

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[DE-1033; FRL-7089-3]

**Approval and Promulgation of Air Quality Implementation Plans; Delaware; Post-1996 Rate-of-Progress Plans and One-Hour Ozone Attainment Demonstration for the Philadelphia-Wilmington-Trenton Ozone Nonattainment Area**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving the attainment demonstration for the one-hour ozone national ambient air quality standard (NAAQS) for the Philadelphia-Wilmington-Trenton severe nonattainment area (the Philadelphia area) as a revision to the Delaware State Implementation Plan (SIP). EPA is also approving the Post-1996 rate-of-progress (ROP) plans for the Delaware portion of the Philadelphia area, namely Kent and New Castle Counties. These control strategy plans were submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC). The measures that have been adopted by the State which comprise the control strategies have and will result in significant emission reductions of volatile organic compounds (VOCs) and oxides of nitrogen (NO<sub>x</sub>) in the Philadelphia area. Two counties in

Delaware, one county in Maryland, seven counties in New Jersey, and five counties in Pennsylvania comprise the Philadelphia area. The intended effect of this action is to approve this SIP revision as meeting the requirements of the Clean Air Act (CAA or the Act).

**DATES:** This final rule is effective on November 28, 2001.

**ADDRESSES:** Copies of the documents relevant to this action are available 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; and Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

**FOR FURTHER INFORMATION CONTACT:** Rose Quinto, (215) 814-2182 at the EPA Region III office above or by e-mail at [quinto.rose@epa.gov](mailto:quinto.rose@epa.gov).

**SUPPLEMENTARY INFORMATION:** This **SUPPLEMENTARY INFORMATION** section is organized to address the following questions:

- I. Background
  - A. What Action Is EPA Taking in this Final Rulemaking?
  - B. What Previous Action Has Been Proposed on These SIP Revisions?
  - C. What Were the Conditions for Approval Provided in the Notice of Proposed Rulemakings for the Attainment Demonstration?
  - D. What Amendments to the Attainment Demonstration SIP did Delaware Submit

- for the Philadelphia Area Since EPA's December 16, 1999 Proposed Action?
- E. What Did the Supplemental Notices of Proposed Rulemaking Cover?
- F. When Did EPA Make a Determination Regarding the Adequacy of the Motor Vehicle Emissions Budgets for the Delaware Portion of the Philadelphia Area?
- G. What SIP Elements Must be Approved Before Full Approval of the Attainment Demonstration Can be Granted?
- H. What Measures are in the Control Strategies for the Post-1996 Plan and the Attainment Demonstration?
- I. What Are the Approved Transportation Conformity Budgets, and What Effects Does This Action Have on Transportation Planning?
- J. What Happens to the Approved 2005 Budgets When States Change Their Budgets Using the MOBILE6 Model?
- K. What Comments Were Received on the Proposed Approvals and How Has EPA Responded to Them?
- II. Response to Comments
- III. Final Action
- IV. Administrative Requirements

**I. Background**

*A. What Action Is EPA Taking in This Final Rulemaking?*

EPA is fully approving the Post-1996 ROP plans and the one-hour attainment demonstration submitted by Delaware for the Philadelphia area as meeting the requirements of 182(c)(2) and (d) of the Act. The following tables identify submittal dates and amendment dates for the Post-1996 ROP plans and the attainment demonstration.

TABLE 1.—SUBMITTAL DATES OF THE ATTAINMENT DEMONSTRATION PLAN

	Date	Summary of content
Initial submittal .....	May 22, 1998 .....	Attainment Demonstration Plan.
Amendment .....	October 8, 1998 .....	Attainment Demonstration Revised to Supplement Regional Scale Modeling.
Amendment .....	January 24, 2000 .....	Attainment Plan Revised for Budgets to Reflect Tier 2/Sulfur Rule Benefits, and to Include Enforceable Commitments.
Amendment .....	December 20, 2000 .....	Attainment Plan Revised to Amend Enforceable Commitments.
Amendment .....	October 9, 2001 .....	Attainment Plan Revised to Include Reasonably Available Control Measures Analysis (RACM).

TABLE 2.—SUBMITTAL DATES OF THE POST-1996 ROP PLANS FOR KENT AND NEW CASTLE COUNTIES

	Date	Content
Initial submittal .....	December 29, 1997 .....	ROP through 1999.
Amendment .....	June 17, 1999 .....	ROP through 1999.
Initial submittal .....	February 3, 2000 .....	ROP through 2002.
Amendment .....	December 20, 2000 .....	ROP through 2002.
Initial submittal .....	December 20, 2000 .....	ROP through 2005.

*B. What Previous Action Has Been Proposed on These SIP Revisions?*

In a December 16, 1999 (64 FR 70444) notice of proposed rulemaking (the December 16, 1999 NPR), we proposed

approval of Delaware's attainment demonstration for the Philadelphia area.

In our December 16, 1999 NPR, we also proposed approval of Delaware's enforceable commitment to submit an adopted ROP plan through the

attainment year for the Delaware portion of the Philadelphia area. Delaware has fulfilled that enforceable commitment.

On August 30, 2001 (66 FR 45800), EPA proposed approval of the Post-1996 ROP plans adopted and submitted by

Delaware to demonstrate ROP from 1996 through the attainment year. In that same notice, EPA also proposed approval of Delaware's contingency measures for ROP. EPA received no comments on any of the actions it proposed to approve in the August 30, 2001 NPR. In this final rulemaking action, we are approving the Post-1996 ROP plans submitted by Delaware which demonstrate ROP from 1996 through the 2005 attainment year and Delaware's contingency measures for ROP.

On February 22, 2000 (65 FR 8703), EPA published a notice of availability on guidance memoranda relating to the ten one-hour ozone attainment demonstrations (including the Philadelphia area) proposed for approval or conditional approval on December 16, 1999. The guidance memoranda are entitled: "Guidance on Motor Vehicle Emissions Budgets in One-Hour Ozone Attainment Demonstrations" dated November 3, 1999, and "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas" dated November 30, 1999.

On July 28, 2000 (65 FR 46383), EPA published a supplemental notice of proposed rulemaking (SNPR) on the attainment demonstration. In that supplemental notice, we clarified and expanded on two issues relating to the motor vehicle emissions budgets in attainment demonstration SIP revisions. This supplemental notice is discussed in Section I.E.(1) of this document.

In its August 30, 2001 NPR (66 FR 45800) referenced earlier in this document, EPA also proposed approval of Delaware's revisions to its 2005 attainment plan consisting of commitments to: (1) submit by October 31, 2001, additional measures to achieve the additional reductions necessary for attainment, and (2) revise the SIP and the motor vehicle emissions budgets within a year of the release of MOBILE6. EPA received no comments on any of the actions it proposed to approve in the August 30, 2001 NPR. In this final rulemaking action, we are approving Delaware's revised commitments.

The comments EPA did receive on the December 16, 1999 (64 FR 70444) and July 28, 2000 (65 FR 46383) proposals listed in this section, relevant to the Philadelphia area's attainment demonstration, are discussed in Sections I. K. and II. of this document.

### *C. What Were the Conditions for Approval Provided in the Notice of Proposed Rulemaking for the Attainment Demonstration?*

On December 16, 1999 (64 FR 70444), EPA proposed approval of the attainment demonstration submitted by the State of Delaware for the Philadelphia area. Our approval was contingent upon certain actions by Delaware. These actions were:

(1) Adopt and submit adequate motor vehicle emissions budgets.

(2) Submit a list of control measures that, when implemented, would be expected to provide sufficient additional emission reductions to further reduce emissions to support the attainment test and a commitment that these measures would not involve additional limits on highway construction beyond those that could be imposed under the submitted motor vehicle emissions budget.

(3) Adopt and submit a rule(s) for the regional NO<sub>x</sub> reductions consistent with the modeling demonstration.

(4) Adopt and submit an enforceable commitment, or a reaffirmation of existing enforceable commitment to do the following:

(a) Submit measures by October 31, 2001 for additional emission reductions as required in the attainment demonstration test, and for additional emission reduction measures developed through the regional process; submit an enforceable commitment for the additional measures and a backstop commitment to adopt and submit intrastate measures for the emission reductions in the event the regional process does not recommend measures that produce emission reductions.

(b) Submit a revised SIP and motor vehicle emissions budget by October 31, 2001 if additional measures affect the motor vehicle emissions inventory.

(c) Submit revised SIP and motor vehicle emissions budgets one year after MOBILE6 is issued.

(d) Perform a mid-course review by December 31, 2003.

### *D. What Amendments to the Attainment Demonstration SIP did Delaware Submit for the Philadelphia Area Since EPA's December 16, 1999 Proposed Action?*

The following is a summary of such submittals which includes the submittal dates of revisions, the content of these submissions and other pertinent facts regarding these submissions:

(1) On January 24, 2000, Delaware submitted an addendum to its attainment demonstration plan for the Philadelphia area. This submittal contains the revised motor vehicle

emissions budgets that reflect the benefits from EPA's Tier 2/Low Sulfur rule, and enforceable commitments to:

(a) Adopt control measures consistent with the reductions assumed in the attainment plan, and assume reductions in transported NO<sub>x</sub> consistent with EPA's NO<sub>x</sub> SIP Call;

(b) Adopt additional measures that can be adopted regionally such as in the OTR, or locally;

(c) Submit a revised SIP and motor vehicle emissions budget by October 31, 2001, if the additional measures affect the motor vehicle emissions inventory; and

(d) Conduct a mid-course review by December 31, 2003.

(2) On December 20, 2000, Delaware submitted an amendment to the January 24, 2000 addendum to its attainment demonstration plan for the Philadelphia area. This submittal addresses two commitments that were not clearly listed in the January 24, 2000 addendum, namely:

(a) To revise SIP and motor vehicle emission budgets using MOBILE6 within one year after it is issued.

(b) To adopt and submit additional control measures for the additional emission reductions as required in the attainment demonstration test by October 31, 2001.

(3) On October 9, 2001, the State of Delaware formally submitted a supplement to its 2005 attainment demonstration SIP consisting of an analysis and determination of RACM.

### *E. What Did the Supplemental Notices of Proposed Rulemaking Cover?*

(1) On July 28, 2000, EPA published a supplemental notice of proposed rulemaking (SNPR) on the attainment demonstration (65 FR 46383). In that supplemental notice, we clarified and expanded on two issues relating to the motor vehicle emissions budgets in this attainment demonstration SIP revision.

(a) First, we proposed a clarification of what occurs if we finalize conditional or full approval of this and certain other attainment demonstration SIP revisions based upon a state's commitment to revise the SIP's motor vehicle emissions budgets in the future. Under the proposal, the motor vehicle emissions budgets in the approved SIP will apply for transportation conformity purposes only until the budgets are revised consistent with the commitment, and we have found the new budgets adequate. Once we have found the newly revised budgets adequate, then they would apply instead of the previous conditionally or fully approved budgets. Normally, revisions to SIP-approved budgets cannot be used

for conformity purposes until we approve those revised budgets as a SIP revision. Therefore, we proposed to clarify that when our approval of this and certain other one-hour ozone attainment demonstrations is based upon a commitment to future revisions to the budget, our approval of the budget lasts only until revisions to satisfy those conditions are submitted and we find them adequate.

(b) Second, we proposed that states may opt to commit to revise their emissions budgets one year after the release of the MOBILE6 model, as originally proposed on December 16, 1999. Or, states may commit to a new option, *i.e.*, to revise their budgets two years following the release of the MOBILE6 model, provided that conformity is not determined without adequate MOBILE6-derived SIP budgets during the second year. This second option is not germane to Delaware's attainment plan for the Philadelphia area because Delaware has submitted an enforceable commitment to revise the motor vehicle emissions budgets within one year after the official release of the MOBILE6 model.

