Appendix D

Federal Register Notice: Baton Rouge 1-Hour Ozone Nonattainment Area; Determination of Attainment of the 1-Hour Ozone Standard

has been named in the information request provided to the institution by FinCEN with any questions relating to the scope or terms of the request. Except as otherwise provided in the information request, a financial institution shall only be required to search its records for:

* * * * *

(iv) * * *

(B)(*1*) A financial institution shall not disclose to any person, other than FinCEN or the requesting Treasury component, the law enforcement agency on whose behalf FinCEN is requesting information, or U.S. law enforcement attaché in the case of a request by a foreign law enforcement agency, which has been named in the information request, the fact that FinCEN has requested or has obtained information under this section, except to the extent necessary to comply with such an information request.

(*2*) Notwithstanding paragraph (b)(3)(iv)(B)(*1*) of this section, a financial institution authorized to share information under § 103.110 may share information concerning an individual, entity, or organization named in a request from FinCEN in accordance with the requirements of such section. However, such sharing shall not disclose the fact that FinCEN has requested information concerning such individual, entity, or organization.

(C) Each financial institution shall maintain adequate procedures to protect the security and confidentiality of requests from FinCEN for information under this section. The requirements of this paragraph (b)(3)(iv)(C) shall be deemed satisfied to the extent that a financial institution applies to such information procedures that the institution has established to satisfy the requirements of section 501 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801), and applicable regulations issued thereunder, with regard to the protection of its customers' nonpublic personal information.

* * * * *

(4) *Relation to the Right to Financial Privacy Act and the Gramm-Leach-Bliley Act.* The information that a financial institution is required to report pursuant to paragraph (b)(3)(ii) of this section is information required to be reported in accordance with a federal statute or rule promulgated thereunder, for purposes of subsection 3413(d) of the Right to Financial Privacy Act (12 U.S.C. 3413(d)) and subsection 502(e)(8) of the Gramm-Leach-Bliley Act (15 U.S.C. 6802(e)(8)).

(5) *No effect on law enforcement or regulatory investigations.* Nothing in this subpart affects the authority of a Federal, State or local law enforcement agency or officer, or FinCEN or another component of the Department of the Treasury, to obtain information directly from a financial institution.

Dated: February 4, 2010.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2010–2928 Filed 2–9–10; 8:45 am]

BILLING CODE 4810–02–P

POSTAL SERVICE

39 CFR Part 965

Rules of Practice in Proceedings Relative to Mail Disputes

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This document revises the rules of practice of the Postal Service's Office of the Judicial Officer to allow qualified persons licensed to practice law to be designated by the Judicial Officer as presiding officers in proceedings relating to mail disputes.

DATES: *Effective Date:* March 1, 2010.

ADDRESSES: Judicial Officer Department, United States Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

FOR FURTHER INFORMATION CONTACT: Administrative Judge Gary E. Shapiro, (703) 812–1910.

SUPPLEMENTARY INFORMATION:

A. Executive Summary

39 CFR Part 965 contains the rules governing proceedings involving Mail Disputes. Only one change is made. Paragraph (a) of section 965.4 of the rules has defined the "presiding officer" as an Administrative Law Judge or an Administrative Judge qualified in accordance with law. The revised rule expands the definition of presiding officer to include any other qualified person licensed to practice law designated by the Judicial Officer to preside over a proceeding conducted pursuant to this part.

B. Summary of Change

Expanding the definition of presiding officer in Part 965 is intended to permit qualified staff counsel employed in the Office of the Judicial Officer to be designated as the initial presiding official authorized to conduct proceedings and issue Initial Decisions in the resolution of mail disputes. Administrative Law Judges and Administrative Judges qualified in accordance with law will continue to be designated as presiding officers in such matters. The appellate procedure is unchanged.

C. Effective Dates and Applicability

These revised rules will govern proceedings under Part 965 docketed on or after March 1, 2010.

List of Subjects in 39 CFR Part 965

Administrative practice and procedure, Mail disputes, Postal Service.

