

Stanley F. Mires,

Chief Counsel, Legislative.

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 52 and 81

[LA-41-1-7355, FRL-5899-8]

#### Designation of Areas for Air Quality Planning Purposes; State of Louisiana; Correction of the Designation for Lafourche Parish

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

**SUMMARY:** On July 17, 1997, EPA published a proposed rulemaking to correct the designation of Lafourche Parish, Louisiana, to nonattainment for ozone (62 FR 38237). One adverse comment letter was received during the 30-day comment period, and the issues raised in that letter are addressed in this document. Pursuant to the Clean Air Act (the Act), which allows EPA to correct its actions, EPA is today correcting the designation of Lafourche Parish to nonattainment for ozone.

**DATES:** This action is effective on January 5, 1998.

**ADDRESSES:** Copies of the information relevant to this action are available for inspection during normal hours at the following location: Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733.

Anyone wishing to review this document at the Region 6 EPA office is asked to contact the person below to schedule an appointment 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** Lt. Mick Cote, Air Planning Section (6PD-L), Environmental Protection Agency, Region VI, 1445 Ross Avenue, Dallas, Texas 75202-2733, telephone (214) 665-7219.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The specific rationale EPA used to correct the ozone designation of Lafourche Parish was explained in the proposed correction document (62 FR 38237, July 17, 1997) and will not be restated here. This document announces EPA's final action regarding the correction of Lafourche Parish to nonattainment for ozone.

##### II. Response to Comments

The EPA received an adverse comment letter dated August 15, 1997, from the Louisiana Mid-Continent Oil and Gas Association. The commenters believed that EPA either failed to consider or purposefully disregarded several factors. The EPA's responses to these comments are detailed below.

*Comment:* EPA failed to consider the odd shape of the parish and the location of the monitor with respect to sources in the parish.

*Response:* 40 CFR part 58, Ambient Air Quality Surveillance, Appendices D and E, describe EPA's monitoring network design and siting criteria for State or Local Air Monitoring Stations (SLAMS). The SLAMS make up the ambient air quality monitoring network which is required by 40 CFR 58.20 to be provided for in the State Implementation Plan (SIP). In general, the SLAMS monitor in Thibodaux was sited in accordance with 40 CFR part 58, Appendices C and D, to measure the maximum population exposure one could reasonably expect to occur in the Parish. The shape of Lafourche Parish and the location of the major emission points were taken into consideration by the State and EPA to determine the appropriate siting scales and monitoring objectives for ozone in Lafourche Parish.

*Comment:* EPA failed to consider the excellent compliance history of the Parish.

*Response:* The EPA considered the compliance history of Lafourche Parish, prior to and during 1995, as part of our evaluation and approval process for the Parish's ozone redesignation request. But despite the prior compliance history of Lafourche, the operative facts showed a violation of the standard that disqualified the area from redesignation to attainment. The language of section 107 (d)(3)(E)(i) and (d)(1)(A) provides that EPA may not redesignate an area unless the Administrator determines that the area has attained the standard. This is reinforced by other sections of the Act, including section 175A maintenance plan requirements, and section 172(c)(9) contingency measures. The EPA has long interpreted this language as requiring EPA to disapprove redesignation requests for areas that violate the standard while a redesignation request is pending. See Memorandum dated September 4, 1992, entitled Procedures for Processing Requests to Redesignate Areas to Attainment, p. 5; Pittsburgh-Beaver Valley nonattainment area (61 FR 19123, May 1, 1996); Richmond, Virginia (59 FR 22757, May 3, 1994), Birmingham, Alabama (62 FR 49154,

September 19, 1997), Northern Kentucky portion of Cincinnati-Hamilton nonattainment area (61 FR 50718, September 27, 1996), and Detroit-Ann Arbor, (60 FR 12459, March 7, 1995). See also the opinion of the United States Court of Appeals for the Third Circuit in *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F. 3rd. 106 (3rd Cir. 1997).

