



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA-R06-OAR-2016-0275; FRL-9956-08-Region 6]

**Determination of Nonattainment and Reclassification of the Houston-Galveston-Brazoria
2008 8-hour Ozone Nonattainment Area; Texas**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is determining that the Houston-Galveston-Brazoria, Texas 2008 8-hour ozone nonattainment area (HGB area) failed to attain the 2008 8-hour ozone national ambient air quality standard (NAAQS) by the applicable attainment deadline of July 20, 2016, and thus is classified by operation of law as “Moderate”. In this action, EPA is also determining January 1, 2017 as the deadline by which Texas must submit to the EPA the State Implementation Plan (SIP) revisions that meet the Clean Air Act (CAA) statutory and regulatory requirements that apply to 2008 ozone NAAQS nonattainment areas reclassified as Moderate.

DATES: This rule is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. **EPA-R06-OAR-2016-0275**. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be

publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733.

FOR FURTHER INFORMATION CONTACT: Ms. Nevine Salem, (214) 665-7222, salem.nevine@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Background

The background for this action is discussed in detail in our September 27, 2016, (81 FR 66240) proposal. In that document, we proposed to determine that the HGB area failed to attain the 2008 ozone NAAQS by the applicable attainment deadline of July 20, 2016,¹ and to reclassify the area as Moderate. We also proposed that Texas must submit to us the SIP revisions to address the Moderate ozone nonattainment area requirements of the CAA section 182(b), as interpreted by 40 CFR part 51 Subpart AA, by January 1, 2017. We received comments on the proposal from one commenter. Our response to comments are presented below.

II. Good Cause Exemption Under the Administrative Procedure Act (APA)

Under APA section 553(d)(3), 5 U.S.C. 553(d)(3), an agency may make a rule immediately effective “for good cause found and published with the rule.” The EPA believes that there is “good cause” to make this rule effective upon publication in the *Federal Register* in order to avoid an impractical outcome and to provide time for the state to meet the relevant statutory and regulatory deadlines. Specifically, for any areas classified as Moderate

¹ The attainment date of July 20, 2016, was established for the Houston-Galveston-Brazoria, TX 2008 ozone Marginal nonattainment area in EPA’s final rule, *Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas for the 2008 Ozone National Ambient Air Quality Standards*, 81 FR 26697, May 4, 2016.

nonattainment for the 2008 ozone NAAQS, the EPA has interpreted CAA section 182, in conjunction with 40 CFR 51.1108(d) and 51.1112(a)(3), to require states to submit their Moderate area SIP revisions and comply with RACT implementation requirements by January 1, 2017. While EPA acknowledges and addresses comments related to the compressed timeline associated with this action elsewhere in this notice, the agency believes that establishing an effective date of this action simultaneous with the date of publication will reconcile the competing statutory interests by eliminating a potentially impractical outcome in which the area might otherwise be subject to Moderate nonattainment area statutory and regulatory deadlines that would already have passed prior to the normal 30 days post-publication effective date. EPA made clear in the action providing the initial extension for this area that absent a second extension, a state would be under a tight deadline to develop an acceptable attainment plan. *See* 81 FR 26703. When 2015 monitoring data became available earlier this year showing that the HGB area would not be eligible for a second one-year extension, the state had every reason to anticipate and prepare for reclassification. In addition, EPA published its proposed rule for this reclassification on September 27, 2016 and is providing direct notice to the state of this final action simultaneous with signature of this rule. Accordingly, the EPA finds that the preparation time actually available to the state and the need to reconcile the statutory interest in reclassification with the deadlines for submission of Moderate area SIP revisions and compliance with RACT implementation requirements, constitute good cause under 5 U.S.C. §553(d)(3) to make this final action effective upon publication.

III. Response to Comments

The EPA published the proposed rule for this action on September 27, 2016, (81 FR 66240), and started a public comment period that ended on October 27, 2016. We received one

set of comments from one commenter, Texas Commission on Environmental Quality (TCEQ) during this period. The comments received from TCEQ can be found in the electronic docket for this action.

Comment 1: TCEQ stated that the proposed SIP submittal deadline of January 1, 2017 for the HGB area is unreasonable, not consistent with previous practice, and the EPA's lack of timely notification of the abbreviated schedule resulted in an undue burden on the state and stakeholders in the HGB area. Instead EPA staff communicated to the State and local stakeholders on several occasions that these SIP revisions would be due one year from final reclassification by the EPA. TCEQ also requested a clarification on how the EPA is working with them to support submittal of the required moderate nonattainment SIP by the proposed January 1, 2017.

