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UNITED STATES ENVIRONMENTAL PROTECTION AGEN
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

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Honorable George Pataki
Governor, State of New York
State Capitol
Albany, New York 12224

Dear Governor Pataki:

I am writing to request that New York State submit to the Environmental Protection Agency (EPA) its recommendations regarding areas that do not attain the 8-hour National Ambient Air Quality Standard for ozone. EPA is requesting that states provide their recommendations by April 15, 2003. In July 1997, EPA promulgated this 8-hour standard for ozone that is critical to the protection of public health. However, its implementation was delayed by legal challenges until now. EPA is confident that with the states' support we can complete the designation process by mid-2004.

New York State previously submitted its recommendations regarding areas that would not attain the 8-hour ozone standard in July of 2000. However, the legal challenges to the standard prevented EPA from acting on those recommendations. We now request that New York update these recommendations using the most recently available measurements of ozone air quality, specifically, data from 2000 through the summer of 2002.

To guide the State in its deliberations I have enclosed information from EPA's Assistant Administrator for Air and Radiation, Jeffery R. Holmstead which I have also shared with Commissioner Crotty and staff of the New York State Department of Environmental Conservation. This information supplements EPA's "Boundary Guidance on Air Quality Designations for the 8-hour National Ambient Air Quality Standards," dated March 28, 2000.

We look forward to working with New York State to develop designations for the 8-hour ozone standard that will lead to healthful air quality for all.

Sincerely,

Jane M. Kenny,
Regional Administrator

Enclosure

cc: Erin Crotty, Commissioner
New York State Department of Environmental Conservation

bcc: T. Helms, EPA-OAQPS
S. Reinders, EPA-OAQPS
W. Baker, DEPP
R. Werner, DEPP-APB
P. Truchan, DEPP-APB
R. Kelly, DEPP-APB
K. Wieber, DEPP-APB
M. Jones, DEPP-DO
File Copy (Green)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 14 2002

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Schedule for 8-Hour Ozone Designations and its Effect on Early Action Compacts

FROM: Jeffrey R. Holmstead
Assistant Administrator

TO: Regional Administrators, Regions I-X

The purpose of this memorandum is to inform State and local air pollution control Agencies and Tribes (States and Tribes) about the Environmental Protection Agency's (EPA's or Agency's) schedule for designating areas for the 8-hour ozone National Ambient Air Quality Standards (NAAQS or standard) and the impact of the designation schedule on areas that are developing early action compacts (compacts). Please share this memorandum with your States and Tribes. This memorandum does not replace earlier guidance on the designation process and determining nonattainment area boundaries based on case-by-case application of air quality-related factors and presumptions. These earlier memoranda, titled "Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards" dated March 28, 2000 and "Guidance on 8-Hour Ozone Designations for Indian Tribes" dated July 18, 2000, provide more detail on these issues and are located at http://www.epa.gov/ttn/oarpg.

Part A of this memorandum describes the schedule for designations, Part B addresses designation of Tribal areas and Part C addresses the effect of this schedule on States and Tribes that are developing compacts pursuant to the Texas "Protocol for Early Action Compacts Designed to Achieve and Maintain the 8-Hour Ozone Standard" (protocol) endorsed by EPA on June 19, 2002. The protocol can be found at http://www.epa.gov/eart1r6/6pd/air/pd-1/8hourozone.pdf.

A. Schedule for Designations for the 8-Hour Ozone NAAQS

On May 30, 2002 representatives of nine environmental organizations filed a notice of citizen suit under the Clear Air Act (Act) alleging that the Administrator failed to promulgate air

quality designations by the required statutory deadline.[1] On November 13, 2002, the nine environmental groups filed their lawsuit in the U.S. District Court for the District of Columbia. The EPA and the environmental groups have agreed upon a schedule for EPA to promulgate air quality designations for the 8-hour ozone standards by April 15, 2004. This agreement is embodied in a consent decree that was lodged with the U.S. District Court for the District of Columbia on November 13, 2002. In accordance with §113(g) of the Act, prior to finalizing the consent decree, EPA will publish a notice in the Federal Register providing a 30-day period for public review. If the public review results in revisions to the consent decree, EPA will modify this guidance as appropriate.

