INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
We Protect Hoosiers and Our Environment.

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John Mooney, Chief
Air Programs Branch (AR-181)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604

Attention: Docket ID No. EPA-RO5-OAR-2012-0989

To Whom It May Concern:

Indiana is disappointed that the U.S. Environmental Protection Agency ("EPA") has proposed disapproval of the State's request to redesignate Indiana's Lake and Porter Counties as attainment for the 2008 eight-hour ozone standard. The State appreciates the opportunity to comment on the proposed disapproval: *Redesignation of Lake and Porter Counties to Attainment of the 2008 Eight-Hour Ozone Standard,* 79 Fed. Reg. 36,692 (proposed rule June 30, 2014) (to be codified at 40 C.F.R. Parts 52 and 81).

Since 2008, Indiana's Lake and Porter counties have consistently attained the 2008 ozone standard. As EPA is aware, Indiana has sought redress of what it considers the erroneous inclusion of the State's Lake and Porter Counties in the Chicago-Naperville, Illinois-Indiana-Wisconsin ozone nonattainment area ("Chicago nonattainment area") in all available forums. Indiana's Lake and Porter Counties' contribution to the monitored nonattainment in the designated nonattainment area is *de minimis*, and – as discussed in previous filings with the EPA – Indiana does not have the jurisdiction to remedy the most significant causes of the monitored nonattainment in the Chicago nonattainment area. Those largest contributors to the area's nonattainment fall squarely outside of Indiana's jurisdictional boundaries within the states of Illinois and Wisconsin.

In furtherance of the State's efforts to remove the unjustified burden placed on Lake and Porter Counties for ozone nonattainment measured in other states, Indiana submitted its request for redesignation in accordance with the requirements of Clean Air Act § 107(d)(3)(E). Indiana's December 5, 2012 submission included sufficient information to for the EPA to make the determinations necessary to designate Lake and Porter Counties as attainment for the 2008 eight-hour ozone standard ("ozone NAAQS").

Because Lake and Porter Counties attain the ozone NAAQS and because their emissions contribute minimally to ozone concentrations in the locations that have observed levels in violation of the NAAQS, disapproval of Indiana's redesignation

request for Lake and Porter Counties fails to achieve any significant decrease in ozone concentrations in any part of the Chicago nonattainment area.

In addition to the practical and jurisdictional concerns Indiana has with the EPA's denial of the requested redesignation, Indiana believes that the EPA is misapplying the requirements of Clean Air Act § 107(d)(3)(E) to Indiana's redesignation request. The proposed denial is premised entirely on the fact that "the Chicago nonattainment area continues to violate [the 2008 eight-hour ozone standard] based on the most recent three years (2011-2013) of quality assured, state-certified monitoring data for this ozone nonattainment area." 79 Fed. Reg. 36,693-96. Because *the entire* Chicago nonattainment area did not achieve a record of no monitored violations during the relevant time period, EPA did not consider Indiana's request further for compliance with the additional requirements of § 107(d)(3)(E). *See Id.* at 36,692 and 36,696 (*e.g.*, "Since the Chicago ozone nonattainment area continues to violate the 2008 eight-hour ozone standard, we cannot conclude that Indiana has developed an acceptable attainment year emissions inventory. * * * ...since the Chicago nonattainment area continues to violate the 2008 eight-hour ozone standard, we conclude that Indiana's estimates of the VOC and NO_x MVEBs are also not acceptable.")

Accordingly, Indiana's most important comment on the proposed denial is: **The EPA has misapplied the requirements of Clean Air Act § 107(d)(3)(E) to Indiana's redesignation request.**

The plain language of § 107(d)(3)(E) does not mandate the EPA to use, as a prerequisite to consideration of all other requirements of § 107(d)(3)(E), whether *the entire nonattainment area* has attained the national ambient air quality standard. In requiring the entire Chicago nonattainment area to demonstrate attainment with the applicable national ambient air quality standard ("NAAQS") – in this case, the 2008 eight-hour ozone standard – the EPA misreads § 107(d)(3)(E).

The Clean Air Act, as with most statutes, was meant to be read as a whole. Admittedly, parsing § 107(d)(3)(E)(i) into a stand-alone requirement, could support the EPA's application of the requirement to Indiana's request. However, as is evident from the plain language, subpart (i) simply cannot be divorced from the overall requirements of § 107(d)(3)(E).

