

Approved: July 3, 2002.  
Anthony J. Principi,  
Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 20 is amended as set forth below:

**PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE**

1. The authority citation for part 20 continues to read as follows:

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

2. In § 20.609, paragraph (c) is revised to read as follows:

**§ 20.609 Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.**

\* \* \* \* \*

(c) *Circumstances under which fees may be charged.* (1) *General.* Except as noted in paragraph (d) of this section, attorneys-at-law and agents may charge claimants or appellants for their services only if both of the following conditions have been met:

(i) A final decision has been promulgated by the Board of Veterans' Appeals with respect to the issue, or issues, involved; and

(ii) The attorney-at-law or agent was retained not later than one year following the date that the decision by the Board of Veterans' Appeals with respect to the issue, or issues, involved was promulgated. (This condition will be considered to have been met with respect to all successor attorneys-at-law or agents acting in the continuous prosecution of the same matter if a predecessor was retained within the required time period.)

(2) *Clear and unmistakable error cases.* For the purposes of this section, in the case of a motion under subpart O of this part (relating to requests for revision of prior Board decisions on the grounds of clear and unmistakable error), the "issue" referred to in this paragraph (c) shall have the same meaning as "issue" in Rule 1401(a) (§ 20.1401(a) of this part).

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 81**

[KY-116; KY-119-200214(d); FRL-7252-8]

**Approval and Promulgation of Implementation Plans Reinstatement of Redesignation of Area for Air Quality Planning Purposes; Kentucky Portion of the Cincinnati-Hamilton Area**

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is finalizing the reinstatement of the redesignation to attainment for the 1-hour ozone National Ambient Air Quality Standard (NAAQS) for the Kentucky portion of the Cincinnati-Hamilton area. This final rule addresses these comments made on EPA direct final rulemaking previously published for this action.

**DATES:** This final rule is effective August 30, 2002.

**ADDRESSES:** Copies of the Commonwealth of Kentucky's original redesignation request, the Court's ruling and other information are available for inspection during normal business hours at EPA Region 4, Air Planning Branch, 61 Forsyth Street, Atlanta, Georgia 30303-8960; Persons wishing to examine these documents should make an appointment at least 24 hours before the visiting day and reference file KY-116.

Copies of the Commonwealth of Kentucky's original redesignation request are also available at Commonwealth of Kentucky, Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky 40601-1403.

**FOR FURTHER INFORMATION CONTACT:** Michele Notarianni at the EPA Region 4 address listed above or 404-562-9031 (phone) or *notarianni.michele@epa.gov* (e-mail).

**SUPPLEMENTARY INFORMATION:**

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**I. Today's Action**

In this final rulemaking, EPA is responding to comments received regarding a direct final and proposed rule to reinstate the redesignation to attainment for the 1-hour ozone NAAQS for the Kentucky portion of the Cincinnati-Hamilton area.

**II. Background**

On June 19, 2000, EPA issued a final rule determining that the Cincinnati-Hamilton area had attained the one-hour ozone NAAQS, and redesignating both the Ohio and Kentucky portions of the area to attainment. 65 FR 37879. A petition for review resulted in the U.S. Court of Appeals for the Sixth Circuit vacating EPA's action in redesignating the area to attainment, and remanding to EPA for further proceedings consistent with the Court's opinion.

On February 12, 2002, the EPA published a proposed rule (67 FR 6459) and a direct final rule (67 FR 6411) to reinstate the attainment redesignation of the Kentucky portion of the Cincinnati-Hamilton moderate 1-hour ozone nonattainment area (Cincinnati-Hamilton area), which comprises the Ohio Counties of Hamilton, Butler, Clermont, and Warren and the Kentucky Counties of Boone, Campbell, and Kenton. Further background is set forth in the direct final rulemaking. 67 FR 6411. The EPA withdrew the direct final rule on April 8, 2002 (67 FR 16646), because adverse comments were received. This final rule addresses the comments.

**III. Comment and Response**

*What Comments Did We (EPA?) Receive and What Are Our Responses?*

EPA received two sets of adverse comments, one submitted by David Baron on behalf of the Sierra Club, Brian Scott, Pasko, and Ron Colwell, and the other submitted by Hank Gaddy on behalf of the Cumberland, KY Chapter of the Sierra Club. A summary of the adverse comments and EPA's responses to them are provided below.

