 1999. The UAM-V and the CAM<sub>x</sub> models are among those listed on the replacement for what was formerly Appendix B of the Guideline on Air Quality Models (Appendix W to 40 CFR Part 51). "The models listed in this section are: ADAM, ADMS, AFTOX, ASPEN, CAM<sub>x</sub>, CMAQ, DEGADIS, HGSYSTEM, HOTMAC, HYROAD, OZIPR, OBODM, Panache, PLUVUEII, REMSAD, SCIPUFF, SDM, SLAB, UAM-V." (See <http://www.epa.gov/scram001/tt22.htm#altmod>, last checked April 6, 2005). For these reasons, EPA believes the Regional Administrator appropriately and reasonably exercised the discretion afforded by Appendix W to allow the continued use of the UAM-IV modeling results in this particular case.

Furthermore, the law is well established that res judicata bars relitigation not only as to all matters actually determined in prior litigation,

but also as to all matters *that might have been determined*. See, e.g., *Appalachian Power, supra*, at 1033–34; *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224, 1235 (D.C. Cir. 1988). EPA proposed to remove UAM-IV as obsolete on April 21, 2001. 65 FR 21506. EPA proposed the conditional approval based on WOE. See 68 FR 5246, February 3, 2003. As noted previously, EPA took final action to remove UAM-IV as obsolete on April 15, 2003, 68 FR 18440, two days before final action on the conditional approval, April 17, 2003. See 68 FR at 19121. The commenter did not raise the issue that UAM-IV was no longer a preferred model listed in Appendix A of Appendix W to 40 CFR 51 in its comments on the conditional approval, and in the subsequent litigation over that EPA action, although it could have, although the commenter had raised the general issue that the modeling demonstration and WOE used in the modeled demonstration of attainment for the Washington area did not meet requirements of section 182(c) of the Act and EPA's own regulations for photochemical grid modeling and other analytical methods.<sup>38</sup> See 68 FR at 19111, April 17, 2003. Res judicata would bar raising the UAM-IV claim now as it could have been litigated in the suit over EPA's conditional approval. Nevertheless, and without waiving its contention that res judicata and/or collateral estoppel bar litigation of the UAM-IV claim, for the reasons stated previously in this response, EPA believes: (1) The Regional Administrator appropriately and reasonably exercised the discretion afforded by Appendix W to allow the continued use of the UAM-IV modeling results in this particular case, (2) EPA's guidance is reasonable and is not a

<sup>38</sup> The fact that EPA had not finalized its proposed removal of UAM-IV as an approved model was no bar to raising this issue in the litigation over the Conditional Approval. Section 307(d)(7)(B) of the Act specifically allows, if certain conditions are met, for comment on a rule after the comment period was closed if "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comments (but within the time specified for judicial review. \* \* \*)." Although EPA's proposal clearly demonstrated its intention to remove the UAM-IV as a preferred model three years prior to the opening of the comment period on the Conditional Approval, EPA's final action on the UAM-IV occurred just two days prior to the Conditional Approval, thereby arising within the time period specified by Section 307(d)(7)(B). Importantly, the commenter did not invoke this administrative reconsideration provision of the Act at the time of the conditional approval. Had the Court of Appeals not vacated and remanded the conditional approval for reasons entirely unrelated to the WOE analysis issue, the commenter would not have been afforded opportunity to attempt add to the record on WOE.

<sup>36</sup> See, Joint memorandum dated January 18, 2002, From John S. Seitz, Director, Office of Air Quality Planning & Standards, and Margo Tsirigotis Oge, Director of Office of Transportation and Air Quality, "Policy Guidance for the Use of MOBILE6 in SIP Development and Transportation Conformity."

<sup>37</sup> The final rule amending Appendix W was signed on April 2, 2003, nearly two months after the proposed conditional approval.

proportional rollback, (3) WOE and the photochemical grid modeling used to demonstrate attainment is consistent with the Act and EPA regulations.

#### B. Comment On the MVEBs

*Comment:* We received a comment that EPA cannot approve the MVEBs in the attainment plan SIP because the NO<sub>x</sub> budgets are 70 tons per day higher than those in the previous attainment SIP budget for the same year. The comment claims that the MVEBs in the previous attainment plan were inadequate because that SIP did not demonstrate attainment with photochemical grid modeling as required by the Act and did not include all reasonably available transportation control measures. The comment asserts that because the MVEBs in the previous attainment plan were inadequate EPA cannot approve the NO<sub>x</sub> MVEBs that are 70 tons per day higher and that EPA does not demonstrate, with photochemical grid modeling as required by the Act, how it can assure attainment in 2005 with such a major increase in allowable motor vehicle emissions.

*Response:* EPA disagrees with the comment that the MVEBs in the SIP revisions are inadequate. EPA had proposed to conditionally approve the previous attainment plan and in the alternative to disapprove the attainment plan with a protective finding that would allow the MVEBs to be used for transportation conformity purposes. Our proposed protective finding was based upon our conclusion that the pre-2001 SIP revisions' attainment plan, which were the subject to the February 3, 2003 notice of proposed rulemaking, had demonstrated that the Washington area will attain the 1-hour ozone NAAQS no later than November 15, 2005, by providing enough reductions with adopted measures to demonstrate attainment. See 68 FR at 5259, February 3, 2003. Our final conditional approval was granted on the basis that the pre-2001 SIP revisions' attainment plan did demonstrate attainment with photochemical grid modeling as required by the Act. We granted a conditional, rather than a full approval solely on the basis that the pre-2001 SIP revisions' attainment plan lacked some adopted measures required by an attainment plan for a severe ozone nonattainment area. See 68 FR 19106 (April 17, 2003). While the conditional approval itself was vacated, our determination that the modeled demonstration of attainment in the pre-2001 SIP revisions' attainment plan demonstrated attainment with photochemical grid modeling as

required by the Act was specifically upheld. *Sierra Club v. EPA*, 356 F.3d at 304–307.

