IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH 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.

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 Fifth 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"

(Attachment 1); and 85 Fed. Reg. 19,096 (Apr. 6, 2020), titled "Air Plan Approval; Texas; Dallas-Fort Worth Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Final Rule" (Attachment 2).

This petition for review is protective in nature. Petitioners are this date filing a petition for review in the U.S. Court of Appeals for the D.C. Circuit, which Petitioners maintain is the proper venue for challenging these final actions. Petitioners file this petition in an abundance of caution, to protect their right to judicial review of EPA's actions in the event that the D.C. Circuit determines that venue does not lie in that court.

DATED: April 14, 2020

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Sierra Club (Petitioner)

  Sierra Club is a national non-profit organization organized and existing under the laws of the State of California. Sierra Club has no parent corporation, and no publicly held company has 10% or greater ownership in Sierra Club.

- Downwinders at Risk (Petitioner)

Downwinders at Risk is a non-profit corporation organized and existing under the laws of the State of Texas. It has no parent corporation, and no publicly held company has 10% or greater ownership in Downwinders at Risk.

- Texas Environmental Justice Advocacy Services (Petitioner)

  Texas Environmental Justice Advocacy Services is a non-profit corporation organized and existing under the laws of the state of Texas. It has no parent corporation, and no publicly held company has 10% or greater ownership in Texas Environmental Justice Advocacy Services.

- Neil Gormley, Earthjustice (Counsel for Downwinders at Risk, Sierra Club, and Texas Environmental Justice Advocacy Services)

- Seth L. Johnson, Earthjustice (Counsel for Downwinders at Risk, Sierra Club, and Texas Environmental Justice Advocacy Services)

- United States Environmental Protection Agency (Respondent)

- Andrew Wheeler, Administrator, United States Environmental Protection Agency (Respondent)

- William Barr, Attorney General, U.S. Department of Justice (Counsel for Respondents)

- Jeffrey Bossert Clark, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice (Counsel for Respondents)

- Matthew Z. Leopold (General Counsel for Respondent United States Environmental Protection Agency)

DATED: April 14, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Petition for Review** and **Certificate of Interested Persons** on Respondents by certified mail, return receipt requested to each of the following addresses on this 14th day of April, 2020.

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/s/ Neil Gormley
Neil Gormley
Earthjustice

Attachment 1

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R06–OAR–2018–0715; FRL–10004–70–Region 6]

Air Plan Approval; Texas; Houston-Galveston-Brazoria Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Section 185 Fee Program

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 Houston-Galveston-Brazoria (HGB) 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 HGB area. The EPA is determining that the HGB 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 HGB area for the 1-hour and 1997 ozone NAAQS. The EPA is also approving the Texas Severe Ozone Nonattainment Area Failure to Attain Fee regulations for the HGB area as an equivalent alternative program to address section 185 of the CAA for the 1-hour ozone NAAQS.

DATES: This rule is effective on March 16, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2018–0715. 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: Carrie Paige, EPA Region 6 Office, Infrastructure & Ozone Section, 1201 Elm Street, Suite 500, Dallas, TX 75270, 214–665–6521, *paige.carrie@epa.gov.* To inspect the hard copy materials, please schedule an appointment with Ms. Paige or Mr. Bill Deese at 214–665–7253.

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

I. Background and Summary of Final Action

The background for this action is discussed in detail in our May 16, 2019 Proposal (84 FR 22093, ''Proposal''). In that document we proposed to: (1) Approve the plan for maintaining both the revoked 1979 1-hour and 1997 8-hour ozone NAAQS [1] through 2032 in the HGB area; (2) Approve 30 Texas Administrative Code (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 185 fee program to address CAA section 185; (3) Determine that the HGB area is continuing to attain both the revoked 1-hour and 1997 ozone NAAQS; (4) Determine that Texas (''the State'') has met the CAA criteria for redesignation of the HGB area; and, (5) Terminate all anti-backsliding obligations for the HGB area for both the 1-hour and 1997 ozone NAAQS.

