

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 52 and 81**

[EPA-R05-OAR-2009-0220; FRL-8952-2]

**Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio; Redesignation of the Columbus Area to Attainment for Ozone****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** EPA is taking several related actions affecting the Columbus, Ohio 1997 8-hour ozone nonattainment area. EPA is making a determination under the Clean Air Act (CAA) that the Columbus area has attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). The Columbus area includes Delaware, Fairfield, Franklin, Knox, Licking, and Madison Counties. This determination is based on quality-assured ambient air quality monitoring data for the 2006–2008 ozone seasons that demonstrate that the 8-hour ozone NAAQS has been attained in the area. Preliminary 2009 air quality data show that the area continues to attain the 8-hour ozone standard. EPA is approving, as a revision to the Ohio State Implementation Plan (SIP), the state's plan for maintaining the 8-hour ozone NAAQS through 2020 in the area. EPA is approving a request from the state of Ohio to redesignate the Columbus area to attainment of the 8-hour ozone NAAQS. EPA is approving the 2002 base year emissions inventory for the Columbus area as meeting the requirements of the CAA. Finally, EPA finds adequate and is approving the state's 2012 and 2020 volatile organic compound (VOC) and oxides of nitrogen (NO<sub>x</sub>) Motor Vehicle Emission Budgets (MVEBs) for the Columbus area.

**DATES:** This final rule is effective September 15, 2009.**ADDRESSES:** EPA has established a docket for this action: Docket ID No. EPA-R05-OAR-2009-0220. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886-1767 before visiting the Region 5 office.

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**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

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**I. What Is the Background for This Rule?***A. What Is the General Background Information?*

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm). EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS on April 30, 2004 (69 FR 23857).

On March 12, 2008, EPA promulgated a more stringent 8-hour ozone standard of 0.075 ppm. This rule was published in the **Federal Register** on March 27, 2008 (73 FR 16436). It is expected that EPA will designate nonattainment areas under the 2008 8-hour ozone standard in 2010. Today's approval of Ohio's SIP revision addresses only the status of the Columbus area with respect to the 1997 8-hour ozone standard.

The background for today's actions with respect to the 1997 ozone standard is discussed in detail in EPA's June 12, 2009, proposal (74 FR 27973). In that rulemaking, we noted that, under EPA regulations at 40 CFR part 50, the 1997 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 ppm. (See 69 FR 23857 (April 30, 2004) for further

information). The data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness, as determined in accordance with Appendix I of Part 50.

Under the CAA, EPA may redesignate nonattainment areas to attainment if sufficient complete, quality-assured data are available to determine that the area has attained the standard and if it meets the other CAA redesignation requirements in section 107(d)(3)(E).

On March 17, 2009, the Ohio EPA submitted a request to redesignate the Columbus area to attainment of the 8-hour ozone standard. The request included three years of complete, quality-assured data for the period of 2006 through 2008, indicating the 8-hour NAAQS for ozone had been achieved. The area continues to attain the standard based on preliminary data available in 2009. The June 12, 2009, proposed rule provides a detailed discussion of how Ohio met this and other CAA requirements.

*B. What Are the Impacts of the December 22, 2006, and June 8, 2007, United States Court of Appeals Decisions Regarding EPA's Phase 1 Implementation Rule?*

On December 22, 2006, in *South Coast Air Quality Management Dist. v. EPA*, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour ozone standard (69 FR 23951, April 30, 2004). 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the D.C. Circuit Court clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. *South Coast Air Quality Mgmt. Dist. v. EPA*, 485 F.3d 1245 (D.C. Cir. 2007). Therefore, the Phase 1 Rule provisions related to classifications for areas currently classified under subpart 2 of Title I, part D of the CAA as 8-hour nonattainment areas, the 8-hour attainment dates, and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS, remain effective. The June 8th decision left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged. The June 8th decision reaffirmed the Court's December 22, 2006, decision that EPA

had improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, contingent on an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain transportation conformity requirements for certain types of Federal actions. The June 8th decision clarified that the Court's reference to conformity requirements was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations.

For the reasons set forth in the proposal, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation. EPA believes that the Court's December 22, 2006, and June 8, 2007, decisions impose no impediment to moving forward with redesignation of this area to attainment, because, even in light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

With respect to the requirement for transportation conformity under the 1-hour standard, the Court in its June 8th decision clarified that, for those areas with 1-hour motor vehicle emissions budgets in their maintenance plans, anti-backsliding requires only that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. To meet this requirement, conformity determinations in such areas must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93.

