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2. Appendix A to 31 CFR chapter V is amended by removing the following entry:

WITTGREEN, Carlos (a.k.a. Carlos WITTGREEN Antinori; a.k.a. Carlos

WITTGREEN A.; a.k.a. Carlos Antonio WITTGREEN), Panama (individual) [CUBA]

Dated: April 24, 2001.

**R. Richard Newcomb,**

*Director, Office of Foreign Assets Control.*

Approved: April 27, 2001.

**James Sloan,**

*Acting Assistant Secretary (Enforcement), Department of the Treasury.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[AZ-098-0025; FRL-6989-1]

### Determination of Attainment of the 1-Hour Ozone Standard for the Phoenix Metropolitan Area, Arizona and Determination Regarding Applicability of Certain Clean Air Act Requirements

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

**ACTION:** Final rule.

**SUMMARY:** EPA is determining that the Phoenix metropolitan serious ozone nonattainment area has attained the 1-hour ozone air quality standard by the deadline required by the Clean Air Act (CAA), November 15, 1999. Based on this determination, we also are determining that the CAA's requirements for reasonable further progress and attainment demonstrations and for contingency measures for the 1-hour ozone standard are not applicable to the area for so long as the Phoenix metropolitan area continues to attain the 1-hour ozone standard.

**EFFECTIVE DATE:** June 29, 2001.

**FOR FURTHER INFORMATION CONTACT:** Doris Lo, Office of Air Planning (AIR-2), U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California 94105. (415) 744-1287, lo.doris@epa.gov.

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#### IV. Administrative Requirements

### I. Background

Under CAA section 181(b)(2)(A), we must determine within six months of an area's applicable attainment date whether an ozone nonattainment area has attained the 1-hour ozone standard. On May 19, 2000 (65 FR 31859), we proposed to find that the Phoenix metropolitan serious ozone nonattainment area had attained the 1-hour ozone standard by its Clean Air Act (CAA) mandated attainment date of November 15, 1999. This proposal was based on all available, quality-assured air quality data collected from the monitoring network, which we determined met our regulations for state air quality monitoring networks.

### II. Attainment Finding

#### A. Response to Comments on the Proposed Finding of Attainment

We received comments on our proposed attainment finding only from the Arizona Center for Law in the Public Interest (ACLPI). These comments concerned the adequacy of the Phoenix area ozone monitoring network. We respond to the most important of these comments below. Our complete responses to all comments can be found in the technical support document (TSD) for this action.

*Comment:* ACLPI claims that EPA's proposed rulemaking contains no evidence that Maricopa County Environmental Services Department (MCESD) has made changes to its ozone network in response to the inadequacies documented by EPA in the past. It also asserts that the County and the State have apparently discontinued the use of certain monitoring sites and states it found particularly troubling the discontinuance of the Papago Park monitor, which recorded the highest ozone violation in 1995.

*Response:* We agree that the Maricopa County ozone monitoring network was deficient when evaluated by EPA in 1989 and 1992. However, rather than reviewing all of the past inadequacies and determining whether the County addressed each one, we decided that a more reasonable approach was to evaluate the ozone monitoring network operated by MCESD as it existed during the attainment period 1997–1999. We have worked successfully with the MCESD over the past 9 years to improve its ambient monitoring program. We have determined that the ozone

monitoring network as designed and operated during the attainment period, and at present, meets all applicable federal regulations. By concluding that the network meets our monitoring regulations, we effectively concluded that MCESD has corrected all past inadequacies.

The issue of whether or not the County and/or State has discontinued the operation of certain sites is not as important as whether the remaining network is designed and operated in a manner that allows the determination that the data collected are representative of ozone air quality in the Phoenix area. We have concluded that the network is sufficient to serve that purpose.

The Papago Park ozone monitor is still operating but has been renamed "Emergency Management." Papago Park was the name given to the site by the Arizona Department of Environmental Quality (ADEQ) which initially operated the site. When the County took over the site, it was renamed Emergency Management. The site has been in continuous operation since it was established in 1990.

*Comment:* ACLPI asserts that EPA acknowledged that the ozone network in Phoenix still fails to meet all of the design requirements of 40 CFR part 58 in that the network does not meet the third monitoring objective, "determining the impact on ambient pollution levels of significant sources or source categories," which can be met by monitoring emissions from significant sources of nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOC).

