



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2020-0166; FRL-8893-02-R6]

Air plan Approval; Texas; Clean Air Act Requirements for Nonattainment New Source Review and Emission Statements for the 2015 Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving the portions of a State Implementation Plan (SIP) revision submitted by the State of Texas that describes how CAA requirements for Nonattainment New Source Review (NNSR) and emission statements are met in the Dallas-Fort Worth (DFW), Houston-Galveston-Brazoria (HGB), and Bexar County ozone nonattainment areas for the 2015 Ozone National Ambient Air Quality Standards (NAAQS).

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2020-0166. All documents in the docket are listed on the <https://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. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Robert Todd, EPA Region 6 Office, Infrastructure and Ozone Section, 214-665-2156, todd.robert@epa.gov. The EPA Region 6 office is closed to the public to reduce the risk of transmitting COVID-19. Please call or e-mail

the contact listed above if you need alternative access to material indexed but not provided in the docket.

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 February 11, 2021 proposal (86 FR 9041). In that document we proposed to approve portions of a SIP revision submitted by the State of Texas on June 24, 2020, that describes how CAA requirements for NNSR and emission statements are met in the DFW, HGB, and Bexar County ozone nonattainment areas for the 2015 ozone NAAQS.

We received comments on our proposal, from several commenters. Our responses to the comments follow.

II. Response to Comments

Comment: Two commenters pointed out that the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated portions of the 2018 rule implementing the 2015 Ozone NAAQS that allowed inter-precursor trading of pollutants.¹ One commenter stated that according to a Texas Commission on Environmental Quality (TCEQ) guidance document, EPA’s approval of inter-precursor trade (IPT) is presumed unless EPA disapproves the trade during the public comment period. The commenter also stated that EPA cannot rely on previous approvals of the State’s NNSR program to meet current requirements.

Response: While the D.C. Circuit has rendered a judgment vacating the portion of EPA’s NNSR EPA regulation that allows inter-precursor trading to meet the offset requirements for ozone, the ozone inter-precursor trading component in the Texas NNSR program regulations is no longer operative for ozone and thus does not preclude approval of this SIP revision that otherwise satisfies NNSR requirements. The court held that the IPT provision for ozone in

¹ *Sierra Club v. EPA*, 985 F.3d 1055 (D.C. Cir. 2021).

EPA's NNSR regulation was contrary to the CAA because "[t]he plain language in the statute ... requires that increased [volatile organic compound] VOC emissions be offset with reductions in VOC, and the same is true for ozone in most circumstances."² Following the court's decision, EPA notified TCEQ in a letter dated June 17, 2021, that the EPA can no longer approve any IPT requests for ozone under procedures in the Texas SIP rules that require that TCEQ submit such trades to EPA for approval. In a response to EPA dated June 25, 2021, TCEQ confirmed that its NNSR inter-precursor trading provisions cannot function without EPA's approval of trades, and the State has not approved any IPT requests for ozone without the prior approval of EPA.³ In its June 25, 2021, letter, TCEQ also stated that its regulations otherwise continue to meet the NNSR program requirements in EPA's regulations at 40 CFR 51.1565 without the operation of the IPT provisions for ozone. EPA agrees with that assessment, as the NNSR offset requirement for ozone may be satisfied under the Texas regulations with offsets for each individual ozone precursor, without trading NO_x for VOC or vice-versa. Since the IPT portion of the Texas regulations is no longer operative for ozone precursors, these provisions do not preclude EPA from approving the Texas NNSR program regulations that otherwise meet the SIP requirements for marginal nonattainment areas under the 2015 ozone NAAQS. EPA's approval finalized via this action does not include TCEQ's IPT provisions for ozone.

EPA does not agree with the commenter that EPA's approval of an inter-precursor trade would be presumed under the Texas SIP unless EPA disapproved the trade during the comment period. EPA's previous approval of certain SIP provisions related to IPTs included only Texas regulations on that subject. EPA did not at any time approve the state guidance document described by the commenter as part of the federally approved SIP. Nothing in the previously-approved regulations establishes a presumption of EPA approval of an inter-precursor trade if EPA does not communicate its disapproval during a relevant public notice and comment period.

² *Sierra Club*, 985 F.3d at 1060-61.

³ The text of each letter is available in the docket to this action.

EPA's inability to approve IPT trades for ozone because of the court decision is sufficient to render the Texas IPT provisions inoperative for ozone.

As stated in our proposal, NNSR permitting program requirements specific to marginal ozone nonattainment areas are reflected in section 182(a)(2)(C), and further defined in 40 CFR part 51, subpart I. EPA and states may rely on previously approved SIP provisions to meet these NNSR requirements, so long as the State provides a SIP revision certifying that the existing SIP requirements are sufficient to meet the requirements of the new classification as is being done here. As stated in our proposal, a more stringent NNSR requirement than the marginal requirements under the 2015 standard currently applies in the DFW and HGB areas as both areas are classified serious nonattainment for the 2008 ozone standard.

Comment: One commenter believes that the State and EPA did not adequately take climate change into consideration when forming air quality standards and the future effects of increased average temperatures on ozone concentrations.