*Comment 1:* A commentator contends that section 107(d)(3)(E) of the Clean Air Act (the "Act") unambiguously prohibits redesignation of any portion of a nonattainment area to attainment unless all of the requirements set forth in section 107(d)(3)(E) are met for the entire nonattainment area. Since the Court in *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001) determined that there was a deficiency in the Ohio Reasonably Available Control Technology (RACT) rules that must be remedied before EPA could find that Ohio met the requirements for redesignation, then this also prevents EPA from reinstating the redesignation of the Kentucky portion which the Court had upheld in all respects.

*Response 1:* The *Wall* Court did not vacate EPA's approval of the maintenance plan for either portion of the area. Therefore the maintenance plan for the entire area is approved. The

Court also did not vacate EPA's determination of attainment for the entire area. Therefore the determination remains in effect. In addition, the area has continued to remain in attainment through July 31, 2002. Moreover, the *Wall* Court upheld EPA's action with respect to all aspects of the redesignation of the Kentucky portion of the Cincinnati area. For the reasons set forth more fully below, EPA believes that the Kentucky portion may be redesignated separately from the Ohio portion, and the deficiency in the Ohio RACT rule in no way prevents EPA from reinstating its redesignation of Kentucky, which the Court has validated in all respects. The Court's ruling on the Ohio RACT rules affects only the requirements relating to the Ohio State Implementation Plan (SIP), which are not relevant to whether Kentucky fulfilled all its requirements under the Clean Air Act regarding the area. 67 FR 6411-6413 (February 12, 2002) (*See also* responses to Comments 2, 3, and 4.)

*Comment 2:* In section 182(j) of the Act, Congress provided for relief from certain Clean Air Act sanctions for a state in a multi-state ozone nonattainment area, where continued nonattainment is due to the failure of one or more other states in which other portions of the area are located to commit to implementation of required measures. Significantly, Congress did not provide for any sort of similar relief from the Act's redesignation requirements for a state within a multi-state ozone nonattainment area.

*Response 2:* The language of section 107(d)(3)(E) itself provides that a portion of a nonattainment area can be redesignated if the requirements for redesignation are met: "The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless \* \* \*" Similarly, section 107(d)(3)(D) provides: "The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State \* \* \*"

Other subparts of section 107(d)(3) also refer to redesignation of an area or portion thereof. See sections 107(d)(3)(A), (B), and (C).

Thus, the Act clearly contemplates the possibility of redesignating a portion of a nonattainment area. The remaining subparts must be read in the context of whether an area or a *portion* of an area is being redesignated. If it is a portion of a multi-state area that is being redesignated, then the word "area" as subsequently used in the subpart must refer to that portion of the multi-state

area that is being redesignated. This interpretation is borne out by the express terms of the subparts of 107(d)(3)(E). (*See* response to Comment 3 below.) In general, EPA issues simultaneous redesignations for joint portions of multistate ozone areas. In a few instances, however, where separate portions of a multistate area have been unable to successfully coordinate their redesignation efforts and one state has met all the requirements for redesignation, EPA has applied section 107(d)(3)(E) to implement Congressional intent to allow redesignation of a portion of the multi-state area where that portion meets the statutory requirements and where the entire area is attaining the standard.

In section 182(j), Congress similarly expressed its intent to allow EPA to treat portions of multi-state areas separately so as not to penalize one portion of a multi-state nonattainment area simply because the state controlling the other portion had not fully discharged its regulatory responsibilities. In that section, even where the entire area remains nonattainment, Congress provided for separate recognition and treatment for the state that had fulfilled its statutory obligations. Similarly, in section 107(d), Congress expressly provided that a portion of a multi-state nonattainment area that met the requirements for redesignation should not be penalized by a failure of a state controlling an adjoining portion. In section 107, Congress distinguished between the air quality in the region and the control regime, and clearly intended that, where air quality met the standard in the area, the state with authority over a portion of the area that has met all the remaining requirements should not be penalized by having to remain labeled nonattainment. Thus under appropriate circumstances, EPA has implemented this intent by allowing redesignation of a portion of a multi-state area.

*Comment 3:* EPA's approach would undermine Congressional intent to ensure that nonattainment areas would completely comply with the Act's requirements prior to redesignation, and to not allow an area to evade adoption of required controls, be redesignated, and fall back into nonattainment.

*Response 3:* EPA's approach does not undermine Congressional intent. In fact, redesignating the Kentucky portion of Cincinnati implements the intent of Congress as expressed in the redesignation provisions of the statute. First, the entire area is attaining the one-hour ozone standard, and EPA's attainment determination remains in effect, and has never been challenged.