The Lafourche direct final approval notice itself stated: "If the monitoring data records a violation of the NAAQS before the direct final action is effective, the direct final approval of the redesignation will be withdrawn and a proposed disapproval substitute for the direct final approval." (60 FR 43021-22). Although such a violation was recorded during the comment period, EPA failed to withdraw the approval and substitute a disapproval, as it acknowledged would have been the appropriate course of action. The EPA's position is consistent with 40 CFR section 50.9, which states that the NAAQS for ozone is attained "when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million[] is equal to or less than 1, as determined by Appendix H." Appendix H explains the methodology for determining "attainment" of the ozone standard. If there are more than three exceedances over a three-year period at any of the monitoring sites, the area has not attained the standard.

The United States Court of Appeals for the Third Circuit, in evaluating EPA's disapproval of a redesignation request for an area that violated the standard while its request was pending, stated: "we accept the view that the EPA may not redesignate an area if the EPA knows that the area is not meeting the NAAQS. The EPA's redesignation of the Lafourche Parish redesignation was thus not proper." *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3rd at 114. The commenters also complained that 1995 was an unusually warm year. But even if this were the case, this provides no grounds for excluding quality-assured monitored exceedances of the ozone standard. The EPA's applicable regulations governing ozone attainment provide no basis for excluding data due to exceptionally hot weather. 40 CFR section 50.9 appendix D and H and part 58. See Birmingham, 62 FR 49154, and the discussion contained therein.

*Comment:* The EPA failed to consider Lafourche Parish's performance with respect to the new 8-hour ozone standard.

*Response:* Compliance with the new 8-hour ozone standard is irrelevant to

the issues in this rulemaking, which concerns only the area's failure to meet the 1-hour standard. The EPA's action here concerns only the requirement to meet the 1-hour standard. It should be noted, however, that data collected from 1993-1995 and 1994-1996 indicate that Lafourche Parish would also be in violation of the new 8-hour standard.

*Comment:* The EPA did not consider the time it took to complete the entire review process, from draft SIP to final notice.

*Response:* The EPA assumes the commenters are referring to the time it took to develop and act upon the redesignation request for Lafourche Parish. The Louisiana Department of Environmental Quality (LDEQ) submitted its initial redesignation request for Lafourche Parish during the Summer of 1993. However, the plan was found to be deficient in several areas, and did not demonstrate maintenance of the ozone standard. The EPA had the option to disapprove this initial request, or ask LDEQ to revise the request and resubmit the revision to us. The LDEQ submitted a revised redesignation request for Lafourche Parish to EPA on November 18, 1994. The direct final approval of that revised maintenance plan and redesignation request appeared in the **Federal Register** on August 18, 1995, some months after receiving the revised request. Although the entire period of EPA's review, measured from the date of the original redesignation request, was more than eighteen months (though EPA took less than that time period to consider the revised request), this does not alter EPA's authority to consider violations that occurred while its review was pending. *Southwestern Pennsylvania Growth Alliance v. Browner, supra.*

*Comment:* The EPA failed to consider the uniqueness of the weather trends and purposefully disregarded the clear and convincing demonstration by LDEQ of transport in 1995.

*Response:* the LDEQ submitted a modeling demonstration to EPA on July 31, 1996, to support its belief that the exceedances in Lafourche Parish in 1995 were the result of transport from the Baton Rouge area. As discussed in the September 5, 1996, response letter to LDEQ, EPA concluded that the modeling demonstration did not prove the overwhelming transport theory. Further, whether the cause of the ozone violation in 1995 was due to transport or local sources, the regulatory result would be the same, and would still result in a designation of nonattainment. The EPA carries the responsibility to protect and inform the public about health issues which, in the case of

Lafourche Parish's violation of the ozone standard, require us to correct our rulemaking error and designate the area back to nonattainment. As in the case of the Pittsburgh-Beaver Valley nonattainment area that was the subject of the Southwestern Pennsylvania Growth Alliance case, there is here no adequate technical demonstration supporting a claim of transport-dominated nonattainment. See *SWPGA v. Browner, supra.* Moreover, even if there had been such a demonstration, the Act provides that an attainment area is one that "meets" the NAAQS, and EPA is prohibited from redesignating an area to attainment unless it determines that the area "has attained" the NAAQS. Thus, even if an area's nonattainment can be demonstrated to be caused by overwhelming transport, that does not entitle the area to be redesignated to attainment. This is made clear by the provisions of section 182(h), which establishes "rural transport" areas. In this section, Congress addressed the situation confronted by the most pristine areas which fail to meet the NAAQS, but make no significant contribution to the ozone concentrations in their area. For these areas, Congress provided some relief in the form of relaxed control requirements; however, Congress insisted on retaining the "nonattainment" designation for these areas that fail to meet the NAAQS due to overwhelming transport. Thus, although Congress provided relief for these areas, it did not change their nonattainment designations. In contrast, Congress did provide that transport may be taken into account in the classification of nonattainment areas (Act section 181(a)(4)). Thus Congress expressed its intent to allow limited adjustments for transport in the context of classifying nonattainment areas, but not for redesignations. See the discussion of this issue in *SWPGA v. Browner.*

