IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, DOWNWINDERS AT RISK, and TEXAS ENVIRONMENTAL JUSTICE ADVOCACY SERVICES, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, U.S. Environmental Protection Agency, *Respondents*.	)	No. 20-1121

PETITION FOR REVIEW

Pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), Rule 15 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 15, Sierra Club, Downwinders at Risk, and Texas Environmental Justice Advocacy Services (collectively, "Petitioners") hereby petition this Court for review of two final actions taken by Respondents U.S. Environmental Protection Agency and Administrator Andrew Wheeler and published in the Federal Register: 85 Fed. Reg. 8411 (Feb. 14, 2020), titled "Air Plan Approval; Texas; Houston-Galveston-Brazoria Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Section 185 Fee Program, Final Rule"

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, DOWNWINDERS AT RISK, and TEXAS ENVIRONMENTAL JUSTICE ADVOCACY SERVICES, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, U.S. Environmental Protection Agency, *Respondents*.	)	No. 20-1121

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Sierra Club, Downwinders at Risk, and Texas Environmental Justice Advocacy Services (collectively, "Petitioners") make the following disclosures:

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

legal action to ensure that everyone, regardless of race or income, is entitled to live in a clean environment.

DATED: April 14, 2020

Respectfully submitted,

/s/ Neil Gormley
Neil Gormley
Seth L. Johnson
Earthjustice
1001 G Street, NW
Suite 1000
Washington, DC 20001
(202) 667-4500
ngormley@earthjustice.org
sjohnson@earthjustice.org

Counsel for Petitioners Sierra Club, Downwinders at Risk, and Texas Environmental Justice Advocacy Services

Attachment 1

110 and part D that are applicable for purposes of redesignation, and all such requirements have been fully approved (Criteria 2 and 5). As discussed in the Proposal, for the revoked ozone standards at issue here, over the past three decades the State has submitted numerous SIPs for the HGB area to implement those standards, improve air quality with respect to those standards, and address anti-backsliding requirements for those standards. The TSD documents many of these actions and EPA approvals. However, EPA has consistently held the position that not every requirement to which an area is subject is applicable for purposes of redesignation. *See, e.g.,* September 4, 1992, Memorandum from John Calcagni (''Calcagni Memorandum'').[4] As described in the Calcagni Memorandum, some of the Part D requirements, such as demonstrations of reasonable further progress, are designed to ensure that nonattainment areas continue to make progress toward attainment. EPA has interpreted these requirements as not ''applicable'' for purposes of redesignation under CAA section 107(d)(3)(E)(ii) and (v) because areas that are applying for redesignation to attainment are already attaining the standard. Similarly, as explained further below, EPA believes that the CAA section 185 fee requirement is not applicable for the purposes of redesignation. We note that we are approving the HGB equivalent alternative section 185 fee program for the revoked 1-hour ozone standard separately in this action but do not believe it is an applicable requirement for redesignation. This means that we are terminating this requirement.

Finally, we are fully approving the maintenance plan for the HGB area. As discussed in the Proposal, we agree that Texas has provided a plan that demonstrates that the HGB area will maintain attainment of the revoked 1-hour and 1997 standards until 2032. The plan also includes contingency measures that would be implemented in the HGB area should the area monitor a violation of these standards in the future.

II. Response to Comments

We received comments from six entities on the proposed rulemaking. These comments are available for review in the docket for this rulemaking. The comments were submitted by the following: Earthjustice (on behalf of five national, regional, and grassroots groups); Baker Botts, L.L.P on behalf of the Section 185 Working Group and BCCA Appeal Group (''Baker Botts''); the Texas Commission on Environmental Quality (TCEQ or State); the Texas Oil and Gas Association (TXOGA); and two anonymous commenters. Our responses to all relevant comments follow. Any other comments received were either deemed irrelevant or beyond the scope of this action and are also included in the docket to this action.

A. Comments on the Plan for Maintaining the Revoked Ozone Standards

Comment: An anonymous commenter (''Commenter'') states that EPA mistakenly evaluates annual emissions inventories for nitrogen oxides (NO_X) and volatile organic compounds (VOC) to show maintenance of the NAAQS. Commenter states that EPA must re-evaluate based on typical ozone season day values and show that permanent and enforceable measures have been enacted to maintain ozone season day averages that limit 1-hour and 8-hour ozone levels.

Response: As described in our TSD, attainment of these ozone NAAQS is determined by reviewing specific data averaged over a three-year period. For example, the 1997 ozone standard is attained when the 3-year average of the annual fourth highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.08 ppm [5] (69 FR 23857, April 30, 2004).[6] Also, as mentioned in our TSD, ground-level ozone is formed when NO_X and VOC react in the presence of sunlight. Therefore, having an inventory of emissions for NO_X and VOC at the time the area first met both of these NAAQS (*i.e.,* in 2014) helps determine what levels of emissions would be needed to maintain these NAAQS in the HGB area. As indicated in our Proposal, the 2014 base year emission inventories (EIs) for NO_X and VOC represent the first year in which the HGB area is attaining both the 1-hour and 1997 ozone NAAQS and thus provide a starting point against which to evaluate the EI levels estimated for future years. In addition, consistent with the Calcagni Memorandum regarding a Maintenance Demonstration, ''[a] State may generally demonstrate maintenance of the NAAQS by either showing that future emissions of a pollutant or its precursors will not exceed the level of the attainment inventory or by modeling to show that the future mix of sources and emission rates will not cause a violation of the NAAQS.'' Calcagni Memorandum at 4. Because the State's estimated future EIs for the HGB area do not exceed the 2014 base year EI (*i.e.,* the attainment inventory), we would not expect the area to have emissions leading to a violation of the 1-hour or 1997 ozone NAAQS.

We disagree that we must re-evaluate based on ''typical ozone season day values'' because the EIs submitted by the State and evaluated in our Proposal were comprised of ozone season daily emissions of NO_X and VOC. No re-evaluation is necessary. We agree that we must determine that improvements in air quality are due to permanent and enforceable reductions in emissions in the HGB area, and we listed such measures in Appendix A of our TSD. For example, one of the emission reduction measures adopted in the HGB Area under the 1-hour ozone NAAQS is the HRVOC emissions cap, whose estimated VOC emission reductions were 135.79 tons per day (tpd) (see 71 FR 52656, September 6, 2006). See Appendix A in the TSD for a list of the permanent and enforceable measures approved in the HGB area under the 1-hour and 1997 ozone NAAQS.[7] Finally, in prior final actions, we established that the HGB area has attained the 1-hour and 1997 ozone NAAQS due to permanent and enforceable emission reductions.[8]

B. Comments on Termination of Anti-Backsliding Obligations for the Revoked Ozone Standards

We proposed to find that the HGB area met all five redesignation criteria in CAA section 107(d)(3)(E), consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *South Coast Air Quality Management District* v. *EPA,* 882 F.3d 1138 (D.C. Cir. 2018) (''*South Coast II*'') for the revoked ozone standards and to terminate the anti-backsliding obligations for the HGB area associated with these standards. In the alternative, we proposed to redesignate the HGB area to attainment for the revoked ozone standards, taking comment on whether

[4] As referenced in our Proposal, see ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992. To view the memo, please visit *https://www.epa.gov/sites/production/files/2016-03/documents/calcagni_memo_-_procedures_for_processing_requests_to_redesignate_areas_to_attainment_090492.pdf.*

[5] This value becomes 0.084 ppm or 84 ppb when rounding is considered.

[6] Ambient air quality monitoring data for the 3-year period must meet a data completeness requirement. For details, please see 40 CFR 50, Appendix I.

[7] The TSD is in the docket for this action and Appendix A begins on page 14 of the TSD.

[8] See 80 FR 63429, October 20, 2015 and 81 FR 78691, November 8, 2016.

NAAQS should include evaluation of attainment of another newer NAAQS. It is common practice that areas designated nonattainment for an earlier, less stringent NAAQS come into compliance with that NAAQS, meet the requirements for redesignation for that NAAQS, and are redesignated to attainment for that NAAQS, while remaining nonattainment for a newer more stringent standard for the same pollutant. Indeed, with Congress' directive that the EPA review and revise the NAAQS as appropriate no less frequently than every five years, it would be nearly impossible for areas to be redesignated to attainment for an older NAAQS if nonattainment of a newer (often more stringent) standard barred EPA from approving redesignation requests for the older standard.

We also disagree that this action's effects terminating anti-backsliding requirements are in any way ''unique.'' Areas that are redesignated to attainment are permitted to stop applying nonattainment area New Source Review offsets and thresholds and transition to the Prevention of Significant Deterioration program, which the EPA does not agree is an unwarranted ''weakening'' of protections. In this case, because the HGB area remains nonattainment for the newer ozone NAAQS, it will continue to be subject to nonattainment new source review (NNSR) emissions offsets and threshold requirements, tailored to the current classifications that apply to the area. We do not agree that it is arbitrary or unlawful to hold areas that were nonattainment for a revoked NAAQS to the same standards that apply to areas that are nonattainment for the current NAAQS. EPA does not agree with commenter's suggestion that areas that have reached attainment should be subject to a more stringent process to shed obligations under a revoked NAAQS than the process required to shed obligations for a current NAAQS.

Finally, with respect to Earthjustice's comment that the *South Coast II* court's holding regarding reclassification does not support an interpretation that the EPA has the authority to alter designations, the EPA is not finalizing a change in designation for the area for the two revoked NAAQS. Because we are not redesignating the HGB area to attainment no further response to this specific comment is required.

Comment: Earthjustice states that EPA cannot lawfully or rationally change Houston's designation under revoked standards.

Response: The EPA is not changing the designation for the HGB area under the 1-hour or 1997 ozone NAAQS in this action. As noted above, the designations for these areas were revoked when the NAAQS were revoked. In this action, EPA is terminating the anti-backsliding requirements associated with the two revoked NAAQS in this area.

Comment: Earthjustice states that EPA arbitrarily fails to consider the consequences of terminating anti-backsliding protections. The commenter asserts that the EPA is not legally obligated to redesignate an area that meets criteria of CAA section 107(d)(3)(E), and that additionally, the EPA must also determine whether it *should* redesignate the area. Earthjustice states that finalization of this Proposal would ratify termination of key anti-backsliding protections, particularly the Severe area NNSR protections that would otherwise apply to proposed new and modified stationary sources and work to impose more stringent limits on harmful ozone-forming pollution attributable to those new and modified stationary sources. By authorizing Houston to have weaker protections than it otherwise would, while still having severely harmful levels of ozone air pollution, Earthjustice claims that the EPA's action irrationally deprives Houston communities of CAA public health protections intended to bring the area expeditiously into compliance with health-based ozone standards.

