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

[OH50-5-7072, FRL-5258-9]

**Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes: State of Ohio****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** On May 2, 1995, the United States Environmental Protection Agency (USEPA) published a proposed and direct final rulemaking notice to approve the ozone redesignation request and associated section 175A maintenance plan for Toledo, Ohio under the Clean Air Act. The 30-day comment period for these notices concluded on June 1, 1995. Four comment letters were received in response to the May 2, 1995 proposal, and included adverse comments and a request to extend the comment period. The USEPA withdrew the direct final rulemaking but denied the request to extend the public comment period. This final rule summarizes all adverse comments and USEPA's responses, and finalizes the approval of the redesignation to attainment of the National Ambient Air Quality Standard for ozone and section 175A maintenance plan for the Toledo area.

**EFFECTIVE DATE:** This action will be effective August 1, 1995.

**ADDRESSES:** Copies of the SIP revisions, public comments and USEPA's responses are available for inspection at the following address: (It is recommended that you telephone Angela Lee at (312) 353-5142 before visiting the Region 5 Office.)

United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:** Angela Lee, Regulation Development Section, Air Enforcement Branch (AE-17J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-5142.

**SUPPLEMENTARY INFORMATION:****I. Background Information**

The 1977 Act required areas that were designated nonattainment to develop

SIPs with sufficient control measures to expeditiously attain and maintain applicable standards. For Ohio, Lucas and Wood Counties were designated nonattainment for ozone, see 43 FR 8962 (March 3, 1978), 43 FR 45993 (October 5, 1978), and 40 CFR part 81. After enactment of the amended Act on November 15, 1990, the nonattainment designation of the Toledo area continued by operation of law according to section 107(d)(1)(C)(i) of the Act; furthermore, the area was classified by operation of law as moderate for ozone pursuant to section 181(a)(1) (56 FR 56694, November 6, 1991), codified at 40 CFR 81.336.

More recently, ambient monitoring data for the Toledo area show no violations of the ozone National Ambient Air Quality Standard (NAAQS) during the period from 1990 through 1992. The area, therefore, became eligible for redesignation from nonattainment to attainment consistent with the amended Act. On September 17, 1993, Ohio requested redesignation of the area to attainment with respect to the ozone NAAQS. To ensure continued attainment of the ozone standard, Ohio submitted an ozone maintenance SIP for the Toledo area with the redesignation request. On November 1, 1993, Ohio held a public hearing on the maintenance plan and redesignation request.

On May 2, 1995, the USEPA published a proposed (60 FR 21490) and direct final rule (60 FR 21456) to approve the redesignation request and section 175A maintenance plan as revisions to the Ohio ozone State Implementation Plan (SIP). The USEPA withdrew the direct final rule on June 19, 1995, (60 FR 31917) in response to receiving adverse comments. This final rule addresses these comments and takes final action regarding the redesignation and section 175A maintenance plan for the Toledo area.

**II. Summary of Comments and Responses**

USEPA has considered the adverse comments received and has decided to proceed with formal action approving the redesignation. A summary of adverse comments received in response to the May 2, 1995 proposed and direct final rulemaking notices (60 FR 21490, 60 FR 21456) and responses to these comments is provided below. Comments were made by two residents of the Toledo, Ohio area, Environment Canada, and the Citizens Commission for Clean Air in the Lake Michigan Basin.

(1) *Comment:* A commentor objects to the use of the direct final procedure

when the proposed redesignation is neither noncontroversial nor routine. Another commentor objected to the final rule procedure due to insufficient opportunity for public comment. Several commentors requested that the direct final rule be withdrawn and republished as a proposed rule. The commentors also requested a 30 day extension of the public comment period. One commentor stated that "most citizens have not heard about the opportunity to comment, and should be afforded additional time to do so." Another commentor requested an extension of the comment period so that concerns about increased vehicle emissions caused by new road construction projects and a possible increase in highway tolls can be evaluated and addressed.

(1) *Response:* The USEPA did not expect adverse comments regarding the approval of the ozone redesignation request and viewed its decision as noncontroversial since it believed that all of the Clean Air Act requirements for redesignation were met. In response to the adverse comment letters which were received, the USEPA withdrew the direct final rule. In any event, that process preserves the public opportunity to comment as a proposed rule was published the same day as the direct final rule was published at 60 FR 21490.

The USEPA is denying the extension requests because it believes the period provided for public comment was adequate in light of the issues presented by the Toledo redesignation request. USEPA further notes that the public had many opportunities to become informed about the issues as Ohio itself had its own public comment period and that a public function for the rulemaking package was held on March 14, 1995, in Toledo, Ohio, which was shown on television news programs. Moreover, USEPA has already exceeded the statutory deadline of section 107(d)(3)(d) to act on this request which expired on March 17, 1995—and does not believe further delay in the action is appropriate.

(2) *Comment:* Several commentors stated that the last two summers were abnormally cool and that data for the last 10 years indicate a trend toward warmer summers in the Toledo area. The commentors requested that USEPA delay rulemaking so that one or two years of monitoring data could be collected to ensure that the improvement in air quality was not caused by cooler temperatures. The commentors also stated that it would be a waste of resources to redesignate the area to attainment when a violation

would require a redesignation back to nonattainment.