*Response:* We stand by our position that in designing an ozone monitoring network—that is, a monitoring network that measures the concentration of the chemical compound "ozone" (O<sub>3</sub>)—an agency cannot meet the third monitoring objective of assessing the impact of major sources or source categories since ozone is not emitted by any type of source. Ozone is formed in an atmospheric, photochemical reaction between NO<sub>x</sub> and VOC. Precursor emissions from a source are transported well downwind before they react to form ozone. In an urban setting, emissions from large point sources mix with emissions from area and mobile sources as they are transported downwind and form ozone. In this setting, it is impossible to monitor specifically for ozone formed from a single source's precursor emissions.

For areas designated as transitional, marginal, and/or moderate ozone nonattainment areas, there is no requirement to monitor for the chemical precursors of ozone. Once an area is designated or reclassified to serious or

above, the state is required to institute a photochemical assessment monitoring (PAMS) program under CAA section 182(c)(1) and its implementing regulations. PAMS programs require the seasonal monitoring of VOC and NO<sub>x</sub> at certain locations in urban nonattainment areas such as downwind of the area's central business district (type 2 site) and in the downwind area(s) where maximum ozone concentrations are expected to occur (type 3 site).

When we reclassified the Phoenix area as serious in 1997, the design and deployment of a PAMS network became a requirement for the area. ADEQ has begun the implementation of the area's PAMS network and has deployed a type 2 site and is in the process of installing a type 3 site at this time. ADEQ's implementation schedule is generally consistent with our PAMS regulations. These sites are appropriately located to meet the PAMS siting requirements. The requirement for operating a PAMS network remains even though we are making a finding that the Phoenix area has attained the 1-hour ozone NAAQS. Data from the PAMS network, however, are not and cannot be used in making a determination of whether or not an area has met the ozone NAAQS because the network only monitors for ozone precursors and not for ozone itself.

*Comment:* ACLPI asserts that Maricopa County's monitoring network is inadequate because the County fails to operate all of its SLAMS sites year-round, stating that EPA regulations require states to monitor ozone at NAMS and SLAMS sites throughout the ozone season and that the ozone season in Arizona runs from January through December citing 40 CFR part 58, appendix D. ACLPI also claims that despite these regulations, more than half of the County's SLAMS sites operate only between April 1 and October 31. While exceedances of the 1-hour ozone standard may be rare during the winter months, they can occur. Consequently, there is no assurance that these exceedances would be captured by one of the annually operating sites due to wide spatial and temporal differences in ozone concentrations.

*Response:* We disagree with ACLPI's assertion that the ozone monitoring network is inadequate because a portion of the monitoring sites operates on a seasonal basis. Our regulations at 40 CFR 58.25 allow states to make modifications to their SLAMS network with the approval of EPA. The County made this modification to its operating schedule with the full concurrence of EPA Region 9 (see letter to Ben Davis, Air Quality AIRS Program Coordinator,

MCESD, from John R. Kennedy, Chief, Technical Support Office, Air Division, U.S. EPA Region 9, November 2, 1999). Moreover, we believe that the monitoring network, even with the seasonal monitors shut down, still provides for adequate spatial coverage of the Phoenix nonattainment area during the winter months. During the five months (November through March) the County shuts down eight sites—less than half of the ozone monitoring sites—leaving functional the remaining ozone network of ten sites operated by the County as well as a number of special purpose monitoring sites operated by ADEQ. The sites that are operated seasonally are generally the sites recording the lowest ozone concentrations.

Regarding the possibility of exceedances of the 1-hour ozone standard during the November to March period, we have reviewed ozone data for the Phoenix area during the period 1980 through 1999. In these 19 years, the Phoenix area has had only one exceedance in the month of April, three in the month of October, and none in the months of November, December, January, February and March. The vast majority of ozone exceedances in the Phoenix area occur in the months of June, July, August, and September when the full network is in operation.

We do agree with ACLPI's statement that ozone air monitoring serves other purposes besides recording exceedances. We believe that portion of the network that operates year round provides adequate data for any other assessment purpose.