■ For the reasons stated in the preamble, the Postal Service amends 39 CFR Part 965 as set forth below:

■ 1. The authority citation for part 965 continues to read as follows:

Authority: 39 U.S.C. 204, 401.

■ 2. In § 965.4, paragraph (a) is revised to read as follows:

§ 965.4 Presiding officers.

(a) The presiding officer shall be an Administrative Law Judge, an Administrative Judge qualified in accordance with law, or any other qualified person licensed to practice law designated by the Judicial Officer to preside over a proceeding conducted pursuant to this part. The Judicial Officer assigns cases under this part. Judicial Officer includes Associate Judicial Officer upon delegation thereto. The Judicial Officer may, on his or her own initiative or for good cause found, preside at the reception of evidence.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 2010–2844 Filed 2–9–10; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2009–0014; FRL–9113–5]

Approval and Promulgation of Air Quality Implementation Plans; Louisiana; Baton Rouge 1-Hour Ozone Nonattainment Area; Determination of Attainment of the 1-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA has determined that the Baton Rouge (BR) 1-hour ozone nonattainment area has attained the 1-hour ozone National Ambient Air Quality Standard (NAAQS). This

determination is based upon three years of complete, quality-assured and certified ambient air monitoring data that show the area has monitored attainment of the 1-hour ozone NAAQS for the 2006–2008 monitoring period. Preliminary data for 2009 also indicate the area continues to attain the 1-hour ozone NAAQS.

The requirements for this area to submit an attainment demonstration, a reasonable further progress plan, contingency measures, and other planning State Implementation Plan (SIP) requirements related to attainment of the 1-hour ozone NAAQS, are suspended for so long as the area continues to attain the 1-hour ozone NAAQS.

DATES: This final rule is effective March 12, 2010.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2009–0014. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Planning Section (6PDL), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays.

Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Rennie, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7367, fax (214) 665–7263, e-mail address *rennie.sandra@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," and "our" means EPA. This supplementary information section is arranged as follows:

I. What Action Is EPA Taking?
II. What Is the Effect of This Action?
III. Responses to Comments
IV. Final Action
V. Statutory and Executive Order Reviews

I. What Action Is EPA Taking?

We are determining that the BR 1-hour ozone nonattainment area is currently attaining the 1-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based upon complete, quality-assured and certified ambient air monitoring data that show the area has monitored attainment of the 1-hour ozone NAAQS for the 2006–2008 monitoring period. Preliminary data for 2009 also indicate that the area continues to attain the 1-hour ozone NAAQS and there were no monitored exceedances of the 1-hour standard at any monitor for this time period. Based on this determination, EPA is also determining that the requirements for this area to submit a severe attainment demonstration, a severe reasonable further progress plan (RFP), applicable contingency measures plans, and other planning State Implementation Plan (SIP) requirements related to attainment of the 1-hour ozone NAAQS, are suspended for so long as the area continues to attain the 1-hour ozone NAAQS.

The rationale for our action is explained in the Notice of Proposed Rulemaking (NPR) published on March 26, 2009 (74 FR 13166) and elaborated upon below in today's rulemaking. We received comments on the proposal which are addressed in this action.

II. What Is the Effect of This Action?

Pursuant to our determination of attainment and in accordance with the interpretation of the Clean Air Act (CAA) set forth in our Clean Data Policy,[1] the effect of the determination is that the following requirements to submit SIP measures under the 1-hour anti-backsliding provisions, addressed in 40 CFR 51.905 and in the Court's ruling in the *South Coast* case (*See South Coast Air Quality Management District* v. *EPA,* 472 F.3d 882 (DC Cir. 2006), are suspended for so long as the area continues to attain the 1-hour standard: a severe area attainment demonstration with its RACM demonstration and other associated elements; the severe RFP plan requirements; and serious and severe area contingency measures under sections 172(c)(9) and 182(c)(9).

If EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register**, that the BR area has violated the 1-hour ozone NAAQS, the basis for the suspension of the requirements would no longer exist, and EPA would take action to withdraw the determination and direct the area to address the suspended requirements.