Response: As stated previously, we are not in this action redesignating the HGB area for the revoked NAAQS. Rather, we find that all five CAA statutory criteria for redesignation are met, and therefore anti-backsliding obligations for the revoked NAAQS are appropriately terminated. We do not agree that the facts and circumstances before us support the commenter's reading that, despite Texas having met all five statutory criteria, the EPA should withhold approval of the state's request.

We note that we have considered the consequence of terminating anti-backsliding protections raised by the commenter, *i.e.,* the Severe classification requirements for NNSR. We believe that the improvement in air quality due to the permanent, enforceable controls included in the Texas SIP for the HGB area makes termination of these Severe area requirements appropriate and, as discussed previously, consistent with the Act's provisions.

We note NNSR is still in place because the area remains nonattainment under the 2008 and 2015 standards. The HGB area is classified as a Marginal nonattainment area under the 2015 ozone NAAQS, and a Serious nonattainment area under the 2008 ozone NAAQS and as such, is required to implement NNSR consistent with the Serious area classification, as required by CAA sections 182(c)(6), 182(c)(7), 182(c)(8), and 182(c)(10).[12] [13] In addition, approval of this final action does not relieve sources in the area of their obligations under previously established permit conditions. The Texas SIP includes a suite of approved permitting regulations for the Minor and Major NNSR for ozone that will continue to apply in the HGB area even after final approval of this action.[14] Each of these permitting regulations has been evaluated and approved by EPA into the SIP as consistent with the requirements of the CAA and protective of air quality, including the requirements at 40 CFR 51.160 whereby the TCEQ cannot issue a permit or authorize an activity that will result in a violation of applicable portions of the control strategy or that will interfere with attainment or maintenance of a NAAQS. Thus, new sources and modifications will continue to be permitted and authorized under the existing SIP permitting requirements if they are determined to be protective of air quality.

This action recognizes that the HGB area met the requirements for redesignation for both the revoked 1-hour and 1997 ozone NAAQS and as a result it is appropriate to relieve the area of the Severe NNSR requirements associated with these revoked standards.

Comment: Earthjustice states that Houston was the only area in Texas to report violations of the revoked 1-hour standard in 2018, exceeding the standard at eleven air monitor locations on five days. Earthjustice states that EPA cannot rationally terminate anti-backsliding protections in Houston as the area continues to experience some of the worst air pollution in the nation.

Response: We do not agree that the HGB area experienced violations of the 1-hour ozone NAAQS in 2018. The area has consistently continued to attain that NAAQS since 2013. As noted above, the statutory requirements for redesignation (and in this case, for termination of anti-

[12] See 84 FR 44238.

[13] Liberty and Waller Counties are designated as attainment/unclassifiable for the 2015 ozone NAAQS, but these two counties are included in the Serious nonattainment area under the 2008 ozone NAAQS, so they must implement NNSR as a Serious ozone nonattainment area.

[14] For example, see the Texas SIP-approved rules addressing Prevention of Significant Deterioration (PSD) at 30 TAC 116.12(20)(A), published at 79 FR 66626, November 10, 2014, and in *www.regulations.gov* docket ID: EPA–R06–OAR–2013–0808.

Comment: Earthjustice states that unhealthy levels of ozone and other air pollutants disproportionally affect communities of color in the Houston nonattainment area, including facilities that handle extremely hazardous substances whose emissions must be reported to the Toxic Release Inventory (TRI). Earthjustice includes a document with their submitted comments titled, ''Evaluation of Vulnerability and Stationary Source Pollution in Houston'' that evaluates particulate matter, total VOCs, and a 19-pollutant index over three time periods (2007–2016, 2012–2016, and 2016). Earthjustice states that the weakened NNSR requirements will allow more VOC emissions than otherwise would be permitted, and communities along the Houston Ship Channel already bear a disproportionate burden of VOC emissions.

Response: The EPA appreciates the work the commenter has performed to evaluate potential disproportionate impacts in vulnerable communities; in this final action, however, we are addressing only the determination that the HGB area is attaining the revoked standards and meets the five criteria for redesignation, which leads to the termination of anti-backsliding measures. We note that emissions of hazardous air pollutants (HAPs), which are reported to the TRI, are regulated by other provisions of the CAA and concerns regarding those emissions are outside the scope of this action.[20]

The report referred to by the commenter examined the geographic distribution of 4 classes of emissions and whether certain communities are disproportionately impacted by these pollutants. The pollutants examined were Particulate Matter (PM), *i.e.,* $PM_{2.5}$ and $PM_{10,}$ VOCs and an index of 19 pollutants that are hazardous air pollutants. Ozone was not one of the pollutants examined. The approvability of this action is based on requirements for ozone and the revoked standards being considered here. As discussed elsewhere, monitors throughout the Houston area have recorded levels meeting both the 1 hour and 1997 8-hour standards for some time. Moreover, Texas will continue to have to work to reduce ozone precursors to meet the 2008 and 2015 ozone standards. Finally, we note that the monitors violating the 2015 ozone standard in the Houston area are located in Brazoria, Galveston, Harris, and Montgomery Counties.[21]

[20] Additional information on HAPs, including what is being done to reduce HAPs, may be found at *https://www.epa.gov/haps.*

[21] See data posted at *https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_attainment.pl.*

Comment: Earthjustice states that EPA arbitrarily concludes that relevant statutory and executive order reviews are not required for this rule and EPA wrongly asserts that the proposed action would only accomplish a revision to the Texas SIP that EPA can only approve or disapprove. Earthjustice states that through this rule, EPA proposes to change and adopt national positions regarding its authority to redesignate areas under CAA section 107(d)(3)(E) and terminate anti-backsliding protections for revoked standards. Earthjustice states these actions are not SIP revisions and thus necessitate the statutory and executive order reviews EPA avoids by citing only a portion of the actions it is taking in this rulemaking. Earthjustice states that, in addition to the environmental justice concerns relevant to the review required by Executive Order 12898, EPA ignores other important considerations that are a part of rational decision-making like effects on children's health and other public health factors.

Response: As stated previously, we are not in this action redesignating the HGB area for the two revoked NAAQS. Earthjustice has not provided much detail regarding which statutory and executive order reviews it believes are applicable and that the EPA has not addressed. In section V of this notice, we discuss EPA's assessment of each statutory and executive order that potentially applies to this action. We note that the introductory paragraph to section VII of the Proposal preamble contains a typographical error that may have caused some of the commenter's concern. The last sentence of that paragraph appears to indicate that the reason for EPA's proposed assessment that the action is exempt from the enumerated statutory and executive orders is solely that the action is a review of a SIP. However, that sentence was intended to be inclusive of all the reasons stated in the introductory paragraph, including that the approval of the request to terminate anti-backsliding does not impose new requirements on sources (*i.e.,* ''For that reason'' more appropriately would have read ''For these reasons'').

With respect to the commenter's concern that EPA has not adequately addressed environmental justice, we do not agree that Executive Order 12898 applies to this action because this action does not affect the level of protection provided to human health or the environment. In this action the level of protection is provided by the ozone NAAQS and this action does not revise the NAAQS. As noted earlier in this final action, the HGB area will remain designated nonattainment for the 2008 and 2015 ozone NAAQS. The HGB area was recently reclassified as a Serious nonattainment area for the 2008 ozone NAAQS, and therefore the State must submit SIP revisions and implement controls to satisfy the statutory and regulatory requirements for a Serious area for the 2008 ozone standard.[22]

With respect to commenter's concern that we have not adequately addressed executive orders regarding children's health, we do not agree that Executive Order 13045 applies to this action. Executive Order (E.O.) 13045 applies to ''economically significant rules under E.O. 12866 that concern an environmental health or safety risk that EPA has reason to believe may disproportionately affect children.'' See 62 FR 19885, April 23, 1997. As noted in the Proposal and below in section V of this preamble, this rule is not ''economically significant'' under E.O. 12866 because it will not have ''an annual effect on the economy of $100 million or more or adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.'' 62 FR 19885.[23]

Comment: Earthjustice states that EPA should not revise the attainment designations in 40 CFR 81 because it has failed to consider the consequences of doing so, including whether changes in the designations listing will affect remaining maintenance plan and other requirements after redesignation.

Response: In this action, we are not revising the designations for the HGB area for the two revoked ozone NAAQS, and therefore the comments regarding consequences of changing the area's designation are beyond the scope of this final action. We are revising the 40 CFR part 81 tables for the HGB area, which currently reflect the approvals of the area's redesignation substitutes from 2015 and 2016. For revoked standards, the sole purpose of the part 81 table is to help identify applicable anti-backsliding obligations. Therefore, we are revising the part 81 tables to reflect that the HGB area has met all the redesignation criteria for the two revoked ozone NAAQS and therefore anti-backsliding obligations associated

[22] See 83 FR 25576 and 84 FR 44238.

[23] See also ''Guide to Considering Children's Health When Developing EPA Actions: Implementing Executive Order 13045 and EPA's Policy on Evaluating Health Risks to Children.'' *https://www.epa.gov/children/guide-considering-childrens-health-when-developing-epa-actions-implementing-executive-order.*

2014 (the attainment inventory year). Consistent with the Calcagni Memorandum regarding a Maintenance Demonstration, ''[a] State may generally demonstrate maintenance of the NAAQS by either showing that future emissions of a pollutant or its precursors will not exceed the level of the attainment inventory or by modeling to show that the future mix of sources and emission rates will not cause a violation of the NAAQS.'' Calcagni Memorandum at 4. Because the State's estimated future EIs for the HGB area do not exceed the 2014 attainment year EI, we do not expect the area to have emissions sufficient to cause a violation of the 1-hour or 1997 ozone NAAQS.

In addition, NNSR offsets will continue to be required in the HGB area because all eight counties are also designated nonattainment, and currently classified as Serious, under the 2008 ozone NAAQS. The required NNSR offset for the HGB area at this time is 1.2:1 for sources emitting at least 50 tpd, consistent with the Serious area requirements provided in CAA section 182(c)(10).[30] Whether a new or modified major source in the HGB area chooses to offset NO_X or VOC or a combination of the two, the offsets must be made in the same eight-county ozone nonattainment area.