#### *B. Attainment Finding for the Phoenix Area*

The 1-hour ozone NAAQS is 0.12 parts per million (ppm) not to be exceeded on average more than one day per year over any three-year period. 40 CFR 50.9 and appendix H. We determine if an area has attained the 1-hour standard by calculating, at each monitor, the average number of days over the standard per year during the preceding three-year period.<sup>1</sup> We use all available, quality assured monitoring data. Under CAA section 181(b)(2)(A),

we must base our determination of attainment or failure to attain on the area's design value as of its applicable attainment deadline, which for the Phoenix metropolitan area was November 15, 1999. (See section III.C. for a discussion of air quality data after November 15, 1999 and consequences of future violations.)

The design value for the Phoenix metropolitan ozone nonattainment area for the 1997 to 1999 period was 0.113 ppm. The Phoenix metropolitan area did not record any exceedances of the 1-hour ozone standard at any monitoring site during the 1997 to 1999 period, so the average number of days over the standard at each monitor in the area for that three-year period was zero. The complete documentation of the monitoring data and design value calculation can be found in the TSD.

Because the area's design value was below the 0.12 ppm 1-hour ozone standard and the area averaged less than 1 exceedance per year at each monitor for the 1997 to 1999 period, we find that the Phoenix metropolitan area attained the 1-hour ozone standard by its Clean Air Act mandated attainment deadline of November 15, 1999.

### **III. Applicability of Clean Air Act Planning Requirements**

#### *A. EPA's Policy on the Applicability of Certain CAA Planning Requirements in Areas Attaining the 1-Hour Ozone Standard*

CAA section 182(c) requires states with serious ozone nonattainment areas to comply with the Act's serious area SIP requirements. Three of these requirements are tied to the attainment demonstration. They are as follows:

1. A demonstration that this plan will result in emission reductions of ozone precursors of at least 3 percent per year from 1996 to 1999 (this provision is known as the 9 percent rate of progress (ROP) plan), CAA section 182(c)(2)(B);

2. A demonstration that the plan will result in attainment of the 1-hour ozone standard as expeditiously as practicable but not later than November 15, 1999, CAA section 182(c)(2)(A);

3. Contingency measures that will be undertaken if the area fails to make reasonable further progress, meet a rate of progress milestone, or to attain the standard by the applicable attainment date, CAA sections 172(c)(9) and 182(c)(9).

We believe that it is reasonable to interpret the CAA to not require these provisions for serious ozone nonattainment areas that are determined to be meeting the 1-hour ozone standard. We discuss our reasoning in

the memorandum from John S. Seitz, Director, OAQPS, EPA, to Regional Air Directors, entitled "Reasonable Further Progress, Attainment Demonstrations, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," May 10, 1995 (Seitz memo), in the proposal for this action and below in our response to comments.<sup>2</sup>

There are a number of other SIP requirements for serious ozone nonattainment areas that are not tied to whether the area has attained the 1-hour standard. These elements include an emission inventory of ozone precursors, reasonably available control technology for major sources and certain other sources; an enhanced motor vehicle inspection and maintenance program, and an enhanced ambient monitoring program. Arizona has already adopted and submitted these elements to us.<sup>3</sup>

#### *B. Response to Comments on EPA's Policy*

ACLPI also commented on the proposed determination regarding the applicability of certain CAA planning requirements to the Phoenix area. We respond to the most significant of these comments below. Our full response to all comments can be found in the TSD.

*Comment:* ACLPI claims that EPA has illegally exempted the Phoenix area from the 9 percent rate of progress (ROP)<sup>4</sup> demonstration, attainment demonstration and contingency measure requirements of the CAA. To support this contention, ACLPI makes two arguments:

- (1) that, taken together, sections 172(c) and 182(c) require that a plan revision for a serious ozone nonattainment area include an attainment demonstration (sections 172(c)(1) and 182(c)(2)(A)), a 9 percent ROP demonstration (sections 172(c)(2) and 182(c)(2)(B)), and contingency measures (section 172(c)(9)); and
- (2) that the May 10, 1995 policy memorandum on which EPA relies to

<sup>2</sup> We have also explained at length in other actions our rationale for the reasonableness of this interpretation of the Act and incorporate those explanations by reference here. See 61 FR 20458 (May 7, 1996) (Cleveland-Akron-Lorain, Ohio); 60 FR 36723 (July 18, 1995) (Salt Lake and Davis Counties, Utah); 60 FR 37366 (July 20, 1995) and 61 FR 31832-33 (June 21, 1996) (Grand Rapids, MI). Our interpretation has also been upheld by the United States Court of Appeals for the 10th Circuit in *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996).

