NATURAL RESOURCES DEFENSE COUNCIL

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RE: Comments on U.S. EPA's Proposed Redesignation of the Columbus Area to Attainment for Ozone, Docket ID No. EPA-R05-OAR-2009-0220

Dear Mr. Mooney,

On behalf of its more than 12,000 members in Ohio, the Natural Resources Defense Council ("NRDC") hereby comments on U.S. EPA's proposal to redesignate the Columbus area in Ohio as attainment for the 1997 ozone National Ambient Air Quality Standard ("NAAQS"), 74 Fed. Reg. 27,973 (June 12, 2009). Ohio EPA's redesignation request fails to demonstrate compliance with the ozone NAAQS, does not ensure that compliance would be maintained in the future or provide for adequate contingency measures, and is improper due to the vacatur of the Subpart I non-attainment area classification. As such, U.S. EPA cannot redesignate the Columbus area on this record.

I. Legal Standards

In order for an area to be redesignated from non-attainment to attainment, the U.S. EPA must find that five requirements are have been satisfied:

1. the area has attained the NAAQS;

2. the applicable implementation plan for the area has been fully approved under 42 U.S.C. § 7410(k);

3. the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan,

federal air pollution control regulations, and other permanent and enforceable reductions;

4. a maintenance plan for the area is fully approved as meeting the requirements of 42 U.S.C. § 7505a; and

5. the state has met all requirements applicable to the area under 42 U.S.C. § 7410 and part D of subchapter I of the Clean Air Act.

42 U.S.C. § 7407(d)(3)(E); *Wall v. U.S. EPA*, 265 F.3d 426, 430 (6th Cir. 2001). At least the first, fourth, and fifth requirements have not been satisfied here.

II. The Columbus Area Has Not Achieved the Ozone NAAQS

In order for a non-attainment area to be re-designated as in attainment, the area must actually achieve compliance with the NAAQS for the pollutant in question. The 1997 ozone NAAQS of which Ohio EPA is seeking to demonstrate attainment is 0.08ppm. 40 C.F.R. § 50.10. The Columbus area has not attained that standard because, as Ohio EPA's own application shows, the Franklin County-New Albany monitor has a fourth highest three year average of 0.084ppm, which is higher than the 0.08ppm standard. (Ohio EPA Request at 9). U.S. EPA contends that the relevant standard is complied with because the area has achieved average 8-hour ozone concentrations less than .085ppm. 74 Fed. Reg. at 27,976. While 40 C.F.R. pt. 50, app. I, purports to authorize such a rounding convention, its use here improperly inflates the 1997 standard from its actual value of .08ppm 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. Such rounding approach has been rejected by U.S. EPA's own scientific advisory committee in developing the 2008 ozone NAAQS as permitting ozone concentrations that exceed the NAAQS to the detriment of the public health. It would be arbitrary and capricious for U.S. EPA to use it here to find an area to be in attainment when, in reality, it is not.

Redesignation is also foreclosed because the evidence is clear that the Columbus area is out of attainment of the 2008 ozone standard, which is currently set at 0.075ppm.[1] 40 C.F.R.

[1] The adequacy of the 2008 ozone NAAQS has been challenged in the U.S. Court of Appeals for the D.C. Circuit, *State of Mississippi v. U.S. EPA*, Case No. 08-1200 and consolidated cases (Ozone NAAQS Litigation), because, as U.S. EPA's own scientific advisory committee ("CASAC") unanimously concluded, the "overwhelming scientific evidence" supports substantially reducing the ozone standard to .060 - .070 ppm. 73 Fed. Reg. 16,436-01, 16,449. Such a lower ozone NAAQS has been found necessary not only by CASAC, but also by U.S. EPA staff scientists, state governments, national health and environmental organizations, the WHO, and numerous medical societies including the American Medical Association, the American Academy of Pediatrics, the International Society for Environmental Epidemiology and the American Thoracic Society. *See* Comments submitted by Caroline Baier-Anderson et al., American Lung Association, Environmental Defense, & Sierra Club, Document ID EPA-HQ-OAR-2005-0172-4261.1. A standard of .060 ppm would more effectively "protect the public health with an adequate margin of safety," as required by 42 U.S.C. § 7409(b)(1).

U.S. EPA has recently filed an unopposed motion to hold the *State of Mississippi* case in abeyance so that the agency can determine whether it thinks the 0.075ppm ozone standard should be revised. The inadequacy of the 2008 standard and the likelihood that it will be changed further demonstrates that, even if the Columbus area had

§ 50.15. Ohio EPA has recommended that the Columbus area be designated non-attainment under the new 2008 ozone standard. (Letter from Chris Korleski to Lynn Buhl, Mar. 9, 2009, at 2). In addition, the 2006 to 2008 monitoring data provided by Ohio EPA demonstrates that five out of the eight monitors in the area have fourth highest three year averages that exceed the 0.075ppm standard. As such, the Columbus area has not demonstrated compliance with the currently applicable NAAQS and, therefore, cannot be considered in attainment with Clean Air Act ozone standards. Redesignation to attainment under the 1997 standard would suspend RFP requirements and other measures that would enable the Columbus area to make progress toward attainment of the 2008 standard. As a result, redesignation to attainment now would be counterproductive and contrary to the aims of the Clean Air Act.

