Andy Beshear
GOVERNOR

ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION
300 Sower Boulevard
Frankfort, Kentucky 40601
Phone: (502) 564-2150
Fax: 502-564-4245

Rebecca Goodman
SECRETARY

Anthony R. Hatton
COMMISSIONER

February 3, 2025

Ms. Jeaneanne Gettle
Acting Regional Administrator
U.S. EPA, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303

Re: Comments relating to *Air Quality Designations; KY; Redesignation of the Kentucky Portion of the Louisville, KY-IN 2015 8-Hour Ozone Nonattainment Area to Attainment;* Docket ID: EPA-R04-OAR-2022-0789; FRL-10888-03-R4

Dear Ms. Gettle,

On behalf of the Commonwealth of Kentucky and the Energy and Environment Cabinet, the Division for Air Quality (Division) respectfully submits the attached comments relating to the U.S. Environmental Protection Agency's (EPA) proposed action in the January 3, 2025 Federal Register publication, soliciting comments on the proposed *Air Quality Designations; KY; Redesignation of the Kentucky Portion of the Louisville, KY-IN 2015 8-Hour Ozone Nonattainment Area to Attainment*.[1]

Overall, the Division finds numerous issues with EPA's proposed final rule. The Division recommends EPA withdraw the proposal to deny the redesignation request, approve the redesignation request consistent with the proposed rule published in the Federal Register on April 23, 2023,[2] and redesignate the Kentucky portion of the Louisville, KY-IN nonattainment area to attainment.

The Division appreciates EPA's consideration of the attached comments. If you have any questions regarding this matter, please contact Ms. Cassandra Jobe, Environmental Control Manager, in the Program Planning and Administration Branch at (502) 782-6670, or cassandra.jobe@ky.gov.

Sincerely,

Michael Kennedy

Michael Kennedy, P.E.,
Director, Division for Air Quality

cc: Denisse Diaz, U.S. EPA Region 4
Lynorae Benjamin, U.S. EPA Region 4

[1] 90 FR 294
[2] 88 FR 23598

Kentucky Energy and Environment Cabinet's Comments Regarding EPA's Proposal to Deny Kentucky's Request to Redesignate the Kentucky Portion of the Louisville, KY-IN Area from Nonattainment to Attainment for the 2015 Ozone NAAQS

The Administrator Determined that the Entire Louisville, KY-IN Area Has Attained the 2015 8-Hour Ozone NAAQS when he approved Indiana's redesignation request.

On February 21, 2022, the State of Indiana submitted its request to redesignate the Indiana portion of the Louisville, KY-IN Area (the "Louisville Area") to attainment for the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS).[1] On May 18, 2022, EPA published a proposed rule in which it proposed to grant Indiana's request and redesignate the Louisville Area to attainment.[2] On July 5, 2022, EPA published its final rule granting Indiana's request and redesignating the Indiana portion of the Louisville Area to attainment.[3] In the proposed rule for Indiana's request to redesignate the Louisville Area, the Administrator determined that the "data demonstrate[s] that the ***Louisville area*** is attaining the 2015 ozone NAAQS[,]" and "[t]he ***Louisville area's*** 3-year ozone design value for 2019-2021 is 0.069 ppm, which meets the 2015 ozone NAAQS. Therefore, in this action, EPA proposes to determine that the ***Louisville area*** is attaining the 2015 ozone NAAQS.[4]" In the Final Rule approving Indiana's request, EPA affirmed the Administrator's determination that the entire Louisville Area had attained the ozone NAAQS pursuant to Section 107(d)(3)(E)(i).[5] Therefore, when EPA published its Final Rule approving Indiana's redesignation request for the Indiana portion of the Louisville Area, the Administrator determined that the entire Louisville Area has attained the 2015 8-hour ozone NAAQS.