In this final action, we are approving the plan for maintaining both the 1-hour and 1997 ozone NAAQS through the year 2032 in the HGB area. We are also approving the HGB Severe Ozone Nonattainment Area Failure to Attain Fee regulations program as an equivalent alternative program to address section 185 of the CAA for the 1-hour ozone NAAQS. We are also determining that the HGB area continues to attain both the 1-hour and 1997 ozone NAAQS and has met the five criteria in CAA section 107(d)(3)(E) for redesignation.

The EPA revoked both the 1-hour and 1997 ozone NAAQS along with associated designations and classifications (69 FR 23951, April 30, 2004; and, 80 FR 12264, March 6, 2015), and thus, the HGB area has no designation under both the 1-hour or 1997 ozone NAAQS that can be changed through redesignation as governed by CAA section 107(d)(3)(E). Therefore, we are not promulgating a redesignation of the HGB area under CAA section 107(d)(3)(E). However, because the HGB area has met the five criteria in section 107(d)(3)(E) for redesignation, we are terminating all anti-backsliding obligations for the HGB area for both the revoked 1-hour and 1997 ozone NAAQS.

To determine the criteria under CAA section 107(d)(3)(E) are met, we must do the following: (1) Determine that the area has attained the NAAQS; (2) Fully approve the applicable implementation plan for the area under CAA section 110(k); (3) Determine that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and Federal air pollutant control regulations and other permanent and enforceable reductions; (4) Fully approve a maintenance plan for the area as meeting the requirements of CAA section 175A; and, (5) Determine the state containing such area has met all requirements applicable to the area under CAA section 110 (Implementation plans) and Part D (Plan Requirements for Nonattainment Areas).

As discussed in our Proposal, in the Technical Support Document (TSD) for this action,[2] and in the remainder of this preamble, the five criteria above have been met. In past actions, we have determined that the area has attained the 1-hour and 1997 ozone NAAQS due to permanent and enforceable measures (Criteria 1 and 3). As discussed in the Proposal and in this final action, air quality in the HGB area has been meeting the 1-hour standard since 2013 and the 1997 ozone standard since 2014. As documented in the Proposal and the TSD, numerous State, Federal and local measures have been adopted and implemented including NOx and Highly Reactive Volatile Organic Compounds (HRVOC) [3] mass emissions cap and trade programs and federal on- and off-road emissions control programs which have resulted in significant reductions and resulted in attainment of the 1-hour and 1997 ozone standards.

We are also finding that the area has met all requirements under CAA section

[1] Throughout this document, we refer to the 1979 1-hour ozone NAAQS as the ''1-hour ozone NAAQS'' and the 1997 8-hour ozone NAAQS as the ''1997 ozone NAAQS.''

[2] There are three TSDs in the docket for this action. The first of the TSDs relates to the CAA section 107(d)(3)(E) criteria, including, but not limited to the maintenance plan for the HGB area for the revoked 1-hour and 1997 ozone NAAQS. The other two TSDs that are referred to later in this action relate to the HGB equivalent alternative section 185 program. Unless otherwise noted, ''TSD'' refers to the first instance described herein.

[3] HRVOCs are important to control as they react quickly to form ozone.

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.

we had authority to do so. In this action, based upon comments received, we are finalizing the first option.

Comment: Earthjustice states that ozone is a serious health problem in Houston.

Response: We agree that ozone is a significant health issue in the HGB area, but we also recognize that significant progress has been made in reducing ozone levels in the area. This action recognizes that the HGB area has met air emissions reductions milestones with respect to both the revoked 1-hour and 1997 ozone NAAQS. We also recognize that further air quality improvement is necessary in the area to meet the two current 2008 and 2015 ozone NAAQS and to protect public health. The HGB area was designated as nonattainment 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.[9] As a result, the State and HGB area—including local governments, business and industry—have implemented measures to reduce emissions of NO_X and VOC that form ozone (*see, e.g.,* Appendix A: Permanent and Enforceable Measures Implemented in the HGB Area, in the TSD for this action). Accordingly, the HGB area has seen its 1-hour ozone design values decrease from over 200 parts per billion (ppb) in 1997 to 112 ppb in 2018. Likewise, the HGB area design values for the 8-hour ozone NAAQS have decreased from 102 ppb in 2003 to 78 ppb in 2018.[10] 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 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 nonattainment area for the 2008 ozone standard.[11]

