

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

[EPA-R05-OAR-2009-0221; FRL-8952-1]

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

SUMMARY: EPA is taking several related actions affecting the Cleveland-Akron-Lorain, Ohio 1997 8-hour ozone nonattainment area. EPA is making a determination under the Clean Air Act (CAA) that the Cleveland-Akron-Lorain area (Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, and Summit Counties) has attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). 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 Cleveland-Akron-Lorain area to attainment of the 8-hour ozone NAAQS. EPA is approving the 2002 base year emissions inventory for the Cleveland-Akron-Lorain area as meeting the requirements of the CAA. EPA is approving Ohio's 15 percent (15%) Rate of Progress (ROP) plan as meeting the requirements of the CAA for the 1-hour ozone standard. EPA is also approving a waiver, for the Cleveland-Akron-Lorain area, from the oxides of nitrogen (NO_x) Reasonably Available Control Technology (RACT) requirements of section 182(f) of the CAA in relation to the 1997 8-hour ozone NAAQS. Finally, EPA finds adequate and is approving the state's 2012 and 2020 volatile organic compound (VOC) and oxides of nitrogen (NO_x) Motor Vehicle Emission Budgets (MVEBs) for the Cleveland-Akron-Lorain 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-2009-0221. All documents in the docket are listed on the 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 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 Cleveland-Akron-Lorain 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 27957). In that rulemaking, we noted that, under EPA regulations at 40 CFR part 50, the 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 and April 24, 2009, the Ohio EPA submitted a request to redesignate the Cleveland-Akron-Lorain 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. Under EPA's proposal, final action to redesignate the Cleveland-Akron-Lorain area to attainment was contingent on final approval of Ohio rules satisfying the requirement for volatile organic compound (VOC) RACT. Such final approval was published on July 28, 2009 at 74 FR 37171.

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 Cleveland-Akron-Lorain 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_x SIP Call and Ohio has now demonstrated that the area can maintain without any additional requirements (beyond those required by the NO_x SIP Call). Therefore, EPA believes that Ohio's demonstration of maintenance under sections 175A and 107(d)(3)(E) remains valid.

The NO_x SIP Call requires states to make significant, specific emissions reductions. It also provided a mechanism, the NO_x Budget Trading Program, which states could use to achieve those reductions. When EPA promulgated CAIR, it discontinued (starting in 2009) the NO_x 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_x Budget Trading Program. In addition, because the provisions of CAIR including the ozone season NO_x trading program remain in place during the remand, EPA is not currently administering the NO_x Budget Trading Program. Nonetheless, all states, regardless of the current status of their regulations that previously required participation in the NO_x Budget Trading Program, will remain

subject to all of the requirements in the NO_x 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_x SIP Call, including the statewide NO_x 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_x Budget Trading Program. Ohio EPA is in the process of promulgating a rule change stating that the NO_x 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_x Budget Trading Program would once again apply, on condition that EPA maintains a NO_x Budget Trading Program.

All NO_x 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_x 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_x 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 adverse comments from the Allegheny County Health Department, a private citizen, and the National Resources Defense Council (NRDC). A summary of the comments received, and EPA's responses, follow.

(1) *Comment:* The totals for VOC Non-road emissions and VOC Area emissions in table 4 are incorrect. Also, the value for 2006 VOC Non-road in table 5 is incorrect.

Response: EPA concurs with the commenter and is revising the tables. Below are corrected tables 4 and 5. The revisions correct typographical errors in the tables and do not affect the net change in total VOC and NO_x emissions between 2002 and 2006, since the correct numbers were used in calculating these values.