### C. What Are the Impacts of the Clean Air Interstate Rule (CAIR) Remand?

As discussed in greater detail in the proposal, EPA has considered the relationship of the Columbus area's maintenance plan to the reductions currently required pursuant to the Clean Air Interstate Rule. This rule was remanded to EPA, and the process of developing a replacement rule is ongoing. However, the remand of CAIR does not alter the requirements of the NO<sub>x</sub> SIP Call and Ohio has now

demonstrated that the area can maintain without any additional requirements (beyond those required by the NO<sub>x</sub> SIP Call). Therefore, EPA believes that Ohio's demonstration of maintenance under sections 175A and 107(d)(3)(E) remains valid.

The NO<sub>x</sub> SIP Call requires states to make significant, specific emissions reductions. It also provided a mechanism, the NO<sub>x</sub> Budget Trading Program, which states could use to achieve those reductions. When EPA promulgated CAIR, it discontinued (starting in 2009) the NO<sub>x</sub> Budget Trading Program, 40 CFR 51.121(r), but created another mechanism—the CAIR ozone season trading program—which states could use to meet their SIP Call obligations, 70 FR 25289–90. EPA notes that a number of states, when submitting SIP revisions to require sources to participate in the CAIR ozone season trading program, removed the SIP provisions that required sources to participate in the NO<sub>x</sub> Budget Trading Program. In addition, because the provisions of CAIR including the ozone season NO<sub>x</sub> trading program remain in place during the remand, EPA is not currently administering the NO<sub>x</sub> Budget Trading Program. Nonetheless, all states, regardless of the current status of their regulations that previously required participation in the NO<sub>x</sub> Budget Trading Program, will remain subject to all of the requirements in the NO<sub>x</sub> SIP Call even if the existing CAIR ozone season trading program is withdrawn or altered. In addition, the anti-backsliding provisions of 40 CFR 51.905(f) specifically provide that the provisions of the NO<sub>x</sub> SIP Call, including the statewide NO<sub>x</sub> emission budgets, continue to apply after revocation of the 1-hour standard.

In the case of Ohio, the state has retained the SIP provisions requiring sources to participate in the NO<sub>x</sub> Budget Trading Program. Ohio EPA is in the process of promulgating a rule change stating that the NO<sub>x</sub> Budget Trading Program would not be applicable so long as CAIR remains in place. However, the drafted rule revision also provides that should CAIR requirements be removed, the NO<sub>x</sub> Budget Trading Program would once again apply, on condition that EPA maintains a NO<sub>x</sub> Budget Trading Program.

All NO<sub>x</sub> SIP Call states have SIPs that currently satisfy their obligations under the SIP Call, the SIP Call reduction requirements are being met, and EPA will continue to enforce the requirements of the NO<sub>x</sub> SIP Call even after any response to the CAIR remand. For these reasons, EPA believes that regardless of the status of the CAIR

program, the NO<sub>x</sub> SIP call requirements can be relied upon in demonstrating maintenance. Here, the state has demonstrated maintenance based in part on those requirements.

## II. What Comments Did We Receive on the Proposed Rule?

EPA provided a 30-day review and comment period. The comment period closed on July 13, 2009. EPA received comments in support of the redesignation from the Mid-Ohio Regional Planning Commission and adverse comments from the National Resources Defense Council (NRDC). A summary of the comments received, and EPA's responses, follow.

(1) *Comment:* Ohio EPA's redesignation request fails to demonstrate compliance with the ozone NAAQS. The Franklin County New Albany monitor has a fourth-highest three-year average of 0.084 ppm, which is higher than the 0.08 ppm standard. EPA contends that the relevant standard is complied with because the area has achieved average 8-hour ozone concentrations less than 0.085 ppm. While 40 CFR part 50, Appendix I, purports to authorize such a rounding convention, its use here improperly inflates the 1997 standard from its actual value of 0.08 ppm and would allow an area to be considered to be in attainment even though it has fourth-highest 3-year average concentrations that exceed the actual ozone NAAQS. Such rounding approach has been rejected by EPA's own scientific advisory committee in developing the 2008 ozone NAAQS, and it would be arbitrary and capricious for EPA to use it here.

*Response:* EPA promulgated the 1997 8-hour ozone standard on July 18, 1997 (62 FR 38856). As part of this rulemaking, EPA promulgated 40 CFR 50 Appendix I, entitled "Interpretation of the 8-hour Primary and Secondary National Ambient Air Quality Standards for Ozone," which provides rounding procedures under which observed values which round to 0.08 ppm are considered to reflect attainment of the standard. As discussed in detail in the proposed rule, an area is considered to be in attainment of the 8-hour ozone standard if the three-year average of the fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area over each year does not exceed 0.084 ppm. Comments regarding the adequacy of the 1997 8-hour ozone standard should have been submitted in response to the proposal on that standard and its implementing regulations that include the data handling and rounding