<sup>3</sup> Serious Area Ozone State Implementation Plan for Maricopa County; submitted to EPA by the Arizona Department of Environmental Quality on December 14, 2000.

<sup>4</sup> Although section 182(b)(1) (moderate areas) and (c)(2)(B) (serious areas) contain the term "reasonable further progress," EPA often uses the terms "rate of progress" and "reasonable further progress" interchangeably.

<sup>1</sup> See generally 57 FR 13506 (April 16, 1992) and Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, EPA, to Regional Air Office Directors; "Procedures for Processing Bump Ups and Extensions for Marginal Ozone Nonattainment Areas," February 3, 1994 (Berry memorandum). While explicitly applicable only to marginal areas, the general procedures for evaluating attainment in this memorandum apply to the Phoenix area in spite of its serious classification because the finding of attainment is being made pursuant to the same Clean Air Act requirements in section 181(b)(2).

exempt the Phoenix area from these requirements flatly contradicts the CAA in that the Act contains no exceptions from its planning requirements for areas that are potentially eligible for redesignation based on monitoring data but have not yet met the redesignation requirements of sections 107(d)(3) and 175A. ACLPI contends that under section 175A of the Act until a nonattainment area is redesignated and a maintenance plan is approved, the requirements of part D “shall continue in force and effect with respect to such area.” (ACLPI acknowledges that the United States Court of Appeals for the 10th Circuit has upheld the May 10, 1995 memorandum but states that the case was incorrectly decided.)

*Response:* We proposed to find that these Clean Air Act requirements are not applicable to the Phoenix area because the area has attained the 1-hour ozone standard as demonstrated by three consecutive years without a violation. In the proposal for today’s action, we discuss our determination that the Phoenix area attained the 1-hour ozone standard by its statutory deadline of November 15, 1999. See 65 FR 31859, 31861. This determination is documented in Section II of the TSD.

The statutory basis for finding that these planning requirements are not applicable is described in the proposal and in the Seitz memo. See 65 FR 31859, 31861–31863; Seitz memo at 2–5.

Contrary to ACLPI’s assertion, we are not granting the Phoenix area an exemption from any applicable requirements under part D. Rather, we have interpreted the requirements of sections 182(c)(2)(A) and (B) and 172(c)(9) as not being applicable once an area has attained the standard, as long as it continues to do so. (See section III.C. below.) This is not a waiver of requirements that by their terms clearly apply; it is a determination that certain requirements are written so as to be operative only if the area is not attaining the standard. Our interpretation is consistent both with the CAA’s goal of achieving and maintaining clean air, and with the concomitant policy goal of avoiding costly and unnecessary emission reductions.

As discussed further below, the plain language of CAA sections 182(c)(2)(A) and (B) and 172(c)(9) does not clearly require attainment, reasonable further progress or contingency measure plans for areas that are designated nonattainment but that have already attained, and continue to attain, the national ozone standard. However, the very purpose of these plans is to bring

areas that are violating the national ambient air quality standard for ozone into attainment. Consistent with this purpose, we interpret these requirements as inapplicable to an area that has attained the standard, but only for so long as the area remains in attainment. The requirements will again apply if such an area violates the standard. Thus, our interpretation is strictly limited to circumstances in which no further emission reductions are required for attainment.

The language of CAA sections 182(c)(2)(A) and (B) is ambiguous as to whether VOC reductions are required for serious nonattainment areas that have already attained the ozone NAAQS, but that have not yet been redesignated to attainment status. While the lead-in sentence to these two requirements states that “\* \* \* the State shall submit a revision to the applicable implementation plan \* \* \*,” subsection (c)(2)(A) calls for a demonstration that the plan will provide for attainment of the NAAQS “by the applicable attainment date.” Subsection (c)(2)(B) provides that the 9 percent plan “will result in VOC emissions reductions \* \* \* until the attainment date.” Thus, the language of sections 182(c)(2)(A) and (B) as a whole begs the question of whether any reductions are required for areas that are already in attainment and therefore need no reductions in VOC emissions to achieve the ozone NAAQS by the attainment date.