The EPA is now requesting that each State Governor and Tribal Chief or Leader submit updated, revised, or new designation recommendations and documentation to the Regional Administrator of the appropriate Regional Office by April 15, 2003. It should be noted that State recommendations do not apply to Indian country. The recommendations should generally be based on 2000-2002 quality assured, Federal reference or equivalent air quality monitoring data. This date will provide time for States and Tribes to quality assure the data for use in developing their recommendations and for EPA to carefully review and evaluate each recommendation prior to promulgating designations. To the extent that 2001-2003 air quality data are available and quality assured at the time of final designations, EPA will use 2001-2003 data when promulgating the designations. Therefore, EPA encourages Regional Offices, States and Tribes to prioritize and accelerate quality assurance of 2003 ozone monitoring data for use in promulgating designations. In the case where a State or Tribe does not submit a recommendation by April 15, 2003, EPA will promulgate the designation it deems appropriate.

In accordance with the Act, EPA will review the recommended designations and may make modifications as deemed necessary. If EPA determines that a modification to a recommendation is necessary, EPA will notify the State or Tribe no later than 120 days prior to promulgating the designations, which will provide an opportunity for the State or Tribe to demonstrate why EPA's modification is not appropriate. The EPA anticipates that it would provide such notification no later than October 15, 2003.

The EPA believes this timetable for promulgating designations is reasonable and appropriate and provides adequate time for States, Tribes, and local communities to develop effective ozone abatement strategies. Accordingly, EPA believes that there is no need for legislative action to alter the statutory deadline for ozone designations or related implementation

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[1]Section 6103 of the Transportation Equity Act for the 21st Century ("TEA-21") provided that EPA was required to designate areas for the 8-hour ozone NAAQS no later than July 18, 2000. See CAA section 107 Note. As part of Pub. L. 106-377, enacted in October 2000, Congress prohibited EPA from spending funds to designate areas for the 8-hour NAAQS until the earlier of a decision by the Supreme Court in Whitman v. American Trucking Assoc. or June 15, 2001. The Supreme Court issued its decision in Whitman v. American Trucking Assoc. on February 27, 2001.

requirements. In addition, EPA believes that it is possible to harmonize implementation of the 8-hour ozone and particulate matter NAAQS for 2.5 microns or less ($PM_{2.5}$) without seeking legislation because EPA will work with States to ensure that area designations for both NAAQS will occur in 2004. Indeed, the designation of areas for the $PM_{2.5}$ standard by December 2004 is one of the Agency's highest priorities, due to the serious public health implications of $PM_{2.5}$ exposure and the corresponding importance of initiating the air quality planning process for both the ozone and $PM_{2.5}$ standards. This will enable States and Tribes to plan for implementation of both NAAQS at the same time. In addition, EPA intends to promulgate an implementation rule and release guidance addressing the 8-hour ozone program by the end of 2003 to aid States in planning for implementation prior to promulgation of designations.

The EPA is committed to ensuring that all stakeholders have an opportunity to participate in the designation process for the 8-hour ozone NAAQS, and that State, local and Tribal officials have ample time to comply with obligations that are triggered by designations. States are encouraged to involve stakeholders in developing their recommendations. Regional Offices should work with States and Tribes, particularly those Tribes located in or near an area where a monitor is recording a violation of the 8-hour ozone NAAQS.

B. Designation of Tribal Areas

Tribes have raised a number of concerns and questions to EPA about the designation process in discussions held by the Tribal Designations and Implementation Work Group. For instance, many Tribes believe that consolidated metropolitan statistical area (C/MSA) boundaries should not include reservations which are often politically and economically not integrated with the surrounding or adjacent urban area. The C/MSA presumption for the recommended nonattainment area plus nearby contributing areas in EPA's guidance recognizes the need for broader nonattainment areas associated with urban areas because of transport of pollution and precursor emissions within and into urban areas, widespread poor air quality in and near urban areas and protection of health and welfare of citizens living in the area. While EPA's guidance establishes a presumption that the metropolitan area[2] is the initial default area, the guidance offers a method to arrive at a different conclusion other than C/MSA through case-by-case evaluation and documentation based on the factors in the guidance. Therefore, a Tribe may make a recommendation that an area not be included in a C/MSA nonattainment area and/or that a nonattainment designation is not appropriate for the area by addressing the factors in the guidance. Another concern that Tribes have raised with the designation process is that Tribes may not have the resources to do the detailed analysis necessary to prepare recommendations. Therefore, EPA offers to work with Tribes to develop their recommendations upon request.