(c) In addition, on July 28, 2000 (65 FR at 46383), we reopened the comment period to take comment on these two issues and to allow comment on any additional materials that were placed in the dockets for the proposed actions close to or after the initial comment period on the December 16, 1999 closed on February 14, 2000. For many of the areas, additional information had been placed in the docket close to the time or since the initial comment period concluded. In general, these materials were identified as consisting of motor vehicle emissions budgets, and revised or additional commitments or reaffirmations submitted by the states.

(2) On August 30, 2001 (66 FR 45800), EPA proposed approval of all of the Post-1996 ROP plans adopted by Delaware to demonstrate ROP from 1996 through the attainment year. In that same notice, EPA also proposed approval of Delaware's contingency measures for ROP. In that August 30, 2001 NPR, EPA also proposed approval of Delaware's revisions to its 2005 attainment SIP consisting of commitments to: (1) Submit by October 31, 2001, additional measures to achieve the additional reductions necessary for attainment, and (2) revise the SIP and the motor vehicle emissions budgets

within a year of the release of MOBILE6. EPA received no comments on any of the actions it proposed to approve in the August 30, 2001 NPR.

(3) On September 7, 2001 (66 FR 46755), EPA published a SNPR on Delaware's 2005 attainment demonstration. In that supplemental notice, we proposed to approve Delaware's RACM analysis and determination for the Philadelphia area. We received no comments on the September 7, 2001 SNPR.

*F. When Did EPA Make a Determination Regarding the Adequacy of the Attainment Motor Vehicle Emissions Budgets for the Delaware Portion of the Philadelphia Area?*

Delaware submitted a revision to the attainment plan SIP for the Philadelphia area on January 24, 2000. This submittal contains revised motor vehicle emissions budgets for the attainment year of 2005 that reflect the benefits of the Heavy Duty Diesel Engine (HDDE) rule, the National Low Emission Vehicle (NLEV) program and the Federal Tier 2/ Low Sulfur rule.

We began our adequacy review process on the budgets in the January 24, 2000 submittal under our adequacy process by a posting on EPA's Web site ([www.epa.gov/otaq/transp/conform/adequacy.htm](http://www.epa.gov/otaq/transp/conform/adequacy.htm)) that started a public comment period on the adequacy of the motor vehicle emissions budgets in the January 24, 2000 SIP revision for the Philadelphia area. We prepared a technical support document for our adequacy determination that included responses to any public comments received during the adequacy process comment period. On May 31, 2000, EPA found the budgets of Delaware's attainment demonstration plan for the Philadelphia area adequate (Letter from Katz to Tyler dated May 31, 2000). In a June 8, 2000, **Federal Register** notice we announced that we had found the budgets of the January 24, 2000 submission adequate (65 FR 36440). (The proposed approval of the budgets in the January 24, 2000 submission is discussed in Section I.B. of this document, and the response to any comments received on the proposed approval are in Section II. of this document.) Our findings of adequacy and responses to comments can be accessed at [www.epa.gov/otaq/traq](http://www.epa.gov/otaq/traq) (once there, click on the "conformity" button).

On December 20, 2000, Delaware submitted, as a formal SIP revision, an acceptable commitment to revise the attainment year motor vehicle emissions budgets using the MOBILE6 model within one year after the release of the MOBILE6 model. As stated earlier in this document, on August 30, 2001 (66 FR 45800), EPA published a NPR proposing to approve Delaware's revised commitments to revise the SIP and the motor vehicle emissions budgets within a year of the release of MOBILE6. EPA received no comments on the August 30, 2001 NPR. In this final rulemaking action, we are approving Delaware's commitment.

*G. What SIP Elements Must be Approved Before Full Approval of the Attainment Demonstration Can Be Granted?*

In the December 16, 1999 NPR for Delaware's attainment demonstration SIP for the Philadelphia area, EPA noted in Table 4, the submission and approval status of many of the control measures or part D requirements of the Act for serious and severe areas. The following provides the current status of those SIP elements which are prerequisite for approval of the attainment demonstration but which were not fully approved as of December 16, 1999 (or which were not listed in Table 4 in the NPR as fully approved):

(1) On September 17, 1999, EPA approved Delaware's sanitary landfills SIP (64 FR 50453).

(2) On December 28, 1999, EPA approved Delaware's National Low Emission Vehicle (NLEV) SIP (64 FR 72564).

(3) On March 9, 2000, EPA approved Delaware's NO<sub>x</sub> budget rule consistent with the Ozone Transport Commission's (OTC) Memorandum of Understanding (MOU) Phase II (65 FR 12481).

(4) On February 7, 2001, EPA approved Delaware's New Source Review Rule (66 FR 9209).

(5) On May 17, 2001, EPA approved Delaware's NO<sub>x</sub> trading rule consistent with the NO<sub>x</sub> SIP call (66 FR 27549).

(6) On June 14, 2001, EPA approved Delaware's NO<sub>x</sub> RACT rule (66 FR 32231).

*H. What Measures Are in the Control Strategy for the Post-1996 Plan and the Attainment Demonstration?*

TABLE 3.—CONTROL MEASURES IN THE ONE-HOUR OZONE POST-1996 ROP AND ATTAINMENT DEMONSTRATION FOR THE PHILADELPHIA OZONE NONATTAINMENT AREA

Control measure	Type of measure	Credited in Post-1996 plan for which milestone years	Credited in attainment plan
Enhanced Inspection & Maintenance .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Federal Motor Vehicle Control program .....	Federal .....	Tier 1—1999 through 2005 .....	Tier 1 and 2
NLEV <sup>1</sup> .....	Approved SIP opt-in .....	Yes—1999 through 2005 .....	Yes
Reformulated Gasoline (Phase 1 & 2) .....	Federal .....	Phase 1—1999 Phase 2—2002 and 2005 .....	Phase 2
Federal Non-road Gasoline Engine standards .....	Federal .....	Yes—1999 through 2005 .....	Yes
Federal Non-road Heavy Duty diesel engine standards .....	Federal .....	Yes—1999 through 2005 .....	Yes
Rail Road Locomotive Controls .....	Federal .....	Yes—2002 and 2005 .....	Yes
NO <sub>x</sub> RACT .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
OTR Regional NO <sub>x</sub> MOU .....	Approved SIP .....	Yes—1999 and 2002 .....	NO <sub>x</sub> SIP Call
Federal NO <sub>x</sub> SIP Call Regional Control .....	Approved SIP .....	Yes—2005 .....	Yes
Non-CTG RACT to 50 tpy .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Stage II Vapor Recovery & .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
On-board Refueling Vapor Recovery (ORVR) ..	Federal .....	Yes—2002 and 2005 .....	Yes
AIM Surface Coatings .....	Federal .....	Yes—2002 and 2005 .....	Yes
Consumer & Commercial products .....	Federal .....	Yes—2002 and 2005 .....	Yes
Autobody Refinishing .....	Federal/Approved SIP .....	Yes—1999 through 2005 .....	Yes
Industrial Cleaning Solvents .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Open Burning Ban .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Stage I Vapor Recovery .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Offset Lithography .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Heavy Duty Diesel Engines (On-road) .....	Federal .....	Yes—2005 .....	Yes
VOC RACT .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Sanitary Landfills .....	Approved SIP .....	Yes—1999 through 2005 .....	Yes
Benzene Waste Rule .....	Federal .....	Yes—1999 through 2005 .....	Yes

<sup>1</sup> To the extent NLEV not superseded by Tier 2.

*I. What Are the Approved Transportation Conformity Budgets, and What Effects Does This Action Have on Transportation Planning?*

(1) What Are the Approved Transportation Conformity Budgets in the Post 1996 ROP Plans and the Attainment Demonstration?

EPA has determined that the budgets in the Post-1996 ROP plans and the

attainment demonstration plan are adequate, and is approving these budgets in this final action. These Delaware plans establish separate VOC and NO<sub>x</sub> budgets for Kent and New Castle Counties, in the Philadelphia area (these are commonly referred to as sub-budgets). The motor vehicle emissions budgets that EPA is approving for each of the two counties are listed in Table 4 by type of control strategy SIP, the

amounts in tons per day (TPD), the year associated with the budgets, and the effective date of EPA's adequacy determination.

TABLE 4.—TRANSPORTATION CONFORMITY BUDGETS OF DELAWARE'S CONTROL STRATEGY SIPs FOR THE PHILADELPHIA AREA

Type of control strategy SIP	Year	Kent County		New Castle County		Effective date of adequacy determination
		VOC	NO <sub>x</sub>	VOC	NO <sub>x</sub>	
Post 1996 ROP Plan .....	1999	7.55	11.17	22.49	29.41	April 29, 1999 (64 FR 31217, published June 10, 1999).
Post 1996 ROP Plan .....	2002	6.30	9.81	18.44	27.29	June 23, 2000, (65 FR 36440, published June 8, 2000).
Post 1996 ROP Plan .....	2005	4.84	7.90	14.76	22.92	May 2, 2001 (66 FR 19769, published April 17, 2001).
Attainment Demonstration .....	2005	4.84	7.90	14.76	22.92	June 23, 2000, (65 FR 36440, published June 8, 2000).

EPA has concluded that these SIP revisions meet the requirements of the Act applicable to the type of control strategy SIP, that is, demonstrates attainment or ROP with the applicable budgets and contains the measures necessary to support these budgets.

(2) Is a Requirement To Redetermine Conformity Within 18-months Under Section 93.104 of the Conformity Rule Triggered?

Our conformity rule establishes the frequency by which transportation plans and transportation improvement programs must be found to conform to the SIP and includes trigger events tied to both submittal and approval of a SIP [40 CFR 93.104(e)]. Both initial

submission and initial approval trigger a redetermination of conformity. This final rule has the effect of approving motor vehicle emissions budgets contained in the attainment demonstration and the Post-1996 ROP plans. We are advising affected transportation planning agencies that this final approval of the budgets listed in Table 4 will require a redetermination that existing transportation plans and TIPs conform

within 18 months of the effective date listed in the DATES section of this document. See 40 CFR 93.104(e).

*J. What Happens to the Approved 2005 Budgets When States Change Their Budgets Using the MOBILE6 Model?*

All states whose attainment demonstration includes the effects of the Tier 2/Low Sulfur program have committed to revise and resubmit their motor vehicle emissions budgets after EPA releases the MOBILE6 model. On December 20, 2000, Delaware submitted a commitment to revise the 2005 motor vehicle budgets in the attainment demonstration within one year of EPA's release of the MOBILE6 model. In this final rulemaking action, EPA is approving, as a SIP revision, Delaware's commitment to revise the 2005 motor vehicle budgets in the attainment demonstration within one year of EPA's release of the MOBILE6 model. If Delaware fails to meet its commitment to submit revised budgets using the MOBILE6 model, EPA could make a finding of failure to implement the SIP, which would start a sanctions clock under section 179 of the Act.

As we proposed in our July 28, 2000 SNPR (65 FR 46383), today's final approval of the budgets contained in the 2005 attainment plan will be effective for conformity purposes only until such time as revised motor vehicle emissions budgets are submitted (pursuant to the commitment to submit revised budgets using the MOBILE6 model within one year of EPA's release of that model) and we have found those revised budgets adequate. We are only approving the attainment demonstration and its current budgets because Delaware has provided an enforceable commitment to revise the budgets using the MOBILE6 model within one year of EPA's release of that model. Therefore, we are limiting the duration of our approval of the current budgets only until such time as the revised budgets are found adequate. Those revised budgets will be more appropriate than the budgets we are approving for conformity purposes for the time being.