Section 182(c)(2)(B) is entitled “Reasonable Further Progress demonstration.” The term “reasonable further progress” is defined as “such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by [EPA] for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date.” CAA section 171(1). This definition applies for the purposes of part D of title I of the CAA, which includes section 182(c). Thus, the term “reasonable further progress” requires only such reductions in emissions as are necessary to attain the NAAQS by the attainment date and no more. Accordingly, our interpretation of section 182(c)(2)(B) is consistent with the statutory definition of “reasonable further progress.” Moreover, our interpretation is tightly bound to the purpose of section 182(c)(2)(B) because we interpret that section’s requirements to be applicable to areas that lapse back into violation prior to redesignation, and which therefore need additional progress towards attainment.

Furthermore, our interpretation of the requirements of section 182(c)(2)(B) is consistent with our interpretation of the general reasonable further progress requirements of CAA section 172. In the General Preamble interpreting certain provisions of part I of the CAA Amendments of 1990, we explained that the reasonable further progress requirements of CAA section 172(c)(2) do not apply when “evaluating a request for redesignation to attainment, since, at a minimum, the air quality data for the area must show that the area has already attained [the NAAQS] \* \* \* [and] RFP towards attainment will, therefore, have no meaning at that point.” 57 FR at 13564. This interpretation of the requirements of section 172(c) was made shortly after the CAA Amendments of 1990 and we have consistently adhered to this interpretation. See 60 FR at 30190 (noting consistency of interpretation).

As with the RFP requirement, if an area has in fact monitored attainment of the standard, we believe there is no need for an area to make a further submission containing additional measures to achieve attainment. Thus the attainment demonstration requirement in section 182(c)(2)(A) would no longer apply under these circumstances. Seitz memo at 3.

We likewise determined that section 172(c)(9) does not require a contingency measure plan for nonattainment areas, such as Phoenix, which we determine to have attained the standard prior to redesignation. The contingency measures plan is required for an area that “fails to make reasonable further progress, or to attain the [NAAQS] by the attainment date \* \* \*.” If, as in the case of Phoenix, we determine that an area has attained the standard by its attainment date, then by definition such an area is not one to which contingency measures apply. There is simply no failure to attain by the attainment date or make progress for which additional measures need be contingent. However, as with sections 182(c)(2)(A) and (B), we interpret section 172(c)(9)’s requirements to be applicable to areas that lapse back into violation prior to redesignation, and that therefore need additional progress towards attainment. Thus, our interpretation ensures that the purposes of section 172(c)(9)—to provide for reasonable progress towards, and the attainment of, clean air—will be served when necessary.

We also do not agree with ACLPI’s contention that the Agency is violating section 175A(c) when it determines that the RFP, attainment and contingency measure requirements do not apply to areas that have attained the NAAQS.

Section 175A(c) provides that the requirements of part D remain in force and effect for an area until such time as it is redesignated. Section 175A(c) does not establish any additional substantive requirements; rather, it ensures that the requirements that do apply by virtue of other Act provisions continue to apply until an area is redesignated. If, however, an Act provision does not apply to an area or does not require that the particular area in question submit a SIP revision, section 175A(c) does not somehow add to the requirements with which the area must comply. In this instance, EPA is interpreting the underlying substantive requirements at issue so as not to apply to areas for so long as they continue to attain the standard. This does not violate section 175A(c); it is an interpretation of the substance of other provisions of the Act, a matter that is not affected by section 175A(c). Other requirements that do not depend on whether the area has attained the standard, such as VOC RACT requirements, continue to apply, however, and section 175A(c) ensures that they continue to apply until the area is redesignated.

Finally, in *Sierra Club*, the Tenth Circuit Court of Appeals upheld the Seitz memo as it applies to moderate ozone nonattainment areas. There, pending completion of the redesignation process, and based on three years of air quality data, EPA found that two Utah Counties that were designated as nonattainment for ozone and classified as moderate had attained the ozone NAAQS. As a result, EPA determined that the CAA's moderate area requirements for attainment and RFP demonstrations, and contingency measures (sections 182(b)(1)(A) and 172(c)(9)) were inapplicable. Finding that this determination was a logical extension of EPA's original, general interpretation in the General Preamble, the Court accorded deference to EPA's interpretation that once a moderate ozone nonattainment area has attained the NAAQS, the moderate area CAA requirements for RFP, attainment and contingency measures no longer apply. *Id.* at 1556. Although the Phoenix area is a serious nonattainment area, there is no doubt that the analogous serious area provisions serve exactly the same purpose as the provisions at issue in *Sierra Club* for moderate areas. Thus the Court's reasoning in that case applies equally to the Phoenix situation.