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 Houston 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 Clean Air Act section 301(a) to do so. Finally, the commenter alleges that the EPA's reliance on *South Coast II* to support its authority to terminate HGB'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 HGB 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 HGB 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 ''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 HGB 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 Houston 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

[9] For the 1-hour and 1997 and 2008 8-hour ozone standards: The Houston nonattainment area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller Counties (56 FR 56694, November 6, 1991; 69 FR 23858, April 30, 2004; and 77 FR 30088, May 21, 2012). For the 2015 8-hour ozone NAAQS: The Houston nonattainment area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, and Montgomery Counties (83 FR 25776, June 4, 2018).

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

[11] See 83 FR 25576, June 4, 2018, and 84 FR 44238, August 23, 2019.

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.

backsliding) are not dependent on whether the area is failing to attain newer, more stringent NAAQS. Nor do we think it would be appropriate to disapprove a state's request to terminate anti-backsliding because an area experienced worse air quality than other areas in the nation, if that area met the statutory criteria associated with redesignation for that prior revoked NAAQS. The HGB area continues to be subject to the CAA statutory and regulatory requirements to meet the more stringent ozone NAAQS, and this action does not alter that obligation.

We acknowledge that in 2018 the HGB area experienced several exceedances of the 1-hour ozone NAAQS. An exceedance of the 1-hour ozone NAAQS occurs when the maximum hourly average concentration at an ozone monitor is above 0.12 parts per million (or 120 ppb) [15] and as Earthjustice notes, there were exceedances at monitors in the HGB area. Six of the regulatory monitors in the HGB area each recorded one exceedance, and a seventh regulatory monitor recorded two exceedances.[16] However, these exceedances did not result in a violation of the 1-hour ozone NAAQS. As described earlier in this document and in our TSD, the 1-hour ozone NAAQS is determined by reviewing specific data averaged over a three-year period. The number of exceedances at a monitoring site would be recorded for each calendar year and then averaged over the past 3 calendar years to determine if this average is less than or equal to 1. A violation occurs when this average is greater than 1. Table 1 in this final action shows the 1-hour ozone exceedances by monitor in the HGB area for calendar years 2014 through 2018 to demonstrate the area's continued attainment of the 1-hour ozone NAAQS.[17] In addition, Table 1 in our Proposal provided the preliminary 2016–2018 1-hour and 1997 ozone design values for the HGB area. Quality-assured data collected through 2018 and preliminary data for 2019 indicate that the area has continued to maintain these NAAQS (see Table 2).

TABLE 1—ONE-HOUR OZONE EXPECTED EXCEEDANCES BY MONITOR IN THE HGB AREA

HGB monitoring site (AQS site)	Expected exceedances by year					3 Years expected exceedances (average)		
	2014	2015	2016	2017	2018	2014–2016	2015–2017	2016–2018
Manvel Croix (48–039–1004)	1.0	0.0	0.0	0.0	0.0	0.3	0.0	0.0
Lake Jackson (48–039–1016)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Galveston (48–167–1034)	0.0	1.0	0.0	0.0	0.0	0.3	0.3	0.0
Houston Aldine (48–201–0024)	0.0	3.0	0.0	0.0	1.0	1.0	1.0	0.3
Channelview (48–201–0026)	0.0	0.0	0.0	0.0	2.0	0.0	0.0	0.7
Tomball (48–201–0029)	0.0	0.0	0.0	0.0	1.1	0.0	0.0	0.4
Houston N Wayside (48–201–0046)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Lang (48–201–0047)	0.0	1.0	0.0	0.0	1.0	0.3	0.3	0.3
Croquet (48–201–0051)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Houston Bissonett (48–201–0055)	0.0	1.0	0.0	0.0	0.0	0.3	0.3	0.0
Monroe (48–201–0062)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Houston Hwy 6 (48–201–0066)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Polk (48–201–0070) [18]	NA	NA	NA	NA	NA	NA	NA	NA
Park Place (48–201–0416)	0.0	3.0	0.0	0.0	0.0	1.0	1.0	0.0
Lynchburg Ferry (48–201–1015)	0.0	0.0	0.0	0.0	1.0	0.0	0.0	0.3
Baytown Garth (48–201–1017)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Houston East (48–201–1034)	0.0	1.1	0.0	0.0	1.0	0.4	0.4	0.3
Clinton Drive (48–201–1035)	0.0	0.0	0.0	0.0	1.0	0.0	0.0	0.3
Deer Park 2 (48–201–1039)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Seabrook (48–201–1050)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Conroe (48–339–0078)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