(2) *Response:* The USEPA may not delay action on this redesignation request since section 107(d)(3)(E) requires USEPA to act on complete redesignation requests within 18 months of their receipt—a period that expired on March 17, 1995. Furthermore, in establishing the criteria for determining if an area is in attainment of the ozone standard, USEPA used three years of ambient monitoring data. See 40 CFR part 50, Appendix H. The USEPA notes that the Toledo area has been in attainment for four consecutive three-year periods (1989–1991, 1990–1992, 1991–1993, and 1992–1994). This includes six years of ambient monitoring data. Thus, Toledo has already been in attainment substantially longer than the three-year period required. The CAA expressly contemplates the possibility that areas redesignated to attainment may violate the NAAQS after redesignation and requires contingency plans to address future violations. Ohio has adopted such a plan for Toledo. If a violation occurs, Stage II Vapor Recovery Program (Stage II) and a vehicle inspection and maintenance program (I/M) will be implemented according to a specified schedule. If a violation occurs after these programs have been implemented, nitrogen oxides (NO<sub>x</sub>) Reasonably Available Control Technology requirements will be implemented in the area.

(3) *Comment:* Toledo will not be able to maintain attainment on a permanent and enforceable basis and therefore does not meet requirement 107(d)(3)(E) of the Clean Air Act. The rulemaking notice states that the *measures* are permanent and enforceable, but does not show that the *improvement* is permanent and enforceable. The improvement in air quality is temporary since emission increases resulting from increased vehicle miles travelled (VMT) will surpass the emission reductions from these measures. Short term emissions reductions and cooler temperatures have been used to claim that a long term improvement in air quality has occurred. Long term air quality will not improve and will decrease due to emissions increases which will offset the gains which have been made. Insufficient data has been gathered on which to base a long term prediction, and models have been based on biased assumptions regarding the effect of capacity expansions. The USEPA should require the state to submit additional information regarding current trends in land use and transportation in the Toledo area. The commentor

mentioned trends which were not conducive to efficient transportation such as decreasing bus ridership, increasing tolls on the Ohio Turnpike, widening of I-75 which will lead to increased VMT, increasing single-occupant vehicle capacity, and increasing use of the Toledo Airport. Another commentor submitted excerpts from an article regarding traffic flow on congested roads from the *American Scientist* dated November-December 1988 written by Joel E. Cohen, Professor of Populations, Rockefeller University.

The USEPA and the State of Ohio have failed to demonstrate that the improvement in air quality was due to permanent and enforceable emission reductions rather than atypically cool ozone seasons in 1992 and 1993. Also the controls on the volatility of gasoline through lowering of the Federal Volatility standard and controls new cars under the Federal Motor Vehicle Emissions Control Program (FMVECP) are insufficient to guarantee permanent improvements under the Clean Air Act. These measures represent only a few of the requirements that should have been enacted prior to any serious consideration of the redesignation request by USEPA.

(3) *Response:* Section 107(d)(3)(E)(iii) of the Clean Air Act requires the USEPA to determine that “the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions.” Ohio met this requirement by estimating emission reductions from federally mandated controls on new cars and on fuel volatility as well as reductions which took place at the British Petroleum Refinery. These controls provided a significant reduction in the areas emissions and the State has shown that no additional reductions are needed to maintain the standard. See 60 FR 21456 and 60 FR 21490.

With respect to the issue of unusual meteorology, the USEPA has compared the average meteorological parameters of maximum daily temperature, minimum daily temperature, average daily temperature, cooling degrees, and days with high temperatures greater than 90 degrees fahrenheit for the periods of June through August, 1991 through 1993, with the 30-year norms for these parameters. The 1991 through 1993 averages for these parameters agreed with those for the 30-year norms with only minor differences. Based on these averaged parameters, it can be concluded that the 1991 through 1993

period was not unusually cool in terms of temperatures. Thus, the State has adequately demonstrated that the air quality improvement was not due to unusually favorable meteorology.

To meet section 107(d)(3)(E)(iii), the improvement in air quality does not have to be shown to be permanent, only the measures that resulted in the improvement need to be permanent and enforceable. However, section 107(d)(3)(E)(iv) does require that the area have a fully approved maintenance plan showing that the ozone standard will be maintained for ten years into the future. This can be done through air quality modeling or by using emissions projections. Ohio demonstrated that, by considering the growth in the area (including VMT growth) and existing controls on emission sources, emissions will remain below the attainment year inventory through the year 2005. In projecting mobile source emissions, Ohio obtained VMT based on the Highway Performance Modeling System which uses traffic counting data for the year 1990. To forecast VMT to the year 2005, Ohio used growth parameters based on modeling of the Long Range Transportation Plan (future highway network). This modeling process incorporated population growth estimates from Ohio Data Users Center, employment forecasts and other forecasts of socio-economic data. The methodology which was used to project emissions is reasonable. The USEPA notes that the emissions projection for mobile sources in the maintenance plan establishes the emissions budget which will be used for determining conformity of transportation plans and transportation improvement programs for the Toledo area. The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

The May 2, 1995 notice describes a tracking plan for updating the emission inventory. As discussed, Ohio has committed to submitting periodic inventories every 3 years. Ohio will compare the projected emissions in the redesignation request with actual emissions. If volatile organic compounds (VOC) emissions exceed 95 percent of 1990 levels, Ohio will implement Stage II and/or I/M.