conventions 40 CFR Part 50 Appendix I. The definition of the standard as set forth in the applicable regulations cannot be challenged here. In addition, in adopting the 2008 standard, 0.075 ppm, EPA changed the “degree of precision to which the level of the standard is specified to the thousandth ppm” (72 FR 37882 (July 11, 2007)), expressing the standard out to three decimal places instead of two, as was previously done with the 1997 standard. While this was a different way of expressing the standard, it did not undermine the implementation of the 1997 standard. As stated in the final rulemaking on the 2008 standard: “Truncating both the individual 8-hour averages used to determine the annual fourth maximum as well as the three-year average of the fourth maxima to the third decimal place is consistent with the approach used in Appendix I for the previous 8-hour ozone standard. 73 FR 16436, 16501 (March 27, 2008). The 2008 three-digit standard achieves the same result that would have been accomplished by adopting a 0.07 standard and permitting rounding up to 0.075. Thus it does not represent, as commenters contend, a repudiation of the result of rounding in the 1997 standard. It is therefore not only consistent with the existing statute and regulations, but entirely reasonable, for EPA to implement the 1997 standard as it has here.

(2) *Comment:* Redesignation is inappropriate because the Columbus area is out of attainment of the 2008 ozone standard, which is currently set at 0.075 ppm. As such, the Columbus area has not demonstrated compliance with the currently applicable NAAQS and, therefore, cannot be considered in attainment with CAA ozone standards. Redesignation to attainment under the 1997 standard would suspend Reasonable Further Progress (RFP) requirements and other measures that would enable the area to make progress toward attainment of the 2008 standard.

The ruling in *Wall v. EPA*, 265 F. 3d 426 (6th Cir. 2001), does not compel a different conclusion. In that case, redesignation for the Cincinnati area was challenged because, *inter alia*, another rulemaking proceeding had found that the area was certain or highly likely to require additional emission reductions. The court rejected the challenge because the other proceeding was not an attainment rulemaking and its data were outdated. In this case, however, Ohio has made a nonattainment recommendation under the 2008 standard using data that are not out of date, and thus redesignation to attainment here would not be

reasonable. As the *Wall* court stated, “[A]ny final determination regarding the adequacy of a maintenance plan will be made ‘in light of the particular circumstances facing the area proposed for redesignation and based on all relevant information available at the time.’” 265 F.3d at 430. A pending designation of nonattainment is relevant information that forecloses redesignation to attainment at this time.

*Response:* The area’s status with respect to the 2008 standard does not foreclose redesignation for the 1997 standard. The redesignation being considered in this action is pertinent to only for the 1997 8-hour ozone standard. Designations for the 2008 8-hour standard have not yet occurred, and will be made in the future in accordance with the process for designating areas under the new standard. This redesignation rulemaking action is not related to that future designation action. As set forth above, the state’s recommendation to designate the area as nonattainment for the 2008 standard does not, as commenters contend, foreclose redesignation of the area for purposes of the 1997 standard. EPA has not yet acted on the state’s recommendation, and even had it done so, this would not prevent redesignation for the prior standard. Indeed, it would be inappropriate to retain the 1997 8-hour nonattainment designation, if no longer applicable, solely on the assumption that the Columbus area might be designated as nonattainment for the 2008 8-hour ozone standard in the future. EPA has in the past continued to redesignate areas under existing standards even after the adoption of new standards for the same pollutant. After adopting the 1997 8-hour ozone standard, EPA continued to redesignate areas for the 1-hour ozone standard until that standard was revoked. See, for example, Cincinnati redesignation, 70 FR 35946 (June 21, 2005).

Thus, even after the area receives its designation for the new standard, the 1997 8-hour ozone standard and the 2008 8-hour ozone standard are considered to be separable in terms of requiring emission controls and determining the area’s attainment status. Subsequent to the adoption of the 2008 standard, EPA has continued to redesignate for the 1997 ozone standard those areas attaining that ozone standard and otherwise meeting redesignation requirements. See, for example, Detroit redesignation, 74 FR 30950 (June 29, 2009); Clearfield and Indiana Counties, Pennsylvania redesignation, 74 FR 11674 (March 19, 2009); Greene County, Pennsylvania

redesignation, 74 FR 11671 (March 19, 2009); and Kewaunee County, Wisconsin redesignation, 73 FR 29436 (May 21, 2008).

