Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2008–0420; FRL–8690–6]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Dallas/Fort Worth 1-Hour Ozone Nonattainment Area; Determination of Attainment of the 1-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to determine that the Dallas/Fort Worth (DFW) 1-hour ozone nonattainment area is currently attaining the 1-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based upon certified ambient air monitoring data that show the area has monitored attainment of the 1-hour ozone NAAQS for the 2004–2006 monitoring period. In addition, quality controlled and quality assured ozone data for 2007 and 2008 that are available in the EPA Air Quality System database, but not yet certified, show this area continues to attain the 1-hour ozone NAAQS. If this proposed determination is made final, the requirements for this area to submit an attainment demonstration or 5% Increment of Progress (IOP) plan, a reasonable further progress plan, contingency measures, and other planning State Implementation Plans (SIPs) related to attainment of the 1-hour ozone NAAQS shall be suspended for so long as the area continues to attain the 1-hour ozone NAAQS.

DATES: Comments must be received on or before *August 11, 2008*.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2008–0420, by one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- U.S. EPA Region 6 Contact Us Web site: *http://epa.gov/region6/r6coment.htm*. Please click on 6PD (Multimedia) and select Air before submitting comments.
- *E-mail:* Mr. Guy Donaldson at donaldson.guy@*epa.gov*. Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2008–0420. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through *http://www.regulations.gov* or e-mail that you consider to be CBI or otherwise protected from disclosure. The *http://www.regulations.gov* Web site is an anonymous access system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *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 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page 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 75202–2733.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Paige, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6521, fax (214) 665–7263, e-mail address *paige.carrie@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' means EPA. This supplementary information section is arranged as follows:

I. What Is the Background for This Action?
II. What Is the Impact of a United States Court of Appeals Decision in the *South Coast* Case Regarding EPA's Phase 1 Ozone Implementation Rule on This Proposed Rule?
III. Proposed Determination of Attainment
IV. What Action Is EPA Taking?
V. Statutory and Executive Order Reviews

I. What Is the Background for This Action?

The Clean Air Act (the Act) requires us to establish National Ambient Air Quality Standards (NAAQS) for certain widespread pollutants that cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare (sections 108 and 109 of the Act). In 1979, we promulgated the 1-hour ozone standard of 0.12 parts per million (ppm) (44 FR 8202, February 8, 1979). For ease of communication, many reports of ozone concentrations are given in parts per billion (ppb); ppb = ppm x 1000. Thus, 0.12 ppm becomes 120 ppb or 124 ppb when rounding is considered.

An area exceeds the 1-hour ozone standard each time an ambient air quality monitor records a 1-hour average ozone concentration above 0.12 ppm in any given day. Only the highest 1-hour ozone concentration at the monitor during any 24 hour day is considered when determining the number of exceedance days at the monitor. An area violates the ozone standard if, over a consecutive 3-year period, more than 3 days of exceedances occur at the same monitor. For more information please see ''National 1-hour primary and secondary air quality standards for ozone'' (40 CFR 50.9) and ''Interpretation of the 1-Hour Primary and Secondary National Ambient Air Quality Standards for Ozone'' (40 CFR 50, Appendix H).

The fourth-highest daily ozone concentration over the 3-year period is called the design value (DV). The DV indicates the severity of the ozone problem in an area; it is the ozone level around which a state designs its control strategy for attaining the ozone standard. A monitor's DV is the fourth highest ambient concentration recorded at that monitor over the previous 3 years. An area's DV is the highest of the design values from the area's monitors.

The Act, 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 their ozone DVs, as marginal, moderate, serious, severe, or extreme.

The control requirements and date by which attainment is to be achieved vary with an area's classification. Marginal areas are subject to the fewest mandated control requirements and had the earliest attainment date, November 15, 1993, while severe and extreme areas are subject to more stringent planning requirements and are provided more time to attain the standard. The DFW 1-hr ozone nonattainment area was initially classified as moderate (56 FR 56694, November 6, 1991) with an attainment date of November 15, 1996. Since the area did not attain the standard by November 15, 1996, we reclassified the area to serious on March 20, 1998 (63 FR 8128). The statutory attainment date for DFW, with its reclassification to serious, was November 15, 1999. The DFW 1-hour ozone nonattainment area contains Dallas, Tarrant, Collin, and Denton Counties (40 CFR parts 81.344). As a result of the reclassification to serious, the State was required to submit an attainment demonstration SIP with an attainment date of November 15, 1999 and a Rate of Progress (ROP) SIP covering the years from November 15, 1996 to November 15, 1999. The State submitted those SIPs on March 19, 1999. The State had previously submitted the moderate area 15% ROP plan on August 8, 1996, before the area was reclassified to serious. The 15% plan was given a conditional, interim approval.