*Comment:* As stated above, ACLPI claims that the Act specifically requires that until a nonattainment area is redesignated and a maintenance plan approved the requirements of part D remain in force and effect with respect

to such area, citing CAA section 175A(c). ACLPI argues that "Congress determined that in the interest of protecting public health, EPA should not be permitted to waive nonattainment planning requirements until states could provide sufficient assurances that the NAAQS would be permanently maintained" and that "it is not the place of EPA to second guess this policy determination."

*Response:* The requirement that states provide sufficient assurances that the NAAQS will be permanently maintained is a criterion for the redesignation of an area to attainment under section 107(d)(3)(E) and not for a finding of attainment under section 181(b)(1). We did not propose to redesignate the Phoenix area to attainment. Before we can do that, Arizona will need to provide, among other things, sufficient assurances in the form of an adequate maintenance plan that the NAAQS will be "permanently" maintained. As we have stated above we are not waiving these requirements but are determining that by the language of the CAA, they do not apply.

*Comment:* ACLPI also argues that there is a sound public policy reason for the Act's approach because a state's monitored compliance with a NAAQS may reflect only a temporary improvement in air quality due to unusually favorable meteorological conditions rather than "permanent and enforceable reductions in emissions" of a pollutant or pollutant precursors.

*Response:* The requirement to determine that clean air is the result of "permanent and enforceable reductions in emissions" is a criterion for the redesignation of an area to attainment under section 107(d)(3)(E) and not for a finding of attainment under section 181(b)(1). We did not propose to redesignate the Phoenix area to attainment.

That aside, we believe that the finding of attainment itself addresses in part the concern about unusually favorable meteorological conditions. We have long recognized that meteorological conditions have a profound effect on ambient ozone concentrations. In setting the current 1-hour ozone standard in 1979, we changed the form of the standard, i.e., the criterion for determining attainment, from a deterministic form "no more than once per year" to a statistical form "when the expected number of days per year is less than or equal to one" over a three-year period in order to properly account for the random nature of meteorological variations. The three-year period for averaging the expected number of exceedances was a reasoned balance

between evening out meteorological effects and properly addressing real changes in emission levels. See the proposal and final actions promulgating the current 1-hour ozone standard at 43 FR 26962, 26968 (June 22, 1978) and 44 FR 8202, 8218 (February 8, 1979).

Moreover, the Phoenix area did not just barely meet the 1-hour ozone standard; it met the standard with room to spare. An area can record up to three days of air quality above the 1-hour ozone standard at any one monitor during a successive three-year period and still be considered attaining the standard. The Phoenix area fared much better than that, recording not a single day over the standard at any of its 20 ozone monitors from 1997 through 1999. This record of clean air has carried into a fourth year. During the 2000 ozone season, the Phoenix area again did not record a single exceedance of the 1-hour ozone standard. See TSD at pp. 12–13. The area's design value, which is a measure of the severity of an area's ozone problem and is used to establish an area's initial classification, was 10 percent below the standard and a 16 percent drop from its design value for the preceding three-year (1994–1996) period.

Furthermore, under EPA's redesignation guidance, there are two aspects to "permanent and enforceable emission reductions." One is unusually favorable meteorology. The other is a temporary reduction in emission rates caused by shutdowns or reduced production due to temporary adverse economic conditions. See Memorandum, John Calcagni, Director, Air Quality Management Division (OAQPS), to Regional Air Directors, "Procedures for Processing Requests to Redesignate Areas to Attainment," September 4, 1992, page 4. "Adverse" is not a term that could be applied to the economy of the greater Phoenix area over the last several years.

In addition, we believe that the Phoenix area's record of clean air can be tied directly to permanent and enforceable emission reductions. The area is subject to a comprehensive ozone control strategy that includes national on-road motor vehicle standards, national non-road engine standards, national consumer product standards, Arizona's cleaner burning gasoline and vehicle emission inspection programs, and Maricopa County's industrial and commercial source rules. This strategy leaves few, if any, sources of VOC unregulated.