Similarly, EPA is only approving the 2005 attainment demonstration and its current budgets because Delaware has provided an enforceable commitment to submit new budgets as a revision to the attainment SIP consistent with any new measures submitted to fill any shortfall, if the additional control measures affect on-road motor vehicle emissions. Therefore, EPA is limiting the duration of our approval of the current budgets only until such time as any such revised budgets are found adequate. Those revised budgets will be more

appropriate than the budgets we are approving for conformity purposes for the time being.

*K. What Comments Were Received on the Proposed Approvals and How Has EPA Responded to Them?*

EPA received comments from the public on the Notice of Proposed Rulemaking (NPR) published on December 16, 1999 (64 FR 70444) for Delaware's ozone attainment demonstration for the Philadelphia area. Comments were received from Robert E. Yuhnke on behalf of Environmental Defense and Natural Resources Defense Council and from the Midwest Ozone Group.

EPA also received comments from the public on the supplemental notice of proposed rulemaking published on July 28, 2000 (65 FR 46383), in which EPA clarified and expanded on two issues relating to the motor vehicle emissions budgets in the attainment demonstration SIPs. Comments were received from Environmental Defense and from ELM Packaging Co.

As previously noted, EPA received no comments on either its August 30, 2001 (66 FR 45800) or September 7, 2001 (66 FR 46755) proposed actions as discussed in Section I.E. of this document.

## II. Response to Comments

The following discussion summarizes and responds to the comments received on EPA's December 16, 1999 (64 FR 70444) and July 28, 2000 (65 FR 46383) proposals to approve Delaware's 2005 attainment demonstration. These are the only proposed actions for which we received comments.

### *A. Attainment Demonstrations—Weight of Evidence*

*Comment:* The weight of evidence approach does not demonstrate attainment or meet the Act requirements for a modeled attainment demonstration. Commenters added several criticisms of various technical aspects of the weight of evidence approach, including certain specific applications of the approach to particular attainment demonstrations. These comments are discussed in the following response.

*Response:* Under section 182(c)(2) and (d) of the Act, serious and severe ozone nonattainment areas were required to submit by November 15, 1994, demonstrations of how they would attain the one-hour standard. Section 182(c)(2)(A) provides that "[t]his attainment demonstration must be based on photochemical grid modeling or any other analytical method determined by

the Administrator, in the Administrator's discretion, to be at least as effective." As described in more detail below, EPA allows states to supplement their photochemical modeling results, with additional evidence designed to account for uncertainties in the photochemical modeling, to demonstrate attainment. This approach is consistent with the requirement of section 182(c)(2)(A) that the attainment demonstration "be based on photochemical grid modeling," because the modeling results constitute the principal component of EPA's analysis, with supplemental information designed to account for uncertainties in the model. This interpretation and application of the photochemical modeling requirement of section 182(c)(2)(A) finds further justification in the broad deference Congress granted EPA to develop appropriate methods for determining attainment, as indicated in the last phrase of section 182(c)(2)(A).

The flexibility granted to EPA under section 182(c)(2)(A) is reflected in the regulations EPA promulgated for modeled attainment demonstrations. These regulations provide, "The adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in [40 CFR part 51, Appendix W] (Guideline on Air Quality Models)."<sup>1</sup> 40 CFR 51.112(a)(1). However, the regulations further provide, "Where an air quality model specified in appendix W \* \* \* is inappropriate, the model may be modified or another model substituted [with approval by EPA, and after] notice and opportunity for public comment. \* \* \*" Appendix W, in turn, provides that, "The Urban Airshed Model (UAM) is recommended for photochemical or reactive pollutant modeling applications involving entire urban areas," but further refers to EPA's modeling guidance for data requirements and procedures for operating the model. 40 CFR part 51, App. W section 6.2.1.a. The modeling guidance discusses the data requirements and operating procedures, as well as interpretation of model results as they relate to the attainment demonstration. This provision references guidance published in 1991, but EPA envisioned the guidance would change as we gained experience with model applications, which is why the guidance is referenced, but does not appear, in

<sup>1</sup> The August 12, 1996 version of "Appendix W to Part 51—Guideline on Air Quality Models" was the rule in effect for these attainment demonstrations. EPA is proposing updates to this rule, that will not take effect until the rulemaking process for them is complete.

Appendix W. With updates in 1996 and 1999, the evolution of EPA's guidance has led us to use both the photochemical grid model, and additional analytical methods approved by EPA.

The modeled attainment test compares model predicted one-hour daily maximum ozone concentrations in all grid cells for the attainment year to the level of the NAAQS. The results may be interpreted through either of two modeled attainment or exceedance tests: the deterministic test or the statistical test. Under the deterministic test, a predicted concentration above 0.124 parts per million (ppm) ozone indicates that the area is expected to exceed the standard in the attainment year and a prediction at or below 0.124 ppm indicates that the area is expected to not exceed the standard. Under the statistical test, attainment is demonstrated when all predicted (i.e., modeled) one-hour ozone concentrations inside the modeling domain are at, or below, an acceptable upper limit above the NAAQS permitted under certain conditions (depending on the severity of the episode modeled).<sup>2</sup>

In 1996, EPA issued guidance<sup>3</sup> to update the 1991 guidance referenced in 40 CFR part 51, App. W, to make the modeled attainment test more closely reflect the form of the NAAQS (i.e., the statistical test described above), to consider the area's ozone design value and the meteorological conditions accompanying observed exceedances, and to allow consideration of other evidence to address uncertainties in the modeling databases and application. When the modeling does not conclusively demonstrate attainment, EPA has concluded that additional analyses may be presented to help determine whether the area will attain the standard. As with other predictive tools, there are inherent uncertainties associated with air quality modeling and its results. The inherent imprecision of the model means that it may be inappropriate to view the specific numerical result of the model as the only determinant of whether the SIP controls are likely to lead to attainment. The EPA's guidance recognizes these limitations, and provides a means for considering other evidence to help assess whether attainment of the NAAQS is likely to be achieved. The process by which this is done is called a weight of evidence (WOE) determination. Under a WOE

determination, the state can rely on, and EPA will consider in addition to the results of the modeled attainment test, other factors such as other modeled output (e.g., changes in the predicted frequency and pervasiveness of one-hour ozone NAAQS exceedances, and predicted change in the ozone design value); actual observed air quality trends (i.e., analyses of monitored air quality data); estimated emissions trends; and the responsiveness of the model predictions to further controls.

In 1999, EPA issued additional guidance<sup>4</sup> that makes further use of model results for base case and future emission estimates to predict a future design value. This guidance describes the use of an additional component of the WOE determination, which requires, under certain circumstances, additional emission reductions that are or will be approved into the SIP, but that were not included in the modeling analysis, that will further reduce the modeled design value. An area is considered to monitor attainment if each monitor site has air quality observed ozone design values (4th highest daily maximum ozone using the three most recent consecutive years of data) at or below the level of the standard. Therefore, it is appropriate for EPA, when making a determination that a control strategy will provide for attainment, to determine whether or not the model-predicted future design value is expected to be at or below the level of the standard. Since the form of the one-hour NAAQS allows exceedances, it did not seem appropriate for EPA to require the test for attainment to be "no exceedances" in the future model predictions.

The method outlined in EPA's 1999 guidance uses the highest measured design value across all sites in the nonattainment area for each of three years. These three "design values" represent the air quality observed during the time period used to predict ozone for the base emissions. This is appropriate because the model is predicting the change in ozone from the base period to the future attainment date. The three yearly design values (highest across the area) are averaged to account for annual fluctuations in meteorology. The result is an estimate of an area's base year design value. The base year design value is multiplied by a ratio of the peak model predicted

ozone concentrations in the attainment year (i.e., average of daily maximum concentrations from all days modeled) to the peak model predicted ozone concentrations in the base year (i.e., average of daily maximum concentrations from all days modeled). The result is an attainment year design value based on the relative change in peak model predicted ozone concentrations from the base year to the attainment year. Modeling results also show that emission control strategies designed to reduce areas of peak ozone concentrations generally result in similar ozone reductions in all core areas of the modeling domain, thereby providing some assurance of attainment at all monitors.

In the event that the attainment year design value is above the standard, the 1999 guidance provides a method for identifying additional emission reductions, not modeled, which at a minimum provide an estimated attainment year design value at the level of the standard. This step uses a locally derived factor which assumes a linear relationship between ozone and the precursors.

A commenter criticized the 1999 guidance as flawed on grounds that it allows the averaging of the three highest air quality sites across a region, whereas EPA's 1991 and 1996 modeling guidance requires that attainment be demonstrated at each site. This has the effect of allowing lower air quality concentrations to be averaged against higher concentrations thus reducing the total emission reduction needed to attain at the higher site. The commenter does not appear to have described the guidance accurately. The guidance does not recommend averaging across a region or spatial averaging of observed data. The guidance does recommend determination of the highest site in the region for each of the three-year periods, determined by the base year modeled. For example, if the base year is 1990, it is the amount of emissions in 1990 that must be adjusted or evaluated (by accounting for growth and controls) to determine whether attainment results. These 1990 emissions would contribute to three design value periods (1988-90, 1989-91 and 1990-92).

Under the approach of the guidance document, EPA determined the design value for each of those three-year periods, and then averaged those three design values, to determine the base design value. This approach is appropriate because, as just noted, the 1990 emissions contributed to each of those periods, and there is no reason to believe the 1990 (episodic) emissions resulted in the highest or lowest of the

<sup>2</sup>Guidance on the Use Of Modeled Results to Demonstrate Attainment of the Ozone NAAQS EPA-454/B-95-007, June 1996.

<sup>3</sup>Ibid.

<sup>4</sup>"Guidance for Improving Weight of Evidence Through Identification of Additional Emission Reductions, Not Modeled." U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Emissions, Monitoring, and Analysis Division, Air Quality Modeling Group, Research Triangle Park, NC 27711. November 1999. Web site: <http://www.epa.gov/ttn/scram>.

three design values. Averaging the three years is beneficial for another reason: It allows consideration of a broader range of meteorological conditions—those that occurred throughout the 1988–1992 period, rather than the meteorology that occurs in one particular year or even one particular ozone episode within that year. Furthermore, EPA relied on three-year averaging only for purposes of determining one component, *i.e.*—the small amount of additional emission reductions not modeled—of the WOE determination. The WOE determination, in turn, is intended to be part of a qualitative assessment of whether additional factors (including the additional emissions reductions not modeled), taken as a whole, indicate that the area is more likely than not to attain.

A commenter criticized the component of this WOE factor that estimates ambient improvement because it does not incorporate complete modeling of the additional emissions reductions. However, the regulations do not mandate, nor does EPA guidance suggest, that states must model all control measures being implemented. Moreover, a component of this technique—the estimation of future design value—should be considered a model predicted estimate. Therefore, results from this technique are an extension of “photochemical grid” modeling and are consistent with section 182(c)(2)(A). Also, a commenter believes that EPA has not provided sufficient opportunity to evaluate the calculations used to estimate additional emission reductions. EPA provided a full 60-day period for comment on all aspects of the proposed rule. EPA has received several comments on the technical aspects of the approach and the results of its application, as discussed above and in the responses to the individual SIPs.

A commenter states that application of the method of attainment analysis used for the December 16, 1999 NPRs will yield a lower control estimate than if we relied entirely on reducing maximum predictions in every grid cell to less than or equal to 124 ppb on every modeled day. However, the commenter’s approach may overestimate needed controls because the form of the standard allows up to 3 exceedances in 3 years in every grid cell. If the model over predicts observed concentrations, predicted controls may be further overestimated. EPA has considered other evidence, as described above through the weight of evidence determination.

