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_X.

[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*.

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

in Table 2 of an April 17, 2003 final rule (68 FR at 19107).[1]

On January 24, 2003 (68 FR 3410), EPA reclassified the Washington area to severe because the area failed to attain the 1-hour ozone NAAQS by the statutory attainment date for serious areas. This action made the Washington area subject to the additional requirements applicable to severe areas under section 182(d) of the CAA. On April 17, 2003 (68 FR at 19107), EPA conditionally approved these SIP revisions. The history of litigation on the April 17, 2003 conditional approval will be discussed in paragraph 3. of this section entitled, ''April 17, 2003 Final Rule Vacated and Withdrawn'.

2. 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, Maryland submitted the SIP revisions necessary to satisfy the requirements section 182(d) of the CAA for severe areas and EPA's conditional approval, with the exception of a SIP revision for the section 185 penalty fee program. These SIP revisions included Maryland's September 2, 2003 and February 19, 2004 submittals (hereafter the February 2004 SIP revisions). The February 2004 SIP revisions contained the attainment plan which consists of:

(1) A photochemical modeling demonstration and adjunct weight of evidence analyses to demonstrate attainment of the ozone NAAQS by no later than November 15, 2005;

(2) Projected emissions inventories showing that Maryland 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.[2] The February 2004 SIP revisions resubmitted to EPA the attainment plan contained in the pre-2001 SIP revisions' serious area attainment plan along with additional elements required for a severe area attainment plan, such as a post-1999 rate-of-progress (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' serious area attainment plan.

EPA had already approved many of Maryland's SIP revisions by the time we published NPR's on January 12, 2005 (70 FR 2085) and February 9, 2005 NPR (70 FR 6796) for Maryland's February 2004 SIP revisions.

We proposed approval on Maryland's February 2004 SIP revisions in two separate NPR's published on January 12, 2005 (70 FR 2085) and on February 9, 2005 (70 FR 6796). On May 3, 2005, the Regional Administrator signed a final rule approving Maryland's 1996–1999 ROP plan and all portions of the ''February 2004 SIP revisions'' except the attainment plan. That final action is published elsewhere in today's **Federal Register**.

3. 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 CAA. 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 the 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 (DC 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.[3]

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 reasonably available control measures, post-1999 ROP plans demonstrating ROP for 2002 and 2005, vehicle miles traveled (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.[4] 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 newly submitted materials, which we collectively refer to as the February 2004 SIP revisions, as well as the resubmitted pre-2001 SIP revisions' attainment plan.

4. 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 plan, 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 (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 plan) 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

[1] Only the commitment to revise the MVEBs found in the March 31, 2000 SIP revisions was subject to these final rules. The portion of the SIP revision related to MVEBs for years after 2005 (outyear budgets) was not subject to these final rules.

[2] 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.

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

[4] With one exception: the ''outyear budgets'' contained in the March 31, 2002 SIP revision and which EPA had never proposed to take action on, were not resubmitted.

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,'' [5] as follows:

(1) This disapproval action covers 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. This protective finding will allow Maryland to use the MVEBs contained in the disapproved SIP for transportation conformity purposes pursuant to 40 CFR 93.120; and

(2) Another final rule, which is published elsewhere in today's **Federal Register**, which among other things,

(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.

III. Comment Received and EPA's Response

EPA received a comment on our February 9, 2005 NPR wherein we proposed to approve the Maryland February 2004 SIP revisions' attainment plan and, in the alternative, proposed to disapprove that plan in concert with the issuance of a protective finding for the MVEBs. Because EPA is not approving the attainment plan we are not responding to the comments opposing the proposed approval. A summary of the adverse comment that we received on our proposed action to disapprove Maryland's attainment plan for the Washington area in concert with the issuance of a protective finding, and our response, follows.

Comment: We received a comment claiming that Maryland's attainment plan does not meet the requirement for a protective finding under EPA's transportation conformity rules because the section 185 penalty fee SIP revision is a control measure. The commenter claims that the section 185 penalty fee provision is an emission reduction requirement because the fees are assessed on emissions in excess of a baseline and will promote emission reductions, and, is an emission reduction requirement relevant to the Act's requirements for severe area SIPs.