Tribes are encouraged, but not required, to submit designation recommendations for their reservations, or other areas under their jurisdiction, to EPA. The Tribal Authority Rule (TAR)

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[2] "Metropolitan area" means the Metropolitan Statistical Area (MSA) or, in areas with multiple contiguous MSAs, the Consolidated Metropolitan Statistical Area (CMSA).

offers flexibility to Tribes for specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in CAA sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191. However, EPA is required by the Act and the consent decree to make designations according to a timetable. Therefore, if a Tribe wishes to participate in the designation process, it must submit a recommendation in time for EPA to consider that recommendation when making a designation. In cases where Tribes do not make recommendations, the EPA, after consultation with the respective Tribe(s), will promulgate the designation it deems appropriate.

The EPA will continue to work with the Tribes to address their concerns, consistent with the TAR. Because many of the Tribal concerns about designations will be area specific, it is important that Tribes work with EPA Regional Offices when developing recommendations. For more information on ozone designations for Tribes, see EPA's Guidance on 8-Hour Ozone Designations for Indian Tribes, available on the Office of Air and Radiation's Tribal AIR website, www.epa.gov/oar/tribal/airprogs/tribe8hd.html. The EPA plans to contact Tribes regarding consultation prior to promulgating actual designations.

C. Early Action Compacts

In this section, EPA is addressing how it anticipates the designation schedule will work for areas that develop voluntary 8-hour compacts, as provided in the protocol. The EPA endorsed this protocol on June 19, 2002. The purpose of a signed 8-hour compact is to provide local areas with flexibility to control air emissions from sources and to offer a means to achieve cleaner air faster than the Act otherwise would require. Areas that currently approach or monitor exceedances of the 8-hour ozone standard, but are designated attainment and "clean" for the 1-hour ozone standard, i.e., no monitored violations, would be eligible to qualify for the compact approach, provided the milestones and schedules discussed in the next section of this memorandum are met. Under this approach, 8-hour air quality plans would be developed consistent with a cooperative agreement between local, State or Tribe and EPA officials. These early 8-hour plans would consist of local, enforceable measures that would achieve air quality reductions earlier than otherwise would be required and that would be approved as part of the State implementation plan (SIP). In cases where a Tribe elects to participate, the local controls would be included as part of the Tribal implementation plan (TIP). For participating areas that are monitoring a violation of the 8-hour ozone standard, EPA would recognize the local area's commitment to early action by provisionally deferring the effective date of the nonatttainment designation. The deferral of the effective date of the designation would be contingent upon the participating area's meeting all terms and milestones of the compact. The Agency believes that these compacts can result in early environmental progress, and we continue to support local areas' commitments to develop plans that are designed to achieve clean air faster than the Act would otherwise require.

We strongly encourage States, Tribes and local areas to begin broad-based stakeholder outreach early, and to maintain an effective and inclusive collaborative process. The early action

program is based upon, and cannot effectively operate without, broad-based support from all interests.

One of the principles of the protocol concerns deferral of the effective date of the nonattainment designation for areas that are in compliance with applicable milestones in the compact. For these areas, EPA would plan to defer the effective date of the nonattainment designation on a rolling basis such that each deferral is linked to a key milestone, as described below in the next section of this memorandum. We have included a schedule for deferrals later in this memorandum in the section entitled "Provisional Deferral of the Effective Date of Nonattainment Designation."

Key Compact Milestones and Schedules

Below EPA sets forth the key milestones, which are also outlined in the protocol, that should be included in each compact. The milestones have been supplemented as described below and in a letter dated October 18, 2002, from Gregg Cooke, EPA, to Robert Huston, Texas Commission on Environmental Quality. The Regional Offices should work closely with States, Tribes and local areas to emphasize the importance of adhering to these critical milestones and schedules, as well as the importance of implementing an effective stakeholder process.

1. December 31, 2002 - The compact must be completed, signed by local, State or Tribal and EPA officials, and submitted to EPA no later than December 31, 2002. Areas that submit compacts after that date will not qualify for the deferred effective date. These agreements represent commitments of States and local areas or Tribes that culminate in the development of the SIPs or TIPs that will achieve local reductions earlier than otherwise required, and which demonstrate attainment of the 8-hour ozone NAAQS by December 31, 2007. The compacts should follow the principles outlined in the protocol and should address the following components described in the protocol: milestones and reporting; emissions inventory; modeling; control strategies; maintenance for growth; public involvement; and local, State or Tribal and EPA commitments.