*Comment:* The EPA did not consider or purposefully disregarded the President's directive to be flexible and minimize paperwork.

*Response:* On July 16, 1997, the President of the United States issued a Presidential Directive entitled Memorandum for the Administrator of the Environmental Protection Agency. This Presidential Directive required EPA to maximize common sense, flexibility, and cost-effectiveness when implementing the 8-hour ozone standard. However, this Presidential Directive also stated that the 1-hour standard will continue to apply in areas where air quality does not meet the current standard (62 FR 38421, July 18, 1997).

*Comment:* The EPA failed to consider the unnecessary paperwork and review burdens on LDEQ and EPA since compliance with both standards is expected by year-end 1998.

*Response:* This action will entail no unnecessary paperwork and review burdens. If the area attains the 1-hour standard and the 8-hour standard in the future, it will be eligible for appropriate designation to attainment of the 8-hour standard and revocation of the 1-hour standard.

### III. Final Action

The EPA issued a direct final rule promulgating a change to the designation of Lafourche Parish, Louisiana, to attainment for ozone, and amended 40 CFR parts 52 and 81 accordingly (60 FR 43020, August 18, 1995). In today's action, EPA is correcting this error by changing the designation of Lafourche Parish to an ozone nonattainment area, and classifying it as an incomplete data area. Today's action also amends 40 CFR parts 52 and 81 to reflect the change in designation. These actions are being taken in accordance with section 110(k)(6) of the Act.

### IV. Administrative Requirements

#### A. Executive Order (E.O.) 12866

The Office of Management and Budget has exempted this regulatory action from E.O. 12866 review.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 600 *et seq.*, requires any Federal agency, when it develops a rule, to identify and address the impact of the rule on the small businesses and other small entities that will be subject to the rule (5 U.S.C. 603 and 604). This requirement applies to any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (605(b)). Besides small businesses, small entities include small governments with jurisdictions of less than 50,000 people and small nonprofit organizations. The Regulatory Flexibility Act requirement applies to any rule subject to notice and comment rulemaking requirements.

As set forth in the proposal, 62 FR 38238-239, this action is not subject to notice-and-comment rulemaking requirements, and therefore is also not subject to the RFA requirement to prepare regulatory flexibility analyses. Moreover, this action will not establish any requirements applicable to small entities. It simply corrects the

designation of the area by restoring the nonattainment designation that was erroneously changed to attainment. The RFA requires analyses of a rule's requirements as they would apply to small entities. If the rule does not apply to small entities, an RFA analysis is inapplicable.

Further, it is unlikely that this action will result in State imposition of control requirements that are different from those applicable in Lafourche Parish before the erroneous change in designation status. Under Title I of the Act, States are primarily responsible for establishing control requirements needed to attain and maintain the NAAQS. Louisiana has adopted an implementation plan that includes control requirements that apply to particular sources or categories of sources, depending on a number of factors, including the designation status of the area in which a source is located. As a result of today's action, Louisiana will once again have to apply some of those control programs in Lafourche Parish. Some of those programs may ultimately impose requirements on small entities in the Parish. However, these controls were applicable before the erroneous designation to attainment; correcting that mistake will only put the small entities in that area in the place they were prior to the mistake being made.