When reviewing a SIP, EPA must make a determination that the control

measures adopted are reasonably likely to lead to attainment. Reliance on the WOE factors allows EPA to make this determination based on a greater body of information presented by the states and available to EPA. This information includes model results for the majority of the control measures. Although not all measures were modeled, EPA reviewed the model’s response to changes in emissions as well as observed air quality changes to evaluate the impact of a few additional measures, not modeled. EPA’s decision was further strengthened by each state’s commitment to check progress towards attainment in a mid-course review and to adopt additional measures, if the anticipated progress is not being made.

A commenter further criticized EPA’s technique for estimating the ambient impact of additional emissions reductions not modeled on grounds that EPA employed a “rollback” modeling technique that, according to the commenter, is precluded under EPA regulations. The commenter explained that 40 CFR part 51, App. W section 6.2.1.e. provides, “Proportional (rollback/forward) modeling is not an acceptable procedure for evaluating ozone control strategies.” Section 14.0 of Appendix W defines “rollback” as “a simple model that assumes that if emissions from each source affecting a given receptor are decreased by the same percentage, ambient air quality concentrations decrease proportionately.” Under this approach if 20 percent improvement in ozone is needed for the area to reach attainment, it is assumed a 20 percent reduction in VOC would be required. There was no approach for identifying NO<sub>x</sub> reductions.

The “proportional rollback” approach is based on a purely empirically/mathematically derived relationship. EPA did not rely on this approach in its evaluation of the attainment demonstrations. The prohibition in Appendix W applies to the use of a rollback method which is empirically/mathematically derived and independent of model estimates or observed air quality and emissions changes as the sole method for evaluating control strategies. For the demonstrations under proposal, EPA used a locally derived (as determined by the model and/or observed changes in air quality) ratio of change in emissions to change in ozone to estimate additional emission reductions to achieve an additional increment of ambient improvement in ozone.

For example, if monitoring or modeling results indicate that ozone was reduced by 25 ppb during a

particular period, and that VOC and NO<sub>x</sub> emissions fell by 20 tons per day and 10 tons per day respectively during that period, EPA developed a ratio of ozone improvement related to reductions in VOC and NO<sub>x</sub>. This formula assumes a linear relationship between the precursors and ozone for a small amount of ozone improvement, but it is not a “proportional rollback” technique. Further, EPA uses these locally derived adjustment factors as a component to estimate the extent to which additional emissions reductions—not the core control strategies—would reduce ozone levels and thereby strengthen the weight of evidence test. EPA uses the UAM to evaluate the core control strategies. This limited use of adjustment factors is more technically sound than the unacceptable use of proportional rollback to determine the ambient impact of the entire set of emissions reductions required under the attainment SIP.

The limited use of adjustment factors is acceptable for practical reasons: it obviates the need to expend more time and resources to perform additional modeling. In addition, the adjustment factor is a locally derived relationship between ozone and its precursors based on air quality observations and/or modeling which is more consistent with recommendations referenced by Appendix W, and does not assume a direct proportional relationship between ozone and its precursors. Lastly, the requirement that areas perform a mid-course review (a check of progress toward attainment), provides a margin of safety.

A commenter expressed concerns that EPA used a modeling technique (proportional rollback) that was expressly prohibited by 40 CFR part 51, Appendix W, without expressly proposing to do so in a notice of proposed rulemaking. However, the commenter is mistaken. As explained above, EPA did not use or rely upon a proportional rollback technique in this rulemaking, but used UAM to evaluate the core control strategies and then applied its WOE guidance. Therefore, because EPA did not use an “alternative model” to UAM, it did not trigger an obligation to modify Appendix W. Furthermore, EPA did propose to use the November 1999 guidance, “Guidance for Improving Weight of Evidence Through Identification of Additional Emission Reductions, Not Modeled,” in the December 16, 1999 NPR and has responded to all comments received on that guidance elsewhere in this document.

A commenter also expressed concern that EPA applied unacceptably broad discretion in fashioning and applying the WOE determinations. For all of the attainment submittals proposed for approval in December 1999 concerning serious and severe ozone nonattainment areas, EPA first reviewed the UAM results. In all cases, the UAM results did not pass the deterministic test. In two cases—Milwaukee and Chicago—the UAM results passed the statistical test; in the rest of the cases, the UAM results failed the statistical test. The UAM has inherent limitations that, in EPA's view, were manifest in all these cases. These limitations include: (1) only selected time periods were modeled, not the entire three-year period used as the definitive means for determining an area's attainment status; (2) there are inherent uncertainties in the model formulation and model inputs such as hourly emission estimates, emissions growth projections, biogenic emission estimates, and derived wind speeds and directions. As a result, for all areas, even Milwaukee and Chicago, EPA examined additional analyses to indicate whether additional SIP controls would yield meaningful reductions in ozone values. These analyses did not point to the need for additional emission reductions for Springfield, Greater Connecticut, Metropolitan Washington, DC, Chicago and Milwaukee, but did point to the need for additional reductions, in varying amounts, in the other areas. As a result, the other areas submitted control requirements to provide the indicated level of emissions reductions. EPA applied the same methodology in these areas, but because of differences in the application of the model to the circumstances of each individual area, the results differed on a case-by-case basis.

As another WOE factor, for areas within the NO<sub>x</sub> SIP call domain, results from the EPA regional modeling for NO<sub>x</sub> controls as well as the Tier 2/Low Sulfur program were considered. Also, for all of the areas, EPA considered recent changes in air quality and emissions. For some areas, this was helpful because there were emission reductions in the most recent years that could be related to observed changes in air quality, while for other areas there appeared to be little change in either air quality or emissions. For areas in which air quality trends, associated with changes in emissions levels, could be discerned, these observed changes were used to help decide whether or not the emission controls in the plan would provide progress towards attainment.

The commenter also complained that EPA has applied the WOE

determinations to adjust modeling results only when those results indicate nonattainment, and not when they indicate attainment. First, we disagree with the premise of this comment: EPA does not apply the WOE factors to adjust model results. EPA applies the WOE factors as additional analysis to compensate for uncertainty in the air quality modeling. Second, EPA has applied WOE determinations to all of the attainment demonstrations proposed for approval in December 1999.

Although for most of them, the air quality modeling results by themselves indicated nonattainment, for two metropolitan areas—Chicago and Milwaukee, including parts of the States of Illinois, Indiana, and Wisconsin, the air quality modeling did indicate attainment on the basis of the statistical test.

The commenter further criticized EPA's application of the WOE determination on grounds that EPA ignores evidence indicating that continued nonattainment is likely, such as, according to the commenter, monitoring data indicating that ozone levels in many cities during 1999 continue to exceed the NAAQS by margins as wide or wider than those predicted by the UAM. EPA has reviewed the evidence provided by the commenter. The 1999 monitor values do not constitute substantial evidence indicating that the SIPs will not provide for attainment. These values do not reflect either the local or regional control programs which are scheduled for implementation in the next several years. Once implemented, these controls are expected to lower emissions and thereby lower ozone values. Moreover, there is little evidence to support the statement that ozone levels in many cities during 1999 continue to exceed the NAAQS by margins as wide or wider than those predicted by the UAM. Since areas did not model 1999 ozone levels using 1999 meteorology and 1999 emissions which reflect reductions anticipated by control measures, that are or will be approved into the SIP, there is no way to determine how the UAM predictions for 1999 compare to the 1999 air quality. Therefore, we can not determine whether or not the monitor values exceed the NAAQS by a wider margin than the UAM predictions for 1999. In summary, there is little evidence to support the conclusion that high exceedances in 1999 will continue to occur after adopted control measures are implemented.

In addition, the commenter argued that in applying the WOE determinations, EPA ignored factors showing that the SIPs under-predict

future emissions, and the commenter included as examples certain mobile source emissions sub-inventories. EPA did not ignore possible under-prediction in mobile emissions. EPA is presently evaluating mobile source emissions data as part of an effort to update the computer model for estimating mobile source emissions. EPA is considering various changes to the model, and is not prepared to conclude at this time that the net effect of all these various changes would be to increase or decrease emissions estimates. For attainment demonstration SIPs that rely on the Tier 2/Low Sulfur program for attainment or otherwise (i.e., reflect these programs in their motor vehicle emissions budgets), states have committed to revise their motor vehicle emissions budgets after the MOBILE6 model is released. EPA will work with states on a case-by-case basis if the new emission estimates raise issues about the sufficiency of the attainment demonstration. If analysis indicates additional measures are needed, EPA will take the appropriate action.

#### *B. Reliance on the NO<sub>x</sub> SIP Call and Tier II*

*Comment:* Several commenters stated that given the uncertainty surrounding the NO<sub>x</sub> SIP Call at the time of EPA's proposals on the attainment demonstrations, there is no basis for the conclusion reached by EPA that states should assume implementation of the NO<sub>x</sub> SIP Call, or rely on it as a part of their demonstrations. One commenter claims that there were errors in the emissions inventories used for the NO<sub>x</sub> SIP Call Supplemental Notice (SNPR) and that these inaccuracies were carried over to the modeling analyses, estimates of air quality based on that modeling, and estimates of EPA's Tier II tailpipe emissions reduction program not modeled in the demonstrations. Thus, because of the inaccuracies in the inventories used for the SIP Call, the attainment demonstration modeling is also flawed. Finally, one commenter suggests that modeling data demonstrates that the benefits of imposing NO<sub>x</sub> SIP Call controls are limited to areas near the sources controlled.

*Response:* These comments were submitted prior to several court decisions largely upholding EPA's NO<sub>x</sub> SIP Call. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), cert. denied, \_\_\_ U.S. \_\_\_, 121 S.Ct. 1225, 149 L.Ed. 135 (2001); *Appalachian Power v. EPA*, 251 F.3d 1026 (D.C. Cir. 2001). In those cases, the court largely upheld the NO<sub>x</sub> SIP Call. Although a few issues were vacated or remanded to EPA for further

consideration, these issues do not concern the accuracy of the emission inventories relied on for purposes of the SIP Call. Moreover, contrary to the commenter's suggestion, the SIP Call modeling data bases were not used to develop estimates of reductions from the Tier II program for the severe-area one-hour attainment demonstrations. Accordingly, the commenter's concerns that inaccurate inventories for the SIP Call modeling lead to inaccurate results for the severe-area one-hour attainment demonstrations are inapposite.

The remanded issues do affect the ability of EPA and the states to achieve the full level of the SIP Call reductions by May 2003. First, the court vacated the rule as it applied to two states—Missouri and Georgia—and also remanded the definition of a co-generator and the assumed emission limit for internal combustion engines. EPA has informed the states that until EPA addresses the remanded issues, EPA will accept SIPs that do not include those small portions of the emission budget. However, EPA is planning to propose a rule shortly to address the remanded issues and ensure that emission reductions from these states and the emission reductions represented by the two source categories are addressed in time to benefit the severe nonattainment areas. Also, although the court in the *Michigan* case subsequently issued an order delaying the implementation date to no later than May 31, 2004, and the *Appalachian Power* case remanded an issue concerning computation of the EGU growth factor, it is EPA's view that states should assume that the SIP Call reductions will occur in time to ensure attainment in the severe nonattainment areas. Both EPA and the states are moving forward to implement the SIP Call.

Finally, contrary to the commenter's conclusions, EPA's modeling to determine the region-wide impacts of the NO<sub>x</sub> SIP Call clearly shows that regional transport of ozone and its precursors is impacting nonattainment areas several states away. This analysis was upheld by the court in *Michigan*.