This action is limited to a determination that the BR area has attained the 1-hour ozone NAAQS, and the effect of such a determination on the obligation to submit specified 1-hour anti-backsliding requirements. It does not formally determine whether the area has attained the 8-hour ozone NAAQS. Nor does it address the 1-hour ozone anti-backsliding requirement for section 185 penalty fees or severe nonattainment new source (NNSR) review. In our proposal, we stated that EPA would address separately the status of 1-hour ozone anti-backsliding requirements for section 185 penalty fees, based on the outcome of a future rulemaking in response to the *South Coast* decision. EPA has issued final guidance on 185 fees entitled "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS" (January 5, 2010). However, in today's rulemaking proceedings, EPA has not proposed and is not finalizing any action regarding the status of 1-hour section 185 fees requirements. As appropriate, EPA will undertake a separate action to address the status of 1-hour anti-backsliding requirements for section 185 fees program in the BR area. Regarding severe nonattainment new source review, the requirement may change after the area is redesignated and has an approved maintenance plan. Please note that the Louisiana PSD (Prevention of Significant Deterioration) SIP requirements would apply in the BR ozone area only upon the effective date of an EPA action approving the removal of the NNSR SIP program from the BR ozone SIP.

III. Responses to Comments

EPA received five comment letters in response to the proposed rulemaking. The comment letters are available for review in the docket for this rulemaking. These comment letters were submitted by Tulane University's Environmental Law Clinic on behalf of the Louisiana Environmental Action Network (LEAN) (hereinafter LEAN), Louisiana Chemical Association (LCA),

[1] Our Clean Data Policy is set forth in a May 10, 1995 EPA memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, entitled "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone Ambient Air Quality Standard."

BASF the Chemical Company (BASF), Shell Chemical Company (Shell), and the Baton Rouge Area Chamber (BRAC). LCA, Shell, BRAC and BASF expressed support for EPA's proposal to find BR is attaining the 1-hour standard and for EPA's proposal to suspend certain SIP requirements under EPA's Clean Data Policy. EPA summarizes and responds below to some additional comments submitted by LCA, and to adverse comments received from LEAN.

LCA submitted the following additional comments:

Comment: LCA asserted that the BR area also attained the 1-hour standard during the 2004–2006 time period, and EPA did not take action on the State's request that EPA make a clean data determination. LCA stated in its comments that it reserves the right to request a determination that the area actually attained the standard at an earlier time, contending that this would have potential consequences with respect to anti-backsliding measures that may be required.

Response: The scope of this action is limited to a finding of attainment for the 1-hour ozone standard based on LDEQ's request for such a finding for the time period between 2006–2008, and continuing until the present. A determination of attainment for purposes of the clean data policy is based on the most recent three years of complete, quality-assured monitoring data, and its duration is conditioned on the area remaining in attainment. Any findings related to other historical periods are not relevant to today's rulemaking.

Comment: LCA stated in its comments that it also reserves the right to request a determination that the BR area actually attained the 1-hour ozone standard by the November 15, 2005 deadline.

Response: The scope of this rulemaking is limited to a determination of attainment for the 1-hour ozone standard based on LDEQ's request for such a determination for the time period between 2006–2008, and continuing until the present. In this rulemaking, EPA is not addressing the BR area's attainment status with respect to any other historical time period, or its status as of its 2005 attainment date.

Comment: LCA contended that EPA can rely on a level of 90 ppb averaged on an 8-hour basis for ozone as being an equivalent level of protection to the 1-hour standard in the absence of any effective 1-hour standard. LCA argues that, because the 1-hour standard was legally revoked during the time period at issue (as of November 2005) EPA rationally could look to the 8-hour data for the BR area and conclude that a design value of 90 ppb was equivalent to the revoked 1-hour standard.

Response: LCA's comment addresses issues that are beyond the scope of this rulemaking. EPA has not made a finding that 90 ppb averaged on an 8 hour basis is equivalent to 120 ppb averaged on a 1-hour basis. This action considers only whether the area has attained the 1-hour ozone standard of 120 ppb (or 124 ppb when rounding is considered), based on monitoring data for that standard.