Our review showed that the attainment demonstration SIP submitted in 1999 did not contain an adequate control strategy or adopted measures to implement the strategy and the 1999 Post-1996 ROP SIP did not achieve the required 9% reduction in emissions for the time period. Therefore, we found both SIPs incomplete and started sanctions and Federal Implementation Plan (FIP) clocks effective May 13, 1999.

A new Post-1996 ROP SIP was submitted October 25, 1999, and was found complete on December 16, 1999, since the new plan contained additional volatile organic compound (VOC) reductions to meet the 9% requirement. The new attainment demonstration SIP was submitted April 25, 2000, and was found complete on June 23, 2000, because it contained a modeled control strategy and adopted regulations to implement the strategy. These two completeness findings stopped the sanctions clocks. The 2000 SIP also contained a transport determination. Under an EPA policy, ''Extension of Attainment Dates for Downwind Transport Areas,'' dated July 16, 1998, an area such as DFW could have been granted an attainment date extension if it could be shown that the DFW area was affected by emissions from an up-wind nonattainment area with a later attainment date (e.g., Houston 2007) to a degree that affects the downwind area's ability to achieve attainment. This policy was not upheld by the Courts. See, *Sierra Club* v. *EPA*, 294 F.3rd 155 (*D.C.* Cir. 2002), *Sierra Club* v. *EPA*, 311 F.3rd 853 (7th Cir. 2002), and *Sierra Club* v. *EPA*, 314 F.3rd 735 (5th Cir. 2002). EPA proposed approval of the 2000 SIP and transport demonstration on January 18, 2001 (66 FR 4756). However, due to the Courts' ruling EPA could not take final action on this SIP.

EPA published the 8-hour ozone designations and the first phase governing certain facets of implementation of the 8-hour ozone standard (Phase 1 Rule) on April 30, 2004 (69 FR 23858 and 69 FR 23951, respectively). The DFW area was designated as nonattainment for the 8-hour ozone standard and comprises nine counties: Collin, Dallas, Denton, and Tarrant counties (these four constitute the 1-hour ozone nonattainment area, hereafter referred to as the four core counties), and Ellis, Johnson, Kaufman, Parker and Rockwall counties. At the time of designation however, the four core counties remained in nonattainment for the 1-hour standard and had two outstanding 1-hour ozone obligations: (1) The area did not have an approved 1-hour ozone attainment demonstration; and (2) the area did not have approved reasonably available control technology (RACT) requirements for major sources of VOC emissions (VOC RACT).

The Phase 1 Rule revoked the 1-hour ozone standard (see 69 FR 23951). The Phase 1 Rule further provided the following three options for areas that had not met the 1-hour ozone attainment demonstration requirement: (1) Submit a 1-hour attainment demonstration no later than 1 year after designation; (2) Submit a Reasonable Further Progress (RFP) plan for the 8-hour NAAQS, no later than 1 year following designations for the 8-hour NAAQS, providing a 5% increment of emissions reduction from the area's 2002 emissions inventory (EI); or (3) Submit an early 8-hour ozone attainment demonstration SIP that ensures that the first segment of RFP is achieved early (See 40 CFR 51.905(a)(ii)). Texas selected option 2, to submit the RFP plan providing a 5% increment of emissions reduction from the area's 2002 EI. This increment of emissions reduction is called the 5% Increment of Progress (IOP) plan. Texas submitted the 5% IOP plan for DFW, but EPA has not taken final action on the plan.

The Phase 1 Rule also provided that 1-hour ozone nonattainment areas are required to adopt and implement ''applicable requirements'' according to the area's classification under the 1-hour ozone standard for anti-backsliding

purposes (see 40 CFR § 51.905(a)(i)). On May 26, 2005, we determined that an area's 1-hour designation and classification as of June 15, 2004 would dictate what 1-hour obligations remain as ''applicable requirements'' under the Phase 1 Rule (70 FR 30592). The DFW 1-hour nonattainment area was still classified as serious on June 15, 2004, so the 1-hour ozone standard requirements applicable to the four core counties are those that apply to nonattainment areas classified as serious. An outstanding ''applicable requirement'' for the four core counties is the VOC RACT. We proposed to approve RACT for all major sources of VOCs in the 1-hour DFW nonattainment area on January 18, 2001 (66 FR 4756) and received no comments. In a separate rulemaking, we are re-proposing to approve RACT for all major sources of VOCs in the 1-hour DFW nonattainment area.