*C. Attainment and Rate-of-Progress Demonstrations—Approval of Demonstrations that Rely on State Commitments or State Rules for Emission Limitations to Lower Emissions in the Future not Yet Adopted by the State and/or Approved by EPA*

*Comment:* Several commenters disagreed with EPA's proposal to approve states' attainment and ROP demonstrations because, (a) not all of

the emissions reductions assumed in the demonstrations have actually taken place, (b) are reflected in rules yet to be adopted and approved by a state and approved by EPA as part of the SIP, (c) are credited illegally as part of a demonstration because they are not approved by EPA as part of the SIP, or (d) the commenter maintains that EPA does not have authority to accept enforceable state commitments to adopt measures in the future in lieu of current adopted measures to fill a near-term shortfall of reductions.

*Response:* EPA disagrees with the comments, and believes—consistent with past practice—that the Act allows approval of enforceable commitments that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted measures.<sup>5</sup> Once EPA determines that circumstances warrant consideration of an enforceable commitment, EPA believes that three factors should be considered in determining whether to approve the enforceable commitment: (1) Whether the commitment addresses a limited portion of the statutorily-required program; (2) whether the state is capable of fulfilling its commitment; and (3) whether the commitment is for a reasonable and appropriate period of time.

As an initial matter, EPA believes that present circumstances for the New York City, Philadelphia, Baltimore and Houston nonattainment areas warrant the consideration of enforceable commitments. The Northeast states that make up the New York, Baltimore, and Philadelphia nonattainment areas submitted SIPs that they reasonably believed demonstrated attainment with fully adopted measures. After EPA's initial review of the plans, EPA recommended to these areas that additional controls would be necessary to ensure attainment. Because these areas had already submitted plans with many fully adopted rules and the

<sup>5</sup> These commitments are enforceable by the EPA and citizens under, respectively, sections 113 and 304 of the CAA. In the past, EPA has approved enforceable commitments and courts have enforced these actions against states that failed to comply with those commitments. See, e.g., *American Lung Ass'n of N.J. v. Kean*, 670 F. Supp. 1285 (D.N.J. 1987), *aff'd*, 871 F.2d 319 (3rd Cir. 1989); *NRDC v. N.Y. State Dept. of Env. Cons.*, 668 F. Supp. 848 (S.D.N.Y. 1987); *Citizens for a Better Env't v. Deukmejian*, 731 F. Supp. 1448, *recon. granted in part*, 746 F. Supp. 976 (N.D. Cal. 1990); *Coalition for Clean Air v. South Coast Air Quality Mgt. Dist.*, No. CV 97-6916-HLH, (C.D. Cal. Aug. 27, 1999). Further, if a state fails to meet its commitments, EPA could make a finding of failure to implement the SIP under section 179(a) of the Act, which starts an 18-month period for the State to begin implementation before mandatory sanctions are imposed.

adoption of additional rules would take some time, EPA believed it was appropriate to allow these areas to supplement their plans with enforceable commitments to adopt and submit control measures to achieve the additional necessary reductions. For Delaware's attainment demonstration for the Philadelphia area, EPA has determined that the submission of enforceable commitments in place of adopted control measures for these limited sets of reductions will not interfere with each area's ability to meet its 2005 attainment obligations.

EPA's approach here of considering enforceable commitments that are limited in scope is not new. EPA has historically recognized that under certain circumstances, issuing full approval may be appropriate for a submission that consists, in part, of an enforceable commitment. See e.g., 62 FR 1150, 1187, January 8, 1997 (ozone attainment demonstration for the South Coast Air Basin); 65 FR 18903, April 10, 2000 (revisions to attainment demonstration for the South Coast Air Basin); 63 FR 41326, August 3, 1998 (federal implementation plan for PM-10 for Phoenix); 48 FR 51472 (state implementation plan for New Jersey). Nothing in the Act speaks directly to the approvability of enforceable commitments.<sup>6</sup> However, EPA believes that its interpretation is consistent with provisions of the Act. For example, section 110(a)(2)(A) provides that each SIP "shall include enforceable emission limitations and other control measures, means or techniques \* \* \* as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirement of the Act." (Emphasis added). Section 172(c)(6) of the Act requires, as a rule generally applicable to nonattainment SIPs, that the SIP "include enforceable emission limitations and such other control measures, means or techniques \* \* \* as may be necessary or appropriate to provide for attainment \* \* \* by the applicable attainment date \* \* \*." (Emphasis added). The emphasized terms mean that enforceable emission limitations and other control measures do not necessarily need to generate reductions in the full amount needed to attain. Rather, the emissions limitations

<sup>6</sup> Section 110(k)(4) provides for "conditional approval" of commitments that need not be enforceable. Under that section, a State may commit to "adopt specific enforceable measures" within one-year of the conditional approval. Rather than enforcing such commitments against the State, the Act provides that the conditional approval will convert to a disapproval if "the State fails to comply with such commitment."

and other control measures may be supplemented with other SIP rules—for example, the enforceable commitments EPA is approving in this final action—as long as the entire package of measures and rules provides for attainment.

As provided above, after concluding that the circumstances warrant consideration of an enforceable commitment—as they do for the Philadelphia area—EPA would consider three factors in determining whether to approve the submitted commitments. First, EPA believes that the commitments must be limited in scope. In 1994, in considering EPA's authority under section 110(k)(4) to conditionally approve unenforceable commitments, the Court of Appeals for the District of Columbia Circuit struck down an EPA policy that would allow states to submit (under limited circumstances) commitments for entire programs. *Natural Resources Defense Council v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994). While EPA does not believe that case is directly applicable here, EPA agrees with the Court that other provisions in the Act contemplate that a SIP submission will consist of more than a mere commitment. See *NRDC*, 22 F.3d at 1134.

In the present circumstances, the commitments address only a small portion of the 2005 attainment plan. For the Philadelphia area, the commitment addresses only 10.6 percent of the VOC and 0.7 percent of the NO<sub>x</sub> emission reductions necessary to attain the standard. A summary of the adopted control measures and other components credited in Delaware's attainment demonstration submission are discussed in Sections I.G. and I.H. of this document.

As to the second factor, whether the state is capable of fulfilling the commitment, EPA considered the current or potential availability of measures capable of achieving the additional level of reductions represented by the commitment. For the New York, Philadelphia and Baltimore nonattainment areas, EPA believes that there are sufficient untapped sources of emission reductions that could achieve the minimal levels of additional reductions that the areas need. This is supported by the recent recommendation of the OTC regarding specific controls that could be adopted to achieve the level of reductions needed for each of these three nonattainment areas. Thus, EPA believes that the states will be able to find sources of reductions to meet the shortfall. The states that comprise the New York, Philadelphia and Baltimore

nonattainment areas are making significant progress toward adopting the measures to fill the shortfall. The OTC has met and on March 29, 2001, recommended a set of control measures. Currently, Delaware has proposed the regulations for all OTC recommended control measures and has gone to public hearings on those control measures. Delaware has indicated that it would submit the measures no later than October 31, 2001. This time period is fully consistent with the Philadelphia area attaining the standard by its approved attainment date.

The third factor EPA has considered in determining to approve limited commitments for the Philadelphia area attainment demonstration is whether the commitment is for a reasonable and appropriate period. EPA recognizes that both the Act and EPA have historically emphasized the need for submission of adopted control measures in order to ensure expeditious implementation and achievement of required emissions reductions. Thus, to the extent that other factors—such as the need to consider innovative control strategies—support the consideration of an enforceable commitment in place of adopted control measures, the commitment should provide for the adoption of the necessary control measures on an expeditious, yet practicable, schedule.

As previously provided, for New York, Baltimore and Philadelphia, EPA proposed that these areas have time to work within the framework of the OTC to develop, if appropriate, a regional control strategy to achieve the necessary reductions and then to adopt the controls on a state-by-state basis. In the proposed approval of the attainment demonstrations, EPA proposed that these areas would have approximately 22 months to complete the OTC and state-adoption processes—a fairly ambitious schedule—i.e., until October 31, 2001. As a starting point in suggesting this time frame for submission of the adopted controls, EPA first considered the CAA "SIP Call" provision of the Act—section 110(k)(5)—which provides states with up to 18 months to submit a SIP after EPA requests a SIP revision. While EPA may have ended its inquiry there, and provided for the states to submit the measures within 18 months of its proposed approval of the attainment demonstrations, EPA further considered that these areas were all located with the Northeast Ozone Transport Region (OTR) and determined that it was appropriate to provide these areas with additional time to work through the OTC process to determine if regional

controls would be appropriate for addressing the shortfall. EPA believed that allowing these states until 2001 to adopt these additional measures would not undercut their attainment dates of November 2005 or 2007. EPA still believes that this is a reasonable schedule for the states to submit adopted control measures that will achieve the additional necessary reductions.

The enforceable commitments submitted by Delaware for the Philadelphia nonattainment area, in conjunction with its other SIP measures and other sources of emissions reductions, constitute the required demonstration of attainment. EPA believes that the delay in submittal of the final rules is permissible under section 110(k)(3) because the State has obligated itself to submit the rules by specified short-term dates, and that obligation is enforceable by EPA and the public. Moreover, as discussed in the December 16, 1999 proposal, its Technical Support Document (TSD), and Sections I.G. and I.H. of this document, the SIP submittal approved today contains major substantive components submitted as adopted regulations and enforceable orders.

The comment is not germane to Delaware's Post 1996 ROP plans. The State of Delaware is relying only on NO<sub>x</sub> and VOC emission reductions achieved within its portion of the Philadelphia nonattainment area for demonstrating ROP from 1996 through the 2005 attainment year. These reductions result from the implementation of fully promulgated Federal or fully adopted and SIP-approved state measures.

#### *D. RACM (Including Transportation Control Measures)*

*Comment:* Several commenters have stated that there is no evidence in several states that they have adopted reasonably available control measures (RACM) or that the SIPs have provided for attainment as expeditiously as practicable. Specifically, the lack of Transportation Control Measures (TCMs) was cited in several comments, but commenters also raised concerns about potential stationary source controls. One commenter stated that mobile source emission budgets in the plans are by definition inadequate because the SIPs do not demonstrate timely attainment or contain the emissions reductions required for all RACM. That commenter claims that EPA may not find adequate a motor vehicle emission budget (MVEB) that is derived from a SIP that is inadequate for the purpose for which it is submitted.

The commenter alleges that none of the MVEBs submitted by the states that EPA is considering for adequacy is consistent with the level of emissions achieved by implementation of all RACM; nor are they derived from SIPs that provide for attainment. Some commenters stated that for measures that are not adopted into the SIP, the state must provide a justification for why they were determined not to be RACM.

*Response:* EPA reviewed the initial SIP submittals for the Philadelphia area and determined that they did not include sufficient documentation concerning available RACM measures. For all of the severe areas for which EPA proposed approval in December 1999, EPA consequently issued policy guidance memorandum to have these states address the RACM requirement through an additional SIP submittal. (Memorandum of December 14, 2000, from John S. Seitz, Director, Office of Air Quality Planning and Standards, re: "Additional Submission on RACM from States with Severe One-hour Ozone Nonattainment Area SIPs").

On August 3, 2001, Delaware submitted its proposed analysis and determination that there are no additional reasonably available control measures (RACM) as a supplement to its 2005 attainment demonstration for the Philadelphia area and requested that EPA approve it as a SIP revision using a form of Federal rulemaking known as parallel-processing. On September 7, 2001, EPA published a SNPR on the attainment demonstration (66 FR 46755). In that supplemental notice, we proposed approval of Delaware's RACM analysis and determination. See Section I.E. of this document. We received no comments on that SNPR.