Commenters have noted that the redesignation would be “counterproductive” because it would “suspend RFP and other measures that would enable the area to make progress towards attainment of the 2008 standard.” This contention, however, is not an obstacle to redesignation for attainment of the 1997 ozone standard. The Sixth Circuit has previously approved as reasonable EPA’s interpretation of what constitutes interference with a new standard under section 110(l), and it does not include “that which does not advance” as opposed to that which “hinder[s] or make[s] worse.” *Kentucky Resources Council v. EPA*, 467 F.3d 986, 995 (6th Cir. 2006). In any event, we have evaluated this redesignation with respect to section 110(l) and have determined that it will not interfere with attainment or maintenance of the 2008 ozone standard nor any other standard, since the area is attaining the 1997 ozone standard, no control measures are being removed from the SIP, and no implementation ceased. See *Id.* (showing deference to EPA’s interpretation of section 110(l)). See also the discussion of 110(l) in the Cincinnati 1-hour ozone redesignation at 70 FR 35960. The rationale stated in the Cincinnati redesignation applies here as well:

EPA does not believe that approving a maintenance plan containing existing control measures that the State has demonstrated will provide emission reductions sufficient to maintain the 1-hour ozone standard can in any way interfere with Ohio’s obligations under the PM<sub>2.5</sub> and 8-hour ozone standards for Cincinnati. EPA is not approving any relaxation of the existing control measures so emissions of VOC and NO<sub>x</sub> will not increase as a consequence of this action. Moreover, Ohio will still have to meet whatever obligations it may have regarding the implementation of the new standards and determining that existing control measures will provide for maintenance of the 1-hour standard does not impair nor interfere with the state’s obligations regarding the new standards. EPA does not believe that section 110(l) transforms this redesignation action into an obligation for the State to comply with its SIP obligations for the new standards earlier than otherwise required which is the implication of the assertion that this action cannot proceed without a demonstration that additional control measures are not necessary to prevent interference with attainment of the PM<sub>2.5</sub> and 8-hour ozone standards. Moreover, the commenter does not present any evidence or even assert that there is anything about any of the control measures contained in the maintenance plan that would

somehow interfere with PM<sub>2.5</sub>, 8-hour ozone attainment, or other requirements. EPA does not believe that approval of this maintenance plan would interfere with the 8-hour ozone or PM<sub>2.5</sub> attainment or other obligations applicable to the Cincinnati area. As Cincinnati's ability to implement those standards would be the same if this redesignation were not occurring, approval of the maintenance plan cannot interfere with the requirements applicable for those standards.

70 FR 35960 (June 21, 2005). Thus EPA has determined that the redesignation of the area does not interfere with attainment of the 2008 8-hour ozone standard and complies with the provisions of section 110(l) of the CAA.

(3) *Comment*: Ohio EPA has not provided an adequate maintenance plan. Ohio EPA has failed to fully satisfy the requirement that it include contingency measures for ensuring continued attainment that can take effect "without further action by the State or EPA." 42 U.S.C. 7402(c)(9). EPA interprets that provision as requiring that the state or EPA need not take any "further rulemaking activities" in order for the contingency measures to be carried out. EPA, *State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990*, 57 FR 13498, 13512; *Greenbaum v. EPA*, 370 F. 3d 527, 541 (6th Cir. 2004). While Ohio EPA has identified a series of possible contingency measures and triggers for possible implementation of those measures, the agency also notes that "adoption of any additional control measures is subject to the necessary administrative and legal process \* \* \* required by Ohio law for rulemaking." (Ohio EPA request, p. 37). EPA must ensure that Ohio EPA can adopt such additional control measures without the need for additional rulemaking before any redesignation for the Columbus area can be made.

*Response*: Section 175A of the CAA requires that a maintenance plan include contingency provisions, as EPA deems necessary, to promptly correct any violation of the NAAQS that occurs after redesignation of the area. Contrary to commenter's contention, these contingency measures are not the same as those required for nonattainment areas under sections 172(c)(9) and 182(c)(9). The statutory provision under section 175A for maintenance plan contingency measures to be employed after redesignation to attainment is distinct from the requirement for contingency measures for nonattainment areas prior to attainment. As explicitly discussed in EPA's September 4, 1992, redesignation policy

memorandum from John Calcagni entitled "Procedures for Processing Requests to Redesignate Areas to Attainment," "For the purposes of section 175A, a State is not required to have fully adopted contingency measures that will take effect without further action by the State in order for the maintenance plan to be approved." EPA has applied this interpretation since 1992, and it has been referred to and relied upon by the Sixth Circuit. In *Greenbaum v. EPA*, cited by the commenters, the Sixth Circuit stated that under section 175A, the EPA "has been granted broad discretion by Congress in determining what is 'necessary to assure' prompt correction." 370 F.3d at 540. In that case, the state had chosen to adopt as contingency measures under section 175A those measures that it had originally adopted pursuant to section 172(c)(9), so the measures happened to meet the requirement of that section that no further state action be necessary. But nothing mandates that section 175A contingency measures meet the strictures that apply solely to section 172(c)(9) measures. The General Preamble language cited by the commenters, that "no further rulemaking activities by the State or EPA would be needed to implement the contingency measures," addresses contingency measures under section 172(c)(9). Indeed, the Sixth Circuit in *Greenbaum* pointed out that this limitation does not apply to contingency measures under section 175A, noting that the Calcagni memorandum states that "[f]or the purposes of section 175A, a State is not required to have fully adopted contingency measures that will take effect without further action by the State in order for the maintenance plan to be approved." 370 F.3d at 541.