Following Indiana's submittal, Kentucky submitted its own redesignation request for the Kentucky portion of the Louisville Area. As a result of the Administrator's determination that the Louisville Area has attained the ozone NAAQS, Kentucky was then required to demonstrate compliance with the remaining requirements of Sections 107(d)(3)(D)(E)(ii)-(v) to have the Kentucky portion of the Louisville Area redesignated to attainment. Indeed, in response to Kentucky's redesignation request, the Administrator <u>again</u> determined that the Kentucky potion of the Louisville Area met the requirements of Sections 107(d)(3)(E)(ii)-(v) and published the first proposed rule to redesignate the Kentucky portion of the Louisville Area to attainment.[6] Now, years after the Administrator's determination that the Louisville Area attained the 2015 standard, EPA published a new proposed rule (the "Proposed Rule"), reversing course and denying Kentucky's redesignation request. In the Proposed Rule, the Administrator only takes issue with the requirement of Section 107(d)(3)(E)(i), which, as explained above, was already expressly determined to have been met for the entire Louisville Area.[7] Therefore, because the Administrator already determined that the entire Louisville Area attained the 2015 8-hour ozone NAAQS, and

[1] *See* 87 FR 30129.
[2] *See Id*.
[3] *See* 87 FR 39750.
[4] 87 FR 39750 at 30130 (emphasis supplied).
[5] *See* 88 FR 39750.
[6] *See* 88 FR 23598, 23601-09.
[7] *See* 88 FR 39750.

that Kentucky has already demonstrated compliance with Sections 107(d)(3)(E)(ii)-(v), the Administrator should grant Kentucky's redesignation request.

The Cabinet's conclusion is supported by the text of Section 107(d)(3). Section 107(d)(3)(D) provides that a state may submit a revised designation of "any area *or portion thereof*.[8]" Similarly, Section 107(d)(3)(E) prohibits the Administrator from redesignating a "nonattainment area (*or portion thereof*) to attainment" unless the requirements of 107(d)(3)(E)(i)-(v) are met.[9] In comparison, Section 107(d)(3)(E)(i) requires the Administrator to determine that "the *area* has attained the [NAAQS].[10]" The use of "area" rather than "area or portion thereof" demonstrates Congress's intent that the Administrator must determine that an entire area has attained the relevant NAAQS, even if the redesignation request is only for a portion of the area.

The Proposed Rule Denying Kentucky's Redesignation Requests Results in a Single Nonattainment Area with Two Different Attainment Designations and is Arbitrary Because the Regional Offices Failed to Act in a Fair and Uniform Manner.

Ozone pollution does not respect state borders. The Louisville Area straddles two states—Kentucky and Indiana—and air quality is a shared concern for both states. Consequently, the Louisville Area spans both EPA Region V (serving Indiana) and EPA Region IV (serving Kentucky). When separate EPA Regional Offices are delegated authority by the Administrator, they are required to exercise that authority in a consistent, fair, and uniform manner.[11] These regions should not take separate actions on a multi-state nonattainment area, as doing so results in contradictory regulations, delayed action, and a lack of accountability. Dividing actions along state lines introduces unnecessary complexity and inefficiency in the regulatory process. By arbitrarily withdrawing the first attainment determination, EPA is creating additional unnecessary work, thereby wasting valuable agency resources and taxpayer dollars for two state regulatory agencies and two regional EPA offices. EPA approved Indiana's request to redesignate the Indiana portion Louisville Area to attainment for the 2015 Ozone National Ambient Air Quality Standards (NAAQS) on July 5, 2022, based upon the same monitoring data that Kentucky relied upon for its redesignation request. It is essential that the entire Louisville Area be considered in the same light.

The Commonwealth of Kentucky and State of Indiana both submitted redesignation requests to their respective EPA Regional offices seeking to redesignate the Louisville Area to attainment for the 2015 ozone NAAQS. As part of their respective requests, both states submitted identical monitoring data to demonstrate that the Louisville Area had attained the 2015 ozone NAAQS. Both Kentucky and Indiana provided monitoring data from monitors in Bullitt (AQS Site Code:

[8] (emphasis supplied).
[9] (emphasis supplied).
[10] (emphasis supplied).
[11] *See* CAA Section 301(a)(2)(A).