TABLE 2—1-HOUR AND 1997 OZONE DESIGN VALUES FOR THE HGB AREA

Years	1-Hour ozone design value (ppb)	1997 ozone design value (ppb)
2011–2013	121	87
2012–2014	111	80
2013–2015	120	80
2014–2016	120	79
2015–2017	120	81
2016–2018	112	78
2017–2019 (preliminary) [19]	114	81

[15] For ease of communication, many reports of ozone concentrations are provided in ppb. To convert, ppb = ppm × 1000 (0.12 × 1000 = 120). Thus, 0.12 ppm = 120 ppb (this value becomes 124 ppb when rounding is considered).

[16] See Table 1 in this final action.

[17] Table 1 in our Proposal TSD provided the 1-hour ozone expected exceedances by monitor in the HGB area for 2014 through 2017. At the time of this writing, data for the last quarter of 2019 are not yet posted in EPA's Air Quality System (AQS) and thus, we are unable to add such to Table 1 in this final action. For more information on the AQS, visit *https://www.epa.gov/aqs.*

[18] The ozone monitor on Polk Avenue (AQS site number 48–201–0070), was discontinued after 2012.

[19] At the time of this writing, the preliminary ozone data for 2019 are posted on the TCEQ website but are not yet posted in AQS. See *https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_attainment.pl.*

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]

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

[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.*

[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.*

with those two revoked NAAQS are terminated.

Comment: Earthjustice states that EPA arbitrarily flouts important considerations relevant to this rulemaking, and states that this action's consequences on interstate and intrastate ozone transport are not considered. Earthjustice states EPA failed to consider how redesignation will affect Texas' interstate ozone transport obligations under existing regulations and how redesignation of the Houston area will affect attainment in other Texas areas, such as San Antonio and Dallas, both of which struggle with existing ozone pollution and are in nonattainment for several standards. Earthjustice states EPA must consider the interstate and intrastate consequences of redesignating and relaxing anti-backsliding controls in the Houston area.

Response: We are not redesignating the HGB area for the revoked 1-hour and 1997 ozone NAAQS. We disagree that EPA is required under the CAA to consider the effect of this action on interstate and intrastate ozone transport before it may terminate the HGB area's anti-backsliding requirements with respect to the two revoked ozone NAAQS in question, and we do not agree that such considerations are important or relevant to this rulemaking. At the outset, we note that the State is projecting HGB area ozone precursor emissions will decrease, reducing the HGB area's impact on other areas.

Interstate ozone transport is addressed under CAA section 110(a)(2),[24] and Texas' interstate transport obligations under the Act are not in any way altered by this action. To the extent that Texas has outstanding interstate ozone transport obligations under CAA section 110(a)(2)(D), they remain obligated to address those statutory requirements after finalization of this action.

The TCEQ has also proposed Serious Area attainment plans for the Houston and Dallas-Fort Worth (DFW) areas for the 2008 eight-hour ozone standard, and those submittals—including any obligation to address intrastate transport as necessary to attain the NAAQS—will also be evaluated in separate actions.

Comment: Earthjustice states that EPA's