Response: EPA disagrees that an approved section 185 penalty fee SIP revision is necessary to grant a protective finding. The section 185 penalty fee program, which is the only ''control measure'' the commenter alleges to be missing from the attainment plan and creating a bar to a protective finding, is not a ''control measure'' as that term is used at 40 CFR 93.120(a)(3).[6] EPA's regulation containing the criteria for granting a protective finding states that the relevant ''control measures'' that must be in place (adopted or subject to a written commitment) in order to receive a protective finding are those ''that fully satisfy the emissions reductions requirements relevant to the statutory provisions for which the implementation plan revision was received, such as reasonable further progress or attainment.''

Because we are granting a protective finding for a disapproved attainment plan, the comments require us to examine whether the section 185 penalty fee provision is a control measure for purposes of achieving emissions reductions relevant to attainment of the 1-hour ozone NAAQS. We conclude it is not. The section 185 penalty fee is a required element of the SIP for a severe or extreme ozone nonattainment area. 42 U.S.C. 7511d(a). Section 185 requires that the SIP contain a provision that major stationary sources within a severe or extreme nonattainment area pay ''a fee to the state as a penalty'' for failure of a severe or extreme nonattainment area to attain the ozone NAAQS by the area's attainment date.[7] This penalty fee, which is based on the tons of volatile organic compounds or nitrogen oxides emitted above a source-specific trigger level based on the source's emissions during the ''attainment year,'' first comes due for emissions during the ''calendar year beginning after the attainment date and must be paid annually until the area attains the NAAQS. 42 U.S.C. 7511d(a)—(c); 7511a(f)(1). Thus, if a severe area, with an attainment date of November 15, 2005, fails to attain by that date, the first penalty assessment will be assessed for emissions in calendar year 2006 that are more than 80% above the source's 2005 baseline. Thus, the penalty cannot first be paid until after the 2006 emissions are known, *i.e.*, some time in 2007.

A penalty fee that is based on emissions could have some incidental effect on emissions if sources decrease their emissions to reduce the amount of the per ton monetary penalty. However, the penalty fee does not ensure that any actual emissions reduction will ever occur, since every source can pay a penalty rather than achieve actual emissions reductions. The section 185 fee has the purpose of extracting a monetary penalty for emissions above a threshold level in relation to a source-specific baseline. It does not mandate that emissions ever be reduced. The section 185 penalty fee is not a control measure as meant by 40 CFR 93.120 because it does not ''satisfy * * * emissions reductions requirements relevant to * * * attainment.'' The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of

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[5] The District Court used the term ''pre-2001 submissions'' and ''pre-2001SIPs'' which consists of what in this document we call ''the pre-2001 SIP revisions' attainment demonstration'' and ''the 1996–1999 ROP plan.''

[6] The term ''control measures * * * that fully satisfy the emissions reductions requirements relevant to * * * attainment,'' is not defined in 40 CFR Part 93. Nor is this term, or the term ''control measure'' itself, defined by Congress in the Act. The failure of Congress to define the term ''control measure'' has been held to create ambiguity in the Act, *see Greenbaum* v. *EPA,* 370 F.3d 527, 536–37 (6th Cir. 2004), and EPA's interpretation as to the meaning of the ambiguous phrase ''control measure'' in a given context therefore should be afforded deference. EPA believes it is reasonable to interpret ''control measures * * * that fully satisfy the emissions reductions requirements relevant to * * * attainment,'' not to include the penalty fee program of Section 185 of the Act for the reasons given in response to this comment.

[7] The fee program established by section 185 of the Act is restricted to major *stationary* sources and does not reach mobile sources. 42 U.S.C. 7511d(a). Therefore, the effects of section 185 does not affect the mobile source emissions and hence cannot affect the MVEBs.

emissions reductions.[8] Further, even if the section 185 penalty fee achieved incidental emissions reductions, those reductions plainly are not ''relevant to attainment,'' since the first year the reductions could be achieved would come only after the area has failed to reach attainment, in the year after the attainment deadline.[9] We reasonably interpret the language in 40 CFR 93.120(a)(3) referring to ''control measures * * * that fully satisfy the emissions reductions requirements relevant to * * * attainment,'' to mean control measures that are intended to achieve emissions reductions prior to the statutory attainment deadline.[10]