If the periodic inventories exceed the attainment level of emissions in the maintenance plan, the USEPA may issue a SIP call to the area under section 110(k)(5) on the basis that the State made inadequate assumptions in projecting the inventory used to demonstrate maintenance. In this event, the USEPA may require the State to

correct the projection inventory and, if increases are projected, propose and ultimately implement maintenance measure(s) to lower the emissions to a level at or below the attainment year level. Under section 175A of the Clean Air Act, Ohio must submit a demonstration that the ozone standard will be maintained for another ten years, eight years after the area is redesignated to attainment. This is expected to result in the Toledo area maintaining the ozone standard for the next 20 years.

(4) *Comment:* Two commentors requested that USEPA prepare an Environmental Impact Statement (EIS) as the redesignation constitutes a major federal action with the potential for significant impacts on the human environment. A number of transportation and land use control measures which would have resulted under requirements applied to nonattainment areas will not be required. The EIS should consider downwind transport of ozone precursors, and the effect of such transport on the Northeastern United States.

(4) *Response:* USEPA is not required to prepare an EIS in connection with this redesignation. Section 7(c)(1) of the Energy Supply and Environmental Coordination Act (Pub. L. 93-319) states that "[n]o action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 856)." This redesignation does not affect the applicability of the National Environmental Policy Act (NEPA) to particular transportation projects in the Toledo area. In addition, the transportation and general conformity rules will still apply after the area is redesignated to attainment. (Conformity determinations for transportation plans, transportation improvement projects, and Federal actions must demonstrate that the emissions budget established by the maintenance plan is not exceeded.)

The redesignation does not allow States to automatically remove control programs which have contributed to an area's attainment of a U.S. National Ambient Air Quality Standard (NAAQS) for any pollutant. Sources of ozone precursors in the Toledo area must continue to implement all control equipment and/or measures in accordance with applicable rules, regulations and permits. Other control programs required by the Act will be implemented in the area, regardless of the ozone designation, such as title IV NO<sub>x</sub> controls, section 112 toxic controls and on-board vapor recovery

requirements. Upon redesignation to attainment, Toledo will be subject to the Prevention of Significant Deterioration provisions (PSD) of the Clean Air Act that apply to stationary sources of air pollution.

The State has assessed emission increases due to growth in all potential sources of emissions and has shown that reductions in emissions over the maintenance period will more than offset any increases in emissions of VOC and NO<sub>x</sub>. As stated in the **Federal Register** notice (60 FR 21456), USEPA will address transport of ozone precursors to downwind areas under section 110 of the Clean Air Act based on a domain-wide modeling analysis. Should this or other studies provide a sufficient scientific basis for taking action in the future, the USEPA will take appropriate action notwithstanding the redesignation of the Toledo area to attainment for ozone.

(5) *Comment:* The USEPA should delay rulemaking on this and all other ozone redesignation requests pending a re-evaluation of the current ozone standard to determine if public health is adequately protected. Recent studies indicate that health impacts occur at lower levels of ozone than the current ozone standard.

(5) *Response:* The USEPA is currently in the process of reevaluating the ozone NAAQS and expects to make a final decision in mid-1997. Until any change is made, however, the USEPA is bound to implement the provisions of the Act as they relate to the current standard, including those relating to designations and redesignation. Moreover, as previously noted under section 107(d)(3)(D) USEPA has 18 months in which to act on a redesignation request and has no authority to delay rulemaking until the entire evaluation of the ozone NAAQS is complete.

(6) *Comment:* Ozone levels exceeded 0.124 parts per million (ppm) at the Yondota Avenue monitor in 1991, 1993, and 1994. From these occurrences, and the absence of mandated forceful control measures post 1994, it is very difficult to have the expectation that the Yondota station will remain in attainment.

(6) *Response:* Exceedances of the ozone standard did occur at the Yondota monitor in 1991, 1993 and 1994, but did not cause a violation of the ozone standard. The control measures approved into the State's Implementation Plan will remain in place to ensure that the ozone standard is maintained. Ohio's maintenance demonstration shows that future emission levels will remain below levels associated with attainment. Continued

maintenance of the ozone NAAQS will be determined by continued ambient monitoring. If a violation does occur at the Yondota monitor after the redesignation is approved, Stage II and I/M will be implemented. In addition, the area will be subject to the PSD program, FMVECP, and other measures.

(7) *Comment:* Environment Canada commented that air quality needs to be managed in a regional context and evaluated over a long term period that takes meteorological variations into consideration. Environment Canada is disappointed that current USEPA policy does not reflect this opinion.

Environment Canada believes that the ground level ozone standards in effect in the United States allow such high levels of ozone and ozone precursors to flow into Canada as to make it practically impossible for Canada to reach its ground level ozone objective of 82 parts per billion. Another commentor asserted that USEPA failed to consider adverse impacts of transport of ozone and ozone precursors to the Province of Ontario, Detroit, the Northeastern United States and the Lake Michigan Basin. USEPA has failed to obtain a legally enforceable commitment from the State of Ohio to cooperate in developing a strategy to reduce the documented problem of ozone transport throughout Eastern North America. Another commentor stated that the air quality problem is not being solved, it is being moved off to other downwind states. This breaks the spirit of the Clean Air Act.