*Comment:* ACLPI claims that EPA implicitly recognizes the possibility that the Phoenix area may violate the ozone NAAQS again. However, ACLPI states

that EPA then dismisses this possibility with the observation that it can require a SIP revision containing the missing elements if a violation occurs. ACLPI asserts that this approach will not help "those who needlessly suffer from unhealthy ozone levels that could have been avoided through compliance with the Act, noting that SIP revisions take months, sometimes years to complete." Finally, ACLPI contends that the "more responsible policy is the one adopted by Congress which requires states to adhere to the Act's nonattainment planning requirements until they can demonstrate that redesignation of an area to attainment is warranted."

*Response:* The Seitz memo explicitly addresses the consequences of future violations of the 1-hour ozone standard. In the proposal for today's action, we merely described this policy as it would apply to the Phoenix area if the area were to violate the standard in the future. While this could be interpreted as acknowledging the possibility of future violations in the Phoenix area, it is not an acknowledgment of the probability of future violations.

Furthermore, ozone will continue to be controlled in the Phoenix area in spite of this finding of attainment and the concurrent finding that certain CAA planning requirements no longer apply. As noted above, the State of Arizona and the Maricopa County Environmental Services Department, the local air pollution control agency, have adopted a comprehensive ozone control program for the Phoenix area. All these existing ozone control measures remain in place and these agencies remain obligated to fully implement and enforce them. Most are SIP-approved or have been submitted for SIP approval. See appendix A of the "Serious Area Ozone State Implementation Plan for Maricopa County," submitted to EPA on December 14, 2000.

In addition, the area will be the beneficiary of substantial new controls over the next few years. The two largest source categories of VOC emissions in the Phoenix area, in order, are gasoline-powered on-road vehicles and gasoline-powered non-road engines. Several already adopted state and federal measures will be implemented over the next few years that will further reduce emissions from these categories. These measures include Arizona's implementation of the final, more stringent cut points for the Vehicle Emissions Inspection Program (VEI) and expansion of that program and the State's Cleaner Burning Gas (CBG) program into growing areas that surround the core Phoenix urbanized area. *Id.*

Nationally, we have issued our tier 2 on-road motor vehicle standards covering both light duty cars and light duty trucks including sports utility vehicles. 65 FR 6697 (February 10, 2000). For non-road engines, we have established emission limitations for new non-road engines of all types. Many of these standards have tiered emission standards that become increasingly stringent in future years. See, for example, the tier 2 standards for small gasoline-powered nonroad engines at 65 FR 24267 (April 25, 2000).

The Phoenix area will also benefit from national standards on the VOC content of consumer products required by CAA section 183(e). These standards control the VOC content of such consumer products as paints, hair sprays, household pesticides, and miscellaneous other consumer goods. 63 FR 48819 (September 11, 1998). We also continue to issue maximum available control technology (MACT) standards under CAA section 112(d) to reduce hazardous air pollutants from stationary sources, most of which target VOC emissions. 40 CFR part 61.

Finally, we note that under ACLPI's construction of the CAA, the Phoenix area would face the prospect of mandatory sanctions under CAA section 179(a) for failing to submit the 9 percent reasonable further progress, attainment demonstration, and contingency measures plans. For example, under ACLPI's interpretation of CAA section 182(c)(2)(B), Arizona would have to adopt controls for the Phoenix area that would reduce VOC emissions by 9 percent despite the fact that the area has attained and continues to attain the 1-hour ozone NAAQS. These measures would impose additional costs upon the area's residents although they are unnecessary for clean air. Thus, ACLPI's interpretation would not only require measures that are not necessary for attaining the standard, it could also lead to sanctions for failing to submit these measures. EPA's contrary interpretation would not require unnecessary emission reductions or sanctions for a state's failure to undertake such reductions.

#### *C. Effects of the Determination on the Phoenix Area and of a Future Violation on This Determination*

During the 2000 ozone season, the Phoenix area continued its record of clean air, experiencing no exceedances of the 1-hour ozone standard. In short, the area remains in attainment of the 1-hour ozone standard as of the date of this final action. Based on our finding that the Phoenix metropolitan area is attaining the 1-hour ozone standard, we are finding that the State of Arizona is

no longer required to submit a 9 percent ROP plan, an attainment demonstration, or contingency measures for the area.

The lack of a requirement to submit these SIP revisions will exist only as long as the Phoenix metropolitan area continues to attain the 1-hour ozone standard. If we subsequently determine that the Phoenix area has violated the 1-hour ozone standard (prior to a redesignation to attainment), the basis for the determination that the area need not make these SIP revisions would no longer exist. Thus, a determination that an area need not submit these SIP revisions amounts to no more than a suspension of the requirements for so long as the area continues to attain the standard.