Finally, despite population and economic growth, emissions of NO_X and VOC in the HGB area have been decreasing since 1990. Emissions of NO_X in the 8-county HGB area have dropped from approximately 1368.97 tpd (1990 base year under the 1-hour ozone NAAQS) to 459.94 tpd (2011 base year under the 2008 ozone NAAQS) and emissions of VOC have dropped from approximately 1491.65 tpd (1990 base year) to 531.40 tpd (2011 base year).[31] *See* 59 FR 55586, November 8, 1994, and 84 FR 3708, February 13, 2019.[32] The HGB SIP must be further revised to meet the emission reductions required by CAA section 182(c)(2)(B) for the Serious ozone nonattainment classification under the 2008 ozone NAAQS.[33] This progress reflects efforts by the State, area governments and industry, federal measures, and others.[34]

Comment: Earthjustice asserts that EPA must either create regulations to authorize termination of anti-backsliding protections when certain conditions are met or reverse its duly adopted, nationally applicable position that EPA lacks authority to redesignate areas under revoked standards. Earthjustice states that either action would be reviewable exclusively in the D.C. Circuit. Earthjustice further asserts that even if aspects of EPA's action constitute a locally or regionally applicable action that overbears the nationally applicable aspects of the action, Earthjustice believes that EPA's action would still be ''based on a determination of nationwide scope and effect'' (citing CAA section 307(b)(1)). Earthjustice asserts that ''EPA expressly proposed in its FR publication to base action on that determination (via either pathway),'' but also states that if a more specific finding and publication were necessary, that EPA is obligated to make the finding and publish it because EPA's action here is a determination of nationwide scope and effect. The commenter concludes that the venue for judicial review of this action therefore necessarily lies in the D.C. Circuit.

Response: First, as noted earlier, the EPA is not in this action changing HGB's designation, so Earthjustice's comments on that point are beyond the scope of this final action. Second, we disagree that promulgation of a regulation authorizing the action taken here is necessary or being undertaken in this notice. As mentioned earlier in this final action, we believe the D.C. Circuit's decision in *South Coast II* regarding the vacatur of the redesignation substitute mechanism made clear that under the CAA, areas may shed anti-backsliding controls where all five redesignation criteria are met. Through this final action, we are replacing our previous approvals of the redesignation substitutes for the HGB area for the revoked 1979 1-hour and 1997 ozone NAAQS, because that mechanism was rejected by the D.C. Circuit for its failure to include all five statutory redesignation criteria. Per the D.C. Circuit's direction, this action examines all five criteria, finds them to be met in the HGB area, and terminates the relevant anti-backsliding obligations for the HGB area, thereby replacing the prior invalid approvals for the HGB area. We do not agree that given the circumstances here, the parties must wait for EPA to promulgate a national regulation codifying what the D.C. Circuit has already indicated the CAA allows before we may replace the redesignation substitutes for the HGB area.

As such, we do not agree that this action is reviewable exclusively in the D.C. Circuit. Under CAA section 307(b)(1),

> A petition for review of action of the Administrator in promulgating [certain enumerated actions] or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of [certain enumerated actions] or any other final action of the Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.

To the extent the commenter is asserting otherwise, we do not agree that this is a ''nationally applicable'' action under CAA section 307(b)(1). This final action approves a request from the State of Texas to find that the State has met all five of the statutory criteria for redesignation under CAA section 107(d)(3)(E) for the HGB area, it approves the submitted CAA section 175A(d) maintenance plan for the HGB area into the Texas SIP, and it approves the State's submitted equivalent alternative program addressing fees under CAA section 185 for the HGB area. The legal and immediate effect of the action terminates anti-backsliding controls for only the HGB area with respect to two revoked NAAQS and amends the 40 CFR part 81 tables accordingly for only the HGB area. Nothing in this action has legal effects in any area of the country outside of the HGB area or Texas on its face. *See Dalton Trucking, Inc.* v. *EPA,* 808 F.3d 875, 881 (D.C. Cir. 2015) (''To determine whether a final action is nationally applicable, 'this Court need look only to the face of the rulemaking, rather than to its practical effects.' '' (internal citations omitted)). The fact that this is

[30] The HGB area is designated as a Serious ozone NAA under the 2008 ozone NAAQS (84 FR 44238).

[31] The 1990 base year includes 335.47 tpd in biogenic VOC emissions. Biogenic emissions, *i.e.,* emissions from natural sources such as plants and trees, are not required to be included in the 2011 base year.

[32] We approved the area's Reasonable Further Progress (RFP) plan for the Moderate ozone NAAQS under the 2008 ozone NAAQS showing 15% emission reductions from 2011 through the attainment year (2017), plus an additional 3% emission reductions to meet the contingency measure requirement.

[33] The State recently proposed a SIP revision to meet RFP Serious area requirements for HGB with an additional average of 3% emission reductions from 2017 through the attainment year (2020), plus an additional 3% emissions reductions to meet the contingency measure requirement (see *https://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-ozone* for the State's proposed Serious area RFP). See also 84 FR 44238.

[34] See also *https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health.*

obligations with respect to those two NAAQS are terminated.

Comment: TCEQ stated that when we began stating that we no longer make findings of failure to attain or reclassify areas for revoked standards, we provided no rationale supporting why we would no longer do so.

Response: As noted above, in the Phase I rule to implement the 1997 ozone standard, we revoked the 1-hour NAAQS and designations for that standard (*see* 69 FR 23951, 23969–70, April 30, 2004). Accordingly, there was neither a 1-hour standard against which to make findings for failure to attain nor 1-hour nonattainment areas to reclassify. We also explained that it would be counterproductive to continue to impose new obligations with respect to the revoked 1-hour standard given on-going implementation of the newer 8-hour 1997 NAAQS. *Id. at* 23985. We recognize that subsequent court decisions, such as the *South Coast II* decision, have affected our view. The *South Coast II* decision vacated our waiver of the statutory attainment deadlines associated with the revoked 1997 ozone NAAQS, for areas that fail to meet an attainment deadline for the 1997 ozone standard, and we are determining how to implement that decision going forward.

Comment: TCEQ commented that if we interpreted revocation of ozone standards as limiting our authority to implement all statutory rights and obligations, including the rights of states to be redesignated to attainment, it would cause an absurd result: *i.e.,* implementing anti-backsliding measures in perpetuity. The commenter added that it would subvert one of the foundational principles of the CAA—restricting the right of states to be freed from obligations that apply to nonattainment areas upon the states achieving the primary purpose of Title I of the CAA—to attain the NAAQS.

Response: The ''absurd result'' noted by the commenter is that an area would need to implement anti-backsliding measures in perpetuity. Through this action we are terminating anti-backsliding controls for the HGB area upon a determination that the five statutory criteria of CAA section 107(d)(3)(E) have been met. Therefore, although we are not redesignating the HGB area to attainment for the revoked ozone standards, the ''absurd result'' noted by the commenter does not remain.

The EPA does believe it is appropriate for states to be freed from anti-backsliding requirements in place for the revoked NAAQS in certain circumstances, and we believe the court in *South Coast II* was clear that this could be done if all the CAA criteria for a redesignation had been met.

Comment: TCEQ commented that the CAA makes no distinction between revoked or effective standards regarding EPA's authority to redesignate. TCEQ also commented that reading the CAA section granting authority for designations generally, it is apparent that Congress intended the same procedures be followed regardless of the status of the NAAQS in question. TCEQ added that nothing in CAA section 107 creates differing procedures when we revoke a standard or qualifies our mandatory duty to act on redesignation submittals from states.

Response: None of the substantive provisions of the CAA make distinctions between revoked and effective NAAQS and the redesignation provision in section 107 is no different. Nonetheless, as noted above, at the time that we revoked the ozone NAAQS in question, we also revoked all designations associated with that NAAQS. We therefore do not think a statutory redesignation is available for an area that no longer has a designation. However, in *South Coast II,* the D.C. Circuit found that the CAA allows areas under a revoked NAAQS to shed anti-backsliding controls if the statutory redesignation criteria are met.

Comment: The TCEQ suggests that the EPA should expand upon the rationale provided in our Proposal for our decision to take no action on the maintenance motor vehicle emission budgets (MVEBs) related to the 1-hour and 1997 ozone NAAQS.

Response: The conformity discussion in our May 21, 2012 rulemaking (77 FR 30160) to establish classifications under the 2008 ozone NAAQS explains that our revocation of the 1-hour standard under the 1997 ozone Phase I implementation rule and the associated anti-backsliding provisions were the subject of the *South Coast I* litigation (*South Coast Air Quality Management District,* 472 F.3d at 882). The Court in *South Coast I* affirmed that conformity determinations need not be made for a revoked standard. Instead, areas would use adequate or approved MVEBs that had been established for the now revoked NAAQS in transportation conformity determinations for the new NAAQS until the area has adequate or approved MVEBs for the new NAAQS. As explained in our May 16, 2019 proposal, the HGB area already has NO_X and VOC MVEBs for the 2008 ozone NAAQS, which are currently used to make conformity determinations for both the 2008 and 2015 ozone NAAQS for transportation plans, transportation improvement programs, and projects according to the requirements of the transportation conformity regulations at 40 CFR part 93.[35]

The TCEQ offers its own basis to expand the rationale for EPA's action by citing the transportation conformity regulations at 40 CFR 93.109(c), which provides that a regional emissions analysis for conformity is only required for a nonattainment or maintenance area until the effective date of revocation of the applicable NAAQS. The TCEQ concludes that this sufficiently justifies EPA's determination not to act on the MVEBs in this SIP submittal because the effective date of revocation for both the 1-hour and 1997 ozone NAAQS has passed, and therefore a regional emissions analysis for conformity is no longer required for these NAAQS in the HGB area. However, EPA notes that 40 CFR 93.109 represents the criteria and procedures for determining conformity *in cases where a determination is required.* As previously explained, the HGB area is not required to demonstrate conformity under the revoked 1-hour and 1997 ozone NAAQS, hence 40 CFR 93.109(c) is not an applicable rationale for the HGB area.

Comment: TCEQ stated that we have the authority to, and should, revise the designations listing in 40 CFR 81 to better reflect the status of applicable anti-backsliding obligations for the areas.

Response: We believe that we have the authority to revise the tables in 40 CFR 81 to better reflect the status of applicable anti-backsliding obligations, particularly because those tables currently reflect the invalid redesignation substitutes that this final action is replacing. We are making ministerial changes to the tables for the 1-hour and 1997 ozone standards in 40 CFR 81.344 to better reflect the status of applicable anti-backsliding obligations for the HGB area.

C. Comments on the HGB Section 185 Fee Equivalent Alternative Program

Comment: Comments were received from Earthjustice and an anonymous commenter that the CAA does not allow for approval of any alternative program for the CAA section 185 fee program. Earthjustice states that by its plain terms CAA section 172(e) applies directly only to the circumstance where EPA weakens a standard and that is not the circumstance here. They further state

[35] *Transportation Conformity Guidance for the South Coast II Court Decision,* EPA–420–B–18–050. November 2018, available on EPA's web page at *https://www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation.*

With respect to the commenter's concern that baseline aggregation could result in higher VOC emissions that include toxic compounds, the CAA's provisions for implementing the ozone NAAQS do not directly address emissions of toxic VOCs. As noted above, nothing in the CAA prohibits the aggregation of VOC and NO_X emissions in establishing the baseline under section 185. Our approval or disapproval of the HGB equivalent alternative section 185 fee program considers whether the program is as stringent for the purposes of ozone control as a section 185 fee program. While the CAA's NAAQS provisions do not directly address emissions of toxic VOCs, other CAA provisions address toxic VOCs. *See* CAA section 112.