(7) *Response:* The USEPA would like to note that the governments of the United States and Canada are in the process of developing a joint study of the transboundary ozone phenomena under the U.S.-Canada Air Quality Agreement. It is envisioned that this regional ozone study will provide the scientific information necessary to understand what contributes to ozone levels in the region, as well as what control measures would contribute to reductions in ozone levels. Should this or other studies provide a sufficient scientific basis for taking action in the future, the USEPA will take an appropriate course of action. The USEPA may take appropriate action notwithstanding the redesignation of the Toledo area. Therefore, the USEPA does not believe that the contentions regarding transboundary impact provide a basis for delaying action at this time on this redesignation or disapproving the redesignation. This is particularly true since approval of the redesignation is not expected to result in an increase in ozone precursor emissions and is not expected to adversely affect air quality

in Canada. In fact, a decrease in both VOC and NO<sub>x</sub> emissions from the Toledo area is expected over the 10-year maintenance period. It should also be noted that redesignation does not allow States to automatically remove control programs which have contributed to an area's attainment of a U.S. National Ambient Air Quality Standard for any pollutant. As discussed previously, the USEPA's general policy is that a State may not relax the adopted and implemented SIP for an area upon the area's redesignation to attainment unless an appropriate demonstration,<sup>1</sup> based on computer modeling, is approved by the USEPA. In this case, no previously implemented control strategies are being relaxed as part of this redesignation.

(8) *Comment:* The maintenance demonstration overestimates reductions in VOC and NO<sub>x</sub> emissions, especially for the latter which relies heavily on NO<sub>x</sub> emission reductions obtained from modifications at the British Petroleum refinery and underestimated economic, population and VMT growth projections. VMT growth projections fail to consider the ensuing sprawl caused by the development of a corridor from northeast to southern Ohio. USEPA reliance on assurances from the State of Ohio that VOC and NO<sub>x</sub> emissions in the Toledo area will decrease 35 percent and 38 percent, respectively, from attainment levels by 2005, is speculative and suspect given continued urban growth and sprawl along major transportation corridors.

(8) *Response:* The methodology used to project emissions followed USEPA guidance. Point source emissions were projected by accounting for known changes to sources for each year between 1990 and 2005 and applying a growth factor based on manufacturing employment data provided by the Bureau of Economic Analysis, United States Department of Commerce, to derive inventories for all ensuing years. Manufacturing employment is expected to remain relatively constant. The NO<sub>x</sub> emission reductions which would result from compliance with Title IV NO<sub>x</sub> requirements are reasonable. Population

projections were obtained from using data from the Ohio Data Users Center (ODUC). ODUC takes into account past trends, the age of the population, economic cycles, and other factors in estimating the future population of the area. Ohio used the Highway Performance Modeling System which uses actual traffic counts to obtain 1990 levels of VMT. This model was developed by the Federal Highway Administration and is an acceptable model for estimating VMT. To project levels of VMT, Ohio used the Long Range Transportation Planning Program which considered the future transportation network. The methodology used to project mobile source emissions was reasonable and should not underpredict growth.

While the overall VMT are expected to increase, this growth will be offset by the FMVECP which will be providing emissions reductions in the area through the production of cleaner automobiles. In addition this area is still subject to the transportation conformity requirements and must show that the expected transportation projects in the area will conform to the ozone SIP for the area. This will help to ensure that growth in VMT will not increase emissions to a point where the ozone standard could be violated. In addition, Ohio has committed to submit an emissions inventory every three years to USEPA. If the total of point, area, and mobile VOC emissions exceed 95 percent of 1990 levels, Ohio has committed to implement either Stage II or I/M or both. Mobile source inventories will incorporate new VMT estimates.

(9) *Comment:* Ohio has not made the necessary commitments to ensure the prompt implementation and operation of the contingency plan in the event of a violation. It is unlikely that Stage II would be re-implemented given that the Director of the Ohio Environmental Protection Agency (OEPA) suspended Stage II on September 17, 1993.

(9) *Response:* The State provided a schedule in their contingency plan for implementing Stage II and an automobile inspection and maintenance program. This schedule was provided in the direct final rule published on May 2, 1995. The Director of the OEPA also committed in the SIP submittal to implementing the contingency plan for the area in the event of a violation in the area. As the compliance deadlines for Stage II begin as early as 6 months after a violation and I/M testing is to commence within 18 months of a violation, the contingency measures satisfy the statutory criteria section of section 175A.

(10) *Comment:* Ohio's failure to implement a part D New Source Review program for Toledo, Ohio cannot be excused by the memorandum from Mary Nichols entitled, "Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment". The USEPA cannot waive statutory requirements of the Clean Air Act when such waivers frustrate the purpose of the Clean Air Act which is to provide clean air, not convenient loopholes for state responsibilities under the Clean Air Act.

(10) *Response:* The USEPA believes that its decision not to insist on a fully-approved NSR program as a pre-requisite to redesignation is justifiable as an exercise of the Agency's general authority to establish de minimis exceptions to statutory requirements. See *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979). Under *Alabama Power Co. v. Costle*, the USEPA has the authority to establish de minimis exceptions to statutory requirements where the application of the statutory requirements would be of trivial or no value environmentally.