21-029-0006), Oldham (AQS Site Code: 21-185-0004), and Jefferson (AQS Site Codes: 21-111-0067, 21-111-0051, and 21-111-0080) Counties in Kentucky, as well as from monitors in Clark (AQS Site Code: 18-019-0008) and Floyd (AQS Site Code: 18-043-1004) Counties in Indiana. In their requests, both states demonstrated that the highest three-year design value for the Louisville Area was below the 0.070 ppm threshold based on the same data from the monitors listed above. Despite relying on the same data in their respective redesignation requests, EPA now proposes a rule that would result in a single area being split into two separate attainment status designations. The reason for the discrepancy is Region IV's failure to act on Kentucky's request in a fair, uniform, and timely manner when compared to Region V's handling of Indiana's redesignation request that was based on identical data.

In promptly approving Indiana's request, the Administrator relied on the shared data to determine the entire Louisville Area has attained the 2015 ozone NAAQS. Indiana submitted its redesignation request on February 21, 2022.[12] On May 18, 2022, just two months and twenty-seven days after Indiana's submittal, EPA published its proposed rule granting Indiana's request.[13] On July 5, 2022, EPA published its final rule granting Indiana's request.[14] In total, Region V published a final rule four months and 14 days after Indiana's request. Further, Region V published its final rule 48 days from issuance of the proposed rule to approve Indiana's request – a time period that included two national holidays.

In contrast, Kentucky submitted its request on September 6, 2022, using the same monitoring data as Indiana to demonstrate attainment of the ozone NAAQS. On December 14, 2022, EPA issued a Completeness Letter finding that Kentucky's submittal met the completeness criteria outlined in 40 CFR Part 51, Appendix V[15]. On April 18, 2023, seven months and twelve days from Kentucky's submittal, Region IV published a proposed rule to grant Kentucky's request.[16] Thus, it took Region IV almost three months longer to *propose* a rule conforming to the Administrator's final determination for the Louisville Area than it took the Administrator to reach his final conclusion in the first place. Regardless, in an action consistent with the Region V rule, Region IV proposed to grant Kentucky's redesignation request. Finally, on January 3, 2025, twenty-seven months and eighteen days from Kentucky's submittal and 20 months and 16 days from issuance of the proposed rule to approve the request, EPA issued the Proposed Rule reversing course and denying Kentucky's request.

[12] 87 FR 39750.
[13] 87 FR 30129.
[14] 87 FR 39750.
[15] A copy of the December 14, 2022 Completeness Letter can be downloaded at https://www.regulations.gov/document/EPA-R04-OAR-2022-0789-0008.
[16] 88 FR 23598.

In the Proposed Rule, Region IV, speaking for the Administrator, cites to 2023 monitoring data and preliminary 2024 monitoring data as its basis for determining that the Louisville Area had not attained the 2015 ozone NAAQS. However, had Region IV acted consistently with Region V's timeframe to issue a rule conforming with the Administrator's final determination for the Louisville Area, it would have issued a final rule on Kentucky's request around January or February 2023. As a result, Region IV would not have access to 2023 or 2024 monitoring data and would have been forced to evaluate Kentucky's request based on the submitted 2019-2021 design value. As the 2019-2021 design value demonstrated attainment of the 2015 ozone NAAQS, Region IV would have granted Kentucky's request.[17]

Section 301(a) of the Clean Air Act ("CAA") allows the Administrator to delegate his duties to regional officers and/or employees. When the Administrator does so, he is required to ensure that his delegees act in a manner "to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter.[18]" When Region IV failed to act on Kentucky's request in a timeframe consistent with Region V's handling of a similar redesignation request relying on identical data, and consistent with the Administrator's final determination for the Louisville Area, it failed to assure fairness and uniformity in the criteria, procedures, and policies for its handling of the request. This failure resulted in Region IV considering monitoring data that would not have been available had it acted uniformly with Region V. As such, the Administrator's delegation of his authority to Region IV to reverse course and propose to deny Kentucky's redesignation request is neither fair nor uniform and is arbitrary and capricious.