That proposed approval was done under a procedure called parallel processing, whereby EPA proposes rulemaking action concurrently with the state's procedures for amending its SIP. If the final, adopted revision is substantially changed from the version EPA proposed to approve, and which was available for public review during EPA's comment period, EPA will evaluate those changes and may publish another supplemental notice of proposed rulemaking. If no substantial changes are made, EPA will publish a final rulemaking notice on the revision. The final rulemaking action by EPA will occur only after the SIP revision has been adopted by the state and submitted formally to EPA for incorporation into the SIP.

On October 9, 2001, the State of Delaware supplemented its original attainment demonstration SIP with a formal submittal of an analysis of

RACM. EPA has determined that there are no changes between Delaware's formally submitted RACM analysis and the proposed version for which we proposed approval on September 7, 2001. We received no comments on the September 7, 2001 SNPR. EPA concluded that Delaware's 2005 attainment demonstration SIP for the Philadelphia area, as formally supplemented on October 9, 2001, meets the requirement for RACM.

Section 172(c)(1) of the Act requires SIPs to contain RACM and provides for areas to attain as expeditiously as practicable. EPA has previously provided guidance interpreting the requirements of 172(c)(1). See 57 FR 13498, 13560. In that guidance, EPA indicated its interpretation that potentially available measures that would not advance the attainment date for an area would not be considered RACM. EPA also indicated in that guidance, that states should consider all potentially available measures to determine whether they were reasonably available for implementation in the area, and whether they would advance the attainment date. Further, states should indicate in their SIP submittals whether measures considered were reasonably available or not, and if measures are reasonably available they must be adopted as RACM. Finally, EPA indicated that states could reject measures as not being RACM because they would not advance the attainment date, would cause substantial widespread and long-term adverse impacts, would be economically or technologically infeasible, or would be unavailable based on local considerations, including costs. EPA also issued a recent memorandum reconfirming the principles in the earlier guidance, entitled, "Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas." John S. Seitz, Director, Office of Air Quality Planning and Standards. November 30, 1999. Web site: [www.epa.gov/ttn/oarpg/t1pgm.html](http://www.epa.gov/ttn/oarpg/t1pgm.html).

The analysis submitted by the Delaware on October 9, 2001, as a supplement to its attainment demonstration SIP for the Philadelphia area, addresses the RACM requirement. Delaware has examined a wide variety of potential stationary source and mobile source controls. The stationary and area source controls that were considered were limits on area source categories not covered by a control technique guideline (CTG), e.g., motor vehicle refinishing, and surface/cleaning degreasing; rule effectiveness

improvements; expanding the applicability of VOC RACT limits to sources smaller than those mandated under the CTG; "beyond RACT" controls on major stationary sources of nitrogen oxides (NO<sub>x</sub>); and other potential measures. The mobile source control measures considered included measures such as the national low emission vehicle program; high occupancy vehicle (HOV) lanes; employer based programs; trip reduction ordinances; bicycle and pedestrian improvements; programs to restrict extended idling of vehicles; early retirement of older motor vehicles; traffic flow improvements; and alternative fuel vehicles. Delaware considered an extensive list of potential control measures and chose measures for implementation which went beyond the Federally mandated controls, which were found to be cost effective and technologically feasible. From the list of measures considered, the rules and measures adopted and submitted by Delaware include the following:

(1) Delaware has adopted, and EPA has SIP-approved, a rule for vehicle refinishing. The rule includes VOC content limits for motor vehicle refinishing coatings at least equivalent to the Federal requirements and required compliance with this rule in 1996 versus in 1998 as required under the Federal rule.

(2) Delaware has adopted, and EPA has SIP approved, a rule for control of VOC emissions from offset lithographic printing operations.

(3) Delaware has adopted, and EPA has SIP approved, a rule for control of VOC emissions from aerospace coating operations with an applicability threshold well below that required by the applicable CTG.

(4) Delaware has adopted, and EPA has SIP approved, a rule for control of VOC emissions from graphic arts operations (packaging rotogravure, publication rotogravure, or flexographic printing press) with an applicability threshold well below that required by the applicable CTG.

(5) Delaware has adopted, and EPA has SIP approved, a rule for control of VOC emissions from use of organic cleaning solvents that includes additional requirements beyond those of applicable CTG for surface cleaning and degreasing.

(6) Delaware has adopted, and EPA has SIP approved, a rule requiring the sale of vehicles under the national low-emission vehicle program (NLEV).

(7) Delaware has adopted, and EPA has SIP approved, a rule to implement Phase II NO<sub>x</sub> controls under the OTC MOU. This rule established a fixed cap

on ozone-season NO<sub>x</sub> emissions from major point sources of NO<sub>x</sub>. The rule grants each source a fixed number of NO<sub>x</sub> allowances, applies state-wide, and requires compliance during the ozone season. The implementation of this rule commenced May 1, 1999 in Delaware and reduces NO<sub>x</sub> emissions both inside and outside the Philadelphia area.

(8) Delaware has adopted, and EPA has SIP approved, a rule to implement the NO<sub>x</sub> SIP call. Delaware's rule requires compliance commencing with the start of the 2003 ozone season.

Other potential measures are not considered to be cost effective or are considered to have implementation difficulties due to the intensive and costly effort that would be involved in regulating numerous, small area source categories. These explanations are provided in further detail in the docket for this rulemaking. Delaware concluded that a number of potential transportation control measures were considered feasible, but would not, in aggregate, advance the attainment date.

Although EPA does not believe that section 172(c)(1) requires implementation of additional measures for the Philadelphia area, this conclusion is not necessarily valid for other areas. Thus, a determination of RACM is necessary on a case-by-case basis and will depend on the circumstances for the individual area. In addition, if in the future EPA moves forward to implement another ozone standard, this RACM analysis would not control what is RACM for these or any other areas for that other ozone standard.

Also, EPA has long advocated that states consider the kinds of control measures that the commenters have suggested, and EPA has indeed provided guidance on those measures. See, e.g., [www.epa.gov/otaq/transp.htm](http://www.epa.gov/otaq/transp.htm). In order to demonstrate that they will attain the one-hour ozone NAAQS as expeditiously as practicable, some areas may need to consider and adopt a number of measures, including the kind that Delaware itself evaluated in its RACM analysis, that even collectively do not result in many emission reductions. Furthermore, EPA encourages areas to implement technically available and economically feasible measures to achieve emissions reductions in the short term, even if such measures do not advance the attainment date, since such measures will likely improve air quality. Also, over time, emission control measures that may not be RACM now for an area may ultimately become feasible for the same area due to advances in control technology or more cost-effective

implementation techniques. Thus, areas should continue to assess the state of control technology as they make progress toward attainment and consider new control technologies that may in fact result in more expeditious improvement in air quality.

Because EPA is finding that the SIP meets the Act's requirement for RACM and that there are no additional reasonably available control measures that can advance the attainment date. EPA concludes that the attainment date being approved is as expeditiously as practicable.

EPA previously responded to comments concerning the adequacy of MVEBs when EPA took final action determining the budgets adequate and does not address those issues again here. The responses are found at [www.epa.gov/oms/transp/conform/pastsips.htm](http://www.epa.gov/oms/transp/conform/pastsips.htm).

#### *E. Adequacy of Motor Vehicle Emissions Budgets*

*Comment:* We received a number of comments about the process and substance of EPA's review of the adequacy of motor vehicle emissions budgets for transportation conformity purposes.

*Response:* EPA's adequacy process for these SIPs has been completed, and we have found the motor vehicle emissions budgets in all of these SIPs to be adequate. We have already responded to any comments related to adequacy when we issued our adequacy findings, and therefore we are not listing the individual comments or responding to them here. Our findings of adequacy and responses to comments can be accessed at [www.epa.gov/otaq/traq](http://www.epa.gov/otaq/traq) (once there, click on the "conformity" button). At the Web site, EPA regional contacts are identified.

#### *F. Motor Vehicle Emissions Inventory*

*Comment:* Several commenters stated that the motor vehicle emissions inventory is not current, particularly with respect to the fleet mix. Commenters stated that the fleet mix does not accurately reflect the growing proportion of sport utility vehicles and gasoline trucks, which pollute more than conventional cars. Also, a commenter stated that EPA and states have not followed a consistent practice in updating SIP modeling to account for changes in vehicle fleets. For these reasons, commenters recommend disapproving the SIPs.

*Response:* All of the SIPs on which we are taking final action are based on the most recent vehicle registration data available at the time the SIP was submitted. The SIPs use the same

vehicle fleet characteristics that were used in the most recent periodic inventory update. The Delaware's SIP is based on vehicle registration data from 1994, which is the most recent data available at the time the SIP was prepared and submitted. EPA requires the most recent available data to be used, but we do not require it to be updated on a specific schedule. Therefore, different SIPs base their fleet mix on different years of data. Our guidance does not suggest that SIPs should be disapproved on this basis. Nevertheless, we do expect that revisions to these SIPs that are submitted using MOBILE6 (as required in those cases where the SIP is relying on emissions reductions from the Tier 2 standards) will use updated vehicle registration data appropriate for use with MOBILE6, whether it is updated local data or the updated national default data that will be part of MOBILE6.

#### *G. VOC Emission Reductions*

*Comment:* For states that need additional VOC reductions, one commenter recommends a process to achieve these VOC emission reductions, which involves the use of HFC-152a (1,1 difluoroethane) as the blowing agent in manufacturing of polystyrene foam products such as food trays and egg cartons. The commenter states that HFC-152a could be used instead of hydrocarbons, a known pollutant, as a blowing agent. Use of HFC-152a, which is classified as VOC exempt, would eliminate nationwide the entire 25,000 tons/year of VOC emissions from this industry.

*Response:* EPA has met with the commenter and has discussed the technology described by the company to reduce VOC emissions from polystyrene foam blowing through the use of HFC-152a (1,1 difluoroethane), which is a VOC exempt compound, as a blowing agent. Since the HFC-152a is VOC exempt, its use would give a VOC reduction compared to the use of VOCs such as pentane or butane as a blowing agent. However, EPA has not studied this technology exhaustively. It is each state's prerogative to specify which measures it will adopt in order to achieve the additional VOC reductions it needs. In evaluating the use of HFC-152a, states may want to consider claims that products made with this blowing agent are comparable in quality to products made with other blowing agents. Also the question of the over-all long term environmental effect of encouraging emissions of fluorine compounds would be relevant to consider. This is a technology which

states may want to consider, but ultimately, the decision of whether to require this particular technology to achieve the necessary VOC emissions reductions must be made by each affected state. Finally, EPA notes that under the significant new alternatives policy (SNAP) program, created under the Act, section 612, EPA has identified acceptable foam blowing agents many of which are not VOCs ([www.epa.gov/ozone/title6/snap/](http://www.epa.gov/ozone/title6/snap/)).

#### H. Credit for Measures Not Fully Implemented

*Comment:* States should not be given credit for measures that are not fully implemented. For example, the states are being given full credit for Federal coating, refinishing and consumer product rules that have been delayed or weakened.

*Response:* Architectural and Industrial Maintenance (AIM) Coatings: On March 22, 1995 EPA issued a memorandum<sup>7</sup> that provided that states could claim a 20 percent reduction in VOC emissions from the AIM coatings category in ROP and attainment plans based on the anticipated promulgation of a national AIM coatings rule. In developing the attainment and ROP SIPs for their nonattainment areas, states relied on this memorandum to estimate emission reductions from the anticipated national AIM rule. EPA promulgated the final AIM rule in September 1998, codified at 40 CFR Part 59 Subpart D. In the preamble to EPA's final AIM coatings regulation, EPA estimated that the regulation will result in 20 percent reduction of nationwide VOC emissions from AIM coatings categories (63 FR 48855). The estimated VOC reductions from the final AIM rule resulted in the same level as those estimated in the March 1995 EPA policy memorandum.