Comment: Earthjustice commented that the HGB alternative program is less stringent than what the CAA requires as it creates no new incentives for reducing emissions and uses programs that are already part of the Texas SIP for the HGB area. With respect to the Texas Emissions Reduction Plan (TERP), the commenter cited to a May 11, 2017 EPA action approving 30 TAC 101.357 (Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP)) for the HGB area, in which we stated that HGB ''[s]ite owners or operators unable to meet [emissions limitations in a cap and trade program] and desiring to use TERP emission reductions for compliance relief, can petition the TCEQ Executive Director for a determination of technical infeasibility'' (82 FR 21919, 21983). With respect to Low Income Repair Assistance Program (LIRAP), the commenter cited to an October 7, 2016 EPA action in which we stated ''[a]lthough the LIRAP is not required by the CAA, certain provisions relating to the program fees have been approved into the Texas SIP to allow for full implementation of the State's [vehicle inspection and maintenance] program'' (81 FR 69679).

Response: In the HGB equivalent alternative section 185 fee program, fees for TERP and LIRAP collected in the HGB area from on-road and off-road mobile sources are used to offset the point source fee obligation. The TERP program was and is designed to accelerate the achievement of NO_X reductions by repowering or retrofitting diesel equipment that would otherwise operate for many years before being replaced with new low emitting equipment. The TERP program was established by the Texas Legislature in 2001 and is approved in the Texas SIP as an economic incentive program (70 FR 48647, August 19, 2005).[38] Texas relied upon reductions from the TERP program in the HGB 1-hour ozone SIP submitted December 17, 2004 and approved in 2006 (70 FR 52670, September 6, 2006). Based on the money allocated to TERP through 2007, the State committed in the 1-hour ozone attainment planning SIP that 38.8 tpd of emission reductions would be achieved by the TERP program before the 1-hour attainment date. The emission reductions were achieved through issuance of grants to equipment owners and operators to implement projects by 2007. While the State has continued to allocate money to the TERP after the 1-hour ozone NAAQS attainment date of 2007, the money goes to projects whose emissions reductions are surplus to the 1-hour ozone attainment demonstration, *i.e.,* Texas has not otherwise taken credit for these emission reductions in the 1-hour ozone NAAQS nonattainment planning (70 FR 52670, 52677). The continuation of the TERP program after 2007 was not required under the previously approved HGB 1-hour ozone standard SIP and any funds collected and resulting emission reductions achieved after 2007 are surplus to what was required under the 1-hour ozone standard attainment SIP. As there was no requirement to continue the TERP program after 2007, we believe that the HGB equivalent alternative section 185 fee program can take credit for continued funding of, and emissions reductions creditable to, the TERP program.

As explained in the prior paragraph, the 1-hour ozone SIP does not take credit for any funds collected or emission reductions achieved after 2007. In the May 11, 2017 EPA SIP action that the commenter cites, we approved the State's rule that under limited conditions the Texas SIP does allow for a facility in the HGB area to pay $75,000 per ton of NO_X to the TERP fund in lieu of reducing NO_X emissions in the HGB MECT (30 TAC 101.357). This is not part of the approved HGB 1-hour ozone standard attainment demonstration, however. We do note that such payments would not affect calculation of the facility's section 185 fee obligation which is based on a facility's actual emissions.

The LIRAP is a voluntary program designed to facilitate repair or replacement of vehicles that did not pass the inspection and maintenance (I/M) test by providing funding to eligible vehicle owners. As such, it could improve timely compliance with the I/M program. Consistent with the I/M program implemented in the HGB area, vehicles must comply with the applicable vehicle emissions I/M requirements in order to pass the inspection. These I/M requirements apply regardless of whether the vehicle operator is eligible for the LIRAP. The LIRAP was not included as a control measure relied on in the attainment demonstration for the 1-hour ozone standard in the HGB area and therefore is not part of the SIP for the HGB area. In the October 7, 2016 action that the commenter cites, we were referring to EPA approval of LIRAP provisions for Travis and Williamson Counties. Specifically, the footnote for the sentence that the commenter cites refers to a final rule published August 8, 2005 (70 FR 45542). In that rule, we approved into the SIP provisions to implement the LIRAP as a voluntary program for Travis and Williamson Counties in the Austin-Round Rock area. We did note in our October 7, 2016 **Federal Register** action that LIRAP is a voluntary program that any county participating in the Texas vehicle I/M program may elect to implement in order to enhance the objectives of the Texas I/M program (81 FR 69679, 69680). In a later action finalizing approval of the LIRAP removal in the Austin-Round Rock area, we noted that the State's LIRAP implementation rules for the HGB area and other ozone nonattainment areas found at 30 TAC 114 Subchapter C, Division 2 adopted by TCEQ created a voluntary program that could be implemented within the vehicle I/M areas in Texas ozone nonattainment areas and are not part of the approved Texas SIP (84 FR 50305, 50306, September 25, 2019).

The funds provided in and the implementation of the TERP and LIRAP on-road and off-road mobile source programs were additional to what would have occurred in the previously-approved 1-hour ozone standard SIP in the HGB area after the missed attainment deadline. Therefore, we disagree that the HGB equivalent alternative section 185 fee program created no new funding and emission reductions that can be counted in determining that the HGB alternative program is in fact equivalent to direct application of CAA section 185.

In sum, the HGB equivalent alternative section 185 fee program for the 1-hour ozone standard does not rely on programs or emissions reductions already required by the applicable 1-hour ozone SIP.

[38] *See* ''Texas Emissions Reduction Plan Biennial Report (2017–2018), Report to the 86th Texas Legislature, December 2018, SFR–079/18''. The document is available at: *https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/079-18.pdf.*

Texas SIP. The program is explicit and clear as to what is required when it is in operation: *i.e.,* that point sources must provide TCEQ with emissions reports and, if appropriate, pay fees while the program is in operation. The public has the right to request and view information on the HGB equivalent alternative section 185 program under the Texas Public Information Act.[39] TCEQ—using information that is available to the public (including EPA) under the Texas Public Information Act—provided a report summarizing the implementation of the HGB alternative section 185 fee equivalent program over its duration. The report is available in the electronic docket for this action (*https://www.regulations.gov/document?D=EPA-R06-OAR-2018-0715-0015*). The TCEQ report found that the TERP fees collected for emission reduction projects in the HGB area for on-road mobile and off-road mobile sources more than fully offset the fees that would have been collected from major point sources under a direct application of section 185.

Comment: Earthjustice commented that rather than take no action, EPA should disapprove the aspects of the HGB alternative program that (1) end the program with an attainment finding (30 TAC 101.118(a)(2)) and (2) hold the program in abeyance after three consecutive years of data demonstrating that the 1-hour standard was not exceeded (30 TAC 101.118(b)). Baker Botts and TXOGA commented that rather than take no action, we should approve 30 TAC 101.118(b).

Response: As stated in the Proposal, we have decided not to take action on these aspects of the program at this time. Given that we did not issue a Proposal to approve or disapprove the aspects of the HGB equivalent alternative section 185 fee program cited by the commenters, we cannot now take final action on these portions of the HGB program. Any EPA action on the listed aspects of the HGB equivalent alternative section 185 fee program would occur through a separate rulemaking process, which would allow for public participation by the commenters.

Comment: TCEQ commented that EPA is obligated to ensure that states may be relieved of the CAA section 185 penalty fee obligation in a timely manner. The commenter further states that (1) EPA has not issued rules to specify the requirements for state programs that implement the CAA 185 fee requirement and (2) EPA's changing interpretations of the CAA section 185 fee requirement resulted in the issuance of limited guidance over the course of many years discussing specific issues states should consider when developing their fee programs.

Response: Where it is appropriate to relieve states of the CAA section 185 fee obligation, we agree that we should endeavor to do so in a timely manner when a request is made by a state. We acknowledge that we have not issued rules for the CAA section 185 fee requirement but we have issued guidance for specific issues on setting baselines[40] and for equivalent alternative programs (the 2010 guidance). As noted in earlier responses, EPA has approved equivalent alternative programs for several areas, and these outline factors that EPA considers in determining whether an equivalent alternative program is approvable. If states have specific questions about section 185 fee programs or equivalent alternative programs, they are encouraged to contact their respective EPA Regional office.

Comment: TCEQ, Baker Botts, and TXOGA submitted comments supporting EPA's Proposal pertaining to the HGB equivalent alternative section 185 fee program.

Response: We acknowledge the support for the Proposal.

Comment: TCEQ commented that EPA should correct typographical and other minor errors in the TSD for the Proposal to approve the HGB equivalent alternative section 185 fee program. TCEQ added that these errors inadvertently result in either incomplete or inaccurate statements regarding the HGB program.

Response: We appreciate the feedback on typographical and other minor errors. An additional TSD titled ''TSD for the HGB Equivalent Alternative Section 185 Fee Program with Corrections Identified by the Texas Commission on Environmental Quality'' is being added to the electronic docket.

III. Final Action

A. Plan for Maintaining the Revoked Ozone Standards

We are approving the maintenance plan for both the revoked 1-hour and 1997 ozone NAAQS in the HGB area because we find it demonstrates the two ozone NAAQS (1979 1-hour and 1997 8-hour) will be maintained for 10 years following this final action (in fact, the state's plan demonstrates maintenance of those two standards through 2032). As further explained in our Proposal and above, we are not approving the submitted 2032 NO_X and VOC MVEBs for transportation conformity purposes because mobile source budgets for more stringent ozone standards are in place in the HGB area. We are finding that the projected emissions inventory which reflects these budgets is consistent with maintenance of the revoked 1-hour and 1997 ozone standards.

B. Redesignation Criteria for the Revoked Standards

We are determining that the HGB area continues to attain the revoked 1-hour and 1997 ozone NAAQS. We are also determining that all five of the redesignation criteria at CAA section 107(d)(3)(E) for the HGB area have been met for these two revoked standards.

C. Termination of Anti-Backsliding Obligations

We are terminating the anti-backsliding obligations for the HGB area with respect to the revoked 1-hour and 1997 ozone NAAQS. Consistent with the *South Coast II* decision, anti-backsliding obligations for the revoked ozone standards may be terminated when the redesignation criteria for those standards are met. This final action replaces the redesignation substitute rules that were previously promulgated for the revoked 1-hour ozone NAAQS (80 FR 63429, October 20, 2015) and the 1997 ozone NAAQS (81 FR 78691, November 8, 2016.) for the HGB area.

D. HGB Equivalent Alternative Section 185 Fee Program

We are approving 30 TAC sections 101.100–101.102, 101.104, 101.106–101.110, 101.113, 101.116, 101.117, 101.118(a)(1), 101.118(a)(3) and 101.120–101.122 as an equivalent alternative section 185 fee program. We are taking no action on 30 TAC sections 101.118(a)(2) and 101.118(b) at this time. We additionally are finding that the section 185 fee program is not an applicable requirement for redesignation.