Second, the maintenance plans for the entire area were approved by EPA, reviewed by the Sixth Circuit, and upheld. The Ohio and Kentucky maintenance plans remain in place, and were never vacated. Third, Kentucky has met *all* of the requirements for redesignation. In its June 2000 rulemaking, EPA reviewed and approved the redesignation based on its findings that Kentucky met these requirements, and the Sixth Circuit has reviewed and upheld EPA's actions in their entirety with respect to the Kentucky portion of the area. Fourth, all aspects of the Ohio portion of the Cincinnati area were reviewed and upheld by the Sixth Circuit, with the sole exception of some RACT rules which the Court agreed were not necessary for attainment or maintenance. Commitments to adopt these rules are already included as contingency measures in the approved maintenance plan for Ohio. Finally, Ohio is in the process of revising its RACT rules so that it can resubmit its redesignation request in accordance with the Court's decision in the *Wall* case, so that it is likely that processing of the redesignation of the Ohio portion of the area will take place in close proximity to the reinstatement of the redesignation, for the Kentucky portion. EPA believes that this type of coordination will further insure that the redesignation efforts will be kept in balance in both portions of the area.

There is thus no legal impediment to redesignation and no environmental benefit in favor of holding the Kentucky portion of the area hostage. To force Kentucky to reconstruct and resubmit work already reviewed and upheld, and to compel EPA to reevaluate rulemakings that this Court has already reviewed and approved, would result in a waste of state, EPA, and judicial resources, and to defeat the intent of Congress. This Court has upheld the principle that where EPA has already approved state rulemakings as meeting Clean Air Act requirements, it need not re-do this work for purposes of finding that requirements are met for a redesignation action. See Calcagni memo<sup>1</sup>, which advises that "an EPA action on a redesignation request does not mean that earlier issues with regard to the SIP will be reopened", and *SPGA v. Browner*, 144 F.3d 984, 989-90 (6th Cir. 1998), *Wall v. EPA*, 265 F.3d 426, 438 (6th Cir. 2001)

<sup>1</sup> Memorandum from John Calcagni, Director of the EPA Air Quality Management Division, dated September 4, 1992, entitled "Procedures for Processing Requests to Redesignate Area to Attainment."

In the case of Cincinnati, the entire area is attaining the one-hour ozone standard, the Kentucky portion has completely complied with the remainder of the Act's requirements prior to being redesignated, and the entire area, including both the Ohio and Kentucky portions, has approved maintenance plans in effect. There is fulfillment, and not evasion of Congressional intent. The introductory sentence in section 107(d)(3)(E) clearly and expressly provides the Administrator with the option of redesignating a portion of a nonattainment area. If a portion of a nonattainment area is the subject of the redesignation, the reference to "area" in the subsequent subparts of section 107(d)(3)(E), must be read to apply to the portion being redesignated. In fact, when one state's portion of a multi-state area is being redesignated, that is the only meaningful way to read subparts (ii) through (v) of section 107(d)(3)(E), since they refer to the control requirements and plans for the state that contains the portion of the area.

Where a portion of an area is requesting redesignation, subpart (i) requires the Administrator to determine its attainment status. Because ozone is an area pollutant, EPA has concluded that the determination of whether a portion of a multistate ozone area has attained includes consideration of the attainment status of the area as a whole. By contrast, subparts (ii) through (v) refer to implementation plan requirements for the area being redesignated, and each plan applies only to that portion over which the state requesting redesignation has authority. Subpart (ii) states that "the Administrator has fully approved the applicable implementation plan for the area under section 110(k)". Where only one state's portion of the area is the subject of the redesignation action, this subsection, written in the singular, applies to that state's plan for the area—that is, to its portion of the larger nonattainment area. Similarly, subpart (iii) requires the Administrator to determine that there are permanent and enforceable reductions in emissions "resulting from implementation of the applicable implementation plan \* \* \*", which means, in the case of a portion of a multi-state area, the implementation plan applicable to that portion of the area being redesignated.

Subpart (iv) states that the Administrator must fully approve "a maintenance plan for the area as meeting the requirements of section 175A". Here again, the only maintenance plan for the area being

redesignated is for that portion over which the state requesting redesignation has authority. No other maintenance plan is subject to approval. Section 175A itself reinforces this reading. It provides:

Each state which submits a request under section 107(d) for redesignation of a nonattainment area for any air pollutant as an area which has attained the national primary ambient air quality standard for that air pollutant shall also submit a revision of the applicable State implementation plan to provide for the maintenance of the national primary ambient air quality standard for such air pollutant in the area concerned for at least 10 years after the redesignation.