In accordance with EPA's final regulation, states have assumed a 20 percent reduction from AIM coatings source categories in their attainment and ROP plans. AIM coatings manufacturers were required to be in compliance with the final regulation within one year of promulgation, except for certain pesticide formulations which were given an additional year to comply. Thus all manufacturers were required to comply, at the latest, by September 2000. Industry confirmed in comments on the proposed AIM rule that 12 months between the issuance of

the final rule and the compliance deadline would be sufficient to "use up existing label stock" and "adjust inventories" to conform to the rule. 63 FR 48848 (September 11, 1998). In addition, EPA determined that, after the compliance date, the volume of nonconforming products would be very low (less than one percent) and would be withdrawn from retail shelves anyway. Therefore, EPA believes that compliant coatings were in use by the fall of 1999 with full reductions to be achieved by September 2000 and that it was appropriate for the states to take credit for a 20 percent emission reduction in their SIPs.

*Autobody Refinish Coatings Rule:* Consistent with a November 27, 1994 EPA policy,<sup>8</sup> many states claimed a 37 percent reduction from this source category based on a proposed rule. However, EPA's final rule, "National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings," published on September 11, 1998 (63 FR 48806), did not regulate lacquer topcoats and will result in a smaller emission reduction of around 33 percent overall nationwide. The 37 percent emission reduction from EPA's proposed rule was an estimate of the total nationwide emission reduction. Since this number is an overall national average, the actual reduction achieved in any particular area could vary depending on the level of control which already existed in the area. For example, in California the reduction from the national rule is zero because California's rules are more stringent than the national rule. In the proposed rule, the estimated percentage reduction for areas that were unregulated before the national rule was about 40 percent. However as a result of the lacquer topcoat exemption added between proposal and final rule, the reduction is now estimated to be 36 percent for previously unregulated areas. Thus, most previously unregulated areas will need to make up the approximately one percent difference between the 37 percent estimate of reductions assumed by states, following EPA guidance based on the proposal, and the 36 percent reduction actually achieved by the final rule for previously unregulated areas. EPA's best estimate of the reduction potential of the final rule was spelled out in a September 19, 1996 memorandum entitled "Emissions Calculations for the Automobile

Refinish Coatings Final Rule" from Mark Morris to Docket No. A-95-18.

*Consumer Products Rule:* Consistent with a June 22, 1995 EPA guidance,<sup>9</sup> states claimed a 20 percent reduction from this source category based on EPA's proposed rule. The final rule, "National Volatile Organic Compound Emission Standards for Consumer Products," (63 FR 48819), published on September 11, 1998, has resulted in a 20 percent reduction after the December 10, 1998 compliance date. Moreover, these reductions largely occurred by the fall of 1999. In the consumer products rule, EPA determined and the consumer products industry concurred, that a significant proportion of subject products have been reformulated in response to state regulations and in anticipation of the final rule (63 FR 48819). That is, industry reformulated the products covered by the consumer products rule in advance of the final rule. Therefore, EPA believes that complying products in accordance with the rule were in use by the fall of 1999. It was appropriate for the states to take credit for a 20 percent emission reduction for the consumer products rule in their SIPs.

#### I. Enforcement of Control Programs

*Comment:* The attainment demonstrations do not clearly set out programs for enforcement of the various control strategies relied on for emission reduction credit.

*Response:* In general, state enforcement, personnel and funding program elements are contained in SIP revisions previously approved by EPA under obligations set forth in section 110(a)(2)(c) of the Act. Once approved by the EPA, there is no need for states to re-adopt and resubmit their enforcement programs with each and every SIP revision generally required by other sections of the Act. In a final rulemaking action published on October 17, 1983 (48 FR 46986), EPA approved Delaware's financial and manpower resource commitments, after having proposed approval of these commitments on February 3, 1983 (48 FR 5093,5095). In addition, emission control regulations will also contain specific enforcement mechanisms, such as record keeping and reporting requirements, and may also provide for periodic state inspections and reviews of the affected sources. EPA's review of these regulations includes review of the enforceability of the regulations. Rules

<sup>7</sup> "Credit for the 15 Percent Rate-of-Progress Plans for Reductions from the Architectural and Industrial Maintenance (AIM) Coating Rules," March 22, 1995, from John S. Seitz, Director, Office of Air Quality Planning and Standards to Air Division Directors, Regions I-X.

<sup>8</sup> "Credit for the 15 Percent Rate-of-Progress Plans for Reductions from the Architectural and Industrial Maintenance (AIM) Coating Rule and the Autobody Refinishing Rule," November 29, 1994, John S. Seitz, Director OAQPS, to Air Division Directors, Regions I-X.

<sup>9</sup> "Regulatory Schedule for Consumer and Commercial Products under Section 183(e) of the Clean Air Act," June 22, 1995, John S. Seitz, Director OAQPS, to Air Division Directors, Regions I-X.

that are not enforceable are generally not approved by EPA. To the extent that the ozone attainment demonstration depends on specific state emission control regulations, these individual regulations have undergone review by the EPA in past approval actions.

#### *J. MOBILE6 and the Motor Vehicle Emissions Budgets (MVEBs)*

*Comment 1:* One commenter generally supports a policy of requiring motor vehicle emissions budgets to be recalculated when revised MOBILE models are released.

*Response 1:* The attainment demonstration SIPs that rely on Tier 2 emission reduction credit contain commitments to revise the motor vehicle emissions budgets after MOBILE6 is released. EPA is approving Delaware's commitment in this final rulemaking.

*Comment 2:* The revised budgets calculated using MOBILE6 will likely be submitted after the MOBILE5 budgets have already been approved. EPA's policy is that submitted SIPs may not replace approved SIPs.

*Response 2:* This is the reason that EPA proposed in the July 28, 2000, SNPR (65 FR 46383) that the approval of the MOBILE5 budgets for conformity purposes would last only until MOBILE6 budgets had been submitted and found adequate. In this way, the MOBILE6 budgets can apply for conformity purposes as soon as they are found adequate. See the discussion at Section I.B. of this document.

*Comment 3:* If a state submits additional control measures that affect the motor vehicle emissions budget, but does not submit a revised motor vehicle emissions budget, EPA should not approve the attainment demonstration.

*Response 3:* EPA agrees. The motor vehicle emissions budgets for the Delaware portion of the Philadelphia area attainment demonstration reflect the motor vehicle control measures in the attainment demonstration. In addition, Delaware has committed to submit new budgets as a revision to the attainment SIP consistent with any new measures submitted to fill any shortfall, if the additional control measures affect on-road motor vehicle emissions. EPA is approving that commitment in this final rulemaking. See the discussion at Section I.B. of this document.

*Comment 4:* EPA should make it clear that the motor vehicle emissions budgets to be used for conformity purposes will be determined from the total motor vehicle emissions reductions required in the SIP, even if the SIP does not explicitly quantify a revised motor vehicle emissions budget.

*Response 4:* EPA will not approve SIPs without motor vehicle emissions budgets that are explicitly quantified for conformity purposes. Delaware's attainment demonstration SIP for the Philadelphia area contains explicitly quantified motor vehicle emissions budgets for its portion of the area which have been even further explicitly quantified as sub-budgets for each of Kent and New Castle Counties. See Section I.I.(1) of this document.

*Comment 5:* If a state fails to follow through on its commitment to submit the revised motor vehicle emissions budgets using MOBILE6, EPA could make a finding of failure to submit a portion of a SIP, which would trigger a sanctions clock under section 179 of the Act.

*Response 5:* We agree that if a state fails to meet its SIP-approved commitment, EPA could make a finding of failure to implement the SIP, which would start a sanctions clock under section 179 of the Act.

*Comment 6:* If the budgets recalculated using MOBILE6 are larger than the MOBILE5 budgets, then attainment should be demonstrated again.

*Response 6:* As EPA proposed in its December 16, 1999 notices, we will work with states on a case-by-case basis if the new emissions estimates raise issues about the sufficiency of the attainment demonstration.

*Comment 7:* If the MOBILE6 budgets are smaller than the MOBILE5 budgets, the difference between the budgets should not be available for reallocation to other sources unless air quality data show that the area is attaining, and a revised attainment demonstration is submitted that demonstrates that the increased emissions are consistent with attainment and maintenance. Similarly, the MOBILE5 budgets should not be retained (while MOBILE6 is being used for conformity demonstrations) unless the above conditions are met.

*Response 7:* EPA agrees that if recalculation using MOBILE6 shows lower motor vehicle emissions than MOBILE5, then these motor vehicle emission reductions cannot be reallocated to other sources or assigned to the motor vehicle emissions budget as a safety margin unless the area reassesses the analysis in its attainment demonstration and shows that it will still attain. In other words, the area must assess how its original attainment demonstration is impacted by using MOBILE6 versus MOBILE5 before it reallocates any apparent motor vehicle emission reductions resulting from the use of MOBILE6. In addition, Delaware will be submitting new budgets based

on MOBILE6, so the MOBILE5 budgets will not be retained in the SIP indefinitely.

#### *K. MOBILE6 Grace Period*

*Comment 1:* We received a comment on whether the grace period before MOBILE6 is required in conformity determinations will be consistent with the schedules for revising SIP motor vehicle emissions budgets within one or two years of MOBILE6's release.

*Response 1:* This comment is not germane to this rulemaking, since the MOBILE6 grace period for the conformity determinations is not explicitly tied to EPA's SIP policy and approvals. However, EPA understands that a longer grace period would allow some areas to better transition to new MOBILE6 budgets. EPA is considering the maximum two-year grace period allowed by the conformity rule, and EPA will address this in the future when the final MOBILE6 emissions model and policy guidance is released.

*Comment 2:* One commenter asked EPA to clarify in the final rule whether MOBILE6 will be required for conformity determinations once new MOBILE6 budgets are submitted and found adequate.

*Response 2:* This comment is not germane to this rulemaking. However, it is important to note that EPA intends to clarify its policy for implementing MOBILE6 in conformity determinations when the MOBILE6 model is released. EPA believes that MOBILE6 should be used in conformity determinations once new MOBILE6 budgets are found adequate.

#### *L. Two-Year Option To Revise the MVEBs*

*Comment:* One commenter did not prefer the additional option for a second year before the state has to revise the conformity budgets with MOBILE6 since new conformity determinations and new transportation projects could be delayed in the second year.

*Response:* EPA proposed the additional option to provide further flexibility in managing MOBILE6 budget revisions. The supplemental proposal did not change the original option to revise budgets within one year of MOBILE6's release. State and local governments can continue to use the one-year option, if desired, or submit a new commitment consistent with the alternative two-year option. EPA expects that state and local agencies have consulted on which option is appropriate and considered the impact on the future conformity determinations. Delaware has committed to revise its budgets within

one-year of MOBILE6's release. EPA is approving that commitment in this final rulemaking.

*M. Comments Contending That Delaware's NO<sub>x</sub> Measures Are Not Approved*

*Comment:* We received comments asserting that credit had been assumed from measures not approved into the SIP. The comments specifically mentioned the NO<sub>x</sub> RACT rule and the Phase II controls under the OTC's MOU. We also received comments that NO<sub>x</sub> RACT applicability should be extended to 25 tons per year sources.