Additionally, keeping the Kentucky portion of the Louisville Area designated as nonattainment for the 2015 ozone NAAQS is facially inconsistent with the decision to redesignate the Indiana portion of the Louisville Area as attainment. Further, both Kentucky and Indiana share a responsibility to ensure clean air for their residents, and their designation status should be aligned to prevent a patchwork of standards and ineffective, fragmented management. If the Kentucky portion of the Louisville Area remains designated as nonattainment, then businesses and industries in the Kentucky portion of the Louisville Area will face stricter emissions regulations and compliance deadlines than those in the Indiana portion of the Louisville Area. It is unlawful for EPA to determine that the air on one side of the Ohio River (in Indiana) is 'clean' and meets the requirements for redesignation, while the other side of the river (Kentucky) is 'not clean' and does not meet the requirements when the submittals were based on the same monitoring data. This disparity creates an economic burden and leads to a competitive disadvantage for businesses in Kentucky, as they would be required to comply with more stringent federal requirements. A unified attainment designation across the entire Louisville Area would ensure that the regulatory

[17] In its proposed rule issued on April 18, 2023, Region IV determined that Kentucky's request demonstrated compliance with the requirements of Section 107(d)(3)(E)(ii)-(iv).
[18] CAA Section 301(a)(2)(A).

burden is distributed fairly, with both states working together to meet the same air quality standards. This approach promotes fairness and regional uniformity while simultaneously reducing the risk of economic imbalances that could arise from differing air quality designations. EPA Region IV's inability to act on Kentucky's redesignation request State Implementation Plan (SIP) submittal should not result in a penalty for the Kentucky portion of the Louisville Area.

Finally, EPA has long recognized the importance of coordinating air quality designations in regions that span multiple states. Historically, multi-state nonattainment areas have been treated as a single air quality management zone, with consistent actions applied across both states. Currently, a review of the status of other multi-state nonattainment areas available on EPA's website indicates that the Louisville Area is the only multi-state nonattainment area in the country to be subject to two separate attainment designations. Dividing the Louisville Area into attainment and nonattainment portions based solely on state boundaries would set a problematic precedent, undermining the effectiveness of regional planning efforts. EPA should continue to treat the Louisville Area as a single unit, consistent with past and current practices, to ensure that air quality issues are managed in a comprehensive and cooperative manner.

EPA's Reliance on Uncertified 2023 Monitoring Data and Preliminary 2024 Monitoring Data is not in Accordance with the Clean Air Act or the Administrative Procedure Act.

The Cabinet recognizes that EPA's disapproval is primarily based on the comparison of the 2023 and 2024 design values against the 2015 ozone NAAQS. However, the Cabinet respectfully asserts that relying on the design values for these years is both impermissible and prohibits a fair and equitable assessment of Kentucky's redesignation request. The redesignation process, as outlined in Section 107(d)(3)(E) of the CAA, requires the EPA to assess whether a given area meets the applicable NAAQS based on a representative "snapshot" of the *certified monitoring data*. Section 107(d)(3)(E)(i) of the CAA requires three complete, consecutive calendar years of *quality-assured air quality monitoring data* to demonstrate attainment. In Kentucky's redesignation request, the period from 2019 to 2021 was used for the approaching nonattainment deadline, and EPA's action to approve or disapprove Kentucky's SIP must be based on monitoring data from that period or snapshot, not subsequent years.

In EPA's view, because Section 107(d)(4)(E) does not establish procedures for when the Administrator fails to act within the timeframe established by the section, he is free to consider any data that becomes available up until he decides to rule on the request. However, "additional sources of law can allow courts to enforce a statute's requirements even when the statute itself lacks its own remedy.[19]" EPA's conduct is not only governed by the CAA, but also the Administrative Procedure Act ("APA"). APA Section 706(2)(A) prohibits agency action that is

[19] *Commonwealth of Ky., et al. v. EPA*, 123 F.4th 447, 475 (6th Cir. 2024) (Murphy, J. Concurring).

not only arbitrary, capricious, or an abuse of discretion, but also when an agency action is "not in accordance with law." The use of the word "shall" in CAA Section 107(d)(3)(D) suggests that EPA lacks discretion to miss the 18-month deadline to approve or deny a redesignation request.[20] Further, APA Section 706(2)(A) allows a reviewing court to "set aside" an agency action it finds to be not in accordance with the law when said action has a "substantial influence" on the outcome of the proceedings[21,22].

