6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2016–0550; FRL-9966-98-Region 6]

Approval and Promulgation of Implementation Plans; Texas; El Paso Carbon Monoxide Limited Maintenance Plan

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 required second carbon monoxide (CO) maintenance plan as a revision to the Texas State Implementation Plan (SIP). The El Paso, Texas CO maintenance area (El Paso Area) has been demonstrating consistent air quality monitoring at or below 85% of the CO National Ambient Air Quality Standard (NAAQS or standard). Because of this, the State of Texas, through its designee, submitted the required second maintenance plan for the El Paso Area as a Limited Maintenance Plan (LMP).

DATES: This final 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–2016–0550. 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: Jeff Riley, 214–665–8542, *riley.jeffrey@epa.gov*.

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

I. Background

The factual background for this action is discussed in detail in our March 21, 2017 direct final rule and proposal (82 FR 14442, 82 FR 14499). Originally, we issued a direct final rule to approve the required second CO maintenance plan for the El Paso, Texas CO maintenance area as a revision to the Texas SIP.

However, the direct final rule and proposal stated that if any relevant adverse comments were received by the end of the public comment period on April 20, 2017, the direct final rule would be withdrawn and we would respond to the comments in a subsequent final action. Relevant adverse comments were received during the comment period, and the direct final rule was withdrawn on May 22, 2017 (82 FR 23148). The background information found in the direct final is still relevant and our March 21, 2017 proposal provides the basis for this final action.

We received comments on our proposal from one commenter. Our response to the comments are below.

II. Response to Comments

Comment 1: The Commenter states that "(a)dditional CO monitors are necessary to effectively monitor compliance" of the CO NAAQS in the El Paso maintenance area, and asserts

that the current El Paso CO monitoring network operated by TCEQ is inadequate in terms of the number, siting, type, and scale of representativeness of the monitors that comprise the network.

Response 1: EPA disagrees with the assertion that the current El Paso CO monitoring network is inadequate to effectively monitor compliance with the CO NAAQS. Each state-submitted annual monitoring network plan is evaluated by EPA pursuant to 40 CFR Part 58.10 requirements to determine if the criteria for implementation and maintenance of the area's air quality surveillance system have been met. Annual monitoring plans for the El Paso area have been reviewed and ultimately approved by EPA for the full extent of the timeframe noted by the Commenter. In recognition of significantly declining CO concentrations in the El Paso Area since 2000, Texas has gradually reduced and consolidated the El Paso CO monitoring network to three sites in 2015 with approval from the EPA. The reductions in the number of active network monitors specifically during the 2012-2014 timeframe were conducted in consultation with EPA, and were done in accordance with 40 CFR Part 58.10 requirements. We have included EPA's responses to the State's annual monitoring network plans for the years 2012-2017 in the docket for this rulemaking.

We further note that 40 CFR 58.10(a)(1) requires that beginning July 1, 2007, the State shall adopt and submit to the Regional Administrator an annual monitoring network plan, and that this annual monitoring network plan must be made available for public inspection for at least 30 days prior to submission to EPA. This public inspection period of annual monitoring network plans has been provided by the State for all submittals since July 1, 2007, and no adverse comments have been received pertaining to the El Paso Area CO monitoring network in this time.

In the September 21, 2016 limited maintenance plan SIP submission, the State provided data showing monitored CO values from 2006–2015, reflecting a 2015 8-hour CO design value of 2.8 ppm. Thus, the design value represented for the 8-hour standard was less than 31% of the CO NAAQS. Only 1 CO monitor is currently required for El Paso, the Chamizal monitor (AQS #48-141-0044) required for NCore (National Core monitoring network) monitoring. This is a neighborhood-scale, high CO concentration site for the city and it recorded a 2.3 ppm 8-hour CO design value for 2016, similar to the 2.4 ppm 8-hour CO design value for 2016 recorded at the nearby Ascarate Park monitor to the southeast of Chamizal. The 2.3 ppm and 2.4 ppm 8-hour CO design values are significantly below the 8-hour CO NAAQS of 9.4 ppm, representing ambient concentrations 24% and 26%, respectively, of the 8-hour CO NAAQS. Both of these monitors are located in the CO maintenance area, and we note that these design values also represent a continued downward trend of CO ambient concentrations beyond the 2015 design value provided in the State's September 21, 2016 submittal.