Apart from the attainment demonstration and RACT, the DFW area has satisfied all other serious area applicable requirements under the 1-hour ozone standard. See the area's Clean Fuels Fleet Program (February 7, 2001 at 66 FR 9203); the area's post 1996 Rate of Progress (ROP) plan and associated motor vehicle emission budgets (MVEBs) (March 28, 2005 at 70 FR 15592); and the area's 15% ROP plan and associated MVEBs (April 12, 2005 at 70 FR 18993). For a complete list, see the Texas SIP map at *http://www.epa.gov/earth1r6/6pd/air/sip/sip.htm*.

II. What Is the Impact of a United States Court of Appeals Decision in the *South Coast* Case Regarding EPA's Phase 1 Ozone Implementation Rule on This Proposed Rule?

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Phase 1 Rule. *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in *South Coast Air Quality Management Dist.* v. *EPA*, Docket No. 04–1201, in response to several petitions for rehearing, the D.C. Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. With respect to the challenges to the anti-backsliding provisions of the rule, the Court vacated three provisions that would have allowed States to remove from the SIP or not to adopt three 1-hour obligations once the 1-hour standard was revoked to transition to the implementation of the 8-hour ozone standard: (1) Nonattainment area new source review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) section 185 penalty fees for 1-hour severe or extreme nonattainment areas that fail to attain the 1-hour standard by the 1-hour attainment date; and (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the Act, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS or for failure to attain that NAAQS. The Court clarified that 1-hour conformity determinations are not required for anti-backsliding purposes.

The provisions in 40 CFR 51.905(a)–(c) concerning anti-backsliding remain in effect and areas must continue to meet those requirements. However, the three provisions noted above, which are specified in 40 CFR 51.905(e), were vacated by the Court. As a result, States must continue to meet the obligations for 1-hour NSR; 1-hour contingency measures; and, for severe and extreme areas, the obligations related to a section 185 fee program. Currently, EPA is developing several proposed rules to address the Court's vacatur and remand with respect to these three requirements. We address below how the obligations for DFW will be met, specifically, the 1-hour obligations under EPA's anti-backsliding rule (as interpreted by the Court), and the obligation under 40 CFR 51.905(a)(ii)(B) that applies to DFW because DFW did not have a fully approved attainment SIP for the 1-hour NAAQS at the time of its designation under the 8-hour NAAQS, will be met.

III. Proposed Determination of Attainment

EPA is proposing to find that the DFW 1-hour ozone nonattainment area is currently in attainment of the 1-hour standard based on the most recent 3 years of quality-assured air quality data. Certified ambient air monitoring data show that the area has monitored attainment of the 1-hour ozone NAAQS for the 2004–2006 monitoring period. Quality controlled and quality assured ozone data for 2007 and 2008 that are available in the EPA Air Quality System database (AQS), but not yet certified, show this area continues to attain the 1-hour ozone NAAQS. In addition, as of June 30, 2008, data available in AQS and on the Texas Commission on Environmental Quality Web site at *http://www.tceq.state.tx.us/cgi-bin/compliance/monops/ozone_exceedance.pl* show no exceedances of the 1-hour standard for the DFW area in 2008. Consistent with 40 CFR 50, Appendix H, Table 1 contains the 1-hour ozone data for the DFW 1-hour ozone nonattainment area monitors that show that the area is currently attaining the 1-hour ozone NAAQS.