Ohio EPA included the following list of potential contingency measures in the maintenance plan for the Columbus area: a lower Reid vapor pressure gasoline program; VOC Reasonably Available Control Technology (RACT) on existing sources covered by EPA control technique guidelines issued after the 1990 CAA; lower applicability of VOC RACT rules to cover smaller existing sources; one or more transportation control measures sufficient to achieve at least half a percent reduction in actual area wide VOC emissions; alternative fuel and diesel retrofit programs for fleet vehicle operations; high volume, low pressure coating application requirements for autobody facilities; regulations for cold cleaner degreaser operations (low vapor pressure solvents); VOC or NO<sub>x</sub>

emission offsets for new and modified major sources; VOC or NO<sub>x</sub> emission offsets for new and modified minor sources; VOC or NO<sub>x</sub> controls on new minor sources (less than 100 tons per year (tpy)); increase in the ratio of emission offsets required for new sources; and, NO<sub>x</sub> RACT for existing combustion sources. The state can choose to implement one or more of these measures as necessary to correct a violation of the standard. As set forth in the proposal, we find that the contingency measures included in the maintenance plan are adequate to assure that the state will promptly correct a future violation of the standard that occurs after redesignation.

(4) *Comment*: Ohio EPA has not provided any information showing that it has adequate resources to enforce the steps relied on in the maintenance plan. Such information is required by 42 U.S.C. 7410(a)(2)(C) which requires that each plan "include a program to provide for the enforcement of measures" described in the plan, and 40 CFR 51.280, which requires a "description of the resources available to the State and local agencies \* \* \* and any additional resources needed to carry out the plan" for the next five years. Ohio EPA, however, has simply asserted that it "has the legal authority and necessary resources to actively enforce any violations of its rules or permit provisions." (Ohio EPA Request, p. 35). The agency has not identified what those resources are, or explained how they are purportedly adequate to ensure enforcement of the plan. This shortcoming is especially troublesome given that Ohio faces a \$3.2 billion budget deficit and will likely be cutting agency budgets to try to close that gap.

*Response*: As discussed in detail in the proposal, section 107(d)(3)(E) of the CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E)(v) allows for redesignation provided that, among other things, the area has met all applicable requirements under section 110 and Part D. Section 110(a) of Title I of the CAA contains the general requirements for a SIP, including the requirement that the state provide "necessary assurances that the State \* \* \* will have adequate personnel, funding, and authority under state \* \* \* law to carry out such implementation plan \* \* \*." The courts are in agreement that: "Congress has left to the Administrator's sound discretion determination of what assurances are 'necessary.'" *NRDC v. EPA*, 478 F.2d 875, 884 (1st Cir. 1973); *Friends of the Earth v. EPA*, 499 F. 2d 1118, 1126 (2d. Cir. 1974), *BCCA Appeal Group v. EPA*,

355 F.3d 817 (5th Cir. 2003). In a December 5, 2007, SIP submittal, Ohio EPA asserted that it continues to retain the resources necessary to evaluate ambient air quality, develop plans to attain new and existing ambient air quality standards, run a complete new source review program, and effectively enforce all applicable requirements. In support of Ohio EPA's assertion that the state continues to staff and implement a vigorous enforcement program, the submittal included Ohio EPA's Enforcement Report: 2006. As documented in the report, Ohio's Division of Air Pollution Control reduced 160 tpy VOC and 419 tpy NO<sub>x</sub> through enforcement actions, secured \$1,248,917 in penalties and issued 41 orders. In addition, the department resolved 96% of its enforcement cases older than 21 months and all verified complaints within two years. With respect to legal authority, Ohio Revised Code 3704.03 provides the Director of Ohio EPA with the authority to develop rules and regulations necessary to meet state and Federal ambient air quality standards and to implement the program.

The Court found that EPA was entitled to rely on the state's certification that the SIP was a valid exercise of its legal authority. See *Ohio Env'tl. Council v. EPA*, 593 F.2d 24, 28 (6th Cir. 1979). In *BCCA v. EPA*, the Fifth Circuit Court of Appeals found that the state had "provided a general assurance that its fiscal and manpower resources were adequate to implement the SIP as a whole." The Court also determined that the Houston, Texas SIP "provided a detailed discussion about the legal authority of state and local agencies to implement, maintain, and enforce the plan as a whole, including citations to applicable law." 355 F.3d at 844. The Fifth Circuit found that, "[b]ased on its past experience with Texas's air quality program and its relationship with the state, the EPA determined that these assurances regarding funding, resources, and legal authority met the minimum requirements of § 7410(a)(2)(E)." Finding that EPA had also evaluated the state's funding and resources and determined they were adequate, the Court concluded that EPA approval was in compliance with the CAA and not arbitrary and capricious. 355 F.3d at 843-845.