Sec. 107(d)(3)(E)(i) states only that: "the Administrator determines that the area has attained the national ambient air quality standard;".

This provision only makes sense when read in context with the all of § 107(d)(3)(E):

> (E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—
>
> (i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410 (k) of this title [regarding State implementation plans];

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title [regarding State implementation plans]; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

Therefore, it is inappropriate, in evaluating Indiana's request to have Lake and Porter Counties redesignated to attainment against the criteria of § 107(d)(3)(E), for the EPA to require Indiana demonstrate the entire Chicago nonattainment area as monitoring attainment.

Sec. 107(d)(3)(E) clearly directs that the factors EPA consider in a redesignation may encompass "a nonattainment area *(or portion thereof)*[.]" (Emphasis added). Pursuant to the whole act rule, the EPA should read subpart (i) within the context of § 107(d)(3)(E) – not apart from it. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute…'[.]"); *Dada v. Mukasey*, 544 U.S. 1 (2008).

As such, the determination of whether "the area" required to be in attainment as part of subpart (i)'s requirement, must be informed and modified by "a nonattainment area (or portion thereof)" described in § 107(d)(3)(E) generally. And, given this necessary context, it was inappropriate for the EPA to dismiss (the remainder of) Indiana's redesignation request because there were monitors – not in Lake or Porter Counties – that showed nonattainment for the relevant period.

The correct reading of § 107(d)(3)(E) as a whole is further supported by the EPA's own actions in another redesignation determination. In 2002, the EPA redesignated only the Kentucky portions of the Cincinnati-Hamilton Area (located across the Ohio-Kentucky state borders) as attainment for the 1-hour ozone standard. *Approval and Promulgation of Implementation Plans Reinstatement of Redesignation of Area of Air Quality Planning Purposes; Kentucky Portion of the Cincinnati-Hamilton Area,* 67 Fed. Reg. 6,411 (Feb. 12, 2002). That final rule was made in response to a lawsuit appealing an earlier redesignation of both the Kentucky and Ohio portions of the nonattainment area to attainment. Of relevance to current Indiana request, in the previous rulemaking the

EPA said: "EPA has the authority to redesignate the Kentucky portion of the area, independent of whether Ohio has met all the requirements for a fully approved State Implementation Plan (SIP) *for the Ohio portion of the area*." *Id* at 6,413 (emphasis added).[1]

The element of § 107(d)(3)(E) differentiated by EPA in that statement is subpart (ii), which prevents the Administrator from redesignating a nonattainment area unless she "has fully approved the applicable implementation plan *for the area* under section 7410(k)…[.]" (Emphasis added).

The same phrase "the area" is used in both subparts (i) and (ii) of § 107(d)(3)(E). Yet in the context of subpart (i) in Indiana's case, EPA interprets that clause to mean "the (entire) nonattainment area." However, in subpart (ii), given Kentucky's case, EPA interpreted the clause to mean "the nonattainment area (or portion thereof)."

Indiana believes the treatment of the clause – in the same section of the Clean Air Act – used by EPA in the Cincinnati-Hamilton redesignation is the correct treatment for Indiana's redesignation request as well. And, if the correct reading had been applied when EPA evaluated the request to redesignate Indiana's Lake and Porter Counties, the EPA would not have disapproved the request.

As such, Indiana asks, as a result of these comments, that EPA re-evaluate the State's December 5, 2012 Request for Redesignation in total to determine whether it conforms to the requirements of § 107(d)(3)(D). If examined against the backdrop of a permissible *portion of the nonattainment area*, IDEM believes that its submission demonstrates that redesignation of Lake and Porter Counties is warranted.

Once again, Indiana appreciates the opportunity to provide comments on this important matter. If you have any questions or need additional information, please contact Keith Baugues at (317) 232-8222 or by email at kbaugues@idem.in.gov.

Sincerely,

Thomas W. Easterly
Commissioner

[1] The EPA in the Cincinnati-Hamilton rulemaking also relied upon the language of § 107(d)(3)(D), referring to "a revised designation of any area or *portion thereof* within the State* * *[,]" to support the ability of the agency to evaluate the redesignation of the basis of something less than the entire nonattainment area. *Id*. at 6,412 (emphasis in original).