EPA Response: EPA greatly appreciates the State's commitment to meet the January 1, 2017 submittal deadline and we understand the significant effort involved in preparing an attainment SIP revision. TCEQ states that they have in the past received a year to submit SIP revisions once reclassified and they should have been given more notice that the time frame for this reclassification's submittal date would be shorter. In fact, as early as 2015 EPA stated we would be linking the submittal due date for Moderate areas to the ozone season of 2017. EPA explained this in our August 27, 2015 (80 FR 51992 at 51999) proposal in relation to reclassifying 11 Marginal nonattainment areas. When that proposal was finalized at 81 FR 26697, (May 4, 2016) we established a submittal due date for those Moderate areas as expeditiously as practicable, but no later than January 1, 2017, so control measures could be in place no later than the ozone season preceding the attainment year. This provided approximately 9 months for these reclassified areas to submit an attainment plan, clearly not a year. In addition, we stated in the May 4, 2016, final rule that Marginal areas like Sheboygan County, Wisconsin that received a 1-

year extension based on certified 2012-2014 air quality data would not likely attain or receive a second 1-year attainment date extension as indicated by preliminary 2015 air quality data, and that the area should begin preparing for that possibility. We also stated that “we expect Wisconsin to be taking the necessary steps to achieve timely attainment...” 81 FR 26697, 26703. The HGB area also met the criteria of CAA section 181(a)(5), as interpreted in 40 CFR 51.1107, similarly to the results of Sheboygan County area and received a 1-year attainment date extension from July 20, 2015 to July 20, 2016. This request for an extension was granted by EPA as part of the May 4, 2016 final action. See, 81 FR 26697 at 26701. Additionally, similar to Sheboygan County, preliminary HGB area air quality data trends for 2015 were not supporting attainment of the July 20, 2016 attainment date or the possibility of EPA granting a second 1-year attainment date extension.

The attainment period (to attain by July 20, 2016) for the HGB area is based on the most recent three full years of ozone available data (which in the case of the HGB area after the first 1-year extension would be 2013-2015 data). The 2015 preliminary air quality data indicated that HGB area would not likely attain the July 20, 2016 attainment date. On April 25, 2016, TCEQ submitted quality assured and certified data with no changes from preliminary data for 2015 air quality data. In addition, the design values TCEQ submitted to EPA on December 2015, demonstrated that Texas was aware they would not attain by the July 20, 2016, date or be eligible for a second 1-year extension and that EPA would propose to reclassify the HGB area as Moderate. Our longstanding policy, as stated in the 1994 EPA Berry Memorandum,² cautions

² See memorandum signed by D. Kent Berry, Acting Director, Air Quality Management Division, “Procedures for Processing Bump Ups and Extension Requests for Marginal Ozone Nonattainment Areas.” U.S. EPA, February 3, 1994.

states to consider whether an attainment date extension will ultimately be helpful if the area is not likely to attain the NAAQS by the extended attainment date.

As stated in the 1994 Berry Memo, EPA's policy regarding attainment date extensions and reclassifications of marginal areas explicitly cautions: "When requesting an extension, States should consider the consequences of eventually not attaining the NAAQS. Although areas can request two 1-year extensions, those that ultimately fail to attain the NAAQS will be bumped up to at least a moderate classification. Consequently, areas that are bumped up will be under very tight timeframes to implement the new SIP requirements, in addition to achieving the reductions to meet the new attainment date."

Region 6 staff regularly participates in monthly calls with TCEQ, including the April/May 2016 timeframe where TCEQ insisted on the impossibility of submitting a SIP revision for a reclassified HGB area by January 1, 2017. Region 6 notified TCEQ in a May 2016 monthly call that if we didn't get the green light to proceed with a later SIP submittal deadline as they requested, our proposal would be published with a January 1, 2017, SIP submittal deadline and require Reasonable Available Control Technology (RACT) implementation by the same deadline. Ultimately, the January 1, 2017, SIP submission deadline was chosen as being consistent and reasonable based on the information discussed above.

Also, EPA has offered assistance to states as they consider the most appropriate course of action for Marginal areas that may be at risk for failing to meet the NAAQS within the three-year timeframe. States can choose to adopt additional controls for such areas or they can seek a voluntary reclassification to a higher classification category (as Texas did for the HGB area with regard to the 1997 ozone standard). See, 73 FR 56983, October 1, 2008. Also we will continue to offer assistance as we have in the past during the monthly calls regarding the TCEQ Dallas-Fort

Worth and HGB 2008 Ozone nonattainment areas. A regular topic on the meetings' agenda is to discuss any issues /updates/actions with TCEQ and offer, assistance/guidance on any issues requested by TCEQ. As TCEQ knows, the determination of how to reach attainment is a state decision. It's up to EPA to determine whether the plan submitted meets the requirements of the CAA. EPA's ability to extend deadlines for areas being reclassified as required by CAA section 181(b)(2) is governed by section 182(i) of the CAA, which directs that the state shall meet the new requirements according to the schedules prescribed in those requirements, but provides "that the Administrator may adjust any applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions." CAA section 182(b), as interpreted by 40 CFR 51.1100 *et seq.*, describes the required SIP revisions and associated deadlines for a nonattainment area classified as moderate at the time of the initial designations. Accordingly, EPA proposed to exercise its discretion under CAA section 182(i) to adjust the moderate SIP submittal deadlines for the HGB area.