Commenters here raise the identical claim regarding section 110 (a)(2)(C) and 40 CFR 51.280 that petitioners set forth in the Cincinnati 1-hour ozone redesignation case *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001). In *Wall*, the Sixth Circuit concluded that "there is no

language in the CAA or in the EPA's regulations that specifically requires that a separate commitment be made within the maintenance plans themselves. Thus, the EPA permissibly determined that Kentucky and Ohio fulfilled the requirement of submitting a 'program to provide for enforcement of the [maintenance] measures' when such measures were already approved in their earlier SIPs." Id. at 438.

As pointed out in the *Wall* case, EPA has previously approved the state SIP as meeting 110(a)(2)(C) requirements in acting on the state's 1-hour ozone SIP. The enforcement of the 8-hour ozone standard is a continuation of this same enforcement program, and the state has submitted confirmation that the area's 8-hour SIP continues to meet those requirements.

In addition, EPA periodically reviews state enforcement programs for adequacy. The EPA Office of Enforcement and Compliance Assurance, EPA's ten regions, the Environmental Council of States Compliance Committee, and other state representatives jointly developed a method to assess state performance in the enforcement and compliance assurance program. EPA performs this assessment on a four-year cycle. The most recent assessment of Ohio EPA's enforcement program using this framework was released by EPA on September 27, 2007. In that assessment, EPA found that Ohio EPA is implementing an adequate enforcement program. Ohio EPA's enforcement actions have been found to be generally successful at bringing sources back into compliance in a specific time frame, with well-defined penalties. Further, Ohio EPA's inspection reports meet the requirements of EPA's Clean Air Act Stationary Source Compliance Monitoring Strategy (CMS). While EPA noted that Ohio EPA could make improvements regarding reporting issues and timeliness of enforcement actions, the state has since addressed these concerns by implementing the corrective actions recommended by EPA in that assessment.

In addition, as required under 40 CFR 35.115, EPA reviews Ohio EPA's air pollution control activities, including enforcement, on a yearly basis. In EPA's most recent review, dated February 24, 2009, EPA found no areas of concern regarding Ohio EPA's ability to adequately implement and enforce its air control programs. During the 2008 Federal fiscal reporting year, Ohio EPA's commitment under the CMS was to complete 342 Title V source full compliance evaluations. There were 375 full compliance evaluations reported to

EPA's AIRS Facility Subsystem (AFS) database. In addition, Ohio EPA exceeded the commitment to conduct 210 synthetic minor source full compliance evaluations by reporting 225 evaluations to AFS.

As in the *BCCA* case, the state has also certified that it has adequate legal authority, and based on EPA's past experience with the state's air quality program and its relationship with the state, as well as its evaluation of the current situation, EPA has determined that these circumstances assure that the requirements of section 110(a)(2)(E) and section 110(a)(2)(C) have been met.

(5) *Comment:* EPA proposes that it can approve Ohio EPA's request to redesignate the Columbus area because the area is classified as a subpart 1 nonattainment area, to which subpart 2 requirements do not apply. This argument fails, however, because the subpart 1 classification has been vacated by the D.C. Circuit. *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006). In the wake of the vacatur, EPA is proposing to redesignate subpart 1 nonattainment areas as moderate subpart 2 nonattainment areas, but this proposed rule has not been finalized (74 FR 2936). Because the current classification has been vacated, however, EPA cannot make use of that classification's requirements to avoid the stringent VOC and NO<sub>x</sub> controls that are required before the Columbus area can be redesignated to attainment.

EPA contends that it can redesignate Columbus to attainment under subpart 1 now and then classify the area later as moderate nonattainment under subpart 2 when the proposed rule is finalized. The agency attempts to justify this proposal by saying that its policy is to evaluate requests for redesignation according to requirements in place at the time the request is submitted, rather than to retroactively impose requirements on the area. EPA's argument, however, ignores the fact that judicial decisions "must be given full retroactive effect." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). The U.S. District Court for the District of Columbia's decision to vacate the subpart 1 classifications demonstrates that the decision to exempt such nonattainment areas from subpart 2 requirements was never valid or effective and "restores the status quo before the invalid rule took effect \* \* \*." *Env'tl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004). As such, EPA can allow redesignation of the Columbus area only under the applicable subpart 2 requirements, not the less stringent and vacated subpart 1 classification.

*Response:* The CAA contains two sets of provisions, subpart 1 and subpart 2, that address planning and control requirements for nonattainment areas. (Both are found in Title I, part D, 42 U.S.C. 7501–7509a and 7511–7511f, respectively.) Subpart 1 contains general requirements for nonattainment areas for any pollutant, including ozone, governed by a NAAQS. Subpart 2 provides more specific requirements for ozone nonattainment areas.

On April 30, 2004 (69 FR 23857), EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS. Under EPA's implementation rule for the 1997 8-hour ozone standard, (69 FR 23951 (April 30, 2004)), an area was classified under subpart 2 based on its 8-hour ozone design value, if it had a 1-hour design value at the time of designation at or above 0.121 ppm (the lowest 1-hour design value in table 1 of subpart 2) (69 FR 23954). All other areas were covered under subpart 1, based upon their 8-hour design values (69 FR 23958). The Columbus area was designated as a subpart 1, 8-hour ozone nonattainment area by EPA on April 30, 2004 (69 FR 23857, 23927) based on air quality monitoring data from 2001–2003 (69 FR 23860).

As noted by the commenter, on December 22, 2006, in *South Coast Air Quality Management Dist. v. EPA*, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. On June 8, 2007, in response to several petitions for rehearing, the D. C. Circuit Court clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. With respect to the 8-hour standard, the Court's ruling rejected EPA's reasons for classifying areas under subpart 1 for the 8-hour standard, and remanded that matter to the Agency. Despite the vacatur of classifications under subpart 1, subpart 1 requirements continue to apply to all nonattainment areas.

In its January 16, 2009, proposed rulemaking in response to the *South Coast* decision, EPA has proposed to classify Columbus under subpart 2 as a moderate area.<sup>74</sup> FR 2936, 2944. If EPA finalizes the January 16 rulemaking, new requirements for areas reclassified under subpart 2 will become applicable for purposes of redesignation when they are due, a deadline that EPA

has proposed to be one year after the effective date of a final rulemaking classifying areas as moderate or marginal. 74 FR 2940–2941.

Under EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA, to qualify for redesignation, states requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. See September 4, 1992, Calcagni memorandum (“Procedures for Processing Requests to Redesignate Areas to Attainment,” Memorandum from John Calcagni, Director, Air Quality Management Division). See also Michael Shapiro Memorandum, September 17, 1993, and 60 FR 12459, 12465–66 (March 7, 1995) (Redesignation of Detroit-Ann Arbor). See *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004), which upheld this interpretation. See, e.g. also 68 FR 25418, 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

At the time the redesignation request was submitted, the Columbus area was not classified under subpart 2, nor were there any subpart 2 requirements yet due for this area. As noted above, even if the Columbus area were reclassified under subpart 2, the new requirements would not become applicable for purposes of redesignation until they become due, a deadline that EPA has proposed to be one year after the effective date of a final rulemaking classifying areas as moderate or marginal. Moreover, it would be inequitable to retroactively apply any new SIP requirements that were not applicable at the time the request was submitted. The D.C. Circuit has recognized the inequity in such retroactive rulemaking. *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002). In any event, what *Sierra Club* sought—to have the effective date of EPA's court-ordered determination converted to the date the statute envisioned, rather than the actual date of EPA's action—was a form of relief the D.C. Circuit quite properly rejected. Court-ordered or not, EPA engaged in rulemaking. The Supreme Court has held that the Administrative Procedures Act prohibits retroactive rulemaking. See *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 756–58 & n.11 (D.C. Cir. 1987), aff'd, 488 U.S. 204 (1988).

Thus, the D.C. Circuit concluded that even if EPA should have accomplished the reclassification at an earlier date, it would be wrong for EPA or the Court to impose requirements retroactive to that date without having given the state an opportunity to meet them. *Sierra Club v. Whitman*, 285 F.3d at 68. The

commenter contends that here “[t]he Court's decision to vacate the subpart 1 classifications ‘restores the status quo before the invalid rule took effect \* \* \*.’” and then implies that the “status quo” is the applicable subpart 2 requirements. However, for areas such as Columbus, that were classified under subpart 1, the subpart 2 classification was not the status quo. There is no established “status quo” classification in light of the vacatur. EPA has not yet finalized the area's classification under subpart 2, and deadlines for submitting subpart 2 requirements have not yet been imposed on the areas that were classified as subpart 1. The Seventh Circuit in the St. Louis case agreed with EPA that, even after the St. Louis area was reclassified to serious, for purposes of redesignation the serious area requirements need not be met if the deadlines for their submission have not come due. *Sierra Club v. EPA*, 375 F.3d 537.

EPA is attempting to address the court's vacatur by establishing a classification system for the former subpart 1 areas. Until this is done, the only requirements currently applicable to these areas are the subpart 1 requirements applicable to all nonattainment areas.