As noted above, the EPA has consistently held the position that not

[39] See *http://foift.org/resources/texas-public-information-act/* and Chapter 552 of the Texas Government Code at *https://statutes.capitol.texas.gov/SOTWDocs/GV/htm/GV.552.htm.*

[40] *See* ''Guidance on Establishing Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment Date'', March 21, 2008 memorandum from William T. Harnett, Director, EPA Air Quality Policy Division, available at: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20080321_harnett_emissions_basline_185.pdf.*

• 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).

B. Submission to Congress and the Comptroller General

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).

C. Petitions for Judicial Review

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 April 14, 2020. 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, Ozone, Nitrogen Oxides, Volatile organic compounds.

Dated: January 29, 2020.

Kenley McQueen,

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:

■ a. In paragraph (c), the table titled ''EPA Approved Regulations in the Texas SIP'' is amended by adding an entry under Chapter 101 for ''Subchapter B—Failure to Attain Fee''; and

■ b. In paragraph (e), the second table titled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' is amended by adding an entry at the end of the table for ''Houston-Galveston-Brazoria Redesignation Request and Maintenance Plan for the 1979 1-hour and 1997 8-hour Ozone Standards''.

The additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 101—General Air Quality Rules				
*	*	*	*	*
Subchapter B—Failure to Attain Fee				
Section 101.100	Definitions	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.101	Applicability	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.102	Equivalent Alternative Fee	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.104	Equivalent Alternative Fee Accounting.	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.106	Baseline Amount Calculation	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.107	Aggregated Baseline Amount	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.108	Alternative Baseline Amount	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.109	Adjustment of Baseline Amount	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.110	Baseline Amount for New Major Stationary Source, New Construction at a Major Stationary Source, or Major Stationary Sources with Less Than 24 Months of Operation.	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.113	Failure to Attain Fee Obligation	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	

TEXAS—OZONE

[1-Hour standard] [1]

Designated area	Designation		Classification	
	Date [2]	Type	Date [2]	Type
* * * * * * *				
Houston-Galveston-Brazoria Area, TX:	See footnote 4	See footnote 4	See footnote 4	See footnote 4.
Brazoria County [4]				
Chambers County [4]				
Fort Bend County [4]				
Galveston County [4]				
Harris County [4]				
Liberty County [4]				
Montgomery County [4]				
Waller County [4]				
* * * * * * *				

[1] The 1-hour ozone standard, designations and classifications are revoked effective June 15, 2005 for areas in Texas except the San Antonio area where they are revoked effective April 15, 2009.

[2] The date at the time designations were revoked is October 18, 2000, unless otherwise noted.

* * * * * * *

[4] The Houston-Galveston-Brazoria Area was designated and classified as "Severe-17" nonattainment on November 15, 1990 and was so designated and classified when the 1-hour ozone standard, designations and classifications were revoked. The area has since attained the 1-hour ozone standard and met all the Clean Air Act criteria for redesignation. All 1-hour ozone standard anti-backsliding obligations for the area are terminated effective March 16, 2020.

* * * * *

TEXAS—1997 8-HOUR OZONE NAAQS

[Primary and secondary] [1]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
* * * * * * *				
Houston-Galveston-Brazoria, TX:	See footnote 4	See footnote 4	See footnote 4	See footnote 4.
Brazoria County [4]				
Chambers County [4]				
Fort Bend County [4]				
Galveston County [4]				
Harris County [4]				
Liberty County [4]				
Montgomery County [4]				
Waller County [4]				
* * * * * * *				
* * * * * * *				

[1] The 1997 8-hour ozone NAAQS, designations and classifications were revoked effective April 6, 2015. The date at the time designations were revoked is June 15, 2004, unless otherwise noted.

* * * * * * *

[4] The Houston-Galveston-Brazoria, TX area was designated nonattainment effective June 15, 2004 and was classified as "Severe-15" effective October 31, 2008. The area has since attained the 1997 8-hour ozone standard and met all the Clean Air Act criteria for redesignation. All 1997 8-hour ozone standard anti-backsliding obligations for the area are terminated effective March 16, 2020.

* * * * *

[FR Doc. 2020–02053 Filed 2–13–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0279; FRL–10003–07]

Propanamide, 2-hydroxy-N, N-dimethyl-; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation established exemptions from the requirement of a tolerance for residues of propanamide, 2-hydroxy-N, N-dimethyl-, when used as an inert ingredient (solvent/co-solvent) in pesticides applied to growing crops and raw agricultural commodities after harvest, or in pesticides applied to animals, limited to 50% by weight in the pesticide formulations. Spring Trading Company,

TABLE 4—EPA-APPROVED CHATTANOOGA REGULATIONS—Continued

State section	Title/subject	Adoption date	EPA approval date	Explanation
				EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Chattanooga-Hamilton County Air Pollution Control Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 8 (9/6/17); City of Collegedale—Section 14–308 (10/16/17); City of East Ridge—Section 8–8 (10/26/17); City of Lakesite—Section 14–8 (11/2/17); Town of Lookout Mountain—Section 8 (11/14/17); City of Red Bank—Section 20–8 (11/21/17); City of Ridgeside—Section 8 (1/16/18); City of Signal Mountain—Section 8 (10/20/17); City of Soddy-Daisy—Section 8–8 (10/5/17); and Town of Walden—Section 8 (10/16/17).
*	*	*	*	* * *
Section 4–10	Records	10/3/2017	4/6/2020, [Insert citation of publication].	Except paragraph 4–10(b) approved 5/10/90, with a 7/20/89 local adoption date. EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 10 (9/6/17); City of Collegedale—Section 14–310 (10/16/17); City of East Ridge—Section 8–10 (10/26/17); City of Lakesite—Section 14–10 (11/2/17); Town of Lookout Mountain—Section 10 (11/14/17); City of Red Bank—Section 20–10 (11/21/17); City of Ridgeside—Section 10 (1/16/18); City of Signal Mountain—Section 10 (10/20/17); City of Soddy-Daisy—Section 8–10 (10/5/17); and Town of Walden—Section 10 (10/16/17).
*	*	*	*	* * *
Section 4–17	Enforcement of chapter; procedure for adjudicatory hearings.	10/3/2017	4/6/2020, [Insert citation of publication].	EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 17 (9/6/17); City of Collegedale—Section 14–17 (10/16/17); City of East Ridge—Section 8–17 (10/26/17); City of Lakesite—Section 14–17 (11/2/17); Town of Lookout Mountain—Section 17 (11/14/17); City of Red Bank—Section 20–17 (11/21/17); City of Ridgeside—Section 17 (1/16/18); City of Signal Mountain—Section 17 (10/20/17); City of Soddy-Daisy—Section 8–17 (10/5/17); and Town of Walden—Section 17 (10/16/17).
*	*	*	*	* * *

* * * * *

[FR Doc. 2020–06582 Filed 4–3–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R06–OAR–2019–0213; FRL–10006–97–Region 6]

Air Plan Approval; Texas; Dallas-Fort Worth Area Redesignation and Maintenance Plan for Revoked 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 or Agency) is approving revisions to the Texas State Implementation Plan (SIP) that pertain to the Dallas-Fort Worth (DFW) area and the 1979 1-hour and 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS or standard). The EPA is approving the plan for maintaining the 1-hour and 1997 ozone NAAQS through the year 2032 in the DFW area. The EPA is determining that the DFW area continues to attain the 1979 1-hour and 1997 8-hour ozone NAAQS and has met the five CAA criteria for redesignation. Therefore, the EPA is terminating all anti-backsliding obligations for the DFW area for the 1-hour and 1997 ozone NAAQS.

DATES: This rule is effective on May 6, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2019–0213. All documents in the docket are listed on the *https://www.regulations.gov* website. 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 *https://www.regulations.gov* or in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270.

FOR FURTHER INFORMATION CONTACT: Robert Todd, EPA Region 6 Office, Infrastructure & Ozone Section, 1201 Elm Street, Suite 500, Dallas, TX 75270, 214–665–2156, *todd.robert@epa.gov*. To inspect the hard copy materials, please schedule an appointment with Mr. Todd or Mr. Bill Deese at 214–665–7253.

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

for both the revoked 1-hour and 1997 ozone NAAQS and is designated as nonattainment for the two current (2008 and 2015) 8-hour ozone NAAQS.[4] As a result, the State and DFW area—including local governments, business and industry—have implemented measures to reduce emissions of NO_X and volatile organic compounds (VOC) that form ozone (*see, e.g.,* State Submittal, Section 2.4: Permanent and Enforceable Measures Reductions and the TSD for this action). Accordingly, the DFW area has seen its 1-hour ozone design values decrease from 147 parts per billion (ppb) in 1992 to 98 ppb in 2018. Likewise, the DFW area design values for the 8-hour ozone NAAQS have decreased from 100 ppb in 2003 to 76 ppb in 2018.[5] Because the area has attained the revoked 1-hour and 1997 ozone NAAQS, and has also met the other CAA statutory requirements for redesignation for these standards, we believe it is appropriate to terminate the anti-backsliding requirements associated with these revoked NAAQS.

The area will remain designated nonattainment for the 2008 and 2015 ozone NAAQS. The DFW area was recently reclassified as a Serious nonattainment area for the 2008 ozone NAAQS, and therefore the State must submit SIP revisions and implement controls to satisfy the statutory and regulatory requirements for a Serious nonattainment area for the 2008 ozone standard.[6]

Comment: Earthjustice states that EPA cannot lawfully or rationally apply the criteria at CAA section 107(d)(3)(E) to terminate anti-backsliding protections for the DFW area, because that statutory provision provides only minimum criteria that must be satisfied before a designated nonattainment area may be redesignated to attainment. Earthjustice states that the provision provides no authority to terminate anti-backsliding on the basis of an area meeting its criteria for a revoked standard. The commenter also states that EPA does not and cannot identify a source of authority for its application of the statutory provision for the purposes of terminating anti-backsliding provisions and has not purported to create regulations here under its general rulemaking authority of CAA section 301(a) to do so. Further, the commenter alleges that the EPA's reliance on *South Coast II* to support its authority to terminate DFW's anti-backsliding requirements for the two revoked ozone NAAQS is unlawful and arbitrary. Earthjustice argues that the D.C. Circuit in *South Coast II* held only that the redesignation substitute was unlawful because it fell short of certain statutory requirements and did not address any other reasons why the regulation was unlawful and arbitrary. The commenter alleges that *South Coast II* ''says nothing'' about whether EPA could lawfully authorize termination of anti-backsliding requirements in the circumstance addressed here, where the area continues to violate the 2008 and 2015 ozone NAAQS, and where termination ''weakens protections in the area.'' Earthjustice states that the *South Coast II* court's holding with respect to the EPA's authority to reclassify areas after revocation is irrelevant to the question of the EPA's authority to change an area's designation after revocation.