The conditional approval was predicated in part upon the States revising and submitting to the EPA by April 17, 2004, SIP revisions constituting an update to the attainment plan incorporating MOBILE6-based MVEBs. Further, the States would need to include in the submittal revisions to the attainment modeling and/or WOE demonstration, as necessary, to show that the SIP would continue to demonstrate attainment by November 15, 2005. See 68 FR at 5258, February 3, 2003.

EPA acknowledged at the time of the conditional approval the possibility that the MVEBs in the pre-2001 SIP revisions' attainment plan might not have included all RACM or all adopted transportation control strategies and TCMs to offset increases in emissions resulting from growth in VMT or numbers of vehicle trips and to obtain reductions in motor vehicle emissions as necessary (in combination with other emission reduction requirements) to comply with the CAA's ROP milestones and attainment demonstration requirements. We had conditioned approval of the pre-2001 SIP revisions' attainment plan upon the States adopting any remaining RACM and any required TCMs. See 68 FR at 19106–19107, 19129–19130 (April 17, 2004).

For the reasons outlined in our notices of proposed rulemakings, and in conjunction with response to comments elsewhere in this document, EPA has concluded that the SIP revisions now before us demonstrate that all RACM has been adopted and that the SIP contains all necessary transportation control strategies and TCMs to offset increases in emissions resulting from growth in VMT or numbers of vehicle trips and to obtain reductions in motor vehicle emissions as necessary (in combination with other emission reduction requirements) to demonstrate attainment and ROP.

EPA disagrees that the “70” ton per day increase from the mobile sector is the only relevant criterion for analyzing the impact of the MVEBs. MVEBs exist in the context of the attainment plan and do not in and of themselves determine whether an area will attain the NAAQS. MVEBs merely are the amount of motor vehicle emissions allowed by a control strategy SIP which consists of, among other things the estimated further reductions from adopted rules affecting all source categories including stationary and area sources in the States' SIPs or promulgated by EPA. A change in the

MVEBs higher or lower cannot, in a vacuum, lead to a conclusion as to whether an area is still on track to attain the NAAQS. Rather, the MVEBs must be considered in context, as follows:

EPA first addressed the sufficiency of the attainment plan in our first round of rulemaking on the pre-2001 SIP revisions' attainment plan. See 68 FR at 5249 (February 3, 2003) (citing 64 FR 70460 (December 16, 1999); 66 FR 586 (January 3, 2001)).

In the December 16, 1999 NPR we noted that the “1998 SIP revisions” did not contain adequate MVEBs.<sup>39</sup> In the December 16, 1999 (64 FR 70460), NPR, we also stated that:

[A] motor vehicle emissions budget is the estimate of motor vehicle emissions in the attainment year that when considered with emissions from all other sources is consistent with attainment. The attainment demonstrations for the Washington area contain levels of modeled emissions that EPA concludes demonstrate attainment once transport from upwind areas is addressed. The basis for this conclusion will not be altered if the Washington area States can demonstrate that the level of nonattainment area emissions in 2005 is equal to or less than the 1999 control strategy levels contained in the attainment demonstrations considering growth. 64 FR at 70473.

In other words, we required the States to revise the MVEBs and to demonstrate that the SIP contained enough measures that when considered with the revised 2005 MVEBs, the overall emissions levels in 2005, taking into account growth through 2005, were less than or equal to the levels of emissions assumed in the photochemical grid modeling. In the TSD for the December 16, 1999 NPR we noted that the photochemical grid modeling performed for the area had assumed local emissions levels of 360 TPD of VOC emissions and over 500 TPD of NO<sub>x</sub> emissions.<sup>40</sup> These were the local emissions levels the 1998 SIP revisions projected the Washington area would have by 1999. The pre-2001 SIP revisions' attainment plans were submitted to fulfill these and other prerequisites for approval proposed in

<sup>39</sup> The “1998 SIP revisions” are those submittals listed in Table 3 of this document which were submitted during calendar year 1998.

<sup>40</sup> “Technical Support Document for the One-Hour Ozone Attainment Demonstrations submitted by the State of Maryland, Commonwealth of Virginia and the District of Columbia for the Metropolitan Washington, DC Ozone Nonattainment Area (DC039–2019, VA090–5036, MD073–3045),” dated November 30, 1999. See also, “Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Post-1996 Rate-of-Progress Plan, Contingency Measures, Transportation Control Measures, 1990 Base Year Inventory Changes, and VMT Offset SIP for the Metropolitan Washington, DC Nonattainment Area,” dated January 5, 2005.

the December 16, 1999 NPR. On January 3, 2001, we approved the pre-2001 SIP revisions' attainment plans.<sup>41</sup> In the TSD for that rulemaking, we concluded that the creditable measures upon which the pre-2001 SIP revisions' attainment plan relied were projected to achieve emissions levels of 356.7 TPD of VOC emissions and 403 TPD of NO<sub>x</sub> emissions.<sup>42</sup> The pre-2001 SIP revisions' attainment plan contained MVEBs of 101.8 TPD of VOC emissions and 161.8 TPD of NO<sub>x</sub> emissions. See 66 FR at 590, January 3, 2001. The pre-2001 SIP revisions' attainment plans were later conditionally approved on April 17, 2004, 68 FR 19106, one condition of the approval being that the States revise the budgets using the MOBILE6 model and revise, as necessary, the attainment modeling and/or WOE demonstration to show that the SIP continues to demonstrate attainment by November 15, 2005. In the TSD prepared for this final rule, EPA concluded that even with the higher MVEBs the SIP contained sufficient creditable measures applying to all source categories to achieve overall emissions levels in the Washington area of 331 TPD of VOC and 491 TPD of NO<sub>x</sub>.<sup>43</sup> Even though the February 2004 SIP revisions contained the higher, 234.7 TPD of NO<sub>x</sub> MVEBs (and lower motor vehicle VOC emissions budgets of 97.4 TPD) than the pre-2001 SIP revisions' attainment plan (101.8 TPD for VOC and 161.8 TPD for NO<sub>x</sub>), the overall emissions levels from all sources of 331 TPD of VOC and 491 TPD of NO<sub>x</sub> are still less than the levels used in the photochemical grid modeling. Because the overall VOC and NO<sub>x</sub> emissions are less than both the 360 TPD of VOC and over 500 TPD of NO<sub>x</sub> used in the photochemical grid modeling, EPA concludes that the 70 ton increase in the NO<sub>x</sub> MVEB will not adversely impact the Washington area's

ability to timely attain the one-hour ozone NAAQS.