IV. Disapproval With Protective Finding

In this final rule, EPA is disapproving the attainment plan of Maryland's February 2004 SIP revisions (and therefore the pre-2001 SIP revisions' attainment plan subsumed therein) for the reasons cited in the February 9, 2005 NPR. As noted previously, on May 3, 2005, the Regional Administrator signed a final rule which approves Maryland's February 2004 SIP revisions except the overall attainment plan, and which approves the 1996–1999 ROP plan. That other final rule, which the Regional Administrator signed on May 3, 2005, also approves the District of Columbia's and the Commonwealth of Virginia's attainment plans for the Washington area and approves the 2005 area-wide MVEBs in those attainment plans. That other final action determines that the District's, Maryland's and Virginia's SIPs contain enough emission reduction measures to achieve the specific purpose of demonstrating attainment with the 1-hour ozone NAAQS and approves the 2005 area-wide MVEBs into the District's, and Virginia's SIPs. That other final action is published elsewhere in today's **Federal Register**, and, along with this action cumulatively constitutes a final action on what the District Court defined as the pre-2001 submissions, as well as the February 2004 SIP revisions.

Pursuant to 40 CFR 93.120(a)(1) and (2), EPA is issuing a protective finding with respect to the attainment plan contained Maryland's February 2004 SIP revisions submission and the resubmitted pre-2001 SIP revisions' attainment plan subsumed therein, but the applicable budgets are those identified in Maryland's February 19, 2004 SIP revisions.

V. Consequences That May Result From Disapproval of a Required SIP Element

EPA has promulgated a rule (40 CFR 52.31), commonly called the ''order of sanctions rule,'' that provides that the offset sanction shall apply in an area 18 months after the effective date of a disapproval of a mandatory Part D SIP requirement. That same rule provides that if the SIP deficiency has still not been remedied by the state and approved by EPA, the highway sanction shall apply in that area 6 months following application of the offset sanction. Under this rule, sanctions will apply automatically in the sequence prescribed in all instances in which sanctions are required following a disapproval, except when EPA determines through a separate rulemaking to change the sanction sequence for one or more specific circumstances.

When EPA disapproves a SIP submission for a nonattainment area based on its failure to meet one or more plan elements required by the CAA, the sanctions clocks actually start on the date the final **Federal Register** actions are effective. Under EPA's order of sanctions rule, 40 CFR 52.31:

(1) If, within 18 months of the effective date found in the DATES section of this final rule, EPA has not issued a final approval for nor issued an interim final determination pursuant to 40 CFR 52.31 for Maryland's attainment plan for the Washington area, the offset sanction will be imposed pursuant to 40 CFR 52.31(e)(1); and

(2) If, within 24 months of the effective date found in the DATES section of this final rule, EPA has not issued a final approval for nor issued an interim final determination pursuant to 40 CFR 52.31 for Maryland's attainment plan for the Washington area, the highway sanction will be imposed pursuant to 40 CFR 52.31(e)(2);

Pursuant to 40 CFR 120(a)(1) this disapproval will cause the conformity status of the transportation plan and TIP to lapse on the date that highway sanctions are imposed, and, no new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted and conformity to this submission is determined.

Furthermore, section 110(c)(1) of the CAA requires EPA to promulgate a Federal Implementation Plan (FIP) any time within two years after an EPA disapproval of a SIP revision unless the State corrects the deficiency and EPA approves the plan or SIP revision before EPA promulgates such FIP.

VI. Protective Finding

When disapproving a control strategy SIP revision such as an attainment plan, EPA may make a protective finding pursuant to section 93.120(a) of the transportation conformity rule, 40 CFR part 93, when as here, EPA finds that the submitted SIP contains adopted control measures that fully satisfy the emission reduction requirements relevant to the statutory provision for which the SIP was submitted. *See* 69 FR at 40048, July 1, 2004, citing 69 FR at 38984–38985, June 30, 2003. If EPA disapproves a plan but gives a protective finding, the MVEBs in the disapproved plan can still be used to demonstrate conformity (62 FR at 43796, August, 15, 1997). There will be no adverse conformity consequences unless highway sanctions are imposed, as is the case with respect to all other SIP planning failures. Highway sanctions would be imposed two years following EPA's disapproval if the SIP deficiency had not been remedied. The conformity of the plan and TIP would lapse once highway sanctions were imposed.

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[8] We note that ''control measures'' may include ''economic incentives such as fees,'' for some purposes of the Act. *See* 42 U.S.C. 7410(a)(2)(A). However, the particular fee program prescribed by section 185 of the Act is not among the ''control measures that fully satisfy * * * emissions reductions requirements relevant to * * * attainment,'' as we explain, since it is not triggered until after a serious or extreme nonattainment area has failed to timely attain the NAAQS.