Response: We disagree that the EPA lacks authority to terminate an area's anti-backsliding requirements for a revoked NAAQS and that we may not do so here for the DFW area with respect to the two revoked ozone NAAQS in question. The commenter's suggestion that the EPA may not look to the statutory redesignation criteria in CAA section 107(d)(3)(E) for authority to terminate the DFW area's anti-backsliding requirements is contradicted by the D.C. Circuit's decision in *South Coast II.* In that decision, the court faulted the redesignation substitute, one of the EPA's mechanisms for terminating anti-backsliding, but only because it had addressed only some, and not all, of the statutory redesignation criteria:

> The redesignation substitute request 'is based on' the Clean Air Act's 'criteria for redesignation to attainment' under [CAA section 107(d)(3)(E)], 80 FR at 12,305, but it does not require full compliance with all five conditions in [CAA section 107(d)(3)(E)]. The Clean Air Act unambiguously requires nonattainment areas to satisfy all five of the conditions under [CAA section 107(d)(3)(E)] before they may shed controls associated with their nonattainment designation. The redesignation substitute lacks the following requirements of [CAA section 107(d)(3)(E)]: (1) The EPA has 'fully approved' the [CAA section 110(k)] implementation plan; (2) the area's maintenance plan satisfies all the requirements under [CAA section 175A]; and (3) the state has met all relevant [CAA section 110 and Part D] requirements. 80 FR at 12,305. Because the 'redesignation substitute' does not include all five statutory requirements, it violates the Clean Air Act. 882 F.3d at 1152.

We disagree that the D.C. Circuit, as commenters suggest, said nothing with respect to how anti-backsliding controls could be lawfully terminated for areas under a revoked NAAQS. The court stated that the Act ''unambiguously'' requires that all five statutory redesignation criteria be met before anti-backsliding controls (*i.e.,* controls associated with the nonattainment designation for a revoked NAAQS) could be shed. *Id.* The court's express basis for vacating the redesignation substitute was that the mechanism failed to incorporate all of the statutory criteria as preconditions. *Id.* (''Because the 'redesignation substitute' does not include all five statutory requirements, it violates the Clean Air Act.''). We do not agree with the commenter's suggestion that the EPA may not rely on the court's plain interpretation of the Act and act in accordance with it. The EPA had previously approved redesignation substitutes for the DFW area for the 1-hour ozone NAAQS and the 1997 ozone NAAQS. As discussed in our Proposal, this final action replaces our previous approvals of the DFW area redesignation substitutes for the 1-hour and 1997 ozone NAAQS.

Furthermore, we reject the commenter's suggestion that nonattainment of the newer, current NAAQS is a unique set of circumstances that would reasonably alter the EPA's ability to either redesignate an area or terminate anti-backsliding requirements for a prior NAAQS. Nothing in CAA section 107(d)(3) suggests that the EPA's approval of a redesignation or termination of anti-backsliding for one NAAQS should include evaluation of attainment of another newer NAAQS. It is common practice that areas designated nonattainment for an earlier, less stringent NAAQS come into compliance with that NAAQS, meet the requirements for redesignation for that NAAQS, and are redesignated to attainment for that NAAQS, while remaining nonattainment for a newer more stringent standard for the same pollutant. Indeed, with Congress' directive that the EPA review and revise the NAAQS as appropriate no less frequently than every five years, it would be nearly impossible for areas to be redesignated to attainment for an older NAAQS if nonattainment of a newer (often more stringent) standard barred EPA from approving

[4] For the 1-hour ozone NAAQS the DFW nonattainment area consists of Collin, Dallas, Denton, and Tarrant Counties (56 FR 56694, November 6, 1991). For the 1997 ozone NAAQS, the DFW nonattainment area included the four counties already listed, plus Ellis, Johnson, Kaufman, Parker, and Rockwall Counties (69 FR 23858, April 30, 2004). For the 2008 ozone NAAQS, the DFW nonattainment area included the nine counties already listed, plus Wise County (77 FR 30088, May 21, 2012). For the 2015 8-hour ozone NAAQS the DFW nonattainment area consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Tarrant, and Wise Counties (83 FR 25776, June 4, 2018).

[5] *See* the TCEQ ozone reports posted at *https://www.tceq.texas.gov/airquality/monops/ozone.*

[6] *See* (83 FR 25776, June 4, 2018), and (84 FR 44238, August 23, 2019).

44238), just as they were required to do prior to the approval of the redesignation substitute for the 1997 ozone NAAQS. Therefore, terminating the NNSR requirements for either of the revoked NAAQS for the DFW area has no impact, much less a disproportionate impact. Texas will continue to have to work to reduce ozone precursors to meet the 2008 and 2015 ozone standards. Finally, we note that monitors throughout the DFW area have recorded concentrations meeting both the 1-hour and 1997 ozone standards for some time.[9]

Comment: Earthjustice states that EPA arbitrarily concludes that relevant statutory and executive order reviews are not required for this rule and EPA wrongly asserts that the proposed action would only accomplish a revision to the Texas SIP that EPA can only approve or disapprove. Earthjustice states that through this rule, EPA proposes to change and adopt national positions regarding its authority to redesignate areas under CAA section 107(d)(3)(E) and terminate anti-backsliding protections for revoked standards. Earthjustice states these actions are not SIP revisions and thus necessitate the statutory and executive order reviews EPA avoids by citing only a portion of the actions it is taking in this rulemaking. Earthjustice states that, in addition to the environmental justice concerns relevant to the review required by Executive Order 12898, EPA ignores other important considerations that are a part of rational decision-making like effects on children's health and other public health factors.

Response: As stated previously, we are not in this action redesignating the DFW area for the two revoked NAAQS. Earthjustice has not provided much detail regarding which statutory and executive order reviews it believes are applicable and that the EPA has not addressed. In section V of this notice, we discuss EPA's assessment of each statutory and executive order that potentially applies to this action. We note that the introductory paragraph to section V of the Proposal preamble contains a typographical error that may have caused some of the commenter's concern. The last sentence of that paragraph appears to indicate that the reason for EPA's proposed assessment that the action is exempt from the enumerated statutory and executive orders is solely that the action is a review of a SIP. However, that sentence was intended to be inclusive of all the reasons stated in the introductory paragraph, including that the approval of the request to terminate anti-backsliding does not impose new requirements on sources (*i.e.,* ''For that reason'' more appropriately would have read ''For these reasons'').

With respect to the commenter's concern that EPA has not adequately addressed environmental justice, we do not agree that Executive Order 12898 applies to this action because this action does not affect the level of protection provided to human health or the environment. In this action the level of protection is provided by the ozone NAAQS and this action does not revise the NAAQS. As noted earlier in this final action, the DFW area will remain designated nonattainment for the 2008 and 2015 ozone NAAQS. The DFW area was recently reclassified as a Serious nonattainment area for the 2008 ozone NAAQS, and therefore the State must submit SIP revisions and implement controls to satisfy the statutory and regulatory requirements for a Serious area for the 2008 ozone standard.[10]

With respect to commenter's concern that we have not adequately addressed executive orders regarding children's health, we do not agree that Executive Order 13045 applies to this action. Executive Order 13045 applies to ''economically significant rules under E.O. 12866 that concern an environmental health or safety risk that EPA has reason to believe may disproportionately affect children.'' *See* 62 FR 19885, April 23, 1997. As noted in the Proposal and below in section V of this preamble, this rule is not ''economically significant'' under E.O. 12866 because it will not have ''an annual effect on the economy of $100 million or more or adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.'' 62 FR 19885.[11]

Comment: Earthjustice states that EPA should not revise the attainment designations in 40 CFR 81 because it has failed to consider the consequences of doing so, including whether changes in the designations listing will affect remaining maintenance plan and other requirements after redesignation.

Response: In this action, we are not revising the designations for the DFW area for the two revoked ozone NAAQS, and therefore the comments regarding consequences of changing the area's designation are beyond the scope of this final action. We are revising the 40 CFR part 81 tables for the DFW area, which currently reflect the approvals of the area's redesignation substitute from 2016. For revoked standards, the sole purpose of the part 81 table is to help identify applicable anti-backsliding obligations. Therefore, we are revising the part 81 tables to reflect that the DFW area has met all the redesignation criteria for the two revoked ozone NAAQS and therefore anti-backsliding obligations associated with those two revoked NAAQS are terminated.

Comment: Earthjustice states the DFW area did not attain by its Serious area attainment date for the 1997 8-hour ozone NAAQS and EPA didn't reclassify the area to Severe nonattainment, as required by CAA section 181(b)(2). Earthjustice states that EPA thus has overdue legal obligations to reclassify the DFW area to Severe under the 1997 ozone standard in line with the D.C. Circuit's *South Coast II* decision. Earthjustice states that our Proposal cannot proceed without the programs for the DFW area to address the CAA section 185 failure to attain fee program [12] and the CAA section 182(d)(1) vehicle miles traveled (VMT) program.[13] Earthjustice also states that EPA has an overdue legal obligation to promulgate a Federal Implementation Plan (FIP) for these programs in the DFW area.

Response: To respond to this comment, it is useful to recount the complicated history leading up to this action. The attainment deadline for the DFW Serious area for the 1997 ozone NAAQS was June 15, 2013 (*see* 75 FR 79302 (December 20, 2010)). EPA proposed to determine that the DFW area failed to attain by the June 15, 2013 attainment date and to reclassify the

[9] *See https://www.epa.gov/air-trends/air-quality-design-values.*

[10] *See* 83 FR 25576 and 84 FR 44238.

[11] *See* also ''Guide to Considering Children's Health When Developing EPA Actions: Implementing Executive Order 13045 and EPA's Policy on Evaluating Health Risks to Children.'' *https://www.epa.gov/children/guide-considering-childrens-health-when-developing-epa-actions-implementing-executive-order.*

[12] The CAA section 185 fee program requirements apply to ozone nonattainment areas classified as Severe or Extreme that fail to attain by the required attainment date. It requires each major stationary source of VOC or NO_X located in an area that fails to attain by its attainment date to pay an annual fee to the state for each ton of VOC or NO_X the source emits in excess of 80 percent of a baseline amount. The fees are paid until the area is redesignated to attainment or in the case of a revoked ozone standard, until the anti-backsliding obligations for the revoked standard area terminated.