*Comment:* We received a comment claiming that EPA cannot approve the MVEBs in the attainment plan because the attainment plan is based on a "flawed WOE analysis" and relies on an outdated photochemical model and thus the modeled demonstration of attainment does not accurately identify the mobile source budgets required to ensure timely attainment.

*Response:* EPA disagrees with the comment. As explained elsewhere in the response to comments portion of this document, EPA believes that the both WOE analysis and the photochemical grid model upon which the States relied meets the requirements of the Act, and EPA's regulations and guidance. Therefore, EPA believes that the MVEBs consistent with the attainment modeling would not be defective based upon any alleged defects in the modeling.

*Comment:* We received a comment asserting that the photochemical modeling runs for the modeled demonstration of attainment assumed motor vehicle NO<sub>x</sub> emissions of 161.8 tons per day instead of the motor vehicle NO<sub>x</sub> emissions budgets of 234.7 tons per day in the attainment plan. The comment states that because EPA has found that emissions projections determined using MOBILE6 are more accurate than the MOBILE5 values relied on in the photochemical grid modeling runs the States should have rerun the photochemical grid model with the MOBILE6 values. The comment contends that the demonstration of attainment is flawed because the demonstration assumes that 2005 ozone levels will be no different even though NO<sub>x</sub> emissions will be more than 72 tons per day higher than assumed in the photochemical grid modeling runs and that because this conclusion of no increase in 2005 ozone levels is based not on photochemical grid modeling, but on the conclusion that ozone levels in 2005 will be determined not by actual 2005 emission levels but by the relative reduction in emissions between the baseline and 2005. The comment claims that this assumption is invalid because ozone levels do not respond in linear fashion to emission changes and claim that EPA does not demonstrate, with photochemical grid modeling as required by the Act, how it can assure attainment in 2005 with such a major increase in allowable motor vehicle emissions. The comment further alleges that this approach would allow any absolute increase in projected 2005 emissions over the level used in the

photochemical grid modeling, as long as the "relative increase over baseline emissions is the same or less."

*Response:* EPA disagrees with the comment because the comment assume that in this case the overall emissions levels in the Washington area in 2005 will be higher than those assumed in the photochemical grid modeling for the attainment year because the MVEB for NO<sub>x</sub> will be higher.

We have noted previously that the photochemical grid modeling performed for the area had assumed local emissions levels of 360 TPD of VOC emissions and over 500 TPD of NO<sub>x</sub> emissions in the attainment year. In the TSD prepared for the February 9, 2005 NPR (which is the notice of proposed rulemaking published for this final rule), EPA concluded that even with the higher MVEBs the SIP would contain sufficient creditable measures applicable to all source categories to achieve emissions levels in the Washington area of 331 TPD of VOC and 491 TPD of NO<sub>x</sub>.<sup>44</sup> Even though the February 2004 SIP revisions contained the higher 234.7 TPD NO<sub>x</sub> MVEB (and a lower VOC MVEB of 97.4 TPD) than the pre-2001 SIP revisions' attainment plan (101.8 TPD for VOC and 161.8 TPD for NO<sub>x</sub>), the overall emissions levels of 331 TPD of VOC and 491 TPD of NO<sub>x</sub> are still less than the levels assumed in the photochemical grid modeling. Therefore in the attainment year, notwithstanding an increase in mobile source NO<sub>x</sub> emissions, there is a decrease in overall emissions in the attainment year, not an increase as implied by the commenter.

The comment that EPA's policy would allow any absolute increase in projected 2005 emissions over the level used in the photochemical grid modeling, as long as the "relative increase over baseline emissions is the same or less," is irrelevant because as discussed in the preceding paragraph the overall emissions levels for the Washington area in 2005 are projected to be less than the overall levels assumed in the photochemical grid modeling used in the demonstration of attainment. That is, the February 2004 SIP revisions achieve emissions levels less than that assumed in the photochemical grid modeling for the attainment year and a greater relative emissions reduction between the 1990 baseline and 2005 attainment year. The

<sup>41</sup> That rule was vacated by the Court of Appeals for reasons unrelated to the adequacy of the modeled demonstration of attainment. See *Sierra Club v. Whitman*, 294 F.3d at 163.

<sup>42</sup> Table II—Summary of Creditable Measures in "Supplement to Technical Support Document for the One-Hour Ozone Attainment Demonstrations, Attainment Date Extension and Post-1996 Rate-of-Progress Plans submitted by the State of Maryland, Commonwealth of Virginia and the District of Columbia for the Metropolitan Washington, DC Ozone Nonattainment Area and Commitment to Revise Motor Vehicle Budgets for the Metropolitan Washington, DC Ozone Nonattainment Area (DC-2025, VA-5052, MD-3064)," dated December 15, 2000.

<sup>43</sup> Table IV. F-1 Relative Reductions on page A-27 of "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area," dated January 31, 2005.