*Response:* EPA has approved the Delaware's NO<sub>x</sub> RACT regulations for this area (66 FR 32231, June 14, 2001). The comment regarding extension of the applicability of RACT to 25 tons per year sources is moot because the Delaware NO<sub>x</sub> RACT regulations's applicability threshold is 25 tons per year as is required in a severe ozone nonattainment area. EPA has fully approved Delaware's rule that implements the Phase II controls under the OTC MOU (65 FR 12481, March 9, 2000).

*N. Attainment and Rate-of-Progress Demonstrations*

*Comment:* One commenter claims that the plans fail to demonstrate emission reductions of 3 percent per year over each 3-year period between November 1999 and November 2002, and November 2002 and November 2005, as required by 42 U.S.C. section 7511a(c)(2)(B). The states have not even attempted to demonstrate compliance with these requirements, and EPA has not proposed to find that they have been met. The EPA has absolutely no authority to waive the statutory mandate for 3 percent annual reductions. The statute does not allow EPA to use the NO<sub>x</sub> SIP call or 126 orders as an excuse for waiving ROP deadlines. The statutory ROP requirement is for emission reductions—not ambient reductions. Emission reductions in upwind states do not waive the statutory requirement for 3 percent annual emission reductions within the downwind nonattainment area.

*Response:* Under no condition is EPA waiving the statutory requirement for 3 percent annual emission reductions. For many areas, EPA did not propose approval of the Post-99 ROP demonstrations at the same time as EPA proposed action on the area's attainment demonstration. On August 30, 2001 (66 FR 45800), EPA proposed full approval of all of the Post-1996 ROP plans adopted by Delaware to demonstrate

ROP from 1996 through the 2005 attainment year. We received no comments on that NPR. (See the discussion in Section I.B. of this document.) Delaware is only relying on NO<sub>x</sub> and VOC reductions from within its portion of the Philadelphia nonattainment area for meeting the ROP requirements from 1996 through the 2005 attainment year. These reductions are the result of fully promulgated Federal and fully adopted and SIP-approved state measures.

*O. Measures for the One Hour NAAQS and for Progress Toward the Eight Hour NAAQS*

*Comment:* One commenter notes that EPA has been working toward promulgation of a revised eight hour ozone NAAQS because the Administrator deemed attaining the one-hour ozone NAAQS is not adequate to protect public health. Therefore, EPA must ensure that measures be implemented now that will be sufficient to meet the one hour standard and that make as much progress toward implementing the 8 hour ozone standard as the requirements of the Act and implementing regulations allow.

*Response:* The one hour standard remains in effect for all of these areas and the SIPs that have been submitted are for the purpose of achieving that NAAQS. Congress has provided the states with the authority to choose the measures necessary to attain the NAAQS. EPA cannot second guess a state's choice if EPA determines that the SIP meets the requirements of the Act. EPA believes that the SIPs for the severe areas meet the requirements for attainment demonstrations for the one hour standard and thus, could not disapprove them even if EPA believed other control requirements might be more effective for attaining the eighthour standard. However, EPA generally believes that emission controls implemented to attain the one hour ozone standard will be beneficial towards attainment of the eighthour ozone standard as well. This is particularly true regarding the implementation of NO<sub>x</sub> emission controls resulting from EPA's NO<sub>x</sub> SIP Call.

Finally, EPA notes that although the eighthour ozone standard has been adopted by the EPA, implementation of this standard has been delayed while certain aspects of the standard remain before the United States Circuit Court of Appeals. The states and the EPA have yet to define the eighthour ozone nonattainment areas and the EPA has yet to issue guidance and requirements

for the implementation of the eighthour ozone standard.

**III. Final Action**

*A. Attainment Demonstration*

EPA is fully approving as meeting sections 182(c)(2) and (d) of the Act, the attainment demonstration for the Philadelphia-Wilmington-Trenton area as submitted by the State of Delaware on May 22, 1998, and amended October 8, 1998, January 24, 2000, December 20, 2000, and October 9, 2001, including its RACM analysis and determination.

*B. Commitments*

EPA is approving the enforceable commitments made to the attainment plan for the Philadelphia-Wilmington-Trenton severe ozone nonattainment area submitted on January 24, 2000 and revised on December 20, 2000. The enforceable commitments are to:

(1) Submit measures by October 31, 2001 for additional emission reductions as required in the attainment demonstration test, and to revise the SIP and motor vehicle emissions budgets by October 31, 2001 if the additional measures affect the motor vehicle emissions inventory,

(2) Revise the SIP and motor vehicle emission budgets using MOBILE6 within one year after it is issued, and

(3) Perform a mid-course review by December 31, 2003.

*C. Post-1996 ROP Plans*

(1) EPA is approving the Post-1996 ROP plans for milestone years 1999, 2002, and 2005 for the Delaware portion of the Philadelphia-Wilmington-Trenton severe ozone nonattainment area, namely Kent and New Castle Counties, which were submitted on December 29, 1997, June 17, 1999, February 3, 2000, and December 20, 2000.

(2) EPA is also approving Delaware's contingency plans for failure to meet ROP in the Delaware portion of the Philadelphia-Wilmington-Trenton severe ozone nonattainment area, namely Kent and New Castle Counties which were submitted on December 29, 1997, June 17, 1999, February 3, 2000, and December 20, 2000.

*D. Mobile Budgets of the Control Strategy Plans*

EPA is approving the following mobile budgets, explicitly quantified as sub-budgets for each of Kent and New Castle Counties, of the Post-96 ROP plans and the Attainment Plan:

## TRANSPORTATION CONFORMITY BUDGETS FOR THE DELAWARE PORTION OF THE PHILADELPHIA AREA

Type of control strategy SIP	Year	Kent County		New Castle County		Effective date of adequacy determination
		VOC	NO <sub>x</sub>	VOC	NO <sub>x</sub>	
Post-1996 ROP Plan .....	1999	7.55	11.17	22.49	29.41	April 29, 1999 (64 FR 31217, published June 10, 1999).
Post-1996 ROP Plan .....	2002	6.30	9.81	18.44	27.29	June 23, 2000, (65 FR 36440, published June 8, 2000).
Post-1996 ROP Plan .....	2005	4.84	7.90	14.76	22.92	May 2, 2001 (66 FR 19769, published April 17, 2001).
Attainment Demonstration .....	2005	4.84	7.90	14.76	22.92	June 23, 2000 (65 FR 36440, published June 8, 2000).

Please note that EPA is only approving the 2005 attainment demonstration and its current budgets because Delaware has provided an enforceable commitment to revise the budgets using the MOBILE6 model within one year of EPA's release of that model. Therefore, we are limiting the duration of our approval of the current budgets only until such time as the revised budgets are found adequate. Those revised budgets will be more appropriate than the budgets we are approving for conformity purposes for the time being.

Similarly, EPA is only approving the 2005 attainment demonstration and its current budgets because Delaware provided enforceable commitments to adopt additional measures to strengthen the attainment demonstration by October 31, 2001 and to submit revised budgets by October 31, 2001 if the additional measures affect the motor vehicle emissions inventory. Therefore, we are limiting the duration of our approval of the current budgets only until such time as any such revised budgets are found adequate. Those revised budgets will be more appropriate than the budgets we are approving for conformity purposes for the time being.

#### IV. Administrative Requirements

##### 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 (Public Law 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 standard, and does not alter the relationship or the distribution of power and responsibilities established in the 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 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 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 Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 28, 2001. 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 Post-1996 ROP plans and the one-hour ozone attainment demonstration SIP for the Philadelphia-Wilmington-Trenton area submitted by the State of Delaware 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, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: October 15, 2001.

**James W. Newsom,**  
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 I—Delaware**

2. Section 52.426 is amended by revising the section heading and designating the existing text as paragraph (a) and adding paragraphs (b), (c) and (d) to read as follows:

**§ 52.426 Control strategy plans for attainment and rate-of-progress: ozone.**

\* \* \* \* \*

(b)(1) EPA approves revisions to the Delaware State Implementation Plan consisting of the Post 1996 ROP plans for milestone years 1999, 2002, and 2005 for the Delaware portion of the Philadelphia-Wilmington-Trenton severe ozone nonattainment area,

namely Kent and New Castle Counties. These revisions were submitted by the Secretary of Delaware Department of Natural Resources and Environmental Control on December 29, 1997, and revised on June 17, 1999, February 3, 2000, and December 20, 2000.

(2) EPA approves Delaware's contingency plans for failure to meet ROP in the Delaware portion of the Philadelphia-Wilmington-Trenton severe ozone nonattainment area, namely Kent and New Castle Counties, for milestone years 1999, 2002 and 2005. These revisions were submitted by the Secretary of Delaware Department of Natural Resources and Environmental Control on December 29, 1997, June 17, 1999, February 3, 2000, and December 20, 2000.

(c) EPA approves the attainment demonstration SIP for the Philadelphia-Wilmington-Trenton area submitted by the Secretary of the Delaware Department of Natural Resources and Environmental Control on May 22, 1998, and amended October 8, 1998, January 24, 2000, December 20, 2000, and October 9, 2001 including its RACM

analysis and determination. EPA is approving the enforceable commitments made to the attainment plan for the Philadelphia-Wilmington-Trenton severe ozone nonattainment area submitted by the Secretary of Delaware Department of Natural Resources and Environmental Control on January 24, 2000 and December 20, 2000. The enforceable commitments are to:

(1) Submit measures by October 31, 2001 for additional emission reductions as required in the attainment demonstration test, and to revise the SIP and motor vehicle emissions budgets by October 31, 2001 if the additional measures affect the motor vehicle emissions inventory,

(2) Revise the SIP and motor vehicle emission budgets using MOBILE6 within one year after it is issued, and

(3) Perform a mid-course review by December 31, 2003.

(d) EPA is approving the following mobile budgets, explicitly quantified as sub-budgets for each of Kent and New Castle Counties, of the Post-96 ROP plans and the Attainment Plan:

**TRANSPORTATION CONFORMITY BUDGETS FOR THE DELAWARE PORTION OF THE PHILADELPHIA AREA**

Type of control strategy SIP	Year	Kent County		New Castle County		Effective Date of Adequacy Determination
		VOC	NO <sub>x</sub>	VOC	NO <sub>x</sub>	
Post-1996 ROP Plan .....	1999	7.55	11.17	22.49	29.41	April 29, 1999 (64 FR 31217, published June 10, 1999).
Post-1996 ROP Plan .....	2002	6.30	9.81	18.44	27.29	June 23, 2000, (65 FR 36440, published June 8, 2000).
Post-1996 ROP Plan .....	2005	4.84	7.90	14.76	22.92	May 2, 2001 (66 FR 19769, published April 17, 2001).
Attainment Demonstration .....	2005	4.84	7.90	14.76	22.92	June 23, 2000, (65 FR 36440, published June 8, 2000).

(1) EPA is only approving the 2005 attainment demonstration and its current budgets because Delaware has provided an enforceable commitment to revise the budgets using the MOBILE6 model within one year of EPA's release of that model. Therefore, EPA is limiting the duration of its approval of the current budgets only until such time as the revised budgets are found adequate. Those revised budgets will be more appropriate than the budgets EPA is

approving for conformity purposes for the time being.

(2) Similarly, EPA is only approving the attainment demonstration and its current budgets because Delaware has provided enforceable commitments to adopt additional measures to strengthen the attainment demonstration by October 31, 2001 and to submit revised budgets by October 31, 2001 if the additional measures affect the motor vehicle emissions inventory. Therefore,

EPA is limiting the duration of its approval of the current budgets only until such time as any such revised budgets are found adequate. Those revised budgets will be more appropriate than the budgets EPA is approving for conformity purposes for the time being.

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