It is clear that the maintenance plan for "the area concerned" and for which the Commonwealth of Kentucky has submitted a request is for a portion of the Cincinnati nonattainment area, and that is the only part of the area for which it has power to make a request and to promulgate planning and control requirements. Moreover, section 175A clearly treats each state's maintenance plan responsibilities as discrete obligations of that state over the area within its jurisdiction. (*See also* responses to Comments 2 and 4 above.) Section 107(d)(3)(v) provides, as a prerequisite to redesignation, that: "The State containing such area has met all requirements applicable to the area under section 110 and part D." This section plainly shows that Congress meant for EPA to evaluate whether the State requesting redesignation of an area has met the applicable requirements for that area, and that this requirement applies in the context of the State containing the area whose redesignation is under consideration. In a multistate area, where only one state's portion of the area is being considered for redesignation, Congress did not intend to require that state to demonstrate, or EPA to evaluate, a separate and distinct set of a different state's requirements applicable to the portion not contained in the state submitting a redesignation request.

*Comment 4:* EPA's approach also undermines the Act's maintenance plan and contingency measure requirements. Section 107(d)(3)(E)(iv) requires that prior to redesignation, EPA must have fully approved a maintenance plan "for the area" under section 175A. The maintenance plan must contain contingency provisions that require implementation of any measures in the pre-redesignation SIP. The lack of adequate RACT measures in the SIP means that the entire area lacks an adequate contingency plan as well. The RACT deficiency threatens the health of

people throughout the nonattainment area—not just in Ohio.

*Response 4:* Pursuant to section 107(d)(3) and section 175A, the maintenance plan requirements are separate for each state's portion of the area to be redesignated. Section 107 provides that the Administrator must fully approve "a maintenance plan for the area as meeting the requirements of section 175A". The use of the singular "a maintenance plan for the area" indicates that this provision is applicable separately to each portion of a multi-state area. Moreover, section 175A, whose requirements are incorporated by 107(d)(3)(iv), reinforces this reading by providing that:

Each State which submits a request under section 107(d) for redesignation of a nonattainment area \* \* \* shall also submit a revision of the applicable State implementation plan to provide for the maintenance of the national primary ambient air quality standard for such pollutant in the area concerned for at least 10 years after the redesignation. The plan shall contain such additional measures, if any as may be necessary to ensure such maintenance.

Section 175A(d) provides that the maintenance plan must also include such enforcement 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."

Thus each state separately submits a redesignation request for the area under its jurisdiction, and each state has authority only to adopt and submit for approval a maintenance plan and a revision of its state implementation plan that are applicable to its territory. Since each state's obligation under section 107(d) and 175A applies solely to each state's implementation plan and each state's separate portion of a multi-state nonattainment area, EPA's reading of section 107 is consistent with the text, plain meaning, and logic of the redesignation and maintenance provisions. In any event, even assuming, contrary to the language of the statute, that approval of one state's maintenance plan revisions were dependent on the approvability of another state's maintenance plan, in the case of Cincinnati both the Ohio and Kentucky maintenance plans have been approved by EPA, and those approvals have been upheld by the Sixth Circuit. The Sixth Circuit in *Wall* expressly stated: "We therefore uphold the EPA's approval of the two states' clean air maintenance plans for the Cincinnati metropolitan area." *Wall v. EPA*, 265 F.3d 426, 437, 438.

Any corrections to the Ohio RACT rules do not undermine the Kentucky maintenance plan, nor do they undermine the approvability of Ohio's plan. The RACT rules at issue were concededly never implemented and not necessary for attainment or maintenance, although a commitment to adopt them was contained in the contingency measures in the Ohio maintenance plan. Plainly no threat to the health of the people of Ohio or the rest of the region is posed by redesignation of the Kentucky portion of the Cincinnati area.

*Comment 5:* Even if EPA could redesignate just a portion of the nonattainment area, it cannot do so here, because the states have not shown maintenance of the standard for at least 10 years, as is required by section 107(d)(3)(E)(iv) and 175A of the Act. Although EPA's prior approval of a maintenance plan was upheld by the *Wall* court, that plan addressed only the 10-year period subsequent to the date of the prior redesignation. Because EPA is proposing a new redesignation, the states must demonstrate maintenance for at least 10 years from the date of approval of the new redesignation—something that they have not done here.

*Response 5:* EPA is not proposing a new redesignation, but rather reinstating the redesignation of the Kentucky portion of the Cincinnati nonattainment area, based on the Sixth Circuit having upheld all of EPA's actions with respect to that redesignation. Moreover, the Court upheld the maintenance plan that accompanied that redesignation. Given that no deficiencies were found after extensive review by the Sixth Circuit, EPA believes that the proper response on remand is reinstatement of the redesignation, rather than having the state and EPA re-do work as to which no defects were found. Commentors seek to have EPA and Kentucky go back to re-do actions that were upheld in their entirety by the Court. No legal or public policy purpose is served by such waste of resources.