In the Proposed Rule, EPA cites to 2023 monitoring data to support its determination that the highest 3-year design value for 2021-2023 for the Louisville Area exceeded the standard of 0.070 ppm. The Administrator's use of 2023 monitoring data is not in accordance with the law, as the Administrator failed to act on Kentucky's redesignation request within the timeframe established by Section 107(d)(3)(D). Kentucky submitted its redesignation request to EPA on September 6, 2022. Pursuant to Section 107(d)(3)(D), the Administrator then had until March 6, 2024, eighteen months from Kentucky's submittal, to approve or deny the request. The Administrator's failure to timely act on the redesignation request by the March 6, 2024 deadline[23] allowed him to consider 2023 monitoring data that had not been certified until after expiration of the 18-month period. EPA guidance provides that "data [for purposes of a redesignation request] should be collected and *quality assured* in accordance with 40 CFR 58[.][24]" As required by regulation:

> The State, or where appropriate local, agency shall submit to the EPA Regional Administrator an annual air monitoring data certification letter to certify data collected by FRM and FEM monitors at SLAMS and SPM sites that meet criteria in appendix A to this part from January 1 to December 31 of the previous year.[25]

Additionally, along with the certification letter, states are required to submit an "annual summary report of all ambient air quality data collected by FRM and FEM monitors at SLAMS and SPM

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[20] *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 33-34 (2016) (holding that use of the word "shall" creates a mandatory rule).
[21] *See United States v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988)); *see Shinseki v. Sanders*, 556 U.S. 396, 407-08 (2009).
[22] In the Completeness Letter EPA identifies Kentucky's Redesignation Request as a "state implementation plan (SIP) revision[.]" CAA Section 110(k)(2), requires the Administrator to act on a SIP revision within twelve months of the determination of completeness. Pursuant to Section 110(k)(2), the Administrator was required to act on Kentucky's request by December 14, 2023. Therefore, by failing to issue the Proposed Rule until January 5, 2025, the Administrator also failed to act in accordance with CAA Section 110(k)(2).
[23] EPA failed to take any further steps on Kentucky's request until the Commonwealth filed a lawsuit seeking to compel the Administrator to act. And those steps, issuing the Proposed Rule that wholly reverses the Administrators original position on the request, are still not the final determination required by the CAA.
[24] *Procedures for Processing Requests to Redesignate Areas to Attainment*, Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereinafter, the *Calcagni Memorandum*) (emphasis supplied).
[25] 40 CFR 58.15(a).

sites….[26]" This annual summary serves as the record of the specific data that is the object of the certification letter.[27] Finally, states are required to submit a summary of the precision and accuracy data for all ambient air quality data collected by FRM and FEM monitors at SLAMS and SPM sites.[28] Kentucky timely submitted its annual certification letter, annual summary report, and precision and accuracy summary for 2023 monitoring data on May 1, 2024. Therefore, the 2023 monitoring data was not "quality assured in accordance with 40 CFR 58" at the time the Administrator was required to act on Kentucky's redesignation request.[29] As the 2023 monitoring data serves as a basis for the Administrator's denial of Kentucky's redesignation request, his failure to abide by the statutory deadline had a "substantial influence" on the outcome of the request warranting judicial intervention.

In the Proposed Rule, EPA also cites to preliminary 2024 monitoring data to support its determination that the design value for 2022-2024 exceeds the 0.070 ppm standard. EPA's use of preliminary 2024 monitoring data is similarly not in accordance with the law because the Administrator failed to act on Kentucky's redesignation request within the timeframe established by Section 107(d)(3)(D). The Administrator's failure to act on the redesignation request until January 3, 2025, allowed him to consider over seven months of preliminary 2024 monitoring data that he would not have had access to if he had abided by the statutory deadline. Further, the preliminary 2024 monitoring data relied on by the Administrator has not been certified as of the date of this comment. Thus, like the 2023 monitoring data discussed above, the preliminary 2024 monitoring data was not "quality assured in accordance with 40 CFR 58.[30]" Therefore, because the preliminary 2024 monitoring data was only available to the Administrator as a result of his failure to abide by the statutory deadline and it served as a basis for his denial of Kentucky's redesignation request, his failure to abide by the deadline had a "substantial influence" on the outcome of the request warranting judicial intervention.