Response: We appreciate the commenter's concern and attention to climate change. However, the climate change related issues raised by the commenter are beyond the scope of our current action which is limited to whether the State's emission statement provisions and nonattainment new source review program, currently in their SIP, meet the requirements set out by the CAA and associated EPA regulations. This action does not set, revise, or form any air quality standards. We refer the commenter to Executive Order 14008 of January 27, 2021, and EPA's webpage on climate change. (See <https://www.epa.gov/climate-change>).

Comment: One commenter stated that EPA's 2015 Ozone NAAQS is significantly higher than the World Health Organization's recommendation of 50 parts per billion.

Response: We appreciate the commenter's concerns related to ozone pollution. However, the level of the NAAQS is beyond the scope of our current action. EPA follows a separate and specific CAA process to set and review the NAAQS, including ozone. See 80 FR 65292 (Oct. 26, 2015) as well as CAA sections 108 and 109. That process is beyond the scope of our current

action. We refer the commenter to the EPA's ozone air quality standards webpage for more information. (See <https://www.epa.gov/ground-level-ozone-pollution>).

Comment: One commenter stated that the City of San Antonio is not adequately funding its pollution control plan.

Response: We appreciate the commenter's concerns over funding and implementation of air programs. Although somewhat unclear, EPA is reading the comment in regard to the adequacy of funding for local, voluntary pollution control programs as opposed to the State's ability to carry out the SIP. As such, this comment is beyond the scope of this action.

Comment: Two commenters expressed concerns over consumer use of fragrant laundry related products. One commenter asked to eliminate dryer sheets and chemically scented laundry detergents because such products contain harmful chemicals that are contributing to the depletion of ozone. Another commenter stated that consumer use of fragrant laundry products, such as dryer sheets, other laundry chemicals, and personal care products affect air quality and suggested that the EPA should hold the manufacturers of these products accountable. Further, the commenter stated that residential use of such laundry products by a larger sector of residential dwellings is not a small source of VOC emissions. The commenter stated that these are a source of chemical irritants and that consumers should switch to more environmentally friendly products. Lastly, the commenter asked EPA to implement restrictions at the consumer level, if it had authority to do so.

Response: We appreciate the concerns raised by these commenters. However, such concerns are beyond the scope of this action. This action only pertains to CAA NNSR and emissions statement requirements for facilities in the DFW, HGB, and Bexar County ozone nonattainment areas for the 2015 Ozone NAAQS. As stated in our proposal, the NNSR program applies to the construction of new major sources or major modifications of existing sources of NO_x or VOC in an area that is designated nonattainment for the ozone NAAQS. The NNSR requirements for Marginal ozone nonattainment areas apply to facilities with the potential to emit 100 tons per

year of NO_x or VOC. The emissions statement requirement applies to the State in regard to certain stationary sources of NO_x and/or VOC emissions. CAA section 182(a)(3)(B). States may choose to inventory emissions from “any class or category of stationary sources which emit less than 25 tons per year of” VOC and/or NO_x via use of emission factors provided by EPA and compiled and reported for the National Emissions Inventory (NEI) every three years. *Id.* The last NEI was produced for the year 2017. Further, it is beyond the scope of this action to implement restrictions on consumer products.

Comment: One commenter stated that Texas is emitting significantly more carbon dioxide (CO₂) per capita than New York and implied this is not appropriate. The commenter also raised questions concerning the impact of our action on the State’s economy and automotive industry in particular.

Response: We appreciate the commenter’s concern and attention to CO₂ emissions and economic impact of regulatory actions. However, CO₂ related issues, including the economic impact of CO₂ regulation on the automotive industry, are beyond the scope of our current action explained above. The NNSR and emission statement rules requirements are implemented for the control of ozone and apply to NO_x and VOCs as these pollutants are precursors to ozone formation. These Clean Air Act requirements do not apply to CO₂ emissions. We refer the commenter to Executive Order 14008 of January 27, 2021, and EPA’s webpage on climate change. (See <https://www.epa.gov/climate-change>).

III. Final Action

We are approving portions of a SIP revision submitted by the State of Texas on June 24, 2020, that describes how CAA requirements for NNSR, and emission statements are met in the DFW, HGB, and Bexar County ozone nonattainment areas for the 2015 ozone NAAQS.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k);

40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[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 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 31, 2021.

David Gray,
Acting Regional Administrator, Region 6.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart SS—Texas

2. In § 52.2270(e), the second table titled “EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP” is amended by adding the entry “Nonattainment New Source Review and Emission Statement Requirements for the 2015 Ozone NAAQS” at the end of the table to read as follows:

§ 52.2270 Identification of plan.

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(e) * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/ effective date	EPA approval date	Comments
* * * * *				
Nonattainment New Source Review and Emission Statement Requirements for the 2015 Ozone NAAQS	Dallas-Fort Worth, Houston Galveston-Brazoria, and Bexar County Ozone Nonattainment Areas	June 24, 2020	[Insert the date of publication in the Federal Register], [Insert Federal Register citation]	

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