TABLE 4—CLEVELAND-AKRON-LORAIN VOC AND NO_x EMISSIONS FOR ATTAINMENT YEAR 2006 [tpd]

	Point		Area		Nonroad		Onroad		Total	
	VOC	NO _x	VOC	NO _x	VOC	NO _x	VOC	NO _x	VOC	NO _x
Ashtabula	0.94	4.52	5.89	0.85	9.19	8.71	4.00	7.01	20.02	21.09
Cuyahoga	3.68	13.56	44.14	13.83	40.62	36.61	27.64	64.40	116.08	128.40
Geauga	0.00	0.00	9.96	1.01	4.87	2.58	2.41	5.06	17.24	8.65
Lake	0.82	37.48	9.06	2.30	11.13	8.99	5.33	13.00	26.34	61.77
Lorain	3.18	27.31	11.45	2.66	13.03	12.84	6.17	14.88	33.83	57.69
Medina	0.79	0.26	7.40	1.57	5.29	5.02	5.05	12.32	18.53	19.17
Portage	0.95	0.22	6.19	1.52	7.49	6.25	4.30	10.79	18.93	18.78
Summit	1.27	3.23	18.17	5.51	12.36	11.33	14.18	32.28	45.98	54.35
Total	11.63	86.58	112.26	29.25	103.98	92.33	69.08	161.74	296.95	369.90

TABLE 5—COMPARISON OF CLEVELAND-AKRON-LORAIN 2002 AND 2006 VOC AND NO_x EMISSIONS [tpd]

	VOC			NO _x		
	2002	2006	Net change (2002–2006)	2002	2006	Net change (2002–2006)
Point	12.64	11.63	– 1.01	156.98	86.58	– 70.40
Area	110.68	112.26	1.58	12.49	29.25	16.76
Nonroad	98.72	103.98	5.26	94.44	92.33	– 2.11
Onroad	109.49	69.08	– 40.41	226.17	161.74	– 64.43
Total	331.53	296.95	– 34.58	490.08	369.90	– 120.18

(2) *Comment:* Open burning is a direct cause of air pollution. Open burning results in direct emissions of carbon dioxide and causes neighbors to use air conditioners to avoid breathing in smoke fumes and prevent smoke damage. Air conditioning is a large source of unnecessary power usage.

Response: EPA appreciates the commenter’s concerns regarding open burning. However, the current rulemaking is a redesignation action that is designed to determine whether an area has met the requirements for redesignation to attainment as set forth in section 107(d)(3)(E) of the CAA. Consideration of how to address open burning issues is not related to the current redesignation action. In this action, EPA has determined that, for the 1997 8-hour NAAQS, the state has met all requirements for redesignation, including a demonstration that the area has met all applicable requirements for the purposes of redesignation and that it will maintain the standard over the ten year maintenance period.

(3) *Comment:* Ohio EPA’s redesignation request fails to demonstrate compliance with the ozone NAAQS. Three out of the eleven ozone monitors in the area registered three-year average fourth-highest concentrations that were greater than 0.08 ppm. 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 three-year average concentrations that exceed the actual ozone NAAQS. The commenter contends that 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 for the 1997 8-hour NAAQS, 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.

(4) *Comment:* Ohio EPA's contention that ozone concentrations have trended downward is not supported by the 2006 to 2008 data provided by the agency. For seven out of the eleven monitors in the Cleveland-Akron-Lorain area, the fourth-high ozone concentration increased from 2006 to 2007. At eight out of the eleven monitors, the 2008 fourth-highest concentration was higher than the 2006 fourth-highest concentration. This suggests that ozone concentrations are not declining and raises questions about whether redesignation is appropriate. While 2008 concentrations are mostly lower than those in 2007, it is not clear if such reduction is due to permanent and enforceable reductions or transient factors. At a minimum, EPA must decline to approve Ohio EPA's redesignation request until 2009 monitoring data can confirm the relevant ozone concentration trends.

Response: The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) allows for redesignation provided that, among other things, the Administrator determines that the area has attained the applicable NAAQS. A determination that an area has attained the standard is based on an objective review of the air quality data. There are no provisions in the CAA or in EPA redesignation policy for using monitoring data trends or statistical analyses as criteria for determining attainment in evaluating a redesignation request. As discussed in detail in the proposed rule, the Cleveland-Akron-Lorain area is monitoring attainment of the 1997 8-hour ozone standard. As discussed in the proposal, the requirement that attainment be due to permanent and enforceable emissions reductions is a separate criterion for redesignation, which has been met here.