Comment: LCA states that it reserves the right to request that the requirement for LDEQ to adopt additional antibacksliding requirements in the SIP, including but not limited to 185 fees, be suspended by the Clean Data Policy attainment determination. LCA asserts that it understands that EPA is in the process of developing a rulemaking and/or guidance concerning whether achieving 1-hour standard attainment (and/or achieving 8-hour standard attainment) suspends the obligation to impose section 185 fees where such have not yet been required by a state for a severe nonattainment area.

Response: The scope of today's action is limited to an attainment determination for the 1-hour ozone standard that suspends the requirements to submit an attainment demonstration, a severe reasonable further progress plan, and applicable contingency measures plans for that standard for so long as the area remains in attainment of the standard in the future. As we stated in the proposal, and in the section above on the effect of today's rulemaking, EPA will address the section 185 fees anti-backsliding requirements for the 1-hour ozone standard in a separate proceeding or rulemaking.

Comment: LCA states that it believes it is fully consistent with the CAA to suspend the requirement to submit the 185 fees program or an equivalent program when an area is determined to be attaining the 1-hour standard.

Response: As stated above and in the previous response to comment, the scope of this action is limited to suspending the requirements to submit an attainment demonstration, a severe reasonable further progress plan, and applicable contingency measures plans for the 1-hour ozone standard for so long as the area remains in attainment of the standard in the future. EPA will address BR's 1-hour anti-backsliding requirements for CAA section 185 fees in a separate rulemaking action.

LEAN made the following comments:

Comment: LEAN asserts generally that EPA cannot suspend certain 1-hour ozone requirements under EPA's Clean Data Policy.

Response: As set forth in detail below, EPA's longstanding interpretation of the CAA under the Clean Data Policy is valid and reasonable, and has been upheld by every court in which it has been challenged. We respond to LEAN's specific comments below.

Comment: LEAN asserts that the 1-hour standard is no longer relevant for determining whether an area's air quality is requisite to protect public health.

Response: While EPA agrees that it has issued an 8-hour ozone standard that is more protective than the 1-hour standard, certain 1-hour anti-backsliding requirements remain applicable to the BR area. Thus the issue of whether an area meets the 1-hour anti-backsliding requirements is still relevant. EPA's Clean Data Policy was originally directed at requirements under the 1-hour standard, and that interpretation has now been incorporated in the form of a regulation for implementation of the 8-hour ozone requirements. Under the Clean Data Policy, an attainment determination for the 1-hour standard has consequences for an area's obligation to submit certain regulatory requirements for that standard. For the reasons set forth in the proposal and in EPA's responses to comments here, a determination that the BR area has attained the 1-hour ozone standard suspends the requirement to submit 1-hour attainment demonstration, 1-hour reasonable further progress and 1-hour contingency measures for so long as the area continues to meet the 1-hour standard. This determination has no bearing on the requirements for the 8-hour ozone standard.

Comment: LEAN asserts that BR has not attained the revised 1997 8-hour ozone standard, which is 75 ppb (the 2008 8-hour standard). *See* 73 FR 16435–16514 (March 27, 2008) [2]

Response: As set forth in responses to comments above, our action here is limited to a determination that the BR area has attained the 1-hour ozone standard based on complete, quality-assured monitoring data for 2006–2008, and preliminary data for 2009. The preliminary 2009 data show the 1-hour

[2] On September 16, 2009 we announced that we are reconsidering our 2008 decision setting national standards for ground-level ozone. The reconsidered standard was announced on January 6 and proposed on January 19, 2010 (75 FR 2938). We expect by August 2010 to have completed our reconsideration of the standard and designations to proceed thereafter. When and if EPA designates BR as nonattainment of the reconsidered standard, LDEQ will be required to prepare a new ozone plan that addresses that standard.

ozone design value continues to be 114 ppb. There were no monitored exceedances for this time period.