2. June 16, 2003 - The protocol requires that, after all adopted Federal and State or Tribal controls that have been or will be implemented by the attainment date of December 31, 2007 are accounted for in the modeling, the local area must adopt additional local controls, as necessary, to achieve reductions earlier than otherwise would be required, and to demonstrate attainment of the 8-hour ozone NAAQS by December 31, 2007. Therefore, by June 16, 2003, the first step in complying with this requirement, the local area will identify and describe the local control measures that are being considered during the local planning process. The June 16, 2003 deadline for describing the control measures under consideration must be met to maintain eligibility in the program. While failure to list a measure at this stage would not preclude its adoption later, it is important to develop a reasonably complete initial list of measures. We recognize that the modeling may not be complete at this stage, and that control measures may need to be modified. This milestone, therefore, will provide the public with clear information on

the measures under consideration, will help ensure that interested parties are fully aware of the level of effort and local commitment that is necessary, and will demonstrate that the local area is making progress toward meeting the critical March 31, 2004 deadline for adoption of local measures.

3. March 31, 2004 - The resulting local plan must be completed and submitted to the State or Tribal leader by March 31, 2004 for inclusion in the SIP or TIP and a copy must be provided to EPA by that date. The local plan shall include measures that are specific, quantified, and permanent, and that if approved by EPA, will be Federally enforceable as part of the SIP or TIP. The March 31, 2004 submission also must include specific implementation dates for the adopted local controls. In addition, the local plan must include detailed documentation supporting the plan and reports outlined in the protocol, as well as a modeling analysis based on local controls demonstrating attainment of the 8-hour ozone NAAQS by December 31, 2007.

4. December 31, 2004 - No later than December 31, 2004, States or Tribes will submit to EPA a SIP or TIP consisting of the local plan, including all adopted control measures, and a demonstration that the area will attain the 8-hour ozone standard by December 31, 2007. If a SIP or TIP has been submitted by that date, EPA will review it for completeness and approvability.

5. September 30, 2005 - EPA will take final action on any SIP or TIP revisions submitted by December 31, 2004, pursuant to the compact.

6. December 31, 2005 - No later than December 31, 2005, the area will implement the local control measures that have been incorporated into the SIP or TIP. The EPA strongly recommends that these local measures be implemented earlier (no later than the beginning of the local area's 2005 ozone season) to ensure that the area will have timely and sufficient air quality data (2005-2007) to show attainment by December 31, 2007.

7. June 30, 2006 progress assessment - The protocol requires 6-month progress reports. No later than June 30, 2006, the State or Tribe must submit to EPA a report attesting to the local area's progress since the December 31, 2005 milestone. To determine whether the effective date of the nonattainment designations should continue to be deferred, EPA will review the mid-2006 report to ensure that the area continues to implement its control measures, that emission reductions attributed to local measures are being achieved, and that improvements in air quality are being made. This 6-month report should contain sufficient information to ensure that EPA can make a comprehensive assessment of air quality progress in the local area.

8. December 31, 2007 - No later than December 31, 2007, the area must attain the 8-hour ozone NAAQS. If the area has attained the standard by December 31, 2007, EPA will withdraw the deferred nonattainment designation and replace it with an attainment designation. If the area fails to attain by this date, the nonattainment designation will become effective on April 15, 2008. In addition, pursuant to the terms of the compact, the State must submit a revised attainment demonstration SIP for the nonattainment area by December 31, 2008.

Provisional Deferral of the Effective Date of Nonattainment Designation

If an area meets the first two compact milestones, EPA anticipates that it will propose in October 2003 to defer the effective date of the nonattainment designation for that area until September 30, 2005, contingent upon the area's submission of local control measures by March 31, 2004, as required by the third compact milestone. If the area submits the required control measures, and after consideration of public comment, EPA intends to take final action by April 15, 2004 on the deferred effective date.

Under the terms of the protocol, EPA has committed to approve the SIP or TIP by September 30, 2005. Assuming the SIP or TIP is approvable, the Agency intends to propose, as part of the approval action, the second deferral of the effective date until December 31, 2006. This will allow the Agency time to determine if implementation of control measures has occurred by the December 31, 2005 milestone before further extending the effective date. If the June 30, 2006 progress assessment (described in the previous section) has been submitted, implementation has occurred, and air quality improvement is taking place, EPA will propose and, if appropriate, take final action on the third deferral of the effective date until April 15, 2008. By that date EPA will determine if an area has attained the 8-hour ozone NAAQS by December 31, 2007, as required by the protocol.