In determining an appropriate deadline for the moderate area SIP revisions for the HGB area, EPA had to consider that pursuant to 40 CFR 51.1108(d), the state must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season. The attainment year ozone season is the complete ozone season immediately preceding a nonattainment area's attainment date. In the case of nonattainment areas classified as moderate for the 2008 ozone NAAQS, the attainment year ozone season is the 2017 ozone season (40 CFR 51.1100(h)). Because an extension of the attainment date is not appropriate here, and control measures for other moderate areas are to be implemented no later than the beginning of the 2017 ozone season, EPA determined it would not be appropriate to adjust the attainment date beyond the beginning of the 2017 ozone season for the HGB area.

Further, because ozone seasons begin as early as January 1, EPA determined that a SIP submission deadline of January 1, 2017, is the latest submittal deadline that allows all states to meet 40 CFR 51.1108(d) requirements, and thus assures consistency as directed by 182(i).

We believe based on the facts discussed above that TCEQ was aware of the likelihood of a January 1, 2017 submission deadline, which lines up with the deadlines of the Marginal areas reclassified as Moderate in the 81 FR 26697, (May 4, 2016) action. In that action, we stated that we recognized the value of providing states as much time as possible to develop an attainment demonstration, however, we also recognized the value in establishing a single due date for Moderate area SIP submissions – including RACT – that would not extend beyond the deadline for implementing such controls. We believe the area was provided adequate notice that time to develop and submit a moderate area attainment plan was likely to be short given that the moderate area attainment year ozone season is the 2017 ozone season for the 2008 ozone NAAQS and that other moderate areas were also required to submit their plans in January 2017.

Comment 2: The TCEQ disagrees with the proposed January 1, 2017 RACT compliance deadline for the reclassified HGB area and recommends adjusting this deadline to allow affected entities to comply with RACT no later than July 20, 2018, the Moderate attainment deadline.

EPA Response: In the 2008 ozone NAAQS SIP Requirements Rule, the EPA promulgated that areas must implement RACT measures as expeditiously as practicable, but no later than January 1 of the 5th year after the effective date of nonattainment designation.³ Nonattainment designation for all areas of the country were effective July 20, 2012,⁴ RACT measures (for areas where they are required) must be implemented by January 1, 2017. We retained the statutory

³ See 80 FR 12264 at 12280, March 6, 2015 and 40 CFR 51.1112(a)(3).

⁴ See 77 FR 30088, May 21, 2012, Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards, Final Rule.

timeframe and the SIP submission deadline of January 1, 2017, in large part, because it occurs no later than the statutory deadline for RACT implementation. In the 2008 ozone NAAQS SIP Requirements Rule, we did state that EPA would set new SIP submission and RACT compliance dates on a reasonable schedule when reclassifying areas. In the May 4, 2016, final rule that made determinations of attainment, provided first 1-year attainment date extensions and reclassified some areas,⁵ we recognized the value in establishing a single due date for Moderate area SIP submissions - including RACT - that does not extend beyond the deadline for implementing such controls. Thus the EPA set the SIP revision and the RACT compliance deadline to be as expeditiously as practicable, but no later than January 1, 2017. This approach aligns the SIP submittal deadline with the deadline for implementing RACT pursuant to 40 CFR 51.1112(a)(3), for each area, and would ensure that SIPs requiring control measures needed for attainment, including RACM, would be submitted concurrent to when those controls are required to be implemented. This treats states consistently, in keeping with CAA section 182(i). For the reasons discussed in this preamble, we believe this time frame is reasonable and consistent with prior actions included in our May 2016 final action when we reclassified 11 areas from Marginal to Moderate.⁶

While the commenter objected to the deadline, citing the need to accelerate schedules and expend added resources to have RACT implemented by the proposed deadline, the state, nonetheless, committed to have their state requirements in place by the deadline proposed by EPA. We acknowledge that the timeline for submitting SIP revisions and implement RACT requirements is compressed, yet, the state has not been prohibited from beginning development of Moderate area SIP revisions prior to finalization of this reclassification. In fact, although

⁵ See 81 FR 26697, (May 4, 2016)

⁶ *Id.*

reclassification of the HGB area is being finalized in this rule, Texas has been aware that EPA would propose to reclassify the HGB area as Moderate from the time that 2015 monitoring data became available showing that the Houston area would not be eligible for an additional 1-year extension. For further discussion of this issue, please see EPA's response to Comment 1 above. Additionally, Texas has experience in developing air quality planning requirements since the HGB area has been previously designated nonattainment for both the 1979 1-hour ozone standard and the 1997 8-hour ozone standard, receiving a classification of Severe for both NAAQS. The EPA has consistently encouraged states to begin working on Moderate area SIP revision requirements ahead of finalization of the reclassification required by the CAA.