Furthermore, looking at the yearly fourth-high ozone concentrations ozone over a two or three year time period is not statistically significant and does not determine a trend. In fact, it is expected that there will be year to year variations in ozone concentrations due to meteorological influences. A review of

data over a longer time period, from 2001 (designations under the 1997 8-hour ozone standard were based on air quality monitoring data from 2001–2003) through 2008, shows a downward trend at each monitor in the area. Moreover, in its maintenance demonstration the state has shown that the 1997 ozone standard can be maintained in the area over a ten-year period after redesignation.

(5) *Comment:* Redesignation is inappropriate because the Cleveland-Akron-Lorain area is out of attainment of the 2008 ozone standard, which is currently set at 0.075 ppm. As such, the Cleveland-Akron-Lorain 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 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 Cleveland-Akron-Lorain 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 2008 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, Michigan 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_{2.5} and 8-hour ozone standards for Cincinnati. EPA is not approving any relaxation of the existing control measures so emissions of VOC and NO_x 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_{2.5} 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_{2.5}, 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_{2.5} 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.

(6) *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. 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, 451 (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." EPA must ensure that Ohio EPA can adopt such additional control measures without the need for additional rulemaking before any redesignation for the Cleveland-Akron-Lorain 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 the commenter's contention, these contingency measures are not the same as those required for nonattainment areas under section 172(c)(9) or 182(c)(9). The statutory provision under section 175A for maintenance 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 Cleveland-Akron-Lorain area: A lower Reid vapor pressure gasoline program; tightened VOC Reasonably Available Control Technology (RACT) on existing sources covered by EPA Control Technique Guidelines issued after the 1990 CAA; 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; VOC or NO_x emission offsets for new and modified major sources; VOC or NO_x emission offsets for new and modified minor sources; VOC or NO_x 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_x 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.

(7) *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.” 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_x 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.” The Fifth Circuit found that, “based 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.

(8) *Comment:* The proposed redesignation relies on an improper NO_x waiver. The NO_x waiver provisions of section 182(f)(1)(A) are designed simply to ensure that NO_x reductions are not required in those limited circumstances where NO_x reductions can actually lead to increased ozone concentrations. There has been no showing of a NO_x disbenefit in this proceeding and, therefore, a NO_x waiver is improper. There is no evidence suggesting that NO_x controls did not contribute to the purported attainment. Instead, the

evidence is clear that they did contribute and, therefore, a NO_x waiver is inappropriate.

Response: As described in EPA's January 14, 2005 policy, Guidance on Limiting Nitrogen Oxides (NO_x) Requirements Related to 8-Hour Ozone Implementation, section 182(f)(1) of the CAA provides that the new NO_x requirements shall not apply (or may be limited to the extent necessary to avoid excess reductions) if the Administrator determines that any one of the following tests is met:

(1) In any area, the net air quality benefits are greater in the absence of NO_x reductions from the sources concerned;

(2) In nonattainment areas not within an ozone transport region, additional NO_x reductions would not contribute to ozone attainment in the area; or

(3) In nonattainment areas within an ozone transport region, additional NO_x reductions would not produce net ozone air quality benefits in the transport region.

Based on the plain language of section 182(f), EPA believes that each test provides an independent basis for receiving a full or limited NO_x exemption. Only the first test listed above is based on a showing that NO_x reductions result in a "disbenefit." If any one of the tests is met, the section 182(f) NO_x requirements would not apply.

In areas monitoring attainment of the ozone standard where section 182(f) NO_x requirements were not implemented over that three-year period, it is clear that the second test listed above is met. Since attainment has already occurred, additional NO_x reductions could not improve the area's attainment status and, therefore, the NO_x exemption request can be approved.

The Cleveland-Akron-Lorain area is monitoring attainment of the 1997 8-hour ozone standard and, over the three-year period used to demonstrate attainment with the NAAQS (2006–2008), NO_x RACT emissions reduction requirements were not yet implemented in the area. Therefore, the Cleveland-Akron-Lorain area can clearly demonstrate that "additional reductions of oxides of nitrogen would not contribute to attainment."

(9) *Comment:* Should EPA proceed with granting Ohio the NO_x waiver, the agency must clarify the scope of the waiver. Ohio EPA's submissions suggest that the state is petitioning for a waiver only of the NO_x RACT requirements, not the other NO_x reductions required by section 182(f). In addition, EPA must make clear that any NO_x waiver is only,

as Ohio EPA requested, "for the interim period between approval of this redesignation request and approval of Ohio's NO_x RACT rules," and does not imply that NO_x RACT requirements are somehow lifted or will not be needed to bring the Cleveland-Akron-Lorain area into attainment of the 2008 ozone NAAQS or any more stringent ozone NAAQS that is developed in the future.

Response: As the commenter stated, Ohio EPA requested that EPA grant a waiver from NO_x RACT requirements for the Cleveland-Akron-Lorain area. In this final action, EPA is approving a waiver from only the NO_x RACT requirements of section 182(f). This has been clarified in both the summary and section III of this action. Further, as stated in the proposal, EPA agrees with the commenter that while Ohio need not adopt NO_x RACT rules as a prerequisite for redesignation with respect to the 1997 8-hour ozone standard, EPA may in the future determine that NO_x RACT rules are required in this area with respect to the 2008 8-hour ozone standard.

III. What Action Is EPA Taking?

EPA is making a determination that the Cleveland-Akron-Lorain area has attained the 8-hour ozone NAAQS. EPA is also approving the maintenance plan SIP revision for the Cleveland-Akron-Lorain 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 Cleveland-Akron-Lorain area from nonattainment to attainment for the 8-hour ozone NAAQS. EPA is also approving the 2002 base year emissions inventory for the Cleveland-Akron-Lorain area as meeting the requirements of section 182(a)(1) of the CAA. EPA is approving a waiver from the section 182(f) NO_x RACT requirements in the Cleveland-Akron-Lorain area. EPA is also approving Ohio's 15% ROP plan as meeting the requirements of section 182(b)(1) of the CAA for the 1-hour ozone standard. Finally, EPA also finds adequate and is approving the state's 2012 and 2020 MVEBs for the Cleveland-Akron-Lorain 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. 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)(9), (hh)(2), (ii) and (jj) to read as follows:

§ 52.1885 Control strategy: Ozone.

* * * * *

(ff) * * *

(9) Approval—On March 17, 2009, and April 24, 2009, the Ohio Environmental Protection Agency submitted a request to redesignate the Cleveland-Akron-Lorain 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 Cleveland-Akron-Lorain area are 46.64 tpd for VOC and 95.89 tpd for NO_x. The 2020 motor vehicle emissions budgets for the area are 31.48 tpd for VOC and 42.75 tpd for NO_x.

* * * * *

(hh) * * *

(2) Approval—Ohio's 2002 inventory satisfies the base year emissions inventory requirements of section 182(a)(1) of the Clean Air Act for the Cleveland-Akron-Lorain area under the 1997 8-hour ozone standard.

(ii) Approval—The 15 percent Volatile Organic Compound reasonable further progress plan for the Cleveland-Akron-Lorain 1-hour ozone area, submitted by Ohio on June 15, 2007, and February 22, 2008, satisfies the

requirements of section 182(b)(1) of the Clean Air Act.

(jj) Approval—EPA is approving exemptions under section 182(f) from requirements for reasonably available control technology for oxides of nitrogen for the Cleveland-Akron-Lorain 8-hour ozone nonattainment area with

respect to the 1997 ozone standards. This waiver was requested by Ohio on March 17, 2009.

PART 81—[AMENDED]

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

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

OHIO-OZONE
[8-Hour Standard]

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

§ 81.336 Ohio.

* * * * *

Designated area	Designation ^a		Classification	
	Date ¹	Type	Date ¹	Type
*	*	*	*	*
Cleveland-Akron-Lorain, OH: Ashtabula County. Cuyahoga County Geauga County. Lake County. Lorain County. Medina County. Portage County. Summit County.	9/15/2009	Attainment.		
*	*	*	*	*

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

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[FR Doc. E9-21818 Filed 9-14-09; 8:45 am]

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