Should the Phoenix metropolitan area begin to violate the 1-hour standard, we will notify Arizona that we have determined that the area is no longer attaining the 1-hour standard. We also will provide notice to the public in the **Federal Register**. Once we determine that the area is no longer attaining the 1-hour ozone standard then Arizona will be required to address the pertinent SIP requirements within a reasonable amount of time. We will set the deadline for the State to submit the required SIP revisions at the time we make a nonattainment finding.

Arizona must continue to operate an appropriate air quality monitoring network, in accordance with 40 CFR part 58, to verify the attainment status of the area. The air quality data relied upon to determine that the area is attaining the ozone standard must be consistent with 40 CFR part 58 requirements and other relevant EPA guidance.

#### *D. Effect of the Determination on Transportation Conformity*

CAA section 176(c) requires that federally funded or approved transportation actions in nonattainment areas "conform" to the area's air quality plans. Conformity ensures that federal transportation actions do not worsen an area's air quality or interfere with its meeting the air quality standards.

One of the primary tests for conformity is to show that transportation plans and improvement programs will not cause motor vehicle emissions to rise above the levels needed for progress toward and attainment with the air quality standards. These motor vehicle emissions levels are set in an area's attainment, maintenance, and/or RFP demonstration and are known as the "transportation conformity budget."

EPA set the current ozone conformity budget for the Phoenix metropolitan

area in our revised federal 15 percent ROP plan. 64 FR 36243 (July 6, 1999). Today's finding (i.e., that the Phoenix area has attained the 1-hour ozone standard and that the State no longer needs to submit attainment and ROP/RFP demonstrations) will not affect the continued applicability of the existing budget. This budget will remain applicable until Arizona submits a maintenance demonstration with a revised transportation conformity budget (or until Arizona submits attainment and RFP/ROP demonstrations with a revised budget should the Phoenix area again violate the 1-hour ozone standard) and we find the new budget adequate.

#### IV. Administrative Requirements

This action merely finds that the Phoenix area has attained a previously established national ambient air quality standard based on an objective review of measured air quality data. It also determines that certain Clean Air Act requirements no longer apply to the Phoenix area because of the attainment finding. It will not impose any new regulations, mandates, or additional enforceable duties on any public, nongovernmental or private entity. 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.*). Under Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), this rule is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. It does not contain any unfunded mandate or significantly or uniquely affects small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This rule also does 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 rule 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, as specified in Executive Order 13132, Federalism (64 FR 43255, August 10, 1999) because it 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.

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 because it would be inconsistent with applicable law for EPA, when determining the attainment status of an area, to use voluntary consensus standards in place of promulgated air quality standards and monitoring procedures that otherwise satisfy the provisions of the Clean Air Act. As required by section 3 of Executive Order 12988, Civil Justice Reform (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. 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 July 30, 2001.

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, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 7401-7671q.

**Dated:** May 14, 2001.

**Laura Yoshii,**

*Acting Regional Administrator, Region 9.*

[FR Doc. 01-13512 Filed 5-29-01; 8:45 am]

**BILLING CODE 6560-50-P**

### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Part 73

[MM Docket No. 93-314 RM-8396]

#### Radio Broadcasting Services; Cadiz and Oak Grove, KY

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** At the request of Ham Broadcasting, Inc. this document sets aside the action in this proceeding which substituted Channel 293C3 for Channel 292A at Cadiz, reallocated Channel 293C3 to Oak Grove, and modified the Station WKDZ-FM license to specify operation on Channel 293C3 at Oak Grove. See 61 FR 31449, published June 20, 1996. This document also dismisses an Application for Review filed by Southern Broadcasting Corporation directed against that action. The Station WKDZ-FM license will specify operation on Channel 293C3 at Cadiz in accordance with the grant of a construction permit application (File No. BPH-20000427ABE). With this action, the proceeding is terminated.

**DATES:** Effective May 30, 2001.

**FOR FURTHER INFORMATION CONTACT:** Robert Hayne, Mass Media Bureau, (202) 418-2177.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Memorandum Opinion and Order* in MM Docket No. 93-314, adopted May 9, 2001, and released May 11, 2001. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW.,