In this context, the issue presented is whether the USEPA has the authority to establish an exception to the requirements of section 107(d)(3)(E) that the USEPA have fully-approved a SIP meeting all of the requirements applicable to the area under section 110 and part D of title I of the Act. Plainly, the NSR provisions of section 110 and part D are requirements that were applicable to the Ohio area seeking redesignation at the time of the submission of the request for redesignation. Thus, on its face, section 107(d)(3)(E) would seem to require that the State have submitted and the USEPA have fully-approved a part D NSR program meeting the requirements of the Act before the areas could be redesignated to attainment.

Under the USEPA's de minimis authority, however, the Agency may establish an exception to an otherwise plain statutory requirement if its fulfillment would be of little or no environmental value. In this context, it is necessary to determine what would be achieved by insisting that there be a fully-approved part D NSR program in place prior to the redesignation of the Toledo area. For the following reasons, the USEPA believes that requiring the adoption and full-approval of a part D NSR program prior to redesignation would not be of significant environmental value in this case.

Ohio has demonstrated that maintenance of the ozone NAAQS will occur even if the emission reductions expected to result from the part D NSR

<sup>1</sup> Such a demonstration must show that removal of a control program will not interfere with maintenance of the ozone NAAQS and would entail submittal of an attainment modeling demonstration with the USEPA's current *Guideline on Air Quality Models*. Also, see memorandum from Gerald A. Emison, April 6, 1987, entitled *Ozone Redesignation Policy*, and memorandum from Michael H. Shapiro, September 17, 1993, entitled *State Implementation Plan (SIP) Requirements for Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992*.

program do not occur. Ohio assumed that NSR would not apply after redesignation to attainment, and therefore, assumed source growth factors based on projected growth in the economy and in the area's population. (It should be noted that the growth factors assumed may be overestimates under PSD, which would restrain source growth through the application of best available control techniques.) Thus, contrary to the assertion of the commentor, Ohio has demonstrated that there is no need to retain the part D NSR as an operative program in the SIP during the maintenance period in order to provide for continued maintenance of the NAAQS. (If this demonstration had not been made, NSR would have had to have been retained in the SIP as an operative program since it would have been needed to maintain the ozone standard.)

The other purpose that requiring the full-approval of a part D NSR program might serve would be to ensure that NSR would become a contingency provision in the maintenance plan required for these areas by section 107(d)(3)(E)(iv) and 175A(d). These provisions require that, for an area to be redesignated to attainment, it must receive full approval of a maintenance plan containing "such contingency provisions as the Administrator deems necessary to assure that the State will promptly correct any violation of the standard which occurs after the redesignation of the area as an attainment area. Such provisions shall include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the SIP for the area before redesignation of the area as an attainment area." Based on this language, it is apparent that whether an approved NSR program must be included as a contingency provision depends on whether it is a "measure" for the control of the pertinent air pollutants.

As the USEPA noted in the proposal regarding this redesignation request, the term "measure" is not defined in section 175A(d) and Congress utilized that term differently in different provisions of the Act with respect to the PSD and NSR permitting programs. For example, in section 110(a)(2)(A), Congress required that SIPs include "enforceable emission limitations and other control measures, means, or techniques \* \* \* as may be necessary or appropriate to meet the applicable requirements of the Act." In section 110(a)(2)(C), Congress required that SIPs include "a program to provide for the enforcement of the measures described

in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program as required in parts C and D." (Emphasis added.) If the term measures as used in section 110(a)(2) (A) and (C) had been intended to include PSD and NSR there would have been no point to requiring that SIPs include both measures and preconstruction review under parts C and D (PSD or NSR). Unless "measures" referred to something other than preconstruction review under parts C and D, the reference to preconstruction review programs in section 110(a)(2)(C) would be rendered mere surplusage. Thus, in section 110(a)(2) (A) and (C), it is apparent that Congress distinguished "measures" from preconstruction review. On the other hand, in other provisions of the Act, such as section 161, Congress appeared to include PSD within the scope of the term "measures."

The USEPA believes that the fact that Congress used the undefined term "measure" differently in different sections of the Act is germane to this issue. This indicates that the term is susceptible to more than one interpretation and that the USEPA has the discretion to interpret it in a reasonable manner in the context of section 175A. Inasmuch as Congress itself has used the term in a manner that excluded PSD and NSR from its scope, the USEPA believes it is reasonable to interpret "measure," as used in section 175A(d), not to include NSR. That this is a reasonable interpretation is further supported by the fact that PSD, a program that is the corollary of part D NSR for attainment areas, goes into effect in lieu of part D NSR.<sup>2</sup> This distinguishes NSR from other required programs under the Act, such as inspection and maintenance and Reasonably Available Control

<sup>2</sup>The U.S. EPA is not suggesting that NSR and PSD are equivalent, but merely that they are the same type of program. The PSD program is a requirement in attainment areas and designed to allow new source permitting, yet contains adequate provisions to protect the NAAQS. If any information including preconstruction monitoring, indicates that an area is not continuing to meet the NAAQS after redesignation to attainment, 40 CFR part 51 appendix S (Interpretive Offset Rule) or a 40 CFR 51.165(b) program would apply. The USEPA believes that in any area that is designated or redesignated as attainment under section 107, but experiences violations of the NAAQS, these provisions should be interpreted as requiring major new or modified sources to obtain VOC emission offsets of at least a 1:1 ratio, and as presuming that 1:1 NO<sub>x</sub> offsets are necessary. See October 14, 1994 memorandum from Mary Nichols entitled *Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment*.