In the event of any missed key milestone, EPA will take action to propose and promulgate a finding of failure to meet the milestone, and to withdraw any deferred effective date of the nonattainment designation shortly after the missed milestone. The deferred effective dates will expire unless EPA determines, as part of the rulemaking actions described above, that all intervening milestones have been achieved. If any milestone is missed and EPA withdraws the deferred effective date, thereby triggering a nonattainment designation and applicable statutory requirements, a nonattainment SIP would have to be submitted to EPA within 1 year of the new effective date of the nonattainment designation. A timeline of key compact milestones and deferred effective dates is attached.

Questions on designations should be directed to Sharon Reinders at 919/541-5284. Questions on 8-hour compacts should be directed to David Cole at 919/541-5565.

cc: Air Directors, Regions I-X
Margo Oge, OTAQ

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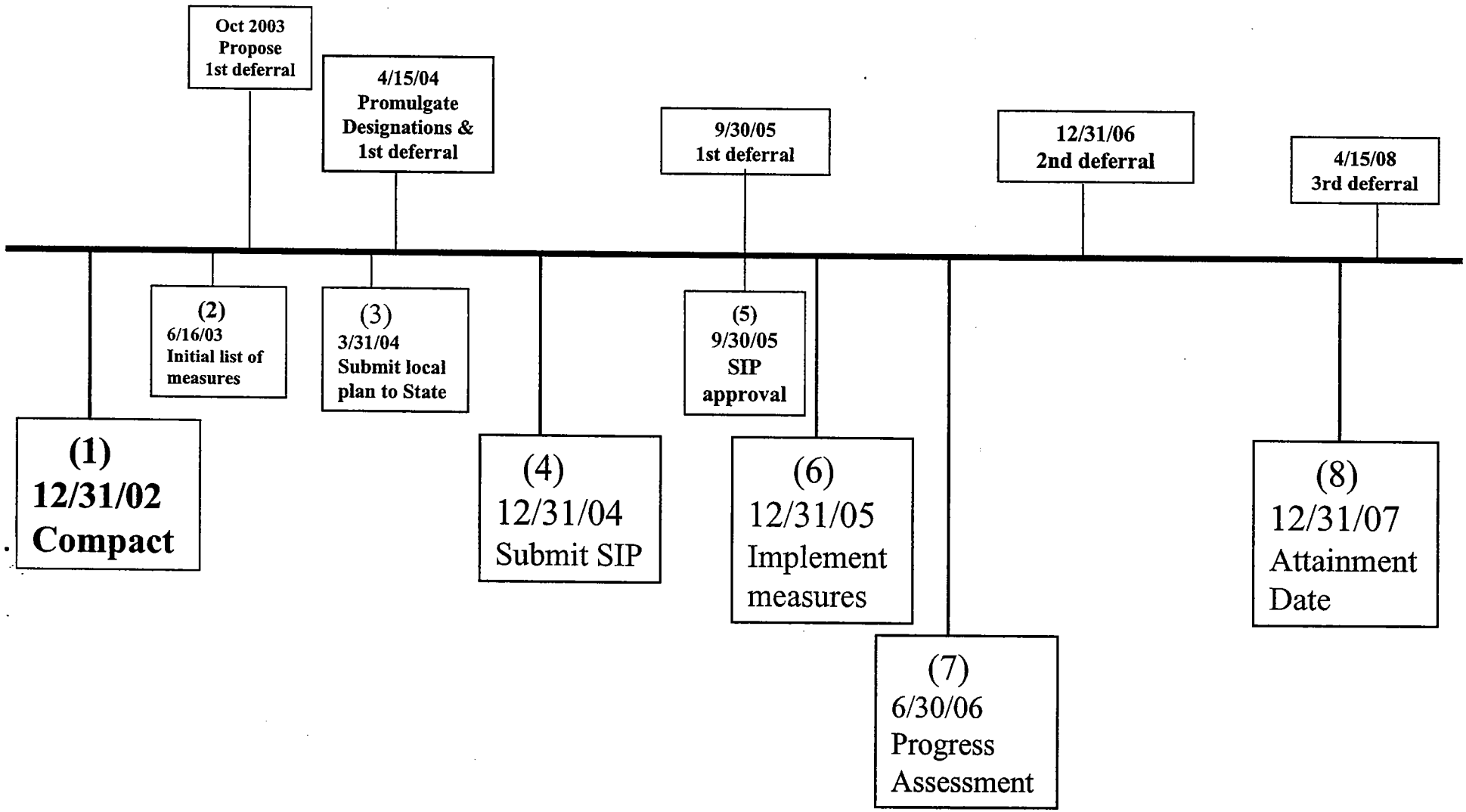
Early Action Compact Timeline