### III. What Action Is EPA Taking?

EPA is making a determination that the Columbus area has attained the 8-hour ozone NAAQS. EPA is also approving the maintenance plan SIP revision for the Columbus area. EPA's approval of the maintenance plan is based on Ohio's demonstration that the plan meets the requirements of section 175A of the CAA. After evaluating Ohio's redesignation request, EPA has determined that it meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. Therefore, EPA is approving the redesignation of the Columbus area from nonattainment to attainment for the 8-hour ozone NAAQS. EPA is approving the 2002 base year emissions inventory for the Columbus area as meeting the requirements of section 172(c)(3) of the CAA. Finally, EPA also finds adequate and is approving the state's 2012 and 2020 MVEBs for the Columbus area.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C.

<sup>1</sup> As noted in the proposal, “Areas originally covered under subpart 1 that have already been redesignated to attainment will not be affected by this rule \* \* \*.” 74 FR 2939.

553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule “grants or recognizes an exemption or relieves a restriction,” and section 553(d)(3) which allows an effective date less than 30 days after publication “as otherwise provided by the agency for good cause found and published with the rule.” The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today’s rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today’s rule relieves the state of planning requirements for this 8-hour ozone nonattainment area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

#### IV. Statutory and Executive Order Reviews

##### *Executive Order 12866; Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, September 30, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget.

##### *Paperwork Reduction Act*

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.*).

##### *Regulatory Flexibility Act*

This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Redesignation of an area to attainment under section 107(d)(3)(E) of the CAA does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources. 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.*).

##### *Unfunded Mandates Reform Act*

Because this rule approves pre-existing requirements under state law, and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or

uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

##### *Executive Order 13132: Federalism*

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). Redesignation is an action that merely affects the status of a geographical area, does not impose any new requirements on sources, or allows a state to avoid adopting or implementing other requirements, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

##### *Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

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).

##### *Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

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.

##### *Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

Because it is not a “significant regulatory action” under Executive Order 12866 or a “significant energy action,” 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).

##### *National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTA), 15 U.S.C. 272, requires Federal agencies to use technical standards that are developed or adopted by voluntary consensus to

carry out policy objectives, so long as such standards are not inconsistent with applicable law or otherwise impracticable. In reviewing program submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Absent a prior existing requirement for the state to use voluntary consensus standards, EPA has no authority to disapprove a program submission for failure to use such standards, and it would thus be inconsistent with applicable law for EPA to use voluntary consensus standards in place of a program submission that otherwise satisfies the provisions of the Act. Redesignation is an action that affects the status of a geographical area but does not impose any new requirements on sources. 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.

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, enacted pursuant to 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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 16, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action 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 the action. This action may not be challenged later in proceedings to enforce its requirements. (See 42 U.S.C. 7607(b)(2).)

#### List of Subjects

##### *40 CFR Part 52*

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wilderness areas.

Dated: August 26, 2009.

Walter W. Kovalick, Jr.,

Acting Regional Administrator, Region 5.

■ Parts 52 and 81, chapter I, Title 40 of the Code of Federal Regulations 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 KK—Ohio**

■ 2. Section 52.1885 is amended by adding paragraphs (ff)(8) and (hh) to read as follows:

**§ 52.1885 Control strategy: Ozone.**

\* \* \* \* \*

(ff) \* \* \*

(8) Approval—On March 17, 2009, the Ohio Environmental Protection Agency submitted a request to redesignate the Columbus area to attainment of the 8-hour ozone NAAQS. As part of the redesignation request, the state submitted a maintenance plan as required by section 175A of the Clean Air Act. Elements of the section 175 maintenance plan include a contingency plan and an obligation to submit a subsequent maintenance plan revision in 8 years as required by the Clean Air Act. The 2012 motor vehicle emissions budgets for the Columbus area are 54.86 tpd for VOC and 91.64 tpd for NO<sub>x</sub>. The 2020 motor vehicle emissions budgets for the area are 36.60 tpd for VOC and 46.61 tpd for NO<sub>x</sub>.

(hh) *8-hour Emissions Inventories.* (1) Approval—Ohio’s 2002 inventory satisfies the base year emissions inventory requirements of section 172(c)(3) of the Clean Air Act for the Columbus area under the 1997 8-hour ozone standard.

(2) [Reserved].

**PART 81—[AMENDED]**

■ 3. The authority citation for part 81 continues to read as follows:

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

■ 4. Section 81.336 is amended by revising the entry for Columbus, OH in the table entitled “Ohio-Ozone (8-Hour Standard)” to read as follows:

**§ 81.336 Ohio.**

\* \* \* \* \*

**OHIO-OZONE (8-HOUR STANDARD)**

Designated area	Designation <sup>a</sup>		Classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
Columbus, OH:				
Delaware County .....	9/15/09	Attainment.		
Fairfield County.				
Franklin County.				
Knox County.				
Licking County.				
Madison County.				
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *

<sup>a</sup> Includes Indian Country located in each county or area, except as otherwise specified.  
<sup>1</sup> This date is June 15, 2004, unless otherwise noted.

\* \* \* \* \*

[FR Doc. E9-21825 Filed 9-14-09; 8:45 am]

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