<sup>44</sup> Table IV. F-1 Relative Reductions on page A-27 of "Technical Support Document for Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; Attainment Demonstration for the Metropolitan Washington, DC Nonattainment Area," dated January 31, 2005.

photochemical grid modeling for the Washington area shows that VOC and NO<sub>x</sub> reductions, along or in combination, that go beyond those assumed in the attainment year will result in additional reduction in ozone concentrations. While ozone may not respond linearly to reductions, the photochemical grid modeling for this area indicates that ozone concentration does respond directionally to a reduction in ozone precursors (a decrease in the ozone precursors VOC and NO<sub>x</sub> will result in a decrease, not an increase in ozone concentration, albeit not necessarily a proportional decrease). Therefore the demonstration that this SIP will result in emissions levels of ozone precursors at levels less than that assumed in the photochemical grid modeling for the attainment year, along with a showing of a greater relative emissions reduction, only adds to the WOE that attainment is demonstrated.

EPA also believes that an upward revision of the MVEBs, which is more than offset by other emissions reductions from other source categories, does not mandate a new photochemical grid modeling demonstration. EPA believes that, if an ozone attainment plan relied on changes in emissions from the base year to an attainment or maintenance year inventory to estimate via photochemical grid modeling the relative changes in monitored ozone levels, that the attainment plan SIP revision with revised MVEBs continues to demonstrate attainment of the ozone NAAQS showing that the relative emission reductions between the base year and the attainment are the same or greater using MOBILE6 than they were using MOBILE5, and that projected emissions levels for the attainment year are lower than those assumed in the modeling demonstration. The Washington area attainment plan relies upon the use of the photochemical modeling results in a relative manner, and, the attainment plan shows a greater relative emission reduction with the MOBILE6-based base year and attainment year MVEBs. *See*, Joint Memorandum dated January 18, 2002, From John S. Seitz, Director, Office of Air Quality Planning & Standards, and Margo Tsirigotis Oge, Director of Office of Transportation and Air Quality, "Policy Guidance for the Use of MOBILE6 in SIP Development and Transportation Conformity." EPA has reasonably interpreted the Act not to require new photochemical grid modeling for every revision of a SIP. While section 182(c)(2)(A) requires demonstrations of attainment for serious

and above areas be based upon photochemical grid modeling (or something equivalent), the Act only establishes a time frame for the initial submittal of the attainment demonstration and does not explicitly require new modeling in connection with every SIP revision. The Act simply requires that the demonstration of attainment be based upon photochemical grid modeling and demonstrate attainment of the ozone NAAQS. *See 1000 Friends of Maryland v. Browner*, 265 F.3d 216 (4th Cir. 2001) ("Nothing in [section 182(c)(2)(A)] prohibits the use of previously performed modeling if that modeling can show that the plan as revised will allow the area to reach attainment").

*Comment:* We received a comment asserting that photochemical grid modeling runs and WOE analysis relied on by EPA in its 2001 approval of the attainment plan assumed that motor vehicle NO<sub>x</sub> emissions would be 161.8 tons per day and that neither EPA nor the States ever proclaimed that were any surplus emission reductions under that scenario. The comment contends that the photochemical grid modeling runs showed continued nonattainment even with motor vehicle emissions at that level and therefore EPA cannot find that motor vehicle NO<sub>x</sub> emissions more than 72 tons per day higher than those assumed in the photochemical grid modeling runs are consistent with timely attainment.

*Response:* As discussed elsewhere in this document in section IV. A. "Comment on the Attainment Demonstration Modeling," EPA disagrees that the photochemical grid modeling runs showed continued nonattainment even with motor vehicle NO<sub>x</sub> emissions at 161.8 TPD. This issue has previously been litigated by the commenter and conclusively decided in EPA's favor. *See Sierra Club v. EPA*, 356 F.3d at 304–307. As noted in our response to previous comments on the MVEBs, EPA has concluded that the MVEBs must be analyzed in the context of the entire SIP, and in that context EPA even with the higher MVEBs the SIP contains sufficient creditable measures applicable to all source categories to achieve overall emissions levels consistent with attainment in a demonstration based on the submitted photochemical grid modeling.

#### C. Comment on the ROP Plans and NO<sub>x</sub> Substitution

*Comment:* We received a comment asserting the ROP plans do not meet the requirements to demonstrate a nine percent reduction in VOC emissions from 1999 to 2002 and a further nine

percent from 2002 to 2005 because the NO<sub>x</sub> substitution in the ROP plans is impermissible. The comment asserts that the plan does not meet section 182(c)(2)(c) of the Act because the plan does not show that a nine percent reduction in NO<sub>x</sub> emissions will result in the same reduction in ozone concentration as a nine percent reduction in VOC emissions. The comment asserts that EPA's reliance on our December 1993 NO<sub>x</sub> Substitution Guidance is flawed because the plain language of the Act requires proof of actual equivalent benefits of NO<sub>x</sub> substitution.

The comment also asserts that because the ROP plans for each of the 1999 to 2005 periods rely solely upon NO<sub>x</sub> reductions the plans do not meet the requirement of section 182(c)(2)(C) because the plan does not provide for some percentage of VOC reduction during each period. The comment claims that the Act requires some non-zero percentage reduction in VOC emissions for any ROP period. Finally, the comment asserts that the Act requires the ROP plan to have VOC reductions by November 15, 2002 to prevent a net increase in VOC emissions by the 2002 milestone date, which would offset the progress achieved by the nine percent NO<sub>x</sub> reductions. The comment notes that the plan provides for such reductions but asserts that EPA cannot approve the ROP plans because the plan does not provide for all of these reductions by the 2002 milestone date.

*Response:* EPA disagrees with the comment and incorporates by reference the response found in section III. A. "Comment on the ROP plans and NO<sub>x</sub> Substitution" of this document.

#### D. Comment on the Transportation Demand Model (TDM) Used in the Plans

*Comment:* We received a comment asserting that the TDM used to project the mobile source emissions does not properly predict traffic volumes in the Washington area on roadways. The comment alleges that the inaccuracies are significant enough that the results cannot form a basis for predicting future motor vehicle emissions or the emission cuts needed to demonstrate attainment of the 1-hour ozone NAAQS by November 15, 2005.