[13] The 182(d)(1) VMT program (CAA section 182(d)(1)(A)) applies to ozone nonattainment areas classified as Severe or Extreme. It requires such areas to offset growth in emissions due to growth in VMT, reduce motor vehicle emissions as necessary to comply with RFP requirements, and choose from among and implement transportation control strategies and transportation control measures as necessary to demonstrate NAAQS attainment.

did not timely issue its determination of that fact. Petitioners challenging EPA's eventual determination that the area did not attain attempted to argue that EPA had de facto made the determination years earlier than its actual 2001 rulemaking, via statements made in a letter to the Governor suggesting that air quality problems remained after the area's attainment date or by the negative implication of not having included the St. Louis area on a list of areas that had attained by the attainment date. The D.C. Circuit ruled that neither of these actions constituted the requisite determination of whether the area attained, agreeing with the Agency that ''if there has not been a rulemaking there has not been an attainment determination.'' *See Sierra Club* v. *Whitman,* 285 F.3d 63, 66 (D.C. Cir. 2002). Nor did the court endorse environmental petitioners' claim that EPA's 2001 determination that St. Louis failed to attain should be ''converted to the date the statute envisioned [*i.e.,* 1997], rather than the actual date of EPA's action.'' *Id.* at 68. The court ruled that the Administrative Procedure Act prohibits retroactive rulemaking, that there is no indication that Congress intended the CAA to be an exception to that prohibition, and that back-dating the effective date of EPA's determination of failure to attain would be arbitrary. *See id.* Specifically, the court stated, ''Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time.'' *Id.*

The situation faced in the St. Louis 1-hour ozone nonattainment area resembles the current situation in the DFW area in another way. That is, after EPA issued the determination that St. Louis had failed to attain by the Moderate attainment deadline and reclassified the area to Serious, the St. Louis area came into attainment of the NAAQS and submitted its request to be redesignated *prior to the deadlines* to submit the Serious area requirements associated with the reclassification. In evaluating Missouri's request to redesignate St. Louis, EPA followed its longstanding interpretation of CAA section 107(d)(3)(E) and evaluated the redesignation based on whether the state had all of its required Moderate SIPs approved, but not based on whether the state had submitted and EPA had approved Serious area plans. Petitioners challenged this precise issue, arguing that Missouri was required to have submitted the Serious area requirements for the St. Louis area before it was permitted to move on to redesignation. *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). The court flatly rejected petitioners' position. The 7th Circuit recognized that St. Louis was required to have been bumped up and treated as a Serious nonattainment area, and therefore subject to the more stringent requirements of that classification such as requiring sources of more than 50 tons (rather than 100 tons) of precursor chemicals to install control measures, but that there would be ''some lead time'' for covered sources to limit their emissions. *Id.* And, ''[b]efore that time arrived, St. Louis met the national ozone standard,'' and the court viewed this as a critical point. *See id.* It agreed with EPA that a reasonable interpretation of CAA section 107(d)(3)(E) was to adjudge St. Louis' redesignation request based on ''whatever actually was in the plan and already implemented *or due at the time of attainment.*'' *Id.* At the heart of the court's disagreement with petitioners was the petitioners' view that reclassification ''was some sort of punishment;'' whereas the court interpreted Congress' reclassification requirements as an instruction to reclassified areas ''to take additional steps . . . to achieve an adequate reduction in ozone, [so] it would be odd to require them even when they turned out to be unnecessary.'' *Id.* In the court's view, ''[r]eclassification was a combination of (a) goad (clean up or suffer expensive measures), and (b) palliative (sterner measures expedite compliance). Once an area has meet [sic] the national air quality standard, neither rationale calls for extra stringency; indeed the statutory system would not be much of a goad if the tighter controls must continue even after attainment.'' *Id.* at 542.

The St. Louis example is therefore informative to the current DFW situation in two ways. First, it suggests that the section 185 fee program SIP and the VMT SIP are not required submissions until EPA promulgates a rulemaking finding that the DFW area failed to attain by its attainment date and reclassifies the area and that such finding cannot be inferred without actual agency action. *See Sierra Club* v. *Whitman,* 285 F.3d at 66. Second, the St. Louis history indicates that even if EPA were to promulgate a finding today that the DFW area failed to attain by its 2013 attainment date, the evaluation being undertaken in this current action of whether the DFW area has met the statutory criteria for redesignation would not include the section 185 fee program or the VMT requirements, because the deadlines to submit those requirements would necessarily be established in the future, and Texas' March 29, 2019 request to terminate its anti-backsliding obligations for the DFW area under the 1997 ozone NAAQS would therefore pre-date any such deadlines.

Additionally, with respect to 185 fees, we note that the Act is explicit that the program begins if a Severe or Extreme area is found to have failed to attain by the applicable attainment deadline for those classifications. *See* CAA § 185(a) (noting that the program will apply ''if the area . . . has failed to attain the [NAAQS] for ozone by the applicable attainment date''). The earliest possible Severe attainment deadline under the Act would have been June 15, 2019. As the DFW area attained the 1997 ozone standard long before any Severe attainment deadline, fees would never be collected for failure to attain the 1997 ozone standard. To require the State to submit a program that could never be triggered does not serve the ultimate goal of the CAA, which is to have areas attain the various NAAQS that EPA establishes as expeditiously as practicable, not to create unnecessary paperwork exercises that could never achieve any environmental benefit.

With respect to the CAA section 182(d)(1)(A) VMT requirements, we note that such programs generally contain three elements: (1) Specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in the Severe nonattainment area, (2) reduction in motor vehicle emissions as necessary (in combination with other emission reduction requirements) to comply with the reasonable further progress requirements of the Act, and (3) adoption and implementation of measures specified in section 108(f) of the Act as necessary to demonstrate attainment of the NAAQS. Even if EPA had promulgated a final determination that the DFW area failed to attain in 2013, or if EPA were to promulgate such a determination today, the Agency's action in 2015 clean data determination finding that the DFW area was attaining the NAAQS [15] would have the effect of

[15] 80 FR 52630, 52631 (September 1, 2015) (''Finalizing the CDD suspends the requirements for the TCEQ to submit an attainment demonstration or other SIPs related to attainment of the 1997 ozone NAAQS in the DFW area for so long as the area is attaining the standard (40 CFR 51.1118)'').

emission inventories (EIs) submitted by the State in its Maintenance Plan and we found the State's approach and methods of calculating the base year and future year EIs appropriate.[20] We disagree that we or the State did not provide an explanation for holding the point source VOC emissions constant for the projection years for the purposes of demonstrating that the standard would be maintained. As TCEQ explains in its SIP, it was following EPA guidance (noting that emissions trends for ozone precursors have generally declined) and thus, for planning purposes, TCEQ found it reasonable to hold point source emissions constant, rather than show such emissions as declining.[21] For projection year EIs, TCEQ designated the 2016 EI as the baseline from which to project future-year emissions because using the most recent point source emissions data would capture the most recent economic conditions and any recent applicable emissions controls. As TCEQ further describes in its SIP, TCEQ noticed that the 2014 attainment year VOC emissions are higher than future-year emissions projected from the sum of the 2016 baseline emissions plus available emission credits.[22] Therefore, future point source VOC emissions were projected by using the 2014 values as a conservative estimate for all future interim years. This approach is consistent with EPA's EI Guidance document at 21.

For point source NO_X emissions, TCEQ took a different approach that is also conservative and fully explained in the SIP submittal. We disagree that there is any disparity. As explained in the SIP submittal, TCEQ held the most recent year (2016) emissions constant and accounted for growth through adjustments for cement kilns.[23] Each of the interim year NO_X EIs were adjusted to account for available, unused emissions credits. TCEQ also assumed that additional emissions would occur based on the possible use of emission credits, which are banked emissions reductions that may return to the DFW area in the future through the use of emission reduction credits (ERCs) and discrete emissions reduction credits (DERCs). All banked (*i.e.,* available for use in future years) and recently-used ERCs and DERCs were added[24] to the future year inventories. We believe this is a conservative estimate because historical use of the DERC has been less than 10 percent of the projected rate—including all the banked ERCs and DERCs in the 2020 inventory assumes a scenario where all available banked credits would be used in 2020, which is inconsistent with past credit usage.

Despite the conservative assumptions for point source growth, the total emissions estimated by the State for all anthropogenic sources of NO_X and VOC in the DFW area for 2020, 2026, and 2032 are lower than those estimated for 2014 (the attainment inventory year). Consistent with the Calcagni Memorandum regarding a Maintenance Demonstration, ''[a] State may generally demonstrate maintenance of the NAAQS by either showing that future emissions of a pollutant or its precursors will not exceed the level of the attainment inventory or by modeling to show that the future mix of sources and emission rates will not cause a violation of the NAAQS.'' Calcagni memorandum at 2. Because the State's estimated future EIs for the DFW area do not exceed the 2014 attainment year EI, we do not expect the area to have emissions sufficient to cause a violation of the 1-hour or 1997 ozone NAAQS.

In addition, NNSR offsets will continue to be required in the DFW area addressed in this action because all nine counties are also designated nonattainment, and currently classified as Serious, under the 2008 ozone NAAQS.[25] The required NNSR offset for the DFW area at this time is 1.2:1 for sources emitting at least 50 tons per year, consistent with the Serious area requirements provided in CAA section 182(c)(10). Whether a new or modified major source in the DFW area chooses to offset NO_X or VOC or a combination of the two, the offsets must be made in the same ozone nonattainment area.

Finally, despite population and economic growth, emissions of NO_X and VOC in the DFW area have been decreasing since 1990. Emissions of NO_X in the DFW area have dropped from approximately 587.93 tons per day (tpd) (1990 base year under the 1-hour ozone NAAQS) to 442.08 tpd (2011 base year under the 2008 ozone NAAQS) and emissions of VOC have dropped from approximately 771.02 tpd (1990 base year) to 475.65 tpd (2011 base year)[26] *See* 59 FR 55586, November 8, 1994, and 80 FR 9204, February 20, 2015.[27] The DFW SIP must be further revised to meet the emission reductions required by CAA section 182(c)(2)(B) for the Serious ozone nonattainment classification under the 2008 ozone NAAQS.[28] This progress reflects efforts by the State, area governments and industry, federal measures, and others.[29]

Comment: Earthjustice states the DFW area did not meet its Moderate attainment date under the 2008 NAAQS and EPA will reclassify the area to Serious nonattainment. Commenter states that once EPA completes that action, ''the new source review requirements will snap back to serious area level and other serious areas requirements will again apply.'' This will cause the area's NSR requirements to ''roller coaster'' to no purpose. The commenter adds that if EPA insists on finalizing the proposal, it should wait to do so until after it reclassifies the DFW area.