While EPA agrees that compliance with the 1-hour standard is not equivalent to attainment of the more protective 1997 or 2008 8-hour standards, certain 1-hour requirements remain applicable to BR for anti-backsliding purposes. Under the Clean Data Policy, a determination of attainment for the 1-hour standard suspends the obligation to submit certain SIP measures, including the 1-hour attainment demonstration, 1-hour reasonable further progress and 1-hour contingency measures for so long as the area continues to meet the 1-hour standard. EPA's longstanding interpretation, which Courts have upheld, is that for an area meeting the 1-hour standard, submissions for the reasonable further progress requirements are not necessary or meaningful, because the goal of the rate of progress reductions—attainment—has been met. Similarly, EPA believes—and Courts have agreed—that a plan to attain the 1-hour standard is unnecessary for an area that is meeting the standard. Moreover, contingency measures, which are tied to rate of progress and attainment plan requirements, are no longer needed where an area is meeting the standard. EPA's rationale for its interpretation is more fully explained in our Clean Data Policy, in EPA's 8-hour ozone implementation rulemaking and the 1-hour ozone rulemakings cited therein. See 70 FR 71612 (November 29, 2005) and in the cases that have upheld EPA's Clean Data Policy. As discussed in more detail below, the Clean Data Policy has been upheld in a number of court cases, including the DC, 7th, 9th and 10th Circuits. *See NRDC* v. *EPA,* 571 F.3d 1245 (DC Cir. 2009); *Sierra Club v. EPA,* 99 F. 3d 1551 (10th Cir. 1996); *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004) and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Cir. June 28, 2005) (memorandum opinion). The Courts have made clear that a determination of attainment, for either the 1-hour or 8-hour standard, is a valid, reasonable, and legitimate alternative way of satisfying the requirements to submit attainment demonstrations, reasonable further progress requirements, and contingency measures, for that standard. Upon EPA's final determination that the BR area is attaining the 1-hour standard, the submission of those measures is no longer legally required for as long as the area remains in attainment. Thus the commenter is incorrect in asserting that EPA is removing mandatory controls from the SIP. The Commenter's claim that the severe 1-hour measures are necessary is belied by the fact that the sole purpose of these measures is to bring about attainment of the 1-hour standard. EPA is determining that this attainment has already occurred and it continues, and that submission of measures designed to create attainment is not necessary for so long as the area continues to attain. Contrary to Commenter's assertion, no further reductions to bring about attainment of the 1-hour standard are necessary or required. The application of the Clean Data Policy for the 1-hour standard does not in any way hinder or interfere with attainment of the 8-hour standard. Requirements for the 1997 8-hour ozone standard remain in place to address the 8-hour standard for which the area is currently designated nonattainment, and those requirements are not affected by this rulemaking. As discussed further below, the DC Circuit Court has upheld the regulation embodying the Clean Data Policy for the 8-hour ozone standard that suspends 8-hour requirements for attainment demonstrations, RFP, and contingency measures upon a determination of attainment for that standard. 40 CFR 51.918. The regulation upheld was based on EPA's interpretation of the Clean Data Policy under the 1-hour ozone standard. Moreover, since it is incontrovertible that a determination of attainment for the 8-hour ozone standard legally suspends certain 8-hour submission requirements, it would be inconsistent and nonsensical to adopt a contradictory interpretation for the identical requirements under the 1-hour standard.

Comment: LEAN argues that Louisiana's five-parish BR area has *never* met minimum federal health-protection standards for ozone air pollution.