TABLE 1.—1-HOUR OZONE DATA FOR THE DFW 1-HOUR OZONE NONATTAINMENT AREA

Site	Design value (ppb)		Actual and estimated number of exceedances [a]				3-year exceedance average	
	2004–2006	2005–2007	2004	2005	2006	2007	2004–2006	2005–2007
Denton County Airport (48–121–0034)	118	118	0	0	0	1	0	0.33
Nuestra (48–113–0075)	117	16	0	0	0	0	0	0
Hinton (48–113–0069)	114	114	0	0	0	0	0	0
Executive (48–113–0087)	111	110	1	0	0	0	0.33	0
Keller (48–439–2003)	115	117	0	2	0	1	0.67	1.00
Meacham (48–439–1002)	117	118	0	2	0	1	0.67	1.00
Arlington (48–439–3011)	113	113	0	0	0	0	0	0
Eagle Mt. Lake (48–439–0075)	124	124	1	2	0	1	1.00	1.00
Grapevine (48–439–3009)	112	111	1	0	0	0	0.33	0
Frisco (48–085–0005)	113	111	0	0	0	0	0	0

[a] The actual and estimated number of exceedances were equal in all cases.

Pursuant to the interpretation set forth in the May 10, 1995 memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, entitled ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone Ambient Air Quality Standard'' (Clean Data Policy), EPA is proposing to make a finding of attainment based on current air quality. Under this policy, if EPA determines through rulemaking that the DFW 1-hour ozone nonattainment area is meeting the 1-hour ozone standard, the requirements for the State to submit and have approved an attainment demonstration and related components such as reasonably available control measures (RACM), an RFP demonstration (including the 5% IOP plan), and contingency measures for failure to attain or make RFP are suspended as long as the area continues to attain the 1-hour ozone NAAQS. If the area subsequently violates the ozone NAAQS, EPA would initiate notice-and-comment rulemaking to withdraw the determination of attainment, which would result in reinstatement of the requirement for the State to submit such plans.

The Tenth, Seventh and Ninth Circuits have upheld EPA rulemakings applying the Clean Data Policy. See *Sierra Club* v. *EPA,* 99 F. 3d 1551 (10th Cir. 1996); *Sierra Club* v. EPA, 375 F.3d 537 (7th Cir. 2004) and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Cir. June 28, 2005) memorandum opinion.[1] See also the discussion and rulemakings cited in the Phase 2 Rule, 70 FR 71644–71646 (November 29, 2005).

IV. What Action Is EPA Taking?

EPA proposes to find that the DFW 1-hour ozone nonattainment area has attained the 1-hour ozone standard. Thus the requirements for submitting the attainment demonstration, RFP requirements, or in this case a 5% IOP, (40 CFR 51.905(a)), and section 172(c)(9) and section 182(c)(9) contingency measures are suspended for so long as the area is attaining the standard.

Thus pursuant to our proposed determination of attainment and in accordance with our Clean Data Policy, the effect of the finding is that the following requirements to submit SIP measures under the 1-hour anti-backsliding provisions (40 CFR Section 51.905) are suspended for so long as the area continues to attain the 1-hour standard:

RFP reductions under section 182(c)(2)(B) (for serious and above areas)

Attainment demonstration under section 182(c)(2) (for serious and above areas)

Contingency measures under section 172(c)(9) and section 182(c)(9) (for serious and above areas).

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action proposes to make a determination based on air quality data, and would, if finalized, result in the suspension of certain Federal requirements. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Because this rule proposes to make a determination based on air quality data, and would, if finalized, result in the suspension of certain Federal requirements, it 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). This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed action also does not have Federalism implications because it does 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to make a determination based on air quality data and would, if finalized, result in the suspension of certain Federal requirements, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it proposes to determine that air quality in the affected area is meeting Federal standards. The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply because it would be inconsistent with applicable law for EPA, when determining the attainment status of an area, to use voluntary consensus standards in place of promulgated air quality standards and monitoring procedures that otherwise satisfy the provisions of the Clean Air Act. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). Under Executive Order 12898, EPA finds that this rule involves a proposed determination of attainment based on air quality data and will not have disproportionately high and adverse human health or environmental effects on any communities in the area, including minority and low-income communities.

List of Subjects in 40 CFR Part 52

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

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

Dated: July 1, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. E8–15809 Filed 7–10–08; 8:45 am]

BILLING CODE 6560–50–P

[1] The Clean Data Policy, as it is embodied in 40 CFR 51.918, is being challenged in the context of the 8-hour ozone standard in the Phase 2 Rule ozone litigation pending in the D.C. Circuit, *NRDC* v. *EPA*, No. 06–1045 (D.C. Cir.).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–0523; FRL–8690–5]

Approval and Promulgation of Implementation Plans; Texas; Control of Emissions of Nitrogen Oxides (NO_X) From Stationary Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing approval of rules for the control of NO_X emissions into the Texas State Implementation Plan (SIP). The Texas