Response: EPA appreciates the commenter's attention to this process detail. We reclassified the DFW area to Serious under the 2008 8-hour ozone

[20] *See https://www.epa.gov/moves/emissions-models-and-other-methods-produce-emission-inventories#locomotive.*

[21] *See* EPA's ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' published May 2017, EPA–454/b–17–002. Section 5, beginning on p. 119 of this Guidance document addresses *Developing Projected Emissions Inventories.* This Guidance document is available on EPA's website at *https://www.epa.gov/air-emissions-inventories/air-emissions-inventory-guidance-documents.*

[22] Not to be confused with the 2016 baseline and as noted earlier in this action, the 2014 base year EIs for NO_X and VOC represent the first year in which the DFW area is attaining both the 1-hour and 1997 ozone NAAQS and thus, the 2014 EI is also called the attainment inventory. The 2014 attainment inventory provides a starting point against which to evaluate the EI levels estimated for future years.

[23] Recently authorized emission limits from permits, consent decrees, and agreed orders were used to project emissions, which is a representative and conservative approach to emissions growth.

[24] The ERCs were divided by 1.15 before being added to the future year EIs to account for the NNSR permitting offset ratio for Moderate ozone nonattainment areas. Since the area is now classified as a Serious ozone nonattainment area however, any ERCs actually used will have to be divided by 1.2. See the SIP submittal for more specific detail on how Texas assumed and calculated the ERC and DERC use for the future EI years.

[25] Wise County is also included in the DFW Serious nonattainment area under the 2008 ozone NAAQS (84 FR 44238).

[26] The 1990 base year includes 126.09 tpd in biogenic VOC emissions. Biogenic emissions, *i.e.,* emissions from natural sources such as plants and trees, are not required to be included in the 2011 base year.

[27] We approved the area's Reasonable Further Progress (RFP) plan for the Moderate ozone NAAQS under the 2008 ozone NAAQS showing 15% emission reductions from 2011 through the attainment year (2017), plus an additional 3% emission reductions to meet the contingency measure requirement.

[28] The State recently adopted a SIP revision to meet RFP Serious area requirements for the DFW area with an additional average of 3% emission reductions from 2017 through the attainment year (2020), plus an additional 3% emissions reductions to meet the contingency measure requirement (*see https://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-ozone* for the State's Serious area RFP). *See* also 84 FR 44238.

[29] *See* also *https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health.*

under those standards and stated we had no authority to change designations. *See* 69 FR 23951, April 30, 2004, 80 FR 12264, March 6, 2015, and *NRDC* v. *EPA,* 777 F.3d 456 (D.C. Cir. 2014) (explaining that EPA revoked the 1-hour NAAQS ''in full, including the associated designations'' in the action at issue in *South Coast Air Quality Management District* v. *EPA,* 472 F.3d at 882 (D.C. Cir, 2006 (''*South Coast I*''). The recent D.C. Circuit decision addressing reclassification under a revoked NAAQS did not address EPA's interpretation that it lacks the ability to alter an area's designation post-revocation of a NAAQS. Moreover, the court's reasoning for requiring EPA to reclassify areas under revoked standards was that a reclassification to a higher classification is a control measure that constrains ozone pollution by imposing stricter measures associated with the higher classification. The same logic does not apply to redesignations, because redesignations do not impose new controls and can provide areas the opportunity to shed nonattainment area controls, provided doing so does not interfere with maintenance of the NAAQS. Therefore, we do not think it follows that the EPA is required to statutorily redesignate areas under a revoked standard simply because the court held that the Agency is required to continue to reclassify areas to a higher classification when they fail to attain. However, consistent with the *South Coast II* decision, we do have the authority to determine that an area has met all the applicable redesignation criteria for a revoked ozone standard and terminate the remaining anti-backsliding obligations for that standard. We are therefore revising the tables in 40 CFR part 81 to reflect that the DFW area has attained the revoked 1979 1-hour and revoked 1997 8-hour NAAQS, and that all anti-backsliding obligations with respect to those two NAAQS are terminated.

Comment: TCEQ stated that when we began stating that we no longer make findings of failure to attain or reclassify areas for revoked standards, we provided no rationale supporting why we would no longer do so.

Response: As noted above, in the Phase I rule to implement the 1997 ozone standard, we revoked the 1-hour NAAQS and designations for that standard (*see* 69 FR 23951, 23969–70, April 30, 2004). Accordingly, there was neither a 1-hour standard against which to make findings for failure to attain nor 1-hour nonattainment areas to reclassify. We also explained that it would be counterproductive to continue to impose new obligations with respect to the revoked 1-hour standard given on-going implementation of the newer 8-hour 1997 NAAQS. *Id. at* 23985. We recognize that subsequent court decisions, such as the *South Coast II* decision, have affected our view. The *South Coast II* decision vacated our waiver of the statutory attainment deadlines associated with the revoked 1997 ozone NAAQS, for areas that fail to meet an attainment deadline for the 1997 ozone standard, and we are determining how to implement that decision going forward.

Comment: TCEQ commented that if we interpreted revocation of ozone standards as limiting our authority to implement all statutory rights and obligations, including the rights of states to be redesignated to attainment, it would cause an absurd result: *i.e.,* implementing anti-backsliding measures in perpetuity. The commenter added that it would subvert one of the foundational principles of the CAA—restricting the right of states to be freed from obligations that apply to nonattainment areas upon the states achieving the primary purpose of Title I of the CAA—to attain the NAAQS.

Response: The ''absurd result'' noted by the commenter is that an area would need to implement anti-backsliding measures in perpetuity. Through this action we are terminating anti-backsliding controls for the DFW area upon a determination that the five statutory criteria of CAA section 107(d)(3)(E) have been met. Therefore, although we are not redesignating the DFW area to attainment for the revoked ozone standards, the ''absurd result'' noted by the commenter does not remain.

The EPA does believe it is appropriate for states to be freed from anti-backsliding requirements in place for the revoked NAAQS in certain circumstances, and we believe the court in *South Coast II* was clear that this could be done if all the CAA criteria for a redesignation had been met.

Comment: TCEQ commented that the CAA makes no distinction between revoked or effective standards regarding EPA's authority to redesignate. TCEQ also commented that reading the CAA section granting authority for designations generally, it is apparent that Congress intended the same procedures be followed regardless of the status of the NAAQS in question. TCEQ added that nothing in CAA section 107 creates differing procedures when we revoke a standard or qualifies our mandatory duty to act on redesignation submittals from states.

Response: None of the substantive provisions of the CAA make distinctions between revoked and effective NAAQS and the redesignation provision in section 107 is no different. Nonetheless, as noted above, at the time that we revoked the ozone NAAQS in question, we also revoked all designations associated with that NAAQS. We therefore do not think a statutory redesignation is available for an area that no longer has a designation. However, in *South Coast II,* the D.C. Circuit found that the CAA allows areas under a revoked NAAQS to shed anti-backsliding controls if the statutory redesignation criteria are met.

Comment: The TCEQ suggests that the EPA should expand upon the rationale provided in our Proposal for our decision to take no action on the maintenance motor vehicle emission budgets (MVEBs) related to the 1-hour and 1997 ozone NAAQS.

Response: The conformity discussion in our May 21, 2012 rulemaking (77 FR 30160) to establish classifications under the 2008 ozone NAAQS explains that our revocation of the 1-hour standard under the 1997 ozone Phase I implementation rule and the associated anti-backsliding provisions were the subject of the *South Coast I* litigation (*South Coast Air Quality Management District* v. *EPA,* 472 F.3d at 882). The Court in *South Coast I* affirmed that conformity determinations need not be made for a revoked standard. Instead, areas would use adequate or approved MVEBs that had been established for the now revoked NAAQS in transportation conformity determinations for the new NAAQS until the area has adequate or approved MVEBs for the new NAAQS. As explained in our June 24, 2019 proposal, the DFW area already has NO_X and VOC MVEBs for the 2008 ozone NAAQS, which are currently used to make conformity determinations for both the 2008 and 2015 ozone NAAQS for transportation plans, transportation improvement programs, and projects according to the requirements of the transportation conformity regulations at 40 CFR part 93.[30]

The TCEQ offers its own basis to expand the rationale for EPA's action by citing the transportation conformity regulations at 40 CFR 93.109(c), which provides that a regional emissions analysis for conformity is only required for a nonattainment or maintenance area until the effective date of revocation of the applicable NAAQS. The TCEQ concludes that this sufficiently justifies

[30] *Transportation Conformity Guidance for the South Coast II Court Decision,* EPA–420–B–18–050. November 2018, available on EPA's web page at *https://www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation.*

this action must be filed in the United States Court of Appeals for the appropriate circuit by June 5, 2020. 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 oxides, Ozone, Volatile organic compounds.

List of Subjects in 40 CFR Part 81

Dated: March 19, 2020.

Kenley McQueen,

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 titled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' is amended by adding an entry at the end of the table for ''Dallas-Fort Worth Redesignation Request and Maintenance Plan for the 1-hour and 1997 8-hour Ozone Standards''.

The addition reads 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 approval/ effective date	EPA approval date	Comments
*	*	*	*	*
Dallas-Fort Worth Redesignation Request and Maintenance Plan for the 1-hour and 1997 8-hour Ozone Standards.	Dallas Fort-Worth, TX	3/29/2019	4/6/2020, [Insert **Federal Register** citation].	

■ 3. Section 52.2275 is amended by revising paragraph (m) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(m) Termination of Anti-backsliding Obligations for the Revoked 1-hour and 1997 8-hour ozone standards. Effective May 6, 2020 EPA has determined that the Dallas-Fort Worth area has met the Clean Air Act criteria for redesignation. Anti-backsliding obligations for the revoked 1-hour and 1997 8-hour ozone standards are terminated in the Dallas-Fort Worth area.

* * * * *

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 4. The authority citation for Part 81 continues to read as follows:

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

■ 5. In § 81.344:

■ a. In the table titled ''Texas—Ozone (1-Hour Standard)'' revise the entry for ''Dallas-Fort Worth Area'' and footnote 3.

■ b. In the table titled ''Texas—1997 8-Hour Ozone NAAQS (Primary and secondary)'' revise the entry for ''Dallas-Fort Worth, TX'' and footnote 5 and remove footnote 6.

The revisions read as follows:

§ 81.344 Texas

* * * * *

TEXAS—OZONE
[1-Hour standard] [1]

Designated area	Designation		Classification	
	Date [2]	Type	Date [2]	Type
*	*	*	*	*
Dallas-Fort Worth Area: Collin County.[3] Dallas County.[3] Denton County.[3] Tarrant County.[3]	See footnote 3	See footnote 3	See footnote 3	See footnote 3.
*	*	*	*	*

* * * * * * * * *

[3] The Dallas-Fort Worth Area was designated and classified as Moderate nonattainment on November 15, 1990. The area was classified as Serious nonattainment on March 20, 1998 and was so designated and classified when the 1-hour ozone standard, designations and classifications were revoked. The area has since attained the 1-hour ozone standard and met all the Clean Air Act criteria for redesignation. All 1-hour ozone standard anti-backsliding obligations for the area are terminated effective May 6, 2020.

* * * * *