Technology programs, which have no corollary for attainment areas. Moreover, the USEPA believes that those other required programs are clearly within the scope of the term "measure."

The USEPA's logic in treating part D NSR in this manner does not mean that other applicable part D requirements, including those that have been previously met and previously relied upon in demonstrating attainment, could be eliminated without an analysis demonstrating that maintenance would be protected. As noted above, Ohio has demonstrated that maintenance would be protected with PSD requirements in effect, rather than those of part D NSR. Thus, the USEPA is not permitting part D NSR to be removed without a demonstration that maintenance of the standard will be achieved. Moreover, the USEPA has not amended its policy with respect to the conversion of other SIP elements to contingency provisions, which provides that they may be converted to contingency provisions only upon a showing that maintenance will be achieved without them being in effect. Finally, as noted above, the USEPA believes that the NSR requirement differs from other requirements, and does not believe that the rationale for the NSR exception extends to other required programs.

The position taken in this action is consistent with the USEPA's current national policy. That policy permits redesignation to proceed without otherwise required NSR programs having been fully approved and converted to contingency provisions provided that the area demonstrates, as has been done in this case, that maintenance will be achieved with the application of PSD rather than part D NSR.

(11) *Comment:* Permitting Toledo, Ohio to defer adoption and implementation of I/M according to the revised USEPA I/M Program Requirements Rule published on January 5, 1995, at 60 FR 1735 frustrates meaningful control of vehicle emissions.

(11) *Response:* While the revised I/M rule (60 FR 1735) allows the I/M program to be placed in the contingency plan, there are still ongoing emission reductions in the area due to the FMVECP. The maintenance demonstration shows that the mobile source emissions are expected to decrease from 102,560 pounds of volatile organic compounds per day in 1996 to 57,412 pounds per day in 2005. The mobile source emissions of oxides of nitrogen are expected to decrease from 65,128 pounds per day in 1996 to 49,374 pounds per day in 2005. These

are significant reductions and are expected to ensure that the area maintains the ozone standard. Thus, deferral of the I/M program does not frustrate meaningful control of vehicle emissions.

(12) *Comment:* One commentator stated that Toledo illegally obtained a waiver from NO<sub>x</sub> conformity requirements under a section 182(f) submittal, and because of it NO<sub>x</sub> conformity requirements should be incorporated into Toledo's maintenance plan. The commentator notes that a NO<sub>x</sub> waiver for conformity purposes can only be issued under section 182(b)(1)(A). Also, not requiring Toledo, Ohio to submit general and transportation conformity SIP revisions with the redesignation request removes any incentive for Toledo, Ohio to adopt procedures for preventing emissions from transportation and federal construction projects contributing to ozone pollution levels. Another commentator stated that land use and transportation controls under the Clean Air Act will not be taken, resulting in increased pollution, if these requirements are changed.

(12) *Response:* Ohio is currently developing transportation and conformity SIP revisions. The USEPA expects to receive these submittals this summer. Maintenance areas are subject to the transportation and general conformity rules and therefore, must submit the SIP revisions required by these rules. The approval of these submissions was not required for the approval of the redesignation request because the redesignation request was submitted before the transportation and general conformity SIPs were due and were, therefore, not applicable requirements for purposes of evaluating this redesignation. Upon redesignation, the transportation conformity rule requires that a regional emission analyses of proposed transportation plans and programs for the Toledo area demonstrate that emissions from the future transportation system are below the motor vehicle emission budget established in the maintenance plan and lower than 1990 levels. The general conformity rule will also apply to the Toledo area after redesignation.

With respect to conformity, USEPA's conformity rules<sup>3,4</sup> currently provide a NO<sub>x</sub> waiver from certain requirements if

an area receives a section 182(f) exemption. Under the transportation conformity rule, a NO<sub>x</sub> waiver relieves an area only of the requirement to meet the "build/no build" and "less-than-1990-baseline" tests. In a notice published in the June 17, 1994 **Federal Register** (59 FR 31238, 31241), entitled "Conformity; General Preamble for Exemption From Nitrogen Oxides Provisions," USEPA reiterated its view that in order to conform, nonattainment and maintenance areas must demonstrate that the transportation plan and transportation improvement program (TIP) are consistent with the motor vehicle emissions budget for NO<sub>x</sub> even where a conformity NO<sub>x</sub> waiver has been granted. Due to a drafting error, that view is not reflected in the current published transportation conformity rules. USEPA is in the process of amending the conformity rule to remedy the problem.

An issue concerning the appropriate Act authority for granting transportation-related NO<sub>x</sub> waivers has been raised by several commentators. NO<sub>x</sub> exemptions are provided for in two separate parts of the Act, section 182(b)(1) and section 182(f). These commentators argue that exemptions from the NO<sub>x</sub> transportation conformity requirements must follow the process provided in section 182(b)(1), since this is the only section explicitly referenced by section 176(c)(3)(A)(iii) in the Act's transportation conformity provisions.

