ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2011-0775; FRL-9688-3]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Determination of Failure to Attain the 1-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to determine that the Houston/Galveston/Brazoria (HGB) area did not attain the 1-hour ozone national ambient air quality standard (NAAQS) by its applicable attainment date, November 15, 2007. This determination is based on three years of complete, quality-assured and certified ambient air quality monitoring data for the period preceding the applicable attainment deadline.

DATES: This rule is effective on [**Insert date 30 days from date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2011-0775. 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 Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733.

The file will be made available by appointment for public inspection in the Region 6 Freedom of Information Act Review Room between the hours of 8:30 am and 4:30 pm weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at (214) 665-7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Kenneth W. Boyce, Air Planning Section (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone 214-665-7259; fax number 214-665-7263; e-mail address *boyce.kenneth@epa.gov*.

SUPPLEMENTARY INFORMATION

Throughout this document, whenever “we” “us” or “our” is used, we mean the EPA.

OUTLINE:

I. Background

EPA’s Proposed Action

The background for today's action is discussed in detail in our February 1, 2012, proposal (77 FR 4937). In that notice, EPA proposed to determine, under the Clean Air Act (CAA or "Act"), the HGB ozone nonattainment area failed to attain the 1-hour ozone NAAQS by its applicable 1-hour NAAQS attainment date of November 15, 2007. The proposal was based on three years of complete, quality-assured and certified ambient air quality monitoring data for the period preceding the applicable attainment deadline (2005-2007).

The CAA, as amended in 1990, required EPA to designate as nonattainment any area that was violating the 1-hour ozone standard, generally based on air quality monitoring data from the 1987 through 1989 period (section 107(d)(4) of the Act; 56 FR 56694, November 6, 1991). The Act further classified these areas, based on the severity of their nonattainment problem, as Marginal, Moderate, Serious, Severe, or Extreme.

The control requirements and date by which attainment of the 1-hour ozone standard was to be achieved varied with an area's classification. Marginal areas were subject to the fewest mandated control requirements and had the earliest attainment date, November 15, 1993, while Severe and Extreme areas were subject to more stringent planning requirements and were provided more time to attain the standard. Two measures that are linked to a determination that a Severe or Extreme area failed to attain the standard by the applicable attainment date are contingency measures [section 172(c)(9)] and a major stationary source fee provision [sections 182(d)(3) and 185)] ("major source fee program" or "section 185 fee program").

Designation and Classification

The HGB area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller counties in Texas. Upon the date of enactment of the 1990 CAA

Amendments, the HGB area was classified as a severe ozone nonattainment area for the 1-hour ozone NAAQS. As noted above, severe and extreme areas are subject to more stringent planning requirements but were provided more time to attain the ozone standard. The HGB 1-hour ozone nonattainment area was classified as severe 17. As a result, the attainment date for the HGB area was November 15, 2007.[1]

Technical Evaluation

As we more fully explained in our February 1, 2012, proposal (77 FR 4937), a determination of whether an area's air quality meets the 1-hour ozone standard is generally based upon three years of complete, quality-assured and certified air quality monitoring data gathered at established State and Local Air Monitoring Stations ("SLAMS") in the nonattainment area and entered into the EPA's Air Quality System (AQS) database. Data from air monitors operated by state/local agencies in compliance with EPA monitoring requirements must be submitted to the AQS database. Monitoring agencies annually certify that these data are accurate to the best of their knowledge. Accordingly, EPA relies primarily on data in its AQS database when determining the attainment status of an area. See 40 CFR § 50.9; 40 CFR part 50, appendix H; 40 CFR part 53; 40 CFR part 58, appendices A, C, D and E. All data are reviewed to determine the area's air quality status in accordance with 40 CFR part 50, appendix H.

Under EPA regulations at 40 CFR §50.9, the 1-hour ozone standard is attained at a monitoring site when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million (235 micrograms per cubic meter) is equal to or less than 1, as determined by 40 CFR part 50, appendix H.