*Response:* EPA disagrees with the comment and incorporates by reference the response found in section III. B. "Comment on the Transportation Demand Model (TDM) Used in the plans" of this document.

#### E. Comment on the VMT Offset SIP

*Comment:* We received a comment asserting that the SIP revisions are

deficient because they do not contain sufficient transportation control measures (TCMs) to offset growth in emissions from growth in vehicle miles traveled (VMT) or in trip numbers. The comment alleges that the Act requires that the SIP offset any growth in emissions due to growth in VMT or in trip numbers not a showing that overall motor vehicle emissions are expected to decline.

*Response:* EPA disagrees with the comment and incorporates by reference the response found in section III. C. "Comment on the VMT Offset SIP" of this document.

#### *F. Comment on the Contingency Measures Plans*

*Comment 1:* We received a comment asserting that EPA cannot approve the contingency measures which were identified in the SIP revisions to address the Washington area's failure to attain by November 15, 1999. The comment claims that, because these measures in the plan required further action by the States, these contingency measures do not meet the CAA's requirement that the measures take effect without further action by the State or EPA after the failure to attain. The comment also claims the contingency measures do not meet EPA's own guidance which requires contingency measures to achieve reductions no later than the year after the one in which the failure is identified because these contingency measures identified by the SIP revision were not implemented until 5 to 6 years after the failure to attain.

*Response 1:* EPA disagrees with the comment and incorporates by reference the response to the comment labeled "comment 1" found in section III. D. "Comment on the Contingency Measures Plans" of this document.

*Comment 2:* We received a comment asserting that the contingency plan for 2005 cannot rely on measures already adopted and in place or to be in place before the 2005 attainment and ROP deadline. The comment claims that the Act requires that contingency measures must be additional measures that will be triggered by the attainment or milestone failure, that is, the Act provision is prospective, not retrospective.

*Response 2:* EPA disagrees with the comment and incorporates by reference the response to the comment labeled "comment 2" found in section III. D. "Comment on the Contingency Measures Plans" of this document.

*Comment 3:* We received a comment that the Act requires a set of contingency measures to address any failure to meet ROP requirements for the 2002–2005 period, that is separate from

those required for failure to attain. The comment claims that the requirement for contingency measures to address post-1996 milestone failures is explicitly set out in the Act as an additional mandate in addition to the requirement for contingency measures to address attainment failures. The comment further claims that the 2005 ROP deadline here could precede the attainment date if, in the case of an area which qualifies for one or both of the 1-year attainment date extensions allowed by the Act.

*Response 3:* EPA disagrees with the comment and incorporates by reference the response to the comment labeled "comment 3" found in section III. D. "Comment on the Contingency Measures Plans" of this document.

*Comment 4:* We received a comment asserting that the contingency plan does not meet EPA's guidance because the plan does not contain a commitment for timely adoption of additional measures if the 3 percent contingency plan is not adequate to correct a failure to attain or achieve an ROP milestone.

*Response 4:* EPA disagrees with the comment and incorporates by reference the response to the comment labeled "comment 4" found in section III. D. "Comment on the Contingency Measures Plans" of this document.

*Comment 5:* We received a comment asserting that the contingency plan must contain some NO<sub>x</sub> reductions since the ROP and attainment plans rely upon NO<sub>x</sub> reductions as well as VOC reductions.

*Response 5:* EPA disagrees with the comment and incorporates by reference the response to the comment labeled "comment 5" found in section III. D. "Comment on the Contingency Measures Plans" of this document.

*Comment 6:* We received a comment alleging that all of the emission reductions from the contingency measures are not "surplus" because neither EPA nor the States have quantified the total VOC and NO<sub>x</sub> reductions needed to attain by November 15, 2005. The comment further claims that the use of a WOE approach in the modeled demonstration of attainment is incapable of identifying the precise level of emission reductions needed for attainment and thus does not support the a claim that there are "surplus" reductions in the SIP that can be used for "contingency" purposes.

*Response 6:* EPA disagrees with the comment and incorporates by reference the response to the comment labeled "comment 6" found in section III. D. "Comment on the Contingency Measures Plans" of this document.

*Comment 7:* We received a comment asserting that the SIP cannot rely on the reformulated gasoline program (RFG program) as a "contingency" measure to address the area's failure to attain by 1999, because the RFG program became mandated by the Act once the Washington area missed the 1999 attainment deadline. The comment claims that contingency measures are measures in addition to those mandated by the Act. The comment also claims that RFG was never intended as a contingency measure and, thus, contrary to EPA's assertion, it is hardly a "penalty" to the nonattainment area to disallow contingency credit for a measure that was never intended as a contingency measure, and that was implemented at a time when the area was already years behind schedule in adopting adequate ROP and attainment plans. The comment further asserts that if the RFG program is a permissible contingency measure the agency's guidance would obligate the states to "backfill" the measure with one year assuring equivalent reductions and that the states have not done so.

*Response 7:* EPA incorporates by reference the response to the comment labeled "comment 7" found in section III. D. "Comment on the Contingency Measures Plans" of this document.

#### *G. Comment on Protective Finding*

We also received comment adverse to issuing a protective finding in concert with a disapproval of the Maryland attainment plan. Because we are not issuing a protective finding in this final rule, we do not address this comment in this document. Our response to these comment adverse to issuing a protective finding are addressed in the final rule disapproving Maryland's attainment plan with a protective finding that is published elsewhere in today's **Federal Register**.

#### **V. Other Matters**

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the

Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. \* \* \*" The opinion concludes that "[r]egarding [section] 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1-1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity."

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its

program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the Clean Air Act, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

## VI. Final Actions

### A. The District of Columbia—1996–1999 ROP Plan

EPA is approving as a revision to the District's SIP the District of Columbia's 1996–1999 ROP plan SIP revision for the Washington area which was submitted on November 3, 1997, as supplemented on May 25, 1999. EPA is approving the 1999 MVEBs of 128.5 tons per day of VOC and 196.4 tons per day of NO<sub>x</sub> established and identified in the Post 1996–1999 ROP plan.

### B. The District of Columbia—1990 Base Year Inventory Revisions

EPA is approving as a revision to the District's SIP the revision to the 1990 Base Year Emissions Inventory submitted by the District of Columbia on September 5, 2003 as supplemented on February 25, 2004.

### C. The District of Columbia—Post 1999–2005 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the District's SIP the District of Columbia's post 1999–2005 ROP plan SIP revision for the Washington area which was submitted on September 5, 2003 as supplemented on February 25, 2004 and the TCMs in Appendix J of the February 25, 2004 submittal. EPA is approving the 2002 MVEBs of 125.2 tons per day for VOC and 290.3 tons per day of NO<sub>x</sub> and the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO<sub>x</sub> established and identified in the Post 1999–2005 ROP Plan.

### D. The District of Columbia—VMT Offset SIP

EPA is approving as a revision to the District's SIP the District of Columbia VMT Offset SIP revision for the Washington area which was submitted on September 5, 2003, as supplemented on February 25, 2004.

### E. The District of Columbia—Contingency Measure Plan

EPA is approving as a revision to the District's SIP the District of Columbia's contingency measure plan SIP revision for the Washington area which was submitted on September 5, 2003, as supplemented on February 25, 2004.

### F. The District of Columbia—Attainment Demonstration and Plan

EPA is approving as a revision to the District's SIP the modeled demonstration of attainment and adjunct WOE analyses that the Washington area will attain the 1-hour ozone NAAQS by November 15, 2005 and the District's 1-hour ozone attainment plan for the Washington area both of which were submitted on September 5, 2003 as supplemented on February 25, 2004. EPA is approving the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO<sub>x</sub> established and identified in the attainment plan.

### G. Maryland—Post 1996–1999 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the State of Maryland's SIP Maryland's post 1996–1999 ROP plan SIP revision for the Washington area which was submitted on December 24, 1997, as supplemented on May 20, 1999, and the TCMs in Appendix H of the May 20, 1999 submittal. EPA is approving the 1999 MVEBs of 128.5 tons per day of VOC and 196.4 tons per day of NO<sub>x</sub> established and identified in the Post 1996–1999 ROP plan.

### H. Maryland—1990 Base Year Inventory Revisions

EPA is approving as a revision to the State of Maryland's SIP the revision to the 1990 Base Year Emissions Inventory submitted by Maryland on September 2, 2003 as supplemented on February 24, 2004.

### I. Maryland—Post 1999–2005 Rate-of-Progress Plan and TCMs

EPA is approving as a revision to the State of Maryland's SIP Maryland's post 1999–2005 ROP plan SIP revision for the Washington area which was submitted on September 2, 2003 as supplemented on February 24, 2004 and the TCMs in Appendix J of the February 24, 2004 submittal. EPA is approving the 2002 MVEBs of 125.2 tons per day for VOC and 290.3 tons per day of NO<sub>x</sub> and the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO<sub>x</sub> established and identified in the Post 1999–2005 ROP Plan.

*J. Maryland—VMT Offset SIP*

EPA is approving as a revision to the State of Maryland's SIP Maryland's VMT Offset SIP revision for the Washington area which was submitted on September 2, 2003 as supplemented on February 24, 2004

*K. Maryland—Contingency Measure Plan*

EPA is approving as a revision to the State of Maryland's SIP Maryland's contingency measure plan SIP revision for the Washington area which was submitted on September 3, 2003, as supplemented on February 24, 2004.

*L. Maryland—Modeled Demonstration of Attainment and Determination That Maryland's Submitted SIP Contains Measures That Fully Satisfy the Emission Reduction Requirements Relevant to Attainment*

EPA is approving as a revision to the State of Maryland's SIP the modeled demonstration of attainment and adjunct WOE analyses that the Washington area will attain the 1-hour ozone NAAQS by November 15, 2005, which was submitted on September 2, 2003 as supplemented on February 24, 2004. EPA is issuing a determination that Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements relevant to attainment of the 1-hour ozone NAAQS in the Washington area by November 15, 2005.

*M. Virginia—Post 1996–1999 Rate-of-Progress Plan and TCMs*

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's post 1996–1999 ROP plan SIP revision for the Washington area which was submitted on December 29, 1997, as supplemented on May 25, 1999, and the TCMs in Appendix H of the May 25, 1999 submittal. EPA is approving the 1999 MVEBs of 128.5 tons per day of VOC and 196.4 tons per day of NO<sub>x</sub> established and identified in the Post 1996–1999 ROP plan.

*N. Virginia—1990 Base Year Inventory Revisions*

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's revision to the 1990 Base Year Emissions Inventory which was submitted on August 19, 2003 as supplemented on February 25, 2004.

*O. Virginia—Post 1999–2005 Rate-of-Progress Plan and TCMs*

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's post 1999–2005 ROP plan SIP

revision for the Washington area which was submitted on August 19, 2003 as supplemented on February 25, 2004 and the TCMs in Appendix J of the February 25, 2004 submittal. EPA is approving the 2002 MVEBs of 125.2 tons per day for VOC and 290.3 tons per day of NO<sub>x</sub> and the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO<sub>x</sub> established and identified in the Post 1999–2005 ROP Plan.

*P. Virginia—VMT Offset SIP*

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's VMT Offset SIP revision for the Washington area which was submitted on August 19, 2003, as supplemented on February 25, 2004.