The Commenter also states that the El Paso CO LMP should include a commitment to collocate at least one near-road nitrogen dioxide (NO_2) monitor with a CO monitor as a contingency should a triggering event take place during the maintenance period. The basis of this argument is twofold: EPA network design criteria under 40 CFR Part 58, Appendix D require at least one CO monitor to operate collocated with one required near-road NO_2 monitor in Core Based Statistical Areas with a population of 1,000,000 or more persons. Further, the Commenter refers to Texas Department of State Health Services (TDSHS) estimates that the El Paso population will be approaching 1,000,000 as early as 2020. The Commenter provided no specific citation for this TDSHS data.

The 40 CFR Part 58, Appendix D standard for population data is considered to be U.S. Census Bureau data. Based on U.S. Census data, El Paso will most likely not reach 1,000,000 in population by 2028. The current population growth estimate rate per year for El Paso is 5,811/year based upon U.S. Census estimates from 2010-2016[1]. The 2010 estimate was 807,108 and the 2016 estimate was 841,971. Using this growth estimate rate, the U.S. Census data indicates that the population of El Paso would reach around 912,000 in 2028, and would reach 1,000,000 by roughly 2043. So, pursuant to EPA 40 CFR Part 58 requirements, a near road NO_2/CO monitoring site will most likely not be required in El Paso until well after 2028 due to this slower growth estimation rate. At this time and based on the data provided, EPA does not believe such a contingency would provide meaningful air quality benefit to the El Paso area.

Comment 2: The Commenter argues that statements made by the current EPA Administration on March 15, 2017 are an indication that the Tier 3 Motor Vehicle Emission and Fuel Standards may be repealed or weakened, and therefore the state's reliance upon these standards as Federal control measures is a tenuous assumption.

Response 2: We disagree with the Commenter. The EPA Administration's March 15, 2017 statements do not pertain to the Tier 3 Motor Vehicle Emission and Fuel Standards. See 79 FR 23414 (April 28, 2014). Rather, these statements concern reopening a mid-term evaluation of the National Program for greenhouse gas (GHG) emissions and fuel economy standards for light-duty vehicles, developed jointly by EPA and the National Highway Traffic Safety Administration (NHTSA). The Phase 2 standards of this program, applying to model years 2017-2025, were promulgated in the Final Rule for 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards. 77 FR 62624

[1] https://www.census.gov/data/tables/2016/demo/popest/total-metro-and-micro-statistical-areas.html

(October 15, 2012). This rulemaking is separate, distinct, and independent of the action we are addressing here. The October 15, 2012 rulemaking is therefore beyond the scope of this rulemaking action and we refer the Commenter to the October 15, 2012 action for further detail.

To EPA's knowledge, no such statements have been made concerning implementation of the Tier 3 Motor Vehicle Emission and Fuel Standards, and therefore the state's reliance upon these standards as valid Federal control measures is appropriate for this SIP action. At this time, we see no legal requirement for the state to revise the LMP with an explicit commitment to reevaluate its reliance thereof in the speculative chance that a Federal measure could be weakened or removed some time in the future. We note that in any case of Federal measures being repealed or weakened, pursuant to 42 U.S.C. §7410(k)(5), the EPA has Clean Air Act authority to require a state to revise an approved SIP if it finds that it has become substantially inadequate to maintain the NAAQS. Moreover, CAA section 175A provides the EPA discretion to require the state to submit a revised SIP should the area fail to maintain the NAAQS.

Comment 3: The Commenter claims that the El Paso CO LMP lacks an adequate contingency plan because the State has not identified an appropriate trigger, and "has not identified measures that will be promptly adopted nor . . . identified a schedule or procedure to implement additional control measures."

Response 3: The State's September 21, 2016 LMP submission identifies violation of the CO NAAQS as a contingency trigger. EPA's interpretation of section 175A of the CAA, as it pertains to LMP's for CO, is contained in the October 6, 1995, national guidance memorandum titled "Limited Maintenance Plan Option for Nonclassifiable CO Nonattainment Areas" from Joseph Paisie, Office of Air Quality Planning and Standards.[2] While the Commenter correctly

[2] A copy of the October 6, 1995 Guidance Memorandum is included in the docket for this rulemaking.

notes that under EPA's guidance, "states are encouraged to choose a pre-violation action level as a trigger", the guidance explicitly states that a violation of the NAAQS is an acceptable trigger[3]. Further, the State has identified potential contingency measures, as well as a schedule and procedure for timely implementation in the event of a CO NAAQS violation.