Response: As set forth in the responses to comment above, EPA's rulemaking action today is limited to a determination that the BR area has attained the 1-hour ozone standard based on complete, quality-assured 2006–2008 air monitoring data, and preliminary data for 2009 that show the area continues in attainment of the 1-hour ozone standard. An area violates the 1-hour ozone standard if, over a consecutive 3-year period, more than 3 days of expected number of exceedances occur at the same monitor. *See* CAA, section 107(d)(4); 40 CFR Part 50, App. H. The data show that during this three-year period, no single monitor recorded more than three expected number of exceedances. EPA did not receive any comments that challenge EPA's determination that the area has monitored attainment of the 1-hour ozone standard for 2006–2008, the most recent three-year period for which complete, quality-assured data are available. Nor is there any challenge to EPA's conclusion that preliminary data for 2009 also indicate that the area continues to be in attainment for the 1-hour ozone standard. While this rulemaking does not address any ozone standard other than the 1-hour standard, EPA notes that recent monitoring data suggest that the BR area is also currently attaining the 1997 8-hour ozone standard.

Comment: LEAN argues that the Court's decision in *South Coast Air Quality Management District* v. *EPA,* 472 F.3d 882 (DC Cir. 2006), prohibits BR from removing controls until it has attained the standard EPA has determined is requisite to public health, which they assert is the 75 ppb 2008 8-hour ozone standard. LEAN contends that the *South Coast* case made it clear that EPA cannot release an area from applicable controls until it has achieved "safe" air quality. They further assert that allowing BR to escape antibacksliding requirements because it attained the 1-hour standard would be ignoring Congress' intent when enacting the CAA that "air quality should be improved until safe and never allowed to retreat thereafter."

Response: The suspension of the obligation to submit the attainment demonstration, RFP plan, and contingency measures for the 1-hour ozone standard does not remove any controls that are in place, or any controls that are required when the area is attaining the 1-hour standard. It is directed only at plan measures aimed specifically at attainment of the 1-hour standard, which are not necessary once the area has attained, and continues to attain that standard. The obligations for submissions being suspended here do not bear on any obligations linked to the revised 2008 8-hour ozone standards. We will address any new 8-hour requirements in a separate proceeding or rulemaking. Moreover, as set forth above, the DC Circuit upheld EPA's regulation embodying the Clean Data Policy in 40 CFR 51.918. That regulation provides that a determination of the 1997 8-hour standard will result in the suspension of requirements to submit requirements related to the 1997 8-hour standard. Thus, contrary to commenter's contention, the DC Circuit supports, and does not prohibit, EPA's application of the Clean Data Policy for purposes of the 1-hour standard. EPA's defense of the Clean Data Policy for the 1997 8-hour standard was identical to and

based upon its interpretation and practice with respect to the 1-hour ozone standard. See Phase 2 Rule, 70 FR 71644–71646 (November 29, 2005) and *NRDC* v. *EPA*, 571 F.3d 1245 (DC Cir. 2009). Thus the DC Circuit has rejected the arguments LEAN raises against the Clean Data Policy, and the Court has upheld EPA's interpretation as consistent with the Clean Air Act.

As noted in footnote two, EPA is currently reconsidering the 2008 8-hour ozone standard of 75 ppb. We expect by August 2010 to have completed our reconsideration of the standard and designations to proceed thereafter. When and if EPA designates BR as nonattainment of the reconsidered standard, LDEQ will be required to prepare a new ozone plan that addresses that standard.

Comment: LEAN argues that EPA cannot lawfully suspend controls from a SIP without going through the comprehensive redesignation procedures of 42 U.S.C. 7407(d)(3).

Response: This action does not constitute a redesignation to attainment pursuant to section 107(d)(3). Consequently, the criteria of section 107(d)(3) do not apply to this action. *See* 60 FR 36723. Nor does the existence of the separate statutory redesignation procedure prevent EPA from applying its interpretation of CAA requirements under the Clean Data Policy.

Several Circuit Courts have upheld the use of the Clean Data Policy to suspend the requirement to submit certain SIP planning measures for the 1-hour ozone standard. The Tenth, Seventh and Ninth Circuits have upheld EPA rulemakings applying the Clean Data Policy. *See Sierra Club* v. *EPA*, 99 F. 3d 1551 (10th Cir. 1996); *Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004) and *Our Children's Earth Foundation* v. *EPA*, No. 04–73032 (9th Cir. June 28, 2005) memorandum opinion. *See* also the discussion and rulemakings cited in the Phase 2 8-Hour Ozone Implementation Rule, 70 FR 71644–71646 (November 29, 2005).

