



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA-R04-OAR-2022-0789; FRL-10888-03-R4]

Air Quality Designations; KY; Redesignation of the Kentucky Portion of the Louisville, KY-IN 2015 8-Hour Ozone Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is withdrawing its proposed approval of the request to redesignate the Kentucky portion of the Louisville, Kentucky-Indiana, 2015 8-hour ozone nonattainment area (hereinafter referred to as the “Louisville, KY-IN Area” or “Area”) to attainment for the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS or standards). EPA is withdrawing its April 18, 2023, proposed approval and is now proposing to deny Kentucky’s request to redesignate the Kentucky portion of the Area from nonattainment to attainment, based on the Area’s violation of the NAAQS. EPA is taking no action at this time on Kentucky’s maintenance plan, including the regional motor vehicle emission budgets for nitrogen oxides (NO_x) and volatile organic compounds (VOC) for the years of 2019 and 2035, submitted with Kentucky’s redesignation request for the Louisville, KY-IN Area. The redesignation request and maintenance plan state implementation plan (SIP) revision were submitted by the Commonwealth of Kentucky, through the Kentucky Energy and Environment Cabinet (Cabinet), Division of Air Quality (DAQ), on September 6, 2022.

DATES: Comments must be received on or before **[Insert date 30 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2022-0789 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from

Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Sarah LaRocca, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-8994. Ms. Sarah LaRocca can also be reached via electronic mail at larocca.sarah@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On September 6, 2022, Kentucky submitted a request to redesignate the Kentucky portion of the Louisville, KY-IN 2015 8-hour ozone nonattainment area from nonattainment to attainment. Accompanying Kentucky's request for redesignation under Clean Air Act (CAA or Act) section 107(d)(3)(D) was a SIP revision containing a maintenance plan for the Area, as is required by CAA sections 107(d)(3)(E)(iv) and 175A in order for EPA to redesignate an area from nonattainment to attainment. On April 18, 2023, EPA proposed to take the following separate but related actions addressing the September 6, 2022, submittal: (1) to approve Kentucky's plan for maintaining the 2015 ozone NAAQS (maintenance plan), including the associated motor vehicle emissions budgets (budgets) for the Louisville, KY-IN Area, and

incorporate the plan into the SIP, and (2) to redesignate the Kentucky portion of the Area to attainment for the 2015 8-hour ozone NAAQS. EPA also notified the public of the status of EPA's adequacy determination for the budgets for the Area. The Louisville, KY-IN Area is composed of Bullitt, Jefferson, and Oldham Counties in Kentucky, and Clark and Floyd Counties in Indiana. These proposed actions are summarized below and described in greater detail in the notice of proposed rulemaking (NPRM) published on April 18, 2023. *See* 88 FR 23598.

II. Criteria for Redesignation

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA prohibits the redesignation of such an area unless: (1) the EPA Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and (5) the state containing such area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the CAA.¹

¹ EPA provided guidance on redesignations in the General Preamble for the Implementation of title I of the CAA Amendments of 1990 on April 16, 1992 (*see* 57 FR 13498) and supplemented that guidance on April 28, 1992 (*see* 57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

1. "Ozone and Carbon Monoxide Design Value Calculations," Memorandum from Bill Laxton, Director, Technical Support Division, June 18, 1990; 2. "Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992; 3. "Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992; 4. "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereinafter referred to as the "Calcagni Memorandum"); 5. "State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines," Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992; 6. "Technical Support Documents (TSDs) for Redesignation of Ozone and Carbon Monoxide (CO) Nonattainment Areas," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993; 7. "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992," Memorandum from