The Proposed Rule states that EPA received comments that the 2022 DV was violating the NAAQS. The Cabinet disagrees with the comment as the 2022 DV was 70 ppb and meets the standard. Additionally, EPA's use of 2023 monitoring data is also improper because the 2023 ozone monitoring data for the Louisville Area was incomplete at the time of issuance of the Proposed Rule. As EPA is aware, in the summer of 2023, large portions of the country were impacted by smoke from Canadian Wildfires. At the direction of EPA, air agencies were advised to submit exceptional event demonstrations to account for smoke-impacted monitoring data. Further, while EPA advised states it would develop a tool for assistance with exceptional events, EPA did not actually release that tool ("EMBER") publicly until December 13, 2024.

[26] *Id.* at 58.15(b).
[27] *Id.*
[28] *Id.* at 58.15(c).
[29] *Calcagni Memorandum*, at 2.
[30] *Id*.

Simultaneously, the Louisville Metro Air Pollution Control District (LMAPCD) was in the process of completing the exceptional event analysis for the Louisville Area for 2023 ozone violations, but was delayed while waiting for EPA to release EMBER. The exceptional event demonstrations, once complete, will show how the design value for 2021-2023 is below the 0.070 ppm standard. Thus, if the 2023 Canadian Wildfires are correctly accounted, the data will demonstrate that the Louisville Area continues to attain the ozone standard pursuant to Section 107(d)(3)(D). As a result, by using incomplete data that EPA was aware did not provide an accurate representation of air quality in the Louisville Area, EPA acted arbitrarily in denying Kentucky's redesignation request.

If the Administrator had acted on Kentucky's redesignation request within the required timeframe established in Section 107(d)(3)(D) and redesignated the Kentucky Portion of the Louisville Area to attainment based on the 2019-2021 or 2020-2022 design value, contingency measures would still be in place to address future ozone exceedances. Pursuant to Section 107(d)(3)(E)(iv), states are required to have an approved maintenance plan for an area before it can be redesignated to attainment. "To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures as EPA deems necessary to assure prompt correction of any future 2015 8-hour ozone violations.[31]" As part of its redesignation request, Kentucky submitted a maintenance plan for the Kentucky portion of the Louisville Area, which was preliminarily approved by EPA.[32] Kentucky's maintenance plan included a two-tiered triggering mechanism to determine when contingency measures are needed and a process of developing and implementing appropriate control measures. EPA found that the maintenance plan "adequately provides the five basic required components of a maintenance plan: the attainment emissions inventory, maintenance demonstration, monitoring plan, verification of continued attainment, and a contingency plan.[33]" As a result, EPA proposed to find that the maintenance plan met the requirements of Section 175A and was approvable.[34] Therefore, if the Administrator would have redesignated the Kentucky portion of the Louisville Area based on the 2019-2021 design value as provided in the proposed rule, the maintenance plan and its contingency measures would have been in place to address any ozone violations in 2023 or 2024.

By focusing on the 2021-2023 and 2022-2024 monitoring data, EPA introduces an assessment that is outside the intended scope of Kentucky's redesignation request and outside of its mandatory timeframe to act. The monitoring data from 2019 to 2021 already demonstrates that the Louisville Area meets the 2015 ozone standard, and any further review should be based on that relevant time frame. EPA's current approach is inconsistent with the established process for evaluating

[31] 88 FR 23598, 23605.
[32] *Id*. at 23605-06.
[33] *Id*. at 23608.
[34] *Id*.

redesignation requests, contrary to the statute governing these requests, and undermines the objective of fairly assessing the air quality status during the specified 3-year period.

EPA's Interpretation of Section 107(d)(3)(E)(i) of the Clean Air Act is Not the Best Reading of the Statute.