The D.C. Circuit has also upheld the Clean Data Policy, as it is embodied in 40 CFR 51.918, which was challenged in the context of the 8-hour ozone standard in the Phase 2 Rule ozone litigation in *See NRDC* v. *EPA*, 571 F.3d 1245 (DC Cir. 2009). The DC Circuit specifically rejected the arguments that the Clean Data Policy is inconsistent with the redesignation provisions of the CAA:

> We think the statute unclear as to whether those sections apply to an area that is already attaining the NAAQS. For the reasons below, we join the Tenth Circuit in holding the EPA's interpretation is reasonable. *See Sierra Club* v. *EPA*, 99 F.3d 1551 (10th Cir.1996).
>
> * * * The EPA's reasoning disposes as well of the NRDC's contentions that the Clean Data Policy unlawfully circumvents the redesignation requirements, CAA § 107(d)(3)(E), 42 U.S.C. 7407(d)(3)(E), violates the mandate that all Part D requirements remain in force until an area has an approved maintenance plan in place, CAA § 175A(c), 42 U.S.C. 7505a(c), and disregards the Supreme Court's admonition that the EPA cannot "render Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory," *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 484, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). The Clean Data Policy does not effect a redesignation; an area must still comply with the statutory requirements before it can be redesignated to attainment. Furthermore, Part D—including Subpart 2—remains in force insofar as it applies but, as we have just seen, the EPA has reasonably concluded the provisions of the Act requiring percentage reductions do not apply to an area that has attained the NAAQS.

See also *Latino Issues Forum* v. *EPA*, No. 0675831 (9th Cir.) Memorandum Opinion, March 2, 2009, in which the 9th Circuit upheld EPA's Clean Data Policy in the context of the PM–10 standard. In rejecting petitioner's challenge to the Clean Data Policy, the Court stated:

> As the EPA rationally explained, if an area is in compliance with PM–10 standards, then further progress for the purpose of ensuring attainment is not necessary.

Thus, the Courts have considered and rejected the commenter's arguments that the Clean Data Policy is at odds with the redesignation process, and have ruled in favor of EPA's interpretation of the Clean Data Policy, finding it consistent with the provisions of the CAA.

Comment: LEAN contends that the Clean Data Policy is illegal and cannot be used to ignore the statutorily-required redesignation procedures of 42 U.S.C. 7407(d)(3).

Response: See above response. As the Courts have recognized, EPA's interpretation under the Clean Data Policy does not circumvent or ignore the Act's redesignation provisions. Nor does the CAA indicate that Congress intended the redesignation provisions to preclude a determination of attainment from suspending requirements to submit that by their terms are inoperative if an area is attaining the NAAQS. Even after application of the Clean Data Policy, an area remains in nonattainment status until EPA redesignates the area after making the other findings required under Section 107(d). *See* 107(d)(3)(E)(i)–(v) (redesignation requirements); see also, e.g., 60 FR 37366 (July 20, 1995) and 61 FR 31831 (June 21, 1996) (suspension of requirements was followed by separate redesignation rule). Applying the Clean Data Policy does not relax any control measures already in place, nor does it affect any other applicable requirements under Part D or other parts of the statute. *See, e.g.*, 60 FR 36723, 36725 (July 18, 1995). In addition, until the area is redesignated, it faces the risk that the suspended obligations will be reimposed if the area lapses back into nonattainment, and the further risk that the area will be reclassified if the lapse causes it to miss its attainment deadline. Therefore, States in which areas attain the NAAQS have every incentive to ensure that those areas remain in attainment and to develop the long-term maintenance plan under Section 175A that is required, in part, to obtain redesignation. *See* CAA section 107(d)(3)(E)(v), *Sierra Club* v. *EPA*, 99 F. 3d 1551, 1558 (10th Cir. 1996).