With certain exceptions, USEPA agrees that section 182(b)(1) is the appropriate authority under the Act for waiving the transportation conformity rule's NO<sub>x</sub> "build/no build" and "less-than-1990" tests, and is planning to amend the rule to be consistent with the statute. However, USEPA believes that this authority is only applicable with respect to those areas that are subject to section 182(b)(1).

The change in authority for granting NO<sub>x</sub> waivers from section 182(f) to section 182(b)(1) has different impacts for areas subject to section 182(b)(1) depending on whether the area is relying on "clean air" data or on modeling data. Areas relying on modeling data must meet the procedure established under section 182(b)(1), including submitting the exemption request as part of a SIP revision. The USEPA may not take action on exemptions for such areas until the rulemaking amending the transportation conformity rule to establish section 182(b)(1) as the appropriate authority for granting such relief has been completed. "Clean data" areas that would otherwise be subject to section 182(b)(1), such as Cincinnati and

Cleveland, will be relieved of the transportation conformity rule's interim period NO<sub>x</sub> requirements at such time as USEPA takes final action implementing its recently-issued policy regarding the applicability of section 182(b)(1) requirements for areas demonstrating attainment of the ozone NAAQS based on "clean data". This policy is contained in a May 10, 1995, memorandum from John Seitz, Director, Office of Air Quality Planning and Standards, entitled "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," which should be referred to for a more thorough discussion. The aspect of the policy that is relevant here is USEPA's determination that the section 182(b)(1) provisions regarding reasonable further progress (RFP) and attainment demonstrations may be interpreted so as not to require the SIP submissions otherwise called for in section 182(b)(1) if an ozone nonattainment area that would otherwise be subject to those requirements is in fact attaining the ozone standard (i.e., attainment of the NAAQS is demonstrated with 3 consecutive years of complete, quality-assured, air-quality monitoring data). Any such "clean data" areas, under this interpretation, would no longer be subject to the requirements of section 182(b)(1) once USEPA takes final rulemaking action adopting the interpretation in conjunction with its determination that the area has attained the standard. At that time, such areas would be treated like ozone nonattainment areas classified marginal and below, and hence eligible for NO<sub>x</sub> waivers from the interim-period transportation conformity requirements by obtaining a waiver under section 182(f), as described below.

Marginal and below ozone nonattainment areas (which represents the majority of the areas USEPA is taking action on today) are not subject to section 176(c)(3)(A)(iii) because they are not subject to section 182(b)(1), and general federal actions are also not subject to section 176(c)(3)(A)(iii) (and, hence, are not subject to section 182(b)(1) either). These areas, however, are still subject to the conformity requirements of section 176(c)(1), which sets out criteria that, if met, will assure consistency with the SIP. The USEPA believes it is reasonable and consistent with the Act to provide relief under section 176(c)(1) for areas not subject to section 182(b)(1) from applicable NO<sub>x</sub> conformity requirements where the

<sup>3</sup>"Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved under Title 23 U.S.C. of the Federal Transit Act," November 24, 1993 (58 FR 62188).

<sup>4</sup>"Determining Conformity of General Federal Actions to State or Federal Implementation Plans: Final Rule," November 30, 1993 (58 FR 63214).

Agency has determined that NO<sub>x</sub> reductions would not be beneficial, and to rely, in doing so, on the NO<sub>x</sub> exemption tests provided in section 182(f) for the reasons given below.

The basic approach of the Act is that NO<sub>x</sub> reductions should apply when beneficial to an area's attainment goals, and should not apply when unhelpful or counterproductive. Section 182(f) reflects this approach but also includes specific substantive tests which provide a basis for USEPA to determine when NO<sub>x</sub> requirements should not apply. Whether under section 182(b)(1) or section 182(f), where USEPA has determined that NO<sub>x</sub> reductions will not benefit attainment or would be counterproductive in an area, USEPA believes it would be unreasonable to insist on NO<sub>x</sub> reductions for purposes of meeting RFP or other milestone requirements. Moreover, there is no substantive difference between the technical analysis required to make an assessment of NO<sub>x</sub> impacts on attainment in a particular area whether undertaken with respect to mobile source or stationary source NO<sub>x</sub> emissions. Consequently, USEPA believes that granting relief from the NO<sub>x</sub> conformity requirements of section 176(c)(1) under section 182(f) in these cases is appropriate.

### III. Final Rulemaking Action

The USEPA approves the redesignation of the Toledo, Ohio ozone area to attainment and the section 175A maintenance plan as a revision to the Ohio SIP. The State of Ohio has satisfied all of the necessary requirements of the Act.

USEPA finds that there is good cause for this redesignation to become effective immediately upon publication because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which exempts the area from certain Clean Air Act requirements that would otherwise apply to it. The immediate effective date for this redesignation is authorized under both 5 U.S.C 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."

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific

technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225), as revised by an October 4, 1993, memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, USEPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

The SIP approvals under section 100 and subchapter I, part D, of the Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on small entities affected. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Act forbids USEPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. USEPA*, 427 U.S. 246, 256-66 (1976).

Redesignation of an area to attainment under section 107(d)(3)(E) of the Clean Air Act 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 regulatory requirements on sources. The Administrator certifies that the approval of the redesignation request will not affect a substantial number of small entities.