Regarding the first criterion's requirement that the area "has attained" the relevant NAAQS, since the passage of the 1990 Amendments to the CAA, EPA has consistently read that provision to require continued attainment until EPA's action redesignating the area, and to prohibit redesignation where an area violates the standard during the pendency of the Agency's review of the state's request. *See* Calcagni Memorandum at 5 ("Regions should advise States of the practical planning consequences if EPA disapproves the redesignation request *or if the request is invalidated because of violations recorded during the EPA's review.*") (emphasis added). The Agency's interpretation of that provision is supported by the Act's definition of attainment and nonattainment areas in CAA section 107(d)(1)(A), which defines a nonattainment area as "any area that does not meet" the NAAQS (CAA section 107(d)(1)(A)(i)) and an attainment area as "any area that meets" the NAAQS. The use of the present tense in CAA section 107(d)(1)(A) is consistent with the use of the present perfect tense in CAA section 107(d)(3)(E)(i), which tasks EPA with determining that an area "has attained" the NAAQS, as opposed to attaining at some previous time (e.g., "had attained) with subsequent violations. *See* 62 FR 49154 (September 19, 1997) (laying out statutory analysis supporting EPA's interpretation of CAA section 107(d)(3)(E)(i) in denial of the Birmingham, AL 1-hour ozone redesignation request). EPA has applied this interpretation of the first attainment redesignation criterion in numerous redesignation actions.²

Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993 (hereinafter referred to as the "Shapiro Memorandum"); 8. "Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas," Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993; 9. "Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment," Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994 (hereinafter referred to as the "Nichols Memorandum"); and 10. "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

² *See, e.g.*, 59 FR 22757 (May 3, 1994) (denial of redesignation request for Richmond, VA); 62 FR 49154 (September 19, 1997) (denial of redesignation request for Birmingham, AL); 61 FR 19193 (May 1, 1996) (denial of redesignation request for Pittsburgh-Beaver Valley, PA); 61 FR 50718 (September 27, 1996) (denial of redesignation request for the Kentucky portion of the Cincinnati-Hamilton KY-OH area); 84 FR 16214 (April 18, 2019) (denial of redesignation request for the Wisconsin portion of the Chicago-Naperville, IL-IN-WI area).

Courts have confirmed EPA's interpretation of the first criterion in cases with factually similar circumstances to those present here. In *Southwestern Pennsylvania Growth Alliance v. Browner*, although denying the petitioner's challenge based on their failure to preserve an issue for litigation, the Third Circuit laid out its agreement with EPA's reading of the provisions. *See* 121 F.3d 106 (3d Cir. 1997). Petitioners there argued that EPA was not permitted to consider violations that occurred after the submission of its redesignation request (and in that case, violations that occurred after EPA's 18-month statutory window to act on the state's request, per CAA section 107(d)(3)(D)). *See id.* at 111. The Court, in an opinion authored by then Judge Alito, wrote, "[e]ven if we were to reach the merits of petitioner's argument, we would hold that 42 U.S.C. 7407(d)(3)(D) did not preclude the EPA from considering the summer 1995 exceedance data. The language of the provision that enumerates the redesignation criteria tends to support this result. Under 42 U.S.C. 7407(d)(3)(E)(i), the EPA Administrator 'may not' promulgate a redesignation of a nonattainment area unless, among other things, 'the Administrator determines that the area has attained the [NAAQS]. The use of the term 'has attained' instead of 'attained' may be interpreted as suggesting that the attainment must continue until the date of the redesignation.'" *Id.* at 113. The Court further stated that it did not agree with petitioners that the mandatory window established by the Act for EPA to approve or deny a state's redesignation request "conclusively indicate[s] that Congress intended to prohibit the EPA from taking action after the expiration of the statutorily specified time period." *Id.* And finally, the Court signaled its agreement with the Agency that continued fulfillment of the first redesignation criterion is paramount to approving a state's request: "Since 42 U.S.C. 7407(d)(3)(E)(i) prohibits the EPA from redesignating an area that is not in attainment of the NAAQS, the EPA correctly denied Pennsylvania's request for redesignation An area's failure to attain a NAAQS is the most fundamental criterion in its designation as a nonattainment area." *Id.* at 118 n.5.

Similarly, the Sixth Circuit has interpreted the first redesignation criterion consistent with the Third Circuit and with EPA. In *Commonwealth of Kentucky v. EPA*, Kentucky argued that EPA should not have denied its request to redesignate its portion of the Cincinnati-Northern Kentucky OH-KY nonattainment area to attainment based on a “single violation in July 1995” when the area had measured clean data in “the period specified in the redesignation request, i.e., 1992-1994.” No. 96-4274, 1998 U.S. App. LEXIS 21686, at 5–6 (6th Cir. Sept. 2, 1998). Similar to the Petitioner’s arguments in the Third Circuit case discussed above, Kentucky asserted that “Congress could have been more clear if it had used the simple present tense (‘attains’) or the progressive present tense (‘is attaining’) to explicitly require continuing compliance.” *Id.* at 9. But the Court, agreeing with EPA, held that “Congress also could have been more clear if it had used the simple past tense (‘attained’) to require a noncontinuing compliance. Congress declined both of these options and simply used the present perfect tense (‘has attained’). According to standard usage, the present perfect tense denotes past action with an abiding effect or continuing relevance Thus, the phrase ‘has attained,’ as the Third Circuit concluded, requires ‘that the attainment must continue until the date of redesignation.’” *Id.* (citation to Third Circuit decision omitted). The Sixth Circuit bolstered its reading of the first redesignation criterion by pointing to the Act’s requirements regarding maintenance. *Id.* at 10.

Significantly, in both cases where parties challenged EPA’s interpretation that the first redesignation criterion requires continued attainment of the NAAQS through the Agency’s final action redesignating the area, the reviewing courts, “after applying all relevant interpretive tools, conclude[d]” that EPA’s reading was “best.” See *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). The Third Circuit and the Sixth Circuit opinions interpreting CAA section 107(d)(3)(E)(i) only cited *Chevron* deference to the Agency as a backstop to their own examination of the text of the provision and conclusion about the best reading of the Act’s first redesignation criterion. See *SPGA v. Browner*, 121 F.3d at 113; *Kentucky v. EPA*, 1998 U.S. App. LEXIS 21686, at 11. Those courts’ findings that the CAA redesignation provision

“requires that the attainment must continue until the date of redesignation” was made in the course of those courts “do[ing] their ordinary job of interpreting statutes,” “based on the traditional tools of statutory construction.” *See Loper Bright*, 144 S. Ct. at 2267–68.

III. Kentucky’s Redesignation Request and SIP Revision

On April 18, 2023, EPA proposed to approve Kentucky’s September 6, 2022, redesignation request and its maintenance plan SIP revision based, in part, on complete, quality-assured, and certified 2019–2021 design values for each monitor in the Louisville, KY-IN Area.³ These design values are equal to or less than the level of the 2015 8-hour ozone NAAQS and were the most current design values at the time of proposal. *See* 88 FR 23598. Consistent with its longstanding interpretation of CAA section 107(d)(3)(E)(i), EPA stated in the NPRM that the Agency would not take final action to approve the redesignation of the Kentucky portion of the Louisville, KY-IN Area if the three-year design value for the Area exceeded the NAAQS prior to EPA’s finalization of the redesignation. *See* 88 FR at 23601. Although preliminary 2022 ozone monitoring data at the time of proposal indicated an attaining 2022 design value for the Louisville, KY-IN Area,⁴ the complete, quality-assured, and certified 2021–2023 design value of 0.072 parts per million (ppm) exceeds the NAAQS as discussed below.

IV. 2023 Violation of the NAAQS for Ozone in the Louisville, KY-IN Area

For ozone, an area may be considered to be attaining the 2015 8-hour ozone NAAQS if it meets that standard, as determined in accordance with 40 CFR 50.19 and Appendix U of 40 CFR part 50, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain the 2015 8-hour ozone NAAQS, the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area must not exceed 0.070 ppm. Based on the data handling and reporting convention

³ EPA’s full rationale for its proposed approval actions was provided in the NPRM.

⁴ On February 21, 2022, Indiana submitted a separate redesignation request and maintenance plan for its portion of the Louisville, KY-IN Area. On July 5, 2022, EPA approved the redesignation request and maintenance plan for the Indiana portion of the Louisville, KY-IN Area. *See* 87 FR 39750.

described in 40 CFR part 50, Appendix U, the 2015 8-hour ozone NAAQS are attained if the design value is 0.070 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58 and recorded in EPA's Air Quality System (AQS).