[9] The section 185 penalty fee program actually provides a disincentive for sources to foster the achievement of attainment by ratcheting down emissions in the calendar year containing the attainment deadline, since the threshold above which emissions trigger the fee is calculated from a baseline determined from emissions occurring over the course of the statutory attainment year. If a source knew or reasonably suspected that the severe or extreme area in which it is located would not timely attain, it would have an incentive to increase its emissions during the attainment deadline year to the highest level allowed by law in order to raise its baseline and corresponding penalty trigger threshold. This perverse incentive is yet another reason that the section 185 penalty fee program is not an emissions reduction measure relevant to attainment.

[10] In another action published in today's **Federal Register**, among other things, we approve the attainment plans for the Washington area submitted by Virginia and the District of Columbia. Neither took credit for emissions reductions based on a section 185 fee program, yet both demonstrate that the Washington area will timely attain the 1-hour ozone NAAQS. In that same **Federal Register** notice we also determine that the Maryland attainment plan that we are disapproving with a protective finding in this notice contains control measures to fully satisfy the emissions reduction requirements relevant to attainment of the 1-hour ozone NAAQS. Thus, even if the section 185 program actually could achieve emissions reduction prior to the attainment deadline, it would not be as an emissions control measure under 40 CFR 93.120, since the attainment plans submitted by the District, Maryland and Virginia demonstrate timely attainment of the NAAQS without resort to a section 185 penalty fee program.

On May 3, 2005, the Regional Administrator signed a final rule approving the District of Columbia's and the Commonwealth of Virginia's attainment plans for the Washington area and approving the 2005 area-wide MVEBs in these attainment plans. This other final action determines that the District's, Maryland's and Virginia's SIPs contain enough emission reduction measures to achieve the specific purpose of demonstrating attainment with the 1-hour ozone NAAQS and approves the 2005 area-wide MVEBs into the District's and Virginia's SIPs. Maryland's February 19, 2004 SIP revision includes the following MVEBs of 97.4 tons per day of volatile organic compound (VOC) emissions and 234.7 tons per day of nitrogen oxide (NO_X) emissions for the 2005 attainment year. These MVEBs are area-wide MVEBs covering the entire Washington area and are the MVEBs that will apply pursuant to the protective finding.

VII. Final Action

EPA is disapproving the Maryland's attainment plan for the Washington area, and, pursuant to 40 CFR 93.120(a), issuing a protective finding to Maryland's February 2004 SIP revisions' attainment plan. This disapproval applies to Maryland's February 2004 SIP revisions' attainment plan for the Washington area and to the pre-2001 SIP revisions' attainment plan which were resubmitted and subsumed by the February 2004 SIP revisions' attainment plan. In another final rule, which is published elsewhere in today's **Federal Register**, EPA is approving 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. That final rule also approves Maryland's 1996–1999 ROP plan for the Washington area.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., OMB must approve all ''collections of information'' by EPA. The Act defines ''collection of information'' as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *'' 44 U.S.C. 3502(3)(A). Because this final rule does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submission does not meet the requirements of the Clean Air Act and EPA cannot approve the submission. The final disapproval will not affect any existing State requirements applicable to small entities in the Washington area. Federal disapproval of a State submittal does not affect its State enforceability. Therefore, because the Federal SIP disapproval does not create any new requirements nor impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action determines that pre-existing requirements under State or local law should not be approved as part of the federally-approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation. This rule will 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, because it merely disapproves 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. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, 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. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

K. 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 disapprove Maryland's 1-hour ozone attainment plan for the Washington area and to issue a protective finding 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 V—Maryland

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

§ 52.1073 Approval status.

* * * * *

(g) EPA is disapproving the Maryland September 2, 2003 and February 19, 2004 SIP revision submittals' 1-hour ozone attainment plan for the Metropolitan Washington DC area. Pursuant to 40 CFR 93.120(a) EPA is issuing a protective finding to the Maryland September 2, 2003 and February 19, 2004 SIP revision submittals' 1-hour ozone attainment plan which identifies the following 2005 attainment year MVEBs: 97.4 tons per day of VOC emissions and 234.7 tons per day of NO_X emissions.

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