*Q. Virginia—Contingency Measure Plan*

EPA is approving as a revision to the Commonwealth of Virginia's SIP Virginia's contingency measure plan SIP revision for the Washington area which was submitted on August 19, 2003, as supplemented on February 25, 2004.

*R. Virginia—Attainment Demonstration and Plan*

EPA is approving as a revision to the Commonwealth of Virginia's SIP the modeled demonstration of attainment and adjunct WOE analyses that the Washington area will attain the 1-hour ozone NAAQS by November 15, 2005 and Virginia's SIP Virginia's 1-hour ozone attainment plan for the Washington area both of which were submitted on August 19, 2003 as supplemented on February 25, 2004. EPA is approving the 2005 MVEBs of 97.4 tons per day for VOC and 234.7 tons per day of NO<sub>x</sub> established and identified in the attainment plan.

**VII. Statutory and Executive Order Reviews***A. General Requirements*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this

rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

*B. Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides

that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

### C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 12, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of

such rule or action. This action to approve the District's and Virginia's base year inventory revision, ROP, VMT Offset, contingency measure and attainment plans, MVEBs and TCMs, Maryland's base year inventory revision, TCMs, and ROP, VMT Offset and contingency measure plan, and Maryland's modeled demonstration of attainment and demonstration that its submitted SIP for the Washington area contains adopted control measures that fully satisfy the emissions reductions requirements relevant to attainment of the 1-hour ozone NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: May 3, 2005.

**Donald S. Welsh,**

*Regional Administrator, Region III.*

■ 40 CFR part 52 is amended as follows:

### PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

### Subpart J—District of Columbia

■ 2. In § 52.470, the table in paragraph (e) is amended by adding at the end of the table, the entries for 1996–1999 Rate-of-Progress Plan, 1990 Base Year Inventory Revisions, Post 1999–2005 Rate-of-Progress Plan and Transportation Control Measures (TCMs) in Appendix J, VMT Offset SIP, Contingency Measure Plan and 1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan to read as follows:

### § 52.470 Identification of plan.

\* \* \* \* \*

(e) \* \* \*

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
* * *	* * *	* * *	* * *	* * *
1996–1999 Rate-of-Progress plan SIP.	Washington 1-hour ozone nonattainment.	11/3/1997, 5/25/1999	5/13/05 ..... [Insert page number where the document begins].	1999 motor vehicle emissions budgets of 128.5 tons per day (tpy) of VOC and 196.4 tpy of NO <sub>x</sub> .
1990 Base Year inventory Revisions,.	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
1999–2005 Rate-of-Progress Plan SIP Revision and the Transportation Control Measures (TCMs) in Appendix J.	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix J of the 2/25/2004 revision, 2002 motor vehicle emissions budgets (MVEBs) of 125.2 tons per day (tpy) for VOC and 290.3 tpy of NO <sub>x</sub> , and, 2005 MVEBs of 97.4 tpy for VOC and 234.7 tpy of NO <sub>x</sub> .
VMT Offset SIP Revision .....	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
Contingency Measure Plan ....	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan.	Washington 1-hour ozone nonattainment area.	9/5/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	2005 motor vehicle emissions budgets of 97.4 tons per day (tpy) for VOC and 234.7 tpy of NO <sub>x</sub> .

### Subpart V—Maryland

■ 3. In § 52.1070, the table in paragraph (e) is amended by adding at the end of the table, the entries for 1996–1999 Rate-of-Progress Plan and Transportation

Control Measures (TCMs) in Appendix H, 1990 Base Year Inventory Revisions, Post 1999–2005 Rate-of-Progress Plan and Transportation Control Measures (TCMs) in Appendix J, VMT Offset SIP, Contingency Measure Plan and Modeled

Demonstration of Attainment to read as follows:

### § 52.1070 Identification of plan.

\* \* \* \* \*

(e) \* \* \*

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
* 1996–1999 Rate-of-Progress Plan SIP and the Transportation Control Measures (TCMs) in Appendix H.	* Washington DC 1-hour ozone nonattainment area.	* 12/20/1997, 5/20/1999	* 5/13/05 ..... [Insert page number where the document begins].	* Only the TCMs in Appendix H of the 5/20/1999 revision, 1999 motor vehicle emissions budgets of 128.5 tons per day (tpy) of VOC and 196.4 tpy of NO <sub>x</sub> .
1990 Base Year Inventory Revisions.	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix J of the 2/24/2004 revision, 2002 motor vehicle emissions budgets (MVEBs) of 125.2 tons per day (tpy) for VOC and 290.3 tpy of NO <sub>x</sub> , and, 2005 MVEBs of 97.4 tpy for VOC and 234.7 tpy of NO <sub>x</sub> .
1999–2005 Rate-of-Progress Plan SIP Revision and the Transportation Control Measures (TCMs) in Appendix J.	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	
VMT Offset SIP Revision .....	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	
Contingency Measure Plan ....	Washington, DC Area .....	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	
1-hour Ozone Modeled Demonstration of Attainment.	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004	5/13/05 ..... [Insert page number where the document begins].	

■ 4. Section 52.1073 is revised by adding paragraph (f) to read as follows:

**§ 52.1073 Approval status.**

\* \* \* \* \*

(f) EPA is issuing a determination that Maryland's submitted SIP for the Washington area contains adopted control measures that fully satisfy the emission reduction requirements relevant to attainment of the 1-hour

ozone NAAQS in the Washington area by November 15, 2005.

**Subpart VV—Virginia**

■ 5. In § 52.2420, the table in paragraph (e) is amended by adding at the end of the table, the entries for 1996–1999 ROP Plan and Transportation Control Measures (TCMs) in Appendix H, 1990 Base Year Inventory Revisions, Post

1999–2005 Rate-of-Progress Plan and Transportation Control Measures (TCMs) in Appendix J, VMT Offset SIP, Contingency Measure Plan and 1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan to read as follows:

**§ 52.2420 Identification of plan.**

\* \* \* \* \*  
(e)\* \* \*

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
* 1996–1999 Rate-of-Progress Plan SIP and the Transportation Control Measures (TCMs) in Appendix H.	* Washington 1-hour ozone nonattainment area.	* 12/29/2003, 5/25/1999	* 5/13/05 ..... [Insert page number where the document begins].	* Only the TCMs in Appendix H of the 5/25/1999 revision, 1999 motor vehicle emissions budgets of 128.5 tons per day (tpy) of VOC and 196.4 tpy of NO <sub>x</sub> .
1990 Base Year Inventory Revisions.	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	Only the TCMs in Appendix J of the 2/25/2004 the revision, 2002 motor vehicle emissions budgets (MVEBs) of 125.2 tons per day (tpy) for VOC and 290.3 tpy of NO <sub>x</sub> , and, 2005 MVEBs of 97.4 tpy for VOC and 234.7 tpy of NO <sub>x</sub> .
1999–2005 Rate-of-Progress Plan SIP Revision and the Transportation Control Measures (TCMs) in Appendix J.	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
VMT Offset SIP Revision .....	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
Contingency Measure Plan ....	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	
1-hour Ozone Modeled Demonstration of Attainment and Attainment Plan.	Washington 1-hour ozone nonattainment area.	8/19/2003, 2/25/2004	5/13/05 ..... [Insert page number where the document begins].	2005 motor vehicle emissions budgets of 97.4 tons per day (tpy) for VOC and 234.7 tpy of NO <sub>x</sub> .

[FR Doc. 05-9401 Filed 5-12-05; 8:45 am]  
BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[RME No. R03-OAR-2004-DC-0010; FRL-7910-4]

#### Approval and Promulgation of Air Quality Implementation Plans; Maryland; Metropolitan Washington DC 1-Hour Ozone Attainment Demonstration Plans

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is disapproving a State Implementation Plan (SIP) revision submitted by the State of Maryland, and is issuing a protective finding for that plan pursuant to EPA's transportation conformity rule. The intended effect of this action is to disapprove Maryland's attainment plan for the Metropolitan Washington, DC severe 1-hour ozone nonattainment area (the Washington area) and to issue a protective finding which allows the motor vehicle emissions budgets identified in that plan to be used in future conformity determinations. This action allows transportation planning activities, including conformity analyses and determinations, to continue normally until such time as highway sanctions would be imposed pursuant to the Clean Air Act (the CAA or the Act) and EPA's order of sanctions rule.

**DATES:** *Effective Date:* This final rule is effective on June 13, 2005.

**ADDRESSES:** EPA has established a docket for this action under Regional Material in EDocket (RME) ID Number R03-OAR-2004-DC-0010. All documents in the docket are listed in the RME index at <http://www.docket.epa.gov/rmepub/>. Once in the system, select "quick search," then key in the appropriate RME identification number. Although listed in the electronic docket, some information is not publicly available,

*i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

**FOR FURTHER INFORMATION CONTACT:** Christopher Cripps, (215) 814-2179, or by e-mail at [cripps.christopher@epa.gov](mailto:cripps.christopher@epa.gov).

**SUPPLEMENTARY INFORMATION:** In this document any reference to "we" and "our" means EPA and EPA's, respectively.

### I. Background

#### A. Summary

On February 9, 2005, (70 FR 6796), EPA published a notice of proposed rulemaking (NPR) for the State of Maryland. In our February 9, 2005, NPR, we proposed approval of an attainment plan SIP revision submitted by the State of Maryland for the Washington area contingent upon the State submitting an approvable SIP revision for certain penalty fees, required by the Act, prior to the time EPA issued a final rule on Maryland's attainment plan. In the alternative, EPA proposed to disapprove the attainment plan SIP revision submitted by the State of Maryland for the Washington area and to issue a protective finding for the attainment plan which would allow the use of the motor vehicle emissions budgets (the MVEBs) identified in the attainment plan SIP to be used for demonstrating conformity.

In the February 9, 2005, NPR, we also proposed to approve attainment plan SIP revisions for the Washington area submitted by the Commonwealth of Virginia and the District of Columbia

(the District). EPA has taken final action on the District's and Virginia's attainment plans in a separate final rule which is published elsewhere in today's **Federal Register**. In that same final rule approving the District's and Virginia's attainment plan for the Washington area, we determine that the attainment plan for Maryland contains adopted control measures that fully satisfy the emission reduction requirement relevant to attainment of the 1-hour ozone National Ambient Air Quality Standard (NAAQS).

#### B. Relationship to Past SIP Revisions and Litigation

##### 1. Prior SIP Revisions

On April 29, 1998, Maryland submitted an attainment plan for the Washington area and supplemented those submittals on August 17, 1998, February 14, 2000 and March 31, 2000. The April 29, 1998, August 17, 1998, February 14, 2000 SIP revisions cumulatively constituted the attainment plan for the Washington area which, at the time, was classified as a serious nonattainment area for the 1-hour ozone NAAQS. In the aggregate, these attainment plans consisted of a photochemical modeling demonstration and adjunct weight of evidence analyses to demonstrate attainment of the ozone NAAQS, projected emissions inventories showing that Maryland had adopted sufficient measures to support the demonstration of attainment, attainment year MVEBs, and a commitment to conduct and submit a mid-course review to EPA by a date certain. The March 31, 2000 SIP revision consisted of a commitment to revise the mobile vehicle emissions budgets one-year after EPA released the MOBILE6 model and MVEBs for years after 2005 (outyear budgets). These attainment plans were submitted to demonstrate that the Washington area would attain the 1-hour ozone NAAQS by no later than November 15, 2005. Hereafter these revisions will be called the "pre-2001 SIP revisions" attainment plan." These are those SIP revisions listed in Table 2 of a January 3, 2001 final rule (66 FR at 586) and those listed