EPA has determined that the HGB area failed to attain the 1-hour ozone standard by its applicable attainment date; that is, the number of expected exceedances at sites in the

[1] 56 FR 56694, November 6, 1991 and CAA section 181(a)(1).

nonattainment area was greater than one per year in the period prior to the applicable attainment date. This determination is based on three years of complete, quality-assured and certified ambient air quality monitoring data in AQS for the 2005-2007 monitoring period for the HGB area. Please see our, February 1, 2012, proposal (77 FR 4937) for a more complete description and summary of the monitoring data relied upon for this determination.

Comment Received on the Proposed Rulemaking

The comment period on the proposed rulemaking closed on March 2, 2012 and EPA received no comments. On May 14, 2012, more than two months after the close of the comment period, the BCCA Appeal Group and the Section 185 Working Group ("the groups" or "BCCA") submitted a late comment opposing EPA's determination that Houston failed to attain the 1-hour ozone standard by its attainment deadline. The groups acknowledged that this late comment – the only comment submitted by the groups -- came after the close of the comment period. The groups claimed, however, that the comment was "based on legal grounds arising after the close of EPA's comment period." The groups contended that an EPA rulemaking entitled, "Final Rule to Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Classification of Areas That Were Initially Classified Under Subpart 1: Revision to the Anti-backsliding Provisions to Address 1-Hour Contingency Measure Requirements; Deletion of Obsolete 1-Hour Standard Provision," 77 FR 28424, 28439 (May 14, 2012) "reflects EPA's final decision not to issue further determinations whether areas (such as HGB) attained the 1-hour ozone standard by the applicable attainment dates." The commenters claimed that "it would be arbitrary and capricious for EPA to ignore the May 14 Rulemaking with respect to the HGB area and make a finding only with respect to HGB."

Response to Comment

EPA believes that there is no justification for this late comment. EPA's May 14, 2012 Rulemaking did not give rise to any new grounds for comment. First, as the commenters themselves admit, "the May 14, rule preserves the… wording" of EPA's regulation at 40 CFR §51.905 (e)(2)(i) Thus the commenters concede that the May 14 Rulemaking merely preserved the regulation, which existed at the time of EPA's proposed determination on Houston, and as to which the groups could have commented at that time. The commenters' argument, it seems, centers on a few sentences, contained in the preamble of the May 14 rule, which refer to the regulation. The commenters offer no explanation for their prior failure to address the regulation in comments on EPA's proposed determination with respect to Houston. See, 77 FR 4937 (Feb. 1, 2012). Since commenters do not claim that the May 14 Rulemaking changed the regulation, perhaps what they intend to convey is that EPA's May 14 Rulemaking reminded the commenters of the regulation's existence. Despite their claim of fresh awareness, however, the commenters' own actions reveal that they were closely acquainted with 40 CFR §51.905(e)(2)(i) and with determinations regarding specific anti-backsliding requirements. For example, in June, 2011, the BCAA Appeal Group filed a motion to intervene in the very litigation that resulted in EPA's agreement to make final determinations on 1-hour ozone attainment for Houston and five other areas in the country. *Sierra Club v. Jackson* (D.D.C. Case No. 1:11-CV-00100-JDB). In support of their motion, BCCA raised the same argument relating to determinations under this regulatory provision that they echo here. Similarly, BCCA took another opportunity to comment on the issue of the Houston determination in the CAA section 113(g) proceedings that EPA conducted when it gave notice of the settlement agreement that resolved the litigation. Ultimately, however, the groups failed to submit any comments on EPA's proposed rulemaking to make the Houston

determination. The comment period closed on March 2, 2012. On May 14 -- just two weeks prior to EPA's deadline for making a final determination under the settlement agreement -- a deadline known to BCCA, as shown by its participation in the litigation and section 113(g) process -- BCCA submitted its comment.[2] The late comment was submitted under the claim that BCCA had just learned of the issue through a tangential reference in a correction to a footnote contained in a separate EPA rulemaking.

Although EPA believes that we are not compelled to respond to BCCA's late comments, since the basis for them existed at the time of the original proposal, EPA has considered their comment, and we address it below.

As set forth above, EPA's May 14 Rulemaking enunciates no new legal position to which the comment is responding. 40 CFR 51.905(e)(2)(i)(A) and (B) provide that EPA is no longer obligated to determine "**pursuant to section 181(b)(2) or section 179(c),"…**"whether an area attained by its deadline the revoked 1-hour standard, or to reclassify the area as a result." 40 CFR §51.905(e)(2). (emphasis added) This regulation existed when EPA published its February 1, 2012 proposed determination for Houston, and EPA's May 14 Rulemaking did not change that regulation. The statements in the preamble cited by the commenters merely corrected a portion of a footnote (n.16) in a 2009 proposal 74 FR 2941, 2942 (January 16, 2009), which had erroneously stated that EPA would continue to reclassify areas under the revoked 1-hour ozone standard. In the May 14 Rulemaking, EPA stated:

> "EPA is clarifying that the portion of footnote 16 stating the EPA remains obligated to make a finding of failure to attain the 1-hour ozone standard by an area's attainment date **(under section 181(b)(2) or section 179(c)) and to reclassify the area** was erroneous and in conflict with 51.905(e)(2)(i)." (emphasis added).

[2] The settlement agreement deadline was May 31, 2012, but was extended to June 7, 2012 for the HGB area.

Contrary to commenters' claim, this clarification nowhere states that EPA is prohibited from or will no longer make determinations of failure to attain the 1-hour ozone deadlines for the purpose of effectuating specific 1-hour anti-backsliding requirements as required by the court in the *South Coast Air Quality Management District, et al.*, v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245.

BCCA's comments are ostensibly in response to EPA's February 1, 2012 proposed determination that the Houston nonattainment area failed to attain the revoked 1-hour ozone standard by its applicable attainment date. EPA's proposal expressly stated that this determination is solely for the purpose of effectuating the 1-hour ozone anti-backsliding requirements for section 185 penalty fees and contingency measures. While BCCA claims that its comment was prompted by EPA's May 14 Rulemaking, that Rulemaking specifically declared that it did not address 1-hour ozone anti-backsliding for section 185 penalty fees, and advised that section 185 anti-backsliding issues would be addressed in other rulemakings. See, 77 FR 28,424 at 28436 (May 14, 2012). Thus it is doubly plain that the paragraph entitled "A Correction to a Footnote in Proposed Rule" in the preamble of the May 14 Rulemaking was not intended to address or to prohibit EPA from proceeding with air quality determinations affecting section 185 anti-backsliding requirements.

EPA recently published in the Federal Register final determinations that three California 1-hour ozone nonattainment areas failed to meet their 1-hour ozone attainment deadlines. See 76 FR 82133 (Dec. 30, 2011). The rulemakings show that, for the purpose of effectuating contingency measures and section 185 anti-backsliding requirements, EPA continues to make determinations of failure to attain the 1-hour ozone deadlines. The California notices, and the responses to comments they contain, explain at length EPA's views of its authority and of its

obligation to make these determinations. See, e.g, 76 FR 82140. They also demonstrate that there is no conflict between 40 CFR §51.905(e)(2)(i) and EPA's continuing obligations to effectuate specific 1-hour ozone anti-backsliding requirements through determinations regarding attainment deadlines. EPA incorporates by reference the extensive discussions of these points contained in the December 30, 2011 California determinations.

Aside from its proposed and final determinations for Houston and the California areas, EPA has proposed and finalized, also pursuant to the settlement agreement, determinations as to whether a number of other 1-hour ozone nonattainment areas throughout the country attained the 1-hour ozone standard by their applicable attainment dates. As in the case of Houston, the purpose of these determinations is limited to effectuating 1-hour ozone anti-backsliding requirements. See, Baltimore, MD 77 FR 4940 (February 1, 2012), NY-NJ-CT 77 FR 3720 (January 25, 2012), Eastern Massachusetts 77 FR 31496 (May 29, 2012), Western Massachusetts 77 FR 25362 (April 30, 2012), and Greater Connecticut 77 FR 15607 (March 16, 2012).

EPA has considered BCCA's comment, and we believe that EPA's responses here will relieve the groups of their concerns that EPA is "ignoring the May 14 rule with respect to the [Houston] area" and also allay their fears that EPA makes determinations such as this "only with respect to [Houston]."

II. Final Action

After revocation of the 1-hour standard, EPA must continue to provide a mechanism to give effect to the 1-hour anti-backsliding requirements. See *SCAQMD v. EPA*, 472 F.3d 882, at 903. As stated in EPA's proposal, EPA is making its determination here pursuant to, and solely with the purpose and effect of discharging this obligation. As EPA stated in its proposal, EPA is

making this attainment deadline determination for the revoked standard for the strictly limited purpose of effectuating specific 1-hour ozone anti-backsliding requirements. Based on the facts and rationale set forth in our February 1, 2012, proposal (77 FR 4937) and in today's rulemaking, EPA has determined that the HGB area failed to attain the 1-hour ozone standard by its applicable attainment date.

This determination bears solely on the HGB's obligation with respect to two required 1-hour anti-backsliding measures: i.e., 1-hour contingency measures for failure to attain under section 172(c)(9), and fee programs under sections 182(d)(3) and 185 of the CAA. This final determination of failure to attain by the area's 2007 attainment date does not result in reclassification of the area under the revoked 1-hour standard. As a severe 1-hour nonattainment area, the HGB area is not subject to reclassification for the 1-hour standard, and in any event EPA is no longer required to reclassify any area to a higher classification for the 1-hour ozone NAAQS based upon a determination that the area failed to attain that NAAQS by its attainment date. 40 CFR §51.905(e)(2)(i)(B).

With respect to the 1-hour ozone anti-backsliding requirement for contingency measures, the Texas SIP included contingency measures to achieve an additional 3 percent reduction in NOx and VOC emissions in 2008. The contingency measure reductions for 2008 were to be obtained from on-road and off-road mobile control measures already being implemented. EPA has previously approved the State's 1-hour ozone attainment demonstration and Rate of Progress plans for the HGB area which included contingency measures. See: 71 FR 52670, 70 FR 7407, 66 FR 57195, and 66 FR 20750. Thus, the reductions from contingency measures have already been achieved and therefore this final determination of failure to attain by the area's 1-hour ozone attainment date would not trigger any additional contingency measures.

With respect to the 1-hour ozone anti-backsliding requirement for penalty fees, section 182(d)(3) of the CAA requires SIPs to include provisions required by section 185 of the CAA. Section 185 requires 1-hour ozone SIPs for severe areas to provide a program requiring each major stationary source of ozone precursors located in the area to pay fees to the State when the area has failed to attain by the attainment date. This final determination of failure to attain by the area's 1-hour attainment date bears on the obligation relating to implementation of the 1-hour anti-backsliding penalty fee program under section 182(d)(3) and 185, unless that obligation is terminated.

III. Statutory and Executive Order Reviews

This action makes a determination, based on air quality, that this area did not attain the 1-hour ozone standard, and it does not impose any requirements beyond those required by federal statute or regulation. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- 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, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not a 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 the 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 Clean Air Act; and
- Does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it would not apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 from date of publication of this document 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 purposed 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, Intergovernmental relations, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 6, 2012

Samuel Coleman

Acting Regional Administrator, Region 6.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. Section 52.2275 is amended by adding paragraph (d) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(d) *Determinations that Certain Areas Did Not Attain the 1-Hour Ozone NAAQS.* EPA has determined that the Houston/Galveston/Brazoria severe-17 1-hour ozone nonattainment area did not attain the 1-hour ozone NAAQS by the applicable attainment date of November 15, 2007. This determination bears on the area's obligations with respect to implementation of two specific 1-hour ozone standard anti-backsliding requirements: section 172(c)(9) contingency measures for failure to attain and sections 182(d)(3) and 185 major stationary source fee programs.

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[FR Doc. 2012-14713 Filed 06/18/2012 at 8:45 am; Publication Date: 06/19/2012]