EPA disagrees with the Commenter's contention that the maintenance plan's implementation schedules for contingency measures fail to satisfy the "prompt response" requirement in CAA section 175A(d). This section of the CAA requires that a maintenance plan include such contingency provisions as the Administrator deems necessary to assure that the state "will promptly correct any violation" of the NAAQS that occurs after redesignation of an area. Thus, Congress gave EPA discretion to evaluate and determine the contingency measures that EPA "deems necessary" to assure that the state will "promptly correct" any subsequent violation.

Section 175A does not establish any deadlines for implementation of contingency measures after redesignation to attainment. It also provides far more latitude than does Section 172(c)(9), which applies to a different set of contingency measures applicable to nonattainment areas. Section 172(c)(9) contingency measures must "take effect . . .without further action by the State or [EPA]." By contrast, section 175A(d) allows EPA to take into account the need of a state to assess, adopt, and implement contingency measures if and when a violation occurs after an area's redesignation to attainment. As noted by the U.S. Court of Appeals for the Sixth Circuit in *Greenbaum v. EPA*, 370 F.3d 527, 540 (6th Cir. 2004), that was cited by the Commenter, the EPA "has been granted broad discretion by Congress in determining what is 'necessary to assure' prompt correction" under section 175A, and "no pre-determined schedule for adoption of

[3] EPA's September 4, 1992, John Calcagni policy memorandum entitled "Procedures for Processing Requests to Redesignate Areas to Attainment" provides further support of this interpretation.

the measures is necessary in each specific case." In making this determination, EPA accounts for the time that is required for states to analyze data and address the causes and appropriate means of remedying a violation. EPA also considers the time required to adopt and implement appropriate measures in assessing what "promptly" means in this context.

In the case of the El Paso Area, EPA believes that the contingency measures set forth in the submittal, combined with the State's commitment to implement contingency measures as expeditiously as practicable but no later than 18 months of a trigger, provide assurance that the State will "promptly" correct a future NAAQS CO violation. Given the uncertainty regarding the nature of the contingency measures required to address a violation, a State may need up to 24 months to enact new statutes; develop new or modified regulations and complete notice and comment rulemaking; or take actions authorized by current state law that require the purchase and installation of equipment (e.g., diesel retrofits) or the development and implementation of new programs. In addition, EPA has previously approved implementation of contingency measures within 24 months of a violation to comply with the requirements of Section 175A in several instances. See, e.g., 81 FR 76891 (November 4, 2016), 80 FR 61775 (October 14, 2015), 79 FR 67120 (November 12, 2014), 78 FR 44494 (July 24, 2013), 77 FR 34819 (June 12, 2012), 76 FR 59512 (Sept. 27, 2011), 75 FR 2091 (January 14, 2010). EPA also notes that the Commenter did not provide any rationale for concluding that a suggested 120-day implementation period of control strategies is necessary to satisfy section 175A.

III. Final Action

We are approving the CO LMP for the El Paso Area submitted by the TCEQ on September 21, 2016 as a revision to the Texas SIP because the State adequately demonstrates

that the El Paso Area will maintain the CO NAAQS and meet all the criteria of a LMP through the second 10-year maintenance period.

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 Clean Air Act; 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: August 29, 2017.

Samuel Coleman,
Acting Regional Administrator, Region 6.

40 CFR part 52 is amended 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 entitled "EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP" is amended by adding a new entry at the end of the table for "Second 10-year Carbon Monoxide maintenance plan (limited maintenance plan) for the El Paso CO area" to read as follows:

§52.2270 Identification of plan.

* * * * *

(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
* * * * * * *				
Second 10-year Carbon Monoxide maintenance plan (limited maintenance plan) for the El Paso CO area.	El Paso, TX	9/21/2016	**[Insert date of publication in the Federal Register], [Insert Federal Register citation]**	

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[FR Doc. 2017-18950 Filed: 9/7/2017 8:45 am; Publication Date: 9/8/2017]