EPA asserts that it interprets the provisions of Section 107(d)(3)(E)(i) to allow the Administrator to consider monitoring data that only became available after the 18-month statutory deadline for the Administrator to rule on a redesignation request. EPA's interpretation goes beyond its statutory authority by allowing it to continue to move the goal post well after the statutory deadline for the Administrator to rule on the request has passed. A more reasonable interpretation of Section 107(d)(3)(E)(i) would prohibit the Administrator from considering monitoring data made available after the 18-month statutory deadline in ruling on a request. This interpretation recognizes Congress's use of the perfect present tense "has attained," which signals its intent that attainment must continue beyond the date of submission of a redesignation request. However, this interpretation would also disallow the Administrator's unreasonable delay in violation of his statutory mandate to make a determination on a state's redesignation request. To interpret the act in a manner that indicates there is no consequence for the Administrator's indefinite delay of his determination until data becomes available that allows him to deny the request wholly nullifies the timeline imposed by Congress. EPA's interpretation leaves states in the dark as to what data the Administrator will consider in acting on a redesignation request because the relevancy of monitoring data in the decision is determined exclusively by the amount of time the Administrator takes to act.

To support its interpretation of Section 107(d)(3)(E)(i), EPA cites to two Court of Appeals decisions, *Southwest Pennsylvania Growth Alliance v. Browner*[35] and *Commonwealth v. U.S. E.P.A.*[36] In EPA's view, these two decisions affirm its interpretation allowing it to consider not only monitoring data that became available after the redesignation request was submitted, but also data that only became available after the timeframe for the Administrator to rule on the request had passed. EPA's reliance on the two opinions is misguided for two reasons. First, neither of the cited opinions addresses a situation where the EPA's denial of a redesignation request results in a single air quality control region being split into two different attainment designations. Second, both decisions are based on EPA's interpretation of a statute and were rendered prior to the United States Supreme Court's opinion in *Loper Bright Enterprises, et. al. v. Raimondo*.[37] Despite EPA's claims otherwise, both courts relied on *Chevron* deference to support their opinions. In *Southwest Pennsylvania Growth Alliance*, then Judge Alito reasoned that "if we assume for present purposes that the language of [CAA Section 107(d)(3)(E)] is ambiguous as to whether the EPA may

[35] 121 F.3d 106 (3d Cir. 1997).
[36] 165 F.3d 26 (6th Cir. 1998).
[37] 603 U.S. 369 (2024).

disregard data arising after the expiration of the 18–month period, we must defer to the EPA's interpretation of this provision under the rule of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).[38]" In *Commonwealth v. E.P.A.*, the Sixth Circuit held:

> Finally, under *Chevron*, where an agency administers a statute and the statute is either silent or ambiguous on an issue, a reviewing court must defer to the agency's statutory interpretation, if it is reasonable. *Chevron*, 467 U.S. at 842-43. Considering (1) the use of the present perfect tense in the phrase, "has attained," denoting past action with abiding effect, (2) the use of the term "maintenance," and (3) the explicit continuation of the nonattainment requirements until redesignation of the area, the EPA's position requiring continuing compliance is not an unreasonable interpretation of the CAA. Accordingly, we must defer to the EPA's interpretation of the statute.[39]

These findings demonstrate that *Chevron* deference was more than a mere "backstop," but rather it was essential to the reasoning in *Southwest Pennsylvania Growth Alliance* and holding in *Commonwealth v. E.P.A*. Therefore, the Supreme Court's decision in *Loper Bright* warrants judicial reexamination of EPA's interpretation of Section 107(d)(3)(E)(i).

The Cabinet recommends EPA withdraw the disapproval of the redesignation request, acknowledge the Canadian Wildfires, and find the Kentucky portion of the Louisville Area 'has attained' the 2015 Ozone NAAQS and redesignate it to attainment consistent with the action already taken for the Louisville Area by EPA Region V[40] and the April 11, 2023 proposed rule[41]. In so recommending, the Cabinet urges EPA to make a final determination that is uniform and fair with the determination the Administrator made in 2022 through the authority delegated to Region V in response to Indiana's request for the exact same area based on the exact same data. The only uniform and fair determination would be to approve the redesignation request for the Kentucky portion of the Louisville Area based on the 2019-2021 monitoring data, as it reflects the air quality status of the Louisville Area during the relevant statutory eighteen-month time period EPA had to act the redesignation request.

[38] 121 F.3d at 113 (dictum).
[39] 165 F.3d at 4.
[40] *See* 87 FR 39750.
[41] *See* 88 FR 23598.