Beyond that, the purpose of the RFA is to promote Federal agency efforts to tailor a rule's requirements to the scale of the small entities that will be subject to it. That purpose cannot be served in the case of State control requirements. Some of the control requirements included in States' SIPs are prescribed to some extent by the Act. Even so, the only issue before EPA in actions such as this one is the proper designation of a particular area. The implementation consequences of a designation are beyond the scope of such actions, and indeed, beyond EPA's reach to the extent they are dictated by the Act itself or are left to States' discretion. In light of all the above, if the RFA were applicable to this action, the Agency would certify that it will not have a significant economic impact on a substantial number of small entities.

**C. Unfunded Mandates**

Under section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or Tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that this action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or Tribal governments in the aggregate, or to the private sector. This Federal action simply corrects an error in the designation for the reasons described above and does not, in itself, impose any mandates.

**D. Submission to Congress and the General Accounting Office**

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of this rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. section 804(2).

**E. Petitions for Judicial Review**

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 3, 1998. 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) of the Act.

**List of Subjects**

**40 CFR Part 52**

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental regulations, Ozone, Reporting and recordkeeping, Volatile organic compounds.

**40 CFR Part 81**

Environmental protection, Air pollution control, National parks and wilderness areas, Designation of areas for air quality planning purposes.

Dated: November 26, 1997.

**Jerry Clifford,**

*Acting Regional Administrator.*

40 CFR parts 52 and 81 are amended as follows:

**PART 52—[AMENDED]**

1. The authority citation for part 52 continues to read as follows:

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

**Subpart T—Louisiana**

2. Under § 52.975, paragraph (f) is added to read as follows:

**§ 52.975 Redesignations and maintenance plans; ozone.**

\* \* \* \* \*

(f) Lafourche Parish, Louisiana, is designated back to nonattainment for ozone. The original classification of incomplete data is retained.

**PART 81—[AMENDED]**

3. The authority citation for part 81 continues to read as follows:

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

4. In § 81.319, the ozone table is amended by revising the entry for Lafourche Parish to read as follows:

**§ 81.319 Louisiana.**

\* \* \* \* \*

LOUISIANA—OZONE

Designated area	Designation		Classification	
	Date <sup>1</sup>	Type	Date	Type
Lafourche Area:				
Lafourche Parish .....	January 5, 1998	Nonattainment ..	.....	Incomplete data

LOUISIANA—OZONE—Continued

Designated area	Designation		Classification	
	Date <sup>1</sup>	Type	Date	Type
*	*	*	*	*

<sup>1</sup> This date is November 15, 1990, unless otherwise noted.

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 180 and 185**

[OPP-300587; FRL-5754-5]

RIN 2070-AB78

**Maleic hydrazide; Pesticide Tolerances for Emergency Exemptions**

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

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes time-limited tolerances for residues of maleic hydrazide (1,2-dihydro-3,6-pyridazinedione) in or on rice commodities as well as tolerances for secondary residues in animal commodities. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on rice in Louisiana. This regulation establishes a maximum permissible level for residues of maleic hydrazide in these food commodities pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. The tolerances will expire and are revoked on September 30, 1998.

**DATES:** This regulation is effective December 5, 1997. Objections and requests for hearings must be received by EPA on or before February 3, 1998.

**ADDRESSES:** Written objections and hearing requests, identified by the docket control number, [OPP-300587], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests

filed with the Hearing Clerk identified by the docket control number, [OPP-300587], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP-300587]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

**FOR FURTHER INFORMATION CONTACT:** By mail: Stephen Schaible, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308-9362, e-mail: schaible.stephen@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing tolerances for residues of the herbicide maleic hydrazide (1,2-dihydro-3,6-pyridazinedione), in or on rice, grain at 105 part per million (ppm); rice, straw at 75 ppm; rice, hulls at 240 ppm; and rice, bran at 180 ppm. Additionally, the Agency is establishing tolerances for secondary residues in milk at 1.0 ppm; at 2.5 ppm in meat, 7 ppm in liver, 32

ppm in kidney, and 3 ppm in fat of cattle, goats, hogs, horses, and sheep; at 0.5 ppm in meat, liver, and fat of poultry; 1.4 ppm in poultry meat byproducts; and 0.5 ppm in eggs. These tolerances will expire and are revoked on September 30, 1998. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

**I. Background and Statutory Authority**

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104-170) was signed into law August 3, 1996. FQPA amends both the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301 *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996)(FRL-5572-9).

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate