

**Regulatory Process in the wake of *South Coast***

On February 16, 2018, the U.S. Court of Appeals for the D.C. Circuit issued an opinion in *South Coast Air Quality Management District v. EPA*, vacating portions of EPA's 2008 ozone implementation rule. In the opinion, the court held that EPA's nationwide Part 51 requirements for state "redesignation substitute" submittals failed to include three of five SIP plan components required by Clean Air Act Section 107(d)(3)(E).

Notably, the opinion did not invalidate the HGB and DFW redesignation substitutes separately promulgated by EPA into Part 81 in 2015 and 2016.

The opinion, if it survives rehearing and appeal, would at most call for a process to prepare and submit the three additional plan elements for EPA review and approval. In the interim, EPA's rulemaking actions on HGB and DFW, which were not judicially challenged, remain in force in Part 81 pending a further EPA rulemaking such as a SIP call or error correction action. Before revisiting the Part 81 actions, the appropriate process would be for Texas to have an opportunity to submit the additional plan elements.

Below are four key reasons why the *South Coast* opinion, if it stands, does not invalidate the separate Part 81 actions and cause HGB and DFW to revert immediately to "severe" and "serious" status:

1. **Rule of law.** EPA's Part 81 actions in 2015 and 2016 were separate final agency actions, each with administrative records that were not before the court in *South Coast*. The Part 81 actions underwent notice-and-comment and were judicially reviewable. No petitions for review were filed on them. They cannot be undone by a judicial opinion reviewing a different final agency action on a different record.
2. **Sustained clean air.** The HGB and DFW areas not only attained both the 125 ppb 1-hour standard and the 84 ppb 8-hour standard, but also have maintained good air quality against those standards.
3. **Cooperative federalism.** Texas framed its Part 81 submittals in the form that EPA specified by rule for Texas and other states. Those submittals could have included the additional plan components, had the rules so provided. The cooperative federalism framework of the Clean Air Act provides an opportunity for Texas to supplement its submittals before EPA's Part 81 actions are revisited.
4. **Infrastructure impact.** Substantial investments in manufacturing infrastructure are underway based on EPA's Part 81 actions. "Springing" into a higher nonattainment status would cause a major detrimental impact to the Texas economy.

TEXAS—1997 8-HOUR OZONE NAAQS  
[Primary and secondary]

Designated area	Designation <sup>a</sup>		Category/classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
Dallas-Fort Worth, TX:				
Collin County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Dallas County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Denton County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Ellis County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Johnson County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Kaufman County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Parker County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Rockwall County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.
Tarrant County <sup>5,6</sup>		Nonattainment	(5)	Subpart 2/Serious.

<sup>a</sup> Includes Indian Country located in each county or area, except as otherwise specified.

<sup>1</sup> This date is June 15, 2004, unless otherwise noted.

<sup>5</sup> Effective January 19, 2011.

<sup>6</sup> A Redesignation Substitute was approved on November 8, 2016.

\* \* \* \* \*  
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BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 52 and 81**

[EPA-R06-OAR-2015-0609; FRL-9953-89-Region 6]

**Clean Air Act Redesignation Substitute for the Houston-Galveston-Brazoria 1997 8-Hour Ozone Nonattainment Area; Texas**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a redesignation substitute and making a finding of attainment for the revoked 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) for the Houston-Galveston-Brazoria ozone nonattainment area (HGB area).

**DATES:** This rule is effective on December 8, 2016.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2015-0609. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be

publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733.

**FOR FURTHER INFORMATION CONTACT:** Tracie Donaldson, 214-665-6633, [Donaldson.tracie@epa.gov](mailto:Donaldson.tracie@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document “we,” “us,” and “our” means the EPA.

**I. Background**

The background for this action is discussed in detail in our May 25, 2016 proposal (81 FR 33166). In that document we proposed to approve a redesignation substitute and make a finding of attainment for the 1997 8-hour ozone NAAQS for the Houston-Galveston-Brazoria ozone nonattainment area (HGB area). The redesignation substitute demonstration indicates that the area has attained the revoked 1997 8-hour ozone NAAQS due to permanent and enforceable emission reductions and that it will maintain that NAAQS for ten years from the date of the EPA’s approval of this demonstration. Final approval of the redesignation substitute results in the area no longer being subject to any remaining applicable anti-backsliding requirements, including nonattainment new source review, associated with the revoked NAAQS. In general, final approval of the redesignation substitute allows Texas to seek to revise the Texas SIP for the area to remove anti-backsliding measures from the active

portion of its SIP if it can demonstrate, pursuant to CAA section 110(1), that such revision would not interfere with attainment or maintenance of any applicable NAAQS, or any other requirement of the CAA. Because the EPA believes Texas does not need to revise its SIP to alter certain provisions for NNSR effective in the HGB area, the offset and threshold requirements applicable in the HGB area for NNSR will be automatically altered upon finalization of the redesignation substitute.

We previously approved a HGB area redesignation substitute for the revoked 1-hour ozone standard (80 FR 63429). In this action, we are also finalizing a non-substantive technical correction to 40 CFR 81.344 to reflect this approval.

We received comments on the proposal from five commenters. Our response to the comments are below.

**II. Response to Comments**

*Comment:* Three commenters recognized the progress of the area and the work of TCEQ in making such significant air quality improvements in the HGB area and urged the EPA to finalize this action to reflect the changes in the area.

*Response:* We agree with the commenters that HGB area has made progress in meeting air quality standards. No changes were made to the final action based on these comments.

*Comment:* One of the supportive commenters urged the EPA to approve revisions to the Texas SIP to reflect changes to certain provisions for the NNSR program effective in the HGB area as a result of the EPA’s approval of the

redesignation substitute. The commenter also asserted that approval of the redesignation substitute will result in the area no longer being subject to any remaining applicable anti-backsliding requirements.

*Response:* Due to the drafting of the Texas SIP, no revision is necessary to alter NNSR requirements applicable in the HGB area following finalization of this redesignation substitute. The NNSR provisions in the existing Texas SIP contains a provision that cross-references the designation of the area to 40 CFR part 81. See 30 TAC section 101.1(71). Because of the structure of this provision, the identification of an area's classification, and thus the related major source thresholds and offset ratios, is updated without any additional revision to the SIP. Therefore, the EPA's approval of the redesignation substitute automatically updates the applicable NNSR requirements. Following finalization of this rule, the NNSR requirements applicable in the HGB area will be in accordance with the HGB area's current classification for the 2008 ozone NAAQS for newly permitted sources.<sup>1</sup>

We note that approval of this redesignation substitute does not relieve sources in the area of their obligations under previously established permit conditions.<sup>2</sup> 81 FR 33161, 33165. The Texas SIP includes a suite of approved permitting regulations for the Minor and Major NSR, which will continue to apply after approval of the redesignation substitute in the HGB area. Each of these programs has been evaluated and approved by EPA 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 national standard. So moving forward to a time when the HGB area has a marginal designation as the only applicable nonattainment designation, new sources and modifications will continue to be permitted and authorized under the existing SIP requirements if they are determined to be protective of air quality. We would also note that EPA has proposed to reclassify Houston from marginal to moderate for the 2008

ozone NAAQS. 81 FR 66240, September 27, 2016.

The EPA agrees that approval of the redesignation substitute will result in the HGB area no longer being subject to the regulatory anti-backsliding requirements for the 1997 ozone standard established pursuant to the principles of CAA section 172(e). However, if an anti-backsliding provision is in the Texas SIP and needs to be changed to reflect the change in this area's status, such change is subject to the SIP revision process, which in turn is subject to review under CAA sections 110 and 193, if applicable. To date, Texas has not submitted a SIP revision concerning any anti-backsliding provisions for the EPA's consideration.

*Comment:* One commenter also recognized the progress and supported the action but wanted the EPA to clarify that the redesignation substitute will permanently eliminate the anti-backsliding requirements for the revoked ozone NAAQS.

*Response:* Following finalization of a redesignation substitute, an area is no longer subject to any remaining applicable anti-backsliding requirements associated with the specific revoked NAAQS, including the major source thresholds and offset ratios associated with the area's classification under those standards. However, as noted previously, any changes to a SIP are subject to consistency checks with CAA sections 110(l) and 193, if applicable. Because the 1997 ozone NAAQS has been revoked, no new requirements associated with that NAAQS would come due at any future date.

*Comment:* One commenter objected to the use of the redesignation substitute mechanism and the implications of such an action. The commenter incorporates by reference the relevant portions of a brief filed in a petition challenging the EPA's promulgation of the redesignation substitute. See *South Coast Air Quality Mgmt. Dist. v. EPA*, No. 15–1115 (D.C. Cir.). They contend that the HGB area continues to have unhealthy levels of ozone pollution, therefore, raising the NNSR thresholds and lowering the offset requirements for the area is inappropriate. The commenter further states that our action will result “in great expense and inefficiency: because some sources will not prevent pollution, they and other sources may have to retrofit at greater expense.” The commenter asks the EPA to either disapprove the redesignation substitute or delay action until the underlying litigation is resolved.

*Response:* The EPA disagrees with the commenter that it is inappropriate to approve redesignation substitutes for the Houston-Galveston-Brazoria area for the 1997 ozone standard. As the commenter noted, the EPA created the redesignation substitute in the 2008 ozone SIP Requirements Rule as one of two acceptable procedures through which a state may demonstrate that it is no longer required to adopt any additional applicable requirements for an area which have not already been approved into the SIP for a revoked ozone NAAQS. 80 FR 12264, 12304 (March 6, 2015).

The EPA acknowledges that this rule has been challenged in the D.C. Circuit by the commenter. However, the rule has not been stayed pending resolution of the litigation, and as such, it is appropriate to continue to implement the 2008 ozone SIP Requirements Rule during the pendency of the litigation.

The EPA believes the redesignation substitute is an appropriate mechanism because it serves as a successor to a redesignation to attainment, for which these areas would have been eligible if the EPA had not revoked the 1-hour and 1997 ozone standards. For a more detailed description of why the EPA has determined the HGB area has met the redesignation criteria for the revoked 1997 ozone standard, see 81 FR 33166 for the proposal and Technical Support Document. Upon approval of a redesignation substitute, a state may request to revise its SIP to shift regulatory anti-backsliding requirements contained in the active portion of the SIP to the contingency measures portion of the SIP, subject to a showing of consistency with the general anti-backsliding checks in CAA sections 110(l) and 193 (if applicable). The EPA approval of the redesignation substitute has the same effect on these areas' nonattainment regulatory anti-backsliding requirements as would a redesignation to attainment for the revoked standard. The EPA believes that, under any view of anti-backsliding for a revoked standard, it should not mean imposing requirements greater than those that would apply if the standard had not been revoked.

An approvable redesignation substitute must include more than a determination of attainment of the prior NAAQS, and show that it addresses redesignation criteria for that NAAQS.

Moreover, the state remains subject to ongoing requirements to meet the new more stringent 2008 ozone standard in that area. In this context, the EPA believes finalizing this action is appropriate—it recognizes and supports Texas's progress in having attained the

<sup>1</sup> See Section D of the TSD for this action in the docket for this rulemaking for additional information.

<sup>2</sup> See Final Implementation Rule for 2008 Ozone Standard, 80 FR 12264, at 12299, footnote 83 and at 12304, footnote 91.

prior standards in the HGB area due to permanent and enforceable emissions reductions, and reinforces continued attainment by demonstrating that the HGB area can maintain the revoked standard. See 80 FR 12264, 12305.

### III. Final Action

We find that Texas has successfully demonstrated it has met the requirements for approval of a redesignation substitute for the revoked 1997 8-hour ozone NAAQS for the HGB area. We are approving the redesignation substitute for the HGB area based on our determination that the demonstration provided by the State of Texas shows that the HGB area has attained the revoked 1997 8-hour ozone NAAQS due to permanent and enforceable emission reductions, and that it will maintain that NAAQS for ten years from the date of the EPA's approval of this demonstration. As we no longer redesignate nonattainment areas to attainment for the revoked 1997 8-hour ozone NAAQS, approval of the demonstration serves as a redesignation substitute under the EPA's implementing regulations. As a result of this action, Texas is no longer required to adopt any additional applicable 1997 8-hour ozone NAAQS requirements for the area which have not already been approved into the SIP (40 CFR 51.1105(b)(1)). It also allows the state to request that the EPA approve the shifting of planning and control requirements implemented pursuant to the 1997 ozone NAAQS from the active portion of the SIP to the contingency measures portion of the SIP, upon a showing of consistency with CAA sections 110(l) and 193 (if applicable) (40 CFR 51.1105(b)(2)).

We are also finalizing a non-substantive technical correction to 40 CFR 81.344 (Section 107 Attainment Status Designations for Texas) to reflect our previous approval of a HGB area redesignation substitute demonstration for the revoked 1-hour ozone standard.

### IV. Statutory and Executive Order Reviews

Under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves a demonstration provided by the State of Texas and finds that the HGB area is

no longer subject to the regulatory anti-backsliding requirements under the principles of CAA section 172(e) for the revoked 1997 8-hour ozone NAAQS; and imposes no additional requirements. Accordingly, I certify that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule does not impose any additional enforceable duties, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). This rule also does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a demonstration provided by the State of Texas and find that the HGB area is no longer subject to the regulatory anti-backsliding requirements under the principles of CAA section 172(e) for the revoked 1997 8-hour ozone NAAQS; and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

The rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Additionally, this rule does not involve establishment of technical standards, and thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority

populations and low-income populations in the United States. The EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

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 January 9, 2017. 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

#### 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

#### 40 CFR Part 81

Environmental protection, Air pollution control.

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

Dated: October 27, 2016.

**Samuel Coleman,**

*Acting Regional Administrator, Region 6.*

40 CFR parts 52 and 81 are 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. Section 52.2275 is amended by adding paragraph (n) to read as follows:

#### § 52.2275 Control strategy and regulations: Ozone.

\* \* \* \* \*

(n) *Approval of Redesignation Substitute for the Houston-Galveston-Brazoria 1997 Ozone Nonattainment Area.* EPA has approved the redesignation substitute for the Houston-Galveston-Brazoria 1997 ozone NAAQS nonattainment area submitted by the State of Texas on August 18,

2015. The State is no longer being required to adopt any additional applicable 1997 ozone NAAQS requirements for the area.

**PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES**

■ 3. The authority citation for part 81 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*  
 ■ 4. Section 81.344 is amended:  
 ■ a. In the table for “Texas—Ozone (1-Hour Standard)” by revising the entries for “Houston-Galveston-Brazoria, TX” and revising footnote 4; and  
 ■ b. In the table for “Texas—1997 8-Hour Ozone NAAQS (Primary and Secondary)” by revising the entries for

“Houston-Galveston-Brazoria, TX” and adding footnote 7.

The revisions and additions read as follows:

**§ 81.344 Texas.**  
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**TEXAS—OZONE<sup>2</sup>**  
 [11-Hour standard]

Designated area	Designation		Classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
* * *	*	*	*	*
Houston-Galveston-Brazoria Area, TX:				
Brazoria County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
Chambers County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
Fort Bend County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
Galveston County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
Harris County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
Liberty County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
Montgomery County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
Waller County <sup>4</sup> .....		Nonattainment .....	11/15/90	Severe-17.
* * *	*	*	*	*

<sup>1</sup> This date is October 18, 2000, unless otherwise noted.  
<sup>2</sup> The 1-hour ozone standard is revoked effective June 15, 2005 for all areas in Texas except the San Antonio area where it is revoked effective April 15, 2009.

<sup>4</sup> A Redesignation Substitute was approved on October 20, 2015.

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**TEXAS—1997 8-HOUR OZONE NAAQS**  
 [Primary and secondary]

Designated area	Designation <sup>a</sup>		Classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
* * *	*	*	*	*
Houston-Galveston-Brazoria, TX:				
Brazoria County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
Chambers County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
Fort Bend County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
Galveston County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
Harris County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
Liberty County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
Montgomery County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
Waller County <sup>7</sup> .....		Nonattainment .....	( <sup>4</sup> )	Subpart 2/Severe 15.
* * *	*	*	*	*

<sup>a</sup> Includes Indian Country located in each county or area, except as otherwise specified.  
<sup>1</sup> This date is June 15, 2004, unless otherwise noted.  
<sup>4</sup> Effective October 31, 2008.  
<sup>7</sup> A Redesignation Substitute was approved on November 8, 2016.

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