EPA reviewed complete, quality-assured, and certified ozone monitoring data from monitoring stations in the Louisville, KY-IN Area for the 2015 8-hour ozone NAAQS for 2021 through 2023, and the highest 3-year design value⁵ for 2021–2023 for the Louisville, KY-IN Area is 0.072 ppm, which exceeds the standard of 0.070 ppm.⁶ Further, preliminary 2024 monitoring data indicates a 2022–2024 design value of 0.075 ppm for the Area. Therefore, the Louisville, KY-IN Area does not meet the first statutory criterion for redesignation to attainment of the 2015 8-hour ozone NAAQS found in section 107(d)(3)(E)(i) of the CAA.

V. Public Comments Received on EPA's April 18, 2023, Proposal

EPA received three sets of adverse comments on the April 18, 2023, NPRM. Commenters asserted that the Louisville, KY-IN Area did not attain the 2015 ozone NAAQS with 2020–2022 data, expressed concern regarding ambient air ozone exceedances, and stated that the reduction in emissions in the Area were not permanent and enforceable. As EPA is withdrawing its proposed approval of the redesignation request, the comments on the earlier proposal are moot.

VI. Proposed Action

EPA is withdrawing its April 18, 2023, proposed approval of Kentucky's request to redesignate the Kentucky portion of the Louisville, KY-IN 2015 8-hour ozone nonattainment area to attainment for the 2015 8-hour ozone NAAQS. For the reasons provided in this notice, EPA is proposing to deny Kentucky's September 6, 2022, redesignation request on the basis that the violations of the NAAQS experienced in the Area during the pendency of EPA's review of

⁵ The design value for an area is the highest 3-year average of the annual fourth-highest daily maximum 8-hour ozone concentration recorded at any monitor in the area.

⁶ Final air quality design values for all criteria pollutants, including ozone, are available at <https://www.epa.gov/air-trends/air-quality-design-values>. These design values are calculated in accordance with 40 CFR part 50.

the request demonstrate that the Area has not met the first redesignation criterion. EPA is not proposing to take action on the Commonwealth's accompanying submissions to fulfill the other redesignation criteria, given its proposed denial of the request based on air quality data.

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This proposed action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and is therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This proposed action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this proposed action will not have a significant economic impact on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This proposed action will not impose any requirements on small entities because it merely proposes to deny a redesignation request as not meeting Federal requirements.

D. Unfunded Mandates Reform Act (UMRA)

This proposed action does not contain an unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The proposed action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This proposed action does not have Federalism implications. It will 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.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed action does not have tribal implications, as specified in Executive Order 13175, because the Area's SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this proposed action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order. Therefore, this proposed action is not subject to Executive Order 13045 because it merely proposes to deny a redesignation request as not meeting Federal requirements. Furthermore, EPA's Policy on Children's Health does not apply to this proposed action.

H. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

This proposed action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This proposed action does not involve technical standards.

J. Executive Order 12898 and Executive Order 14096: Federal Actions to Address

*Environmental Justice in Minority Populations and Low-Income Populations and
Revitalizing Our Nation's Commitment to Environmental Justice for All*

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on communities with EJ concerns to the greatest extent practicable and permitted by law. Executive Order 14096 (Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 FR 25251, April 26, 2023) builds on and supplements EO 12898 and defines EJ as among other things, the “just treatment and meaningful involvement of all people regardless of income, race, color, national origin, or Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment.”

Neither the Cabinet nor the Louisville Metro Air Pollution Control District evaluated EJ considerations as part of the Cabinet's redesignation request; the CAA and applicable implementing regulations neither prohibit nor require an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this proposed action. Consideration of EJ is not required as part of this proposed action, and there is no information in the record upon which this decision is based that is inconsistent with the stated goal of Executive Order 12898/14096 of achieving EJ for communities with EJ concerns.

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: December 23, 2024.

Jeanne Gettle,
Acting Regional Administrator,
Region 4.