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 October 2, 1995. 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 may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

Under sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), signed into law on March 22, 1995, USEPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of \$100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

Through submission of the state implementation plan or plan revisions approved in this action, the State and any affected local or tribal governments have elected to adopt the program provided for under section 175A of the Clean Air Act. The rules and commitments being proposed for approval in this action may bind State, local and tribal governments to perform certain actions and also may ultimately lead to the private sector being required to perform certain duties. To the extent that the rules and commitments being proposed for approval by this action will impose or lead to the imposition of any mandate upon the State, local or tribal governments either as the owner or operator of a source or as a regulator, or would impose or lead to the imposition of any mandate upon the private sector, EPA's action will impose no new requirements; such sources are already subject to these requirements under State law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action. The USEPA has also determined that this action does not include a mandate that may result in estimated costs of \$100 million or more to State, local, or tribal governments in the aggregate or to the private sector.

#### List of Subjects

##### 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Motor vehicle pollution, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

##### 40 CFR Part 81

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

Dated: July 5, 1995.  
**David A. Ullrich,**  
*Acting Regional Administrator.*

Title 40 of the Code of Federal Regulations, chapter I, parts 52 and 81, are amended as follows:

**PART 52—[AMENDED]**

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

**Authority:** 42 U.S.C. 7401-7671q.

2. Section 52.1870 is amended by adding a new paragraph (c)(105) to read as follows:

**§ 52.1870 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(105) On September 17, 1993, the Ohio Environmental Protection Agency requested the redesignation of Lucas and Wood Counties to attainment of the

National Ambient Air Quality Standard for ozone. To meet the redesignation criteria set forth by section 107(d)(3)(E) (iii) and (iv), Ohio credited emissions reductions from the enclosure of the "oily ditch" at the British Petroleum Refinery in Oregon, Ohio. The USEPA is approving the Director's Finding and Order which requires the enclosure of the "oily ditch" into the SIP for Lucas and Wood Counties.

(i) Incorporation by reference.  
 (A) letter dated June 2, 1994, from Donald R. Schregardus, Director, Ohio Environmental Protection Agency, to Valdas Adamkus, Regional Administrator, USEPA, Region 5, and one enclosure which is the revised Director's Final Findings and Orders in the matter of BP Oil company, Toledo Refinery, 4001 Cedar Point Road, Oregon, Ohio, Fugitive Emissions from the Refinery Waste Water System "Oily Ditch", effective June 2, 1994.

3. Section 52.1885 is amended by adding paragraph (b)(5) to read as follows:

**§ 52.1885 Control Strategy: Ozone.**

\* \* \* \* \*

(b) \* \* \*

(5) Lucas and Wood Counties.

\* \* \* \* \*

**PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES**

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

**Authority:** 42 U.S.C. 7401-7671q.

2. Section 81.336 is amended by revising the entry in the ozone table for Toledo to read as follows:

**§ 81.336 Ohio.**

\* \* \* \* \*

OHIO—OZONE

Designated area	Designation		Classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
*	*	*	*	*
Toledo area:				
Lucas County .....	August 1, 1995 .....	Attainment.		
Wood County .....	August 1, 1995 .....	Attainment.		
*	*	*	*	*

<sup>1</sup> This date is November 15, 1990, unless otherwise noted.

[FR Doc. 95-18510 Filed 7-31-95; 8:45 am]  
 BILLING CODE 6560-50-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Care Financing Administration  
 42 CFR Parts 409 and 484**

[BPD-469-CN]

RIN 0938-AD78

**Medicare Program; Medicare Coverage of Home Health Services, Medicare Conditions of Participation, and Home Health Aide Supervision; Correction**

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects several errors made in a final rule published on December 20, 1994 (59 FR 65482) concerning Medicare coverage of home health services, Medicare

conditions of participation, and home health aide supervision.

**EFFECTIVE DATE:** February 21, 1995.

**FOR FURTHER INFORMATION CONTACT:** Julie Brown, (410) 966-4669.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 20, 1994, we published a final rule concerning Medicare coverage of home health services, Medicare conditions of participation, and home health aide supervision. (59 FR 65482) In it were a number of technical errors:

When revising our regulations at 42 CFR 409.42(d) (redesignated as § 409.42(b)), we inadvertently revised obsolete regulations text.

When adding § 409.45, we overlooked the statutory name change in section 1861(b)(6) of the Social Security Act as amended by section 4039(b)(2) of the Omnibus Budget Reconciliation Act of 1987.

When adding § 484.36(d)(4)(iii), we overlooked the training requirements in § 484.36(b). However, we proposed the

addition of paragraph (d)(4) in order to identify the responsibilities of an HHA or hospice that furnishes services under arrangement, including "ensuring that the aides have met the training requirements." (56 FR 49157) Section 484.36(b) contains training requirements.

There were also a number of incorrect crossreferences.

**Correction of Publication**

Accordingly, the publication on December 20, 1994, of the final regulation, which was the subject of FR Doc. 94-31062, is corrected as follows:

**§ 409.42 [Corrected]**

Page 65494, column 1: In § 409.42(b), line 6, the words "with the HHA's policy and" are removed.

Page 65494, column 1: In § 409.42(c)(2), (c)(3), and (c)(4), the phrase "§ 409.44(b)" is revised to read "§ 409.44(c)".

**§ 409.45 [Corrected]**

Page 65495, column 2: In § 409.45(a), the phrases "§ 409.44(a)" and