Comment: LEAN asserts that EPA has never identified a lawful contingency measure for the BR area or has yet to approve a lawful contingency measures plan. The effect of EPA's action is to reward delay tactics by canceling those pollution reductions it has unlawfully delayed.

Response: While we agree with the Commenter that BR does not have serious or severe area contingency measures for the 1-hour standard in place, for the reasons set forth in the responses to comments above and in the proposal, the obligation to submit such measures is suspended upon a finding of attainment for the 1-hour standard per the Clean Data Policy. Since EPA is determining that the area is attaining the 1-hour standard, and for as long as the area continues to attain, the requirement to submit contingency measures is suspended and no additional reductions are necessary to attain that standard. EPA is not rewarding delay tactics, but rather is simply recognizing that it is unnecessary and not required at this time to compel the State to submit measures whose sole purpose is to bring about attainment that is already occurring.

Comment: LEAN comments that, while EPA states in the proposed rule that the suspended requirements would be re-implemented if BR falls out of attainment for the 1-hour standard, the proposed rule makes no mention of how quickly the suspended requirements to submit would have to be put back in place if BR fell out of attainment. LEAN speculates that the requirements could be re-imposed and then re-suspended in an illegal manner.

Response: EPA will make a future determination in notice-and-comment rulemaking if the BR falls out of attainment for the 1-hour standard. The

Clean Data Policy lays out the process to implement a suspended measure:

[i]f EPA subsequently determines that an area has violated the standard, the basis for the determination that the area need not make the pertinent SIP revisions would no longer exist. The EPA would notify the State of that determination and would also provide notice to the public in the **Federal Register**. Such a determination would mean that the area would thereafter have to address the pertinent SIP requirements within a *reasonable* amount of time, which EPA would establish taking into account the individual circumstances surrounding the particular SIP submission at issue.[3]

Thus EPA has undertaken to act reasonably and responsibly in the future to re-impose the obligation for the State to submit the measures should EPA determine that the area has fallen out of attainment. The Commenter is thus wrong to assume that EPA's exercise of its discretion with regard to timing of reinstatement of obligations would bring about absurd or illegal results. Any such concerns are entirely speculative and without foundation in fact.

IV. Final Action

For the reasons set forth in the proposed rulemaking and in this final rulemaking, and based on complete, quality-assured data for 2006–2008, and data for 2009 that are currently available, we are determining that the BR 1-hour ozone nonattainment area has attained and continues to attain the 1-hour ozone standard. Thus, the requirements for submitting the 1-hour ozone severe nonattainment area attainment demonstration SIP with its RACM demonstration and other associated elements, the severe RFP requirements, and section 172(c)(9) and section 182(c)(9) serious and severe contingency measures are suspended for so long as the area is attaining the 1-hour ozone standard.

V. Statutory and Executive Order Reviews

This action merely makes a determination of attainment based upon air quality that results in suspensions of certain Clean Air Act requirements, and does not impose additional requirements. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because there is no federally recognized Indian country located in the states, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 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 rules 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 these actions must be filed in the United States Court of Appeals for the appropriate circuit by April 12, 2010. Filing a petition for reconsideration by the Administrator of these final rules 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 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 52

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

Dated: January 29, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 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 T—Louisiana

■ 2. Section 52.977 is added to read as follows:

§ 52.977 Control strategy and regulations: Ozone.

Determination of Attainment. Effective March 12, 2010 EPA has determined the Baton Rouge 1-hour ozone nonattainment area has attained the 1-hour ozone National Ambient Air Quality Standard (NAAQS). Under the provisions of EPA's Clean Data Policy, this determination suspends the requirements for this area to submit a severe attainment demonstration, a severe reasonable further progress plan, applicable contingency measures plans, and other planning Louisiana State Implementation Plan (SIP) requirements related to attainment of the 1-hour ozone NAAQS for so long as the area continues to attain the 1-hour ozone NAAQS.

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[3] As referenced in footnote 1, *see* May 10, 1995 EPA memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, entitled "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone Ambient Air Quality Standard." *See* also 70 FR 71644–71646 (November 29, 2005).