A review of the State's SIP revision proposal of September 21, 2016,⁷ indicates that the state did not specifically propose any additional or new RACT requirements in the 2018 attainment demonstration, yet, simply proposed expanded coverage of a list of existing sources. TCEQ's expansion was stated as follows:

“the commission expects that all facilities that are currently subject to the 90% control efficiency are already meeting the 95% control efficiency requirement and that this change will not require any of those subject to the current rule to replace their current control device. Generally the commission expects the proposed requirements to place minimal burden (proposed change: the aggregate of crude oil and condensate storage tanks at pipeline breakout station in the HGB area (total of 6 sites)) on affected owners and operators and that the proposed compliance date provide adequate amount of time for these owners and operators

⁷ TCEQ Chapter 115-Control of Air Pollution from Volatile Organic Compounds Rule Project No. 2016-039-115-AI at Page 5 and 23, received by EPA under a cover letter dated September 21, 2016. This action by the State is their proposal for a SIP revision to address how HGB area will attain the 2008 ozone standard by its attainment date.

to make all necessary installations and adjustment. . . . the proposed amendments are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on the economy, a sector of the economy, productivity, competition jobs, the environment, or the public health and safety of the state or a sector of the state.”⁸

In addition, the EPA notes that after a state’s SIP revisions are submitted to EPA, the agency has 6 months to determine completeness of the SIP. Within that timeframe, the state may submit updates or revisions to their SIP submission. After 6 months, if the EPA has not determined the SIP to be complete, the SIP submission is deemed complete by operation of law. There will also be a time span before EPA initiates action to provide notice and comment on EPA’s action to approve/disapprove the state’s attainment plan. When EPA approves a SIP revision, it becomes federally enforceable at that time. The EPA believes these timeframes provide adequate time for all affected entities to have implemented RACT.

III. Final Action

We are determining that the HGB area failed to attain the 2008 ozone NAAQS by the attainment deadline date of July 20, 2016, and to reclassify the area as Moderate. Texas must submit to us the SIP revisions to address the Moderate ozone nonattainment area requirements of the CAA by January 1, 2017. This action is being taken under section 181(b)(2) of the Act. The requirements of this final action is effective immediately upon publication. See, 5 U.S.C. §553(d)(3).

IV. Statutory and Executive Order Reviews

⁸ TCEQ Chapter 115-Control of Air Pollution from Volatile Organic Compounds Rule Project No. 2016-039-115-AI at Page 5 and 23, received by EPA under a cover letter dated September 21, 2016.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

This final action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action merely determines that the HGB area failed to meet an ozone NAAQS attainment deadline, reclassifies the area, and sets the date when a revised SIP is due to EPA.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It 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.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where EPA or an Indian

tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely determines that the HGB area failed to meet an ozone NAAQS attainment deadline, reclassifies the area, and sets the date when a revised SIP is due to EPA.

H. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action merely determines that the HGB area failed to meet an ozone NAAQS attainment deadline, reclassifies the area, and sets the date when a revised SIP is due to EPA.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 8, 2016.

Ron Curry,
Regional Administrator, Region 6.

40 CFR part 81 is amended as follows:

PART 81–DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

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

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS – Texas

2. In §81.344, the table titled “Texas – 2008 8-Hour Ozone NAAQS (Primary and secondary)” is amended by revising the entry for “Houston-Galveston-Brazoria, TX” to read as follows.

§ 81.344 Texas.

* * * * *

Texas – 2008 Ozone NAAQS (Primary and secondary)²

Designated area	Designation		Classification	
	Date ¹	Type	Date ¹	Type
* * * * *				
Houston-Galveston-Brazoria, TX: ²		Nonattainment	[Insert date 30 days after date of publication in the Federal Register]	Moderate.
Brazoria County				

Chambers County				
Fort Bend County				
Galveston County				
Harris County				
Liberty County				
Montgomery County				
Waller County				
* * * * *				

¹This date is July 20, 2012, unless otherwise noted.

²Excludes Indian country located in each area, unless otherwise noted.

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