*Comment 6:* New information that was not available at the time of public comment on EPA's previous redesignation shows that the maintenance plan does not in fact assure maintenance of the standard for at least 10 years. Modeling conducted by EPA in connection with the heavy-duty diesel vehicle and diesel fuel rule shows that the Cincinnati area will again violate the ozone standard by 2007, and that these violations will continue through 2030 even with emission reductions from the diesel rule. This modeling takes into account monitoring data through 1999. In its

prior redesignation, EPA discounted the modeling results of the Agency's Tier 2 rulemaking on the ground that it did not consider 1999 monitoring data. Yet EPA's diesel rule does consider this data and predicts ozone violations that EPA should not ignore or discount. Although the diesel rule Regulatory Impact Analysis (RIA) asserts that "the risk of future exceedances occurring in the Cincinnati-Hamilton area is most prevalent after the end date of Cincinnati's proposed 10-year maintenance plan (i.e. after 2010)", the commentator sees nothing that supports this assertion, and asks EPA to explain it. The commentator further requests EPA to explain how prevalent the RIA shows the risk of exceedances to be in or before and after 2010, and before and after 2012, which the commentator contends is the end of the new maintenance period, and how EPA judges such risk. The commentator also argues that regardless of whether the risk is more prevalent in later years, the RIA still predicts violations prior to 2010.

*Response 6:* The information provided in the heavy-duty diesel rule discussed by the commentator does not show that the Cincinnati area will again violate the ozone standard by 2007. First, as with the Tier 2 rule, the focus of the heavy duty rule was not to evaluate the attainment or nonattainment of the Cincinnati metropolitan area, but rather to reduce emissions from heavy duty trucks nationally.

As the Court found in *Wall*, the heavy duty diesel rule, like the findings in the Tier 2 rulemaking proceeding, are not applicable here. The *Wall* Court observed that:

The focus of the Tier 2 proceeding was not specifically to evaluate the attainment or nonattainment to the Cincinnati metropolitan area, but rather to develop a 'major program designed to significantly reduce the emissions from new passenger cars and light trucks, including pickup trucks, vans, minivans, and sport-utility vehicles', vehicles whose emissions contribute heavily to the generation of ground-level ozone. 65 FR 6698 265 F.3d at 437.

Similarly, the focus of the heavy duty diesel rule was a national program to reduce emissions from heavy duty diesel trucks throughout the United States. EPA based its decision to regulate such sources on the national need for emission reductions, not on the need of any particular area. One of the pieces of information EPA used in its review of the need for these reductions was regional photochemical ozone modeling performed by EPA for the diesel rule. However, EPA also took into consideration other modeling studies developed for SIPs. EPA noted that:

\* \* \* [t]he ozone modeling in the SIP revisions has the advantage of using emission inventories that are more specific to the area being modeled, and of using meteorological conditions selected specifically for each area. Also, the SIP revisions included other evidence and analysis, such as analysis of air quality and emissions trends, observation-based models that make use of data on ozone precursors, alternative rollback analyses, and information on the responsiveness of the air quality model. For some areas we decided that the predictions of 1-hour ozone exceedances from our modeling were less reliable than conclusions that could be drawn from this additional evidence and analysis... Thus, these local analyses are considered to be more extensive than our own modeling for estimating whether there would be NAAQS nonattainment without further emission reductions, where interpreted by a weight of evidence method which meets our guidance for such modeling. 66 FR 5013.<sup>2</sup>

We reviewed 45 areas with some history of ozone nonattainment to determine whether there was a broad need for further emission reductions. Based on all of the evidence presented, we determined that there is a significant risk that an appreciable number of the 45 areas will violate the 1-hour ozone standard between 2007 and 2030. *Id.* at 5015. We made no determination that any area would violate the ozone standard during that time.

We divided the areas into three sets of areas, based on time of attainment demonstration under the Act and recent history regarding exceedances. Cincinnati was in the third group, where available ozone modeling and other information was "less clear regarding the need for additional reductions." In particular, these areas did not have recent exceedances, but did have recent data indicating levels within 10 percent of the ozone NAAQS. *Id.* at 5015–16.

With regard to Cincinnati specifically, EPA stated in our RIA for the diesel rule:

The Agency recently redesignated Cincinnati-Hamilton, OH–KY–IN to attainment on June 19, 2000. This determination is based on four years of clean air quality monitoring data from 1996 to 1999 (1999 data was not considered in the Tier 2 air quality analysis or the proposal for this

<sup>2</sup> As we noted in our previous approval for this nonattainment area, with respect to ozone modeling performed for the tier 2 rule "we used a regional ozone modeling system to predict ozone in many cities, as part of an interpretative process to characterize the risk of nonattainment in a large and geographically broad number of areas. While ozone predictions and the characterization of the risk of nonattainment in individual areas was a step toward reaching a conclusion about risks across the group of areas, that characterization was not an Agency finding of violations for any specific areas." 65 FR 37882.

rulemaking), and a downward emissions trend. In today's action, Cincinnati-Hamilton is considered to have some risk of registering exceedances of the 1-hour ozone standard during the time period when the HD vehicle standards would take effect. This determination is based on air quality monitoring analysis and 1999 data with concentrations within 10 percent of the standard. Given these circumstances, the risk of future exceedances occurring in the Cincinnati-Hamilton area is most prevalent in the time period beyond the end date of Cincinnati's proposed 10-year maintenance plan (i.e., after 2010). As discussed in more detail in the relevant portions of the response to comment document for the Cincinnati-Hamilton attainment determination, any emissions and ozone modeling system used to predict future ozone involves approximations and uncertainties, and are best treated as indicators of risk rather than absolute forecasts. Thus a determination made in this rule that there is some risk of future exceedances during the relevant time period is not inconsistent with EPA approval of Cincinnati's redesignation to attainment, and its approval of Cincinnati's 10-year maintenance plan (citing to Technical Memorandum to EPA Air Docket A-99-06, April 20, 2000, Cincinnati Redesignation in Attainment and Approval of 10-Year Maintenance Plan). Diesel Rule RIA at II-15.

As this information from the diesel rule shows, EPA believes that the modeling performed for the diesel rule was only one factor, and not necessarily the most important factor, in determining whether, and to what extent, Cincinnati was at risk of nonattainment. It is therefore not inconsistent with EPA's action in today's final rule.

Regarding the commentator's question on the prevalence of risk for future exceedances, as EPA's model used in the diesel rule broadly predicts a decrease in vehicle-based emissions until 2007, a relative leveling off between 2007 and 2020, and an increase after 2020, it presumes that without further reductions, emissions and resulting ozone concentrations would increase in later years compared to the years 2010 or 2012. Diesel Rule RIA at II-12 to 13.

*Comment 7:* A commentator contends that EPA has not proposed to find compliance with the other prerequisites for redesignation in section 107(d)(3)(E). It is not enough that EPA found compliance with these requirements in its July 2000 redesignation rulemaking. EPA itself has taken the position that redesignation is precluded if the area violates the NAAQS anytime prior to final action on a proposed redesignation. *Kentucky v. EPA*, No. 96-4274 (6th Cir. Sept. 2, 1998). Under the statute, EPA must make a determination that all of the statutory prerequisites are

met at the time of final action on a proposed redesignation.

*Response 7:* EPA is not re-creating or repropounding a redesignation *ab initio*. EPA is simply reinstating on remand from the Court a rulemaking that the Court has upheld in all respects. In this rulemaking, EPA found, and the Court agreed, that the Commonwealth of Kentucky had met all the requirements for redesignation at the time of redesignation. In a separate and discrete rulemaking action accompanying the redesignation action, EPA found that the area had attained the standard, and issued a formal determination that the area had attained the one-hour ozone standard. This determination of attainment, which continues in effect to this date, has never been withdrawn or even challenged. EPA also approved, and this Court upheld, maintenance plans for both portions of the area, which plans continue in effect to this date. Under these circumstances, reinstatement of the rulemaking is the proper procedure on remand. All other requirements that EPA had previously found to satisfy the redesignation criteria also remain in effect. EPA is not required to make new findings to support EPA actions that have already been taken with respect to Kentucky and which the Court has upheld after judicial review.

*Comment 8:* Even if EPA could redesignate a portion of the nonattainment area, it has no authority to make that redesignation retroactive. Section 175A(c) expressly provides that the nonattainment area requirements continue to apply "[u]ntil" the area is redesignated to attainment and a maintenance plan is approved. Here, where the *Wall* court vacated the prior redesignation, that redesignation is a nullity. Any subsequent redesignation can be prospective only.

*Response 8:* EPA is not engaging in retroactive rulemaking. It is merely reinstating a rulemaking that the Sixth Circuit did not invalidate. While the Sixth Circuit did vacate the redesignation, it did so only because of a defect—the lack of implemented RACT rules—that applies solely to that portion of the Cincinnati ozone nonattainment area that lies within the State of Ohio. The court found no such defects in the portions of the area situated within Kentucky. Moreover, the Clean Air Act specifically provides that EPA may redesignate a portion of an area, such as the portion of the Cincinnati area that lies within Kentucky, when that portion qualifies for redesignation. 42 U.S.C. 7407(d)(3). Because the statute's authority extends to partial redesignations, because EPA

previously found that the area (including the portion within Kentucky) qualifies for redesignation, and because the court did not find any defects in Kentucky's showing that it was entitled to redesignation, EPA does not believe that it is engaged in retroactive rulemaking in reinstating the redesignation of the Cincinnati ozone nonattainment area only insofar as it applies to the Kentucky portion.

*Comment 9:* Sierra Club asks for a public hearing on the proposal. They question whether EPA can lawfully finalize its proposal without a hearing, when no public hearing was held at the state level. Section 7410(a)(1),(2).

*Response 9:* Since EPA is merely reinstating its action after all state proceedings, Federal notice and comment requirements, and judicial review have taken place, it does not see any legal or policy reason to hold another hearing on requirements that have already been determined at all three levels to have been met.

*Comment 10:* EPA itself has taken the position that it cannot redesignate a portion of the Cincinnati area to attainment unless the requirements of section 107(d)(3)(E) have been met throughout the entire nonattainment area. In 1996 the Agency expressly rejected an argument that the Kentucky portion of the nonattainment area should be redesignated to attainment where the only violations of the standard being recorded were at monitors in the Ohio portion. EPA stated unequivocally that "a request to redesignate a portion of an area to attainment may not be approved if the entire area does not meet the redesignation requirements." 61 FR 50718, 50719

*Response 10:* When EPA in its prior rulemaking disapproved the redesignation request for the Cincinnati area, it was because the area was not attaining the standard. EPA has consistently required an ozone nonattainment area with a single airshed to attain the standard as a whole in order to be redesignated. The quoted statement was made in the context of that requirement. But EPA has also consistently allowed a portion of a multi-state area, where the entire area is attaining the standard, to be redesignated, provided the state with authority over that portion has met all the control regime requirements for that portion. Prior rulemakings applying this interpretation include:

CT portion of the CT-northern NJ-NY CMSA to attainment for carbon monoxide. 65 FR 12005-12015 (March 10, 1999) (Direct final rulemaking)

Huntington, WVA portion of Huntington-Ashland KY ozone nonattainment area. 59 FR 65719 (December 21, 1994)

Particulate matter redesignation of Ohio portion of the Steubenville area. 65 FR 77308 (December 11, 2000).

*Comment 11:* A commentator challenges the public policy and scientific basis for treating the Kentucky portion of the Cincinnati-Northern Kentucky area as a single airshed. EPA's attempt to bifurcate the Ohio and Kentucky portions of the area lacks any rational basis and does not comport with research on transport in the Ohio River Valley. EPA's action is an unwise departure from treating the area as a single airshed.

*Response 11:* EPA is not treating the Kentucky portion of Cincinnati as a separate airshed. To the contrary, EPA has determined that the entire Cincinnati area is attaining the one-hour ozone standard, and this is a *sine qua non* for redesignation. Moreover, the maintenance plans for both portions of the area have been approved and EPA's approvals upheld by the Sixth Circuit. EPA's action is also in keeping with its long-standing policy, once a multi-state area has attained the standard, to evaluate separately the control regime requirements for each state's portion of the area. See rulemakings listed above and response to Comment 10. EPA believes that both the law and public policy support its position that once one portion of the area has met all the requirements for redesignation, EPA should not hold that portion's redesignation hostage until a separate state fulfills the control regime requirements for its portion.

*Comment 12:* The area is not in compliance with the proposed eight-hour ozone standard. In May, 2001, the three Northern Kentucky counties at issue received a grade of F for their air quality, based on the number of days from 1997 to 1999 with ozone readings greater than .085 ppm. These data do not support the conclusion that the air quality in Northern Kentucky is improving.

*Response 12:* The area is being redesignated to attainment for the one-hour ozone standard, and therefore its status with regard to the 8-hour ozone standard is not relevant to this proceeding. EPA has determined that the area has met the one-hour ozone standard and that finding has not been challenged. The Cincinnati area has been in continuous attainment for the one-hour standard since 1998. Maintenance plans designed to maintain the one-hour ozone standard for both

the Kentucky and Ohio portions have been approved by EPA, and those approvals have been upheld by the Sixth Circuit.

*Comment 13:* To justify redesignation, changes must be due to permanent and enforceable reductions in emissions. Kentucky's treatment of minor and synthetic minor sources for purposes of prevention of significant deterioration (PSD) and new source review means that there is no limit on these types of changes while the area is designated attainment.

*Response 13:* EPA is not proposing a new redesignation, but rather reinstating the redesignation of the Kentucky portion of the Cincinnati nonattainment area, based on the Sixth Circuit having upheld all of EPA's actions with respect to that redesignation. EPA's initial redesignation to attainment contained a determination that attainment was due to permanent and enforceable reductions in emissions. Kentucky's treatment of minor and synthetic minor sources for purposes of PSD and new source review is consistent with the PSD requirements for ozone areas. The Court upheld EPA's approval of the area's maintenance demonstration which was premised on PSD being in place.

*Comment 14:* Inadequate staffing at Kentucky's Department of Air Quality means that changes are not permanently enforceable.

*Response 14:* EPA does not agree with the commentator that the Kentucky's Department of Air Quality has inadequate staffing. EPA has already determined that the changes in emissions and subsequent ambient air quality improvements are due to permanent and enforceable measures. The Sixth Circuit did uphold EPA's previous determination. The Court also upheld EPA's approval of Kentucky's and Ohio's resource and enforcement commitments. *Wall v. EPA*. 265 F.3d 438.

#### IV. Final Action

The EPA is reinstating the attainment redesignation of the one-hour ozone NAAQS for the Kentucky portion of the Cincinnati-Hamilton area.

#### V. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May

22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection

burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. 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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 30, 2002. 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).)

#### List of Subjects in 40 CFR Part 81

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

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

Dated: July 19, 2002.

#### A. Stanley Meiburg,

*Acting Regional, Administrator, Region 4.*

[FR Doc. 02-19324 Filed 7-30-02; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

[OPP-2002-0155; FRL-7191-4]

#### Acephate, Amitraz, Carbaryl, Chlorpyrifos, Cryolite, et al.; Tolerance Revocations

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

**ACTION:** Final rule.

**SUMMARY:** This document revokes certain tolerances for residues of the

pesticides acephate, amitraz, carbaryl, chlorpyrifos, cryolite, disulfoton, ethalfluralin, ethion, ethoprop, fenthion, fluralin, methamidophos, metribuzin, oxamyl, phorate, phosalone, phosmet, pirimiphos-methyl, profenofos, propiconazole, tetrachlorvinphos, thiram, and tribufos because these specific tolerances are either no longer needed or are associated with food uses that are no longer registered in the United States. The regulatory actions in this document are part of the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996. By law, EPA is required by August 2002 to reassess 66% of the tolerances in existence on August 2, 1996, or about 6,400 tolerances. The regulatory actions in this document pertain to the revocation of 140 tolerances. Because ten tolerances were previously reassessed, 130 tolerances would be counted as reassessed. Also, EPA is announcing that six goat and sheep tolerances at 0 ppm for amitraz are considered to be reassessed. Therefore, a total of 136 tolerance reassessments would be counted among tolerance/exemption reassessments made toward the August, 2002 review deadline.

**DATES:** This regulation is effective October 29, 2002; however, certain regulatory actions will not occur until the date specified in the regulatory text. Objections and requests for hearings, identified by docket ID number OPP-2002-0155, must be received by EPA on or before September 30, 2002.

**ADDRESSES:** Written objections and hearing requests may be submitted by mail, in person, or by courier. Please follow the detailed instructions for each method as provided in Unit IV. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, your objections and hearing requests must identify docket ID number OPP-2002-0155 in the subject line on the first page of your response.

**FOR FURTHER INFORMATION CONTACT:** By mail: Joseph Nevola, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308-8037; e-mail address: nevola.joseph@epa.gov.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### A. Does this Action Apply to Me?

You may be affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically.* You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at <http://www.epa.gov/>. To access this document, on the Home Page select "Laws and Regulations," "Regulations and Proposed Rules," and then look up the entry for this document under the "**Federal Register—Environmental Documents**." You can also go directly to the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>. A frequently updated electronic version of 40 CFR part 180 is available at [http://www.access.gpo.gov/nara/cfr/cfrhtml\\_00/Title\\_40/40cfr180\\_00.html](http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr180_00.html), a beta site currently under development.

2. *In person.* The Agency has established an official record for this action under docket ID number OPP-2002-0155. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well