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. *Id*. at 437. The court rejected the challenge because the other proceeding was not an attainment rulemaking and its data were outdated. *Id*. In this case, however, Ohio *has* made a non-attainment 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 [i.e. redesignation to attainment] 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.*'" *Id.* at 431 (quoting Calcagni Memorandum at 8) (emphasis added). A pending designation of non-attainment is certainly relevant information that forecloses redesignation to attainment at this time.

III. Ohio EPA Has Not Provided an Adequate Maintenance Plan

In order for the U.S. EPA to approve redesignation for the Columbus area, the agency must find that the Ohio EPA has presented a maintenance plan, including contingency measures, that will ensure that the area will remain in compliance with the ozone NAAQS for at least the next 10 years. 42 U.S.C. § 7505a. While Ohio EPA purports to have submitted such a plan, it falls short in at least two areas.

First, 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 the measures" described in the plan," and 40 C.F.R. § 51.280, which requires a "description of the resources available to the State and local agencies . . . and any additional resources needed to carry out the plan" for the next five years. Ohio EPA, however, has simply asserted that it "has the legal authority and necessary resources to actively enforce any violations of its rules or permit provisions." (Ohio EPA Request at 29). The agency has not identified what those resources are, or explained how they are purportedly adequate to ensure enforcement

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achieved compliance with the 1997 ozone standard the area should not be found in attainment for ozone because it is clear that the area exceeds both the existing 2008 ozone NAAQS and the more stringent limit that should be established.

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.

Second, 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). The U.S. EPA interprets that provision as requiring that the State or U.S. EPA need not take any "further rulemaking activities" in order for the contingency measure to be carried out. U.S. EPA, *State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990*, 57 Fed. Reg. 13,498, 13,512 (Apr. 16, 1992); *Greenbaum v. U.S. EPA*, 370 F.3d 527, 541 (6th Cir. 2004). While Ohio EPA has identified a series of possible contingency measures and triggers for possible implementation of those measures, the agency also notes that "adoption of any additional control measures is subject to the necessary administrative and legal process . . . required by Ohio law for rulemaking." (Ohio EPA Request at 31). U.S. EPA must ensure that Ohio EPA can adopt such additional control measures without the need for additional rulemaking before any redesignation for the Columbus area can be made.

IV. The Record Does Not Demonstrate Compliance With the Subpart 2 Provisions Applicable to Ozone Non-Attainment Areas.

In order for a non-attainment area to be redesignated, the state must have adopted in its State Implementation Plan ("SIP") all applicable requirements of part D of subchapter I of the Clean Air Act. 42 U.S.C. § 7407(d)(3)(E)(v). For areas that are out of attainment with the ozone NAAQS, applicable requirements include those found in 42 U.S.C. § 7511a, which requires a detailed reasonable further progress requirement, installation of reasonably available control technologies ("RACT"), implementation of gasoline vapor recovery and motor vehicle inspection and maintenance programs, and an emission offset requirement. Such requirements must be applied to volatile organic compounds ("VOCs") and nitrogen oxide ("NOx") where, as here, there is no NOx disbenefit. 42 U.S.C. § 7511a(b), (f). There has been no demonstration here, however, that Ohio's SIP includes such requirements for the Columbus area.

U.S. EPA proposes that it can approve Ohio EPA's request to redesignate the Columbus area because that area is classified as a Subpart 1 non-attainment area, to which only the less stringent requirements of 42 U.S.C. § 7502 apply, rather than a Subpart 2 area to which 42 U.S.C. § 7511a(b),(f) applies. 74 Fed. Reg. at 27,975. This argument fails, however, because the Subpart 1 classification has been vacated by the D.C. Circuit. *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), *reh'g denied*, 489 F.3d 1245 (2007) (clarifying the earlier holding). In the wake of the *SCAQMD* vacatur, U.S. EPA is proposing to redesignate Subpart 1 non-attainment areas as moderate Subpart 2 non-attainment areas, but this proposed rule has not been finalized. 74 Fed. Reg. 2936. Because the current classification has been vacated, however, U.S. EPA cannot make use of that classification's requirements to avoid the stringent VOC and NOx controls that are required before the Columbus area can be redesignated to attainment.

U.S. EPA contends that it can redesignate Columbus to attainment under Subpart 1 now, and then classify the area later as moderate non-attainment under Subpart 2 when the proposed

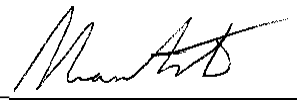
rule is finalized. 74 Fed. Reg. at 27975. The agency attempts to justify this proposal by saying that its policy is to evaluate requests for redesignation according to requirements in place at the time the request is submitted, rather than to retroactively impose requirements on an area. *Id.* U.S. EPA's argument, however, ignores the fact that judicial decisions "must be given full retroactive effect." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993); *see also Hatchett v. United States*, 330 F.3d 875, 882-83 (6th Cir. 2003); *Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1124 & n.4 (5th Cir. 1997) (listing cases applying *Harper* to non-Supreme Court decisions). The *SCAQMD* court's decision to "vacate" the unlawful Subpart 1 classifications demonstrates that the decision to exempt such non-attainment areas from Subpart 2 requirements was never valid or effective and "restores the status quo before the invalid rule took effect. . . ." *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (citing *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987)). As such, U.S. EPA can allow redesignation of the Columbus area only under the applicable Subpart 2 requirements, not the less stringent and vacated Subpart I classification.

V. Conclusion

For the foregoing reasons, the U.S. EPA must reject Ohio EPA's proposal to redesignate the Columbus area as attainment for ozone.

Thank you for the opportunity to comment on this issue and for your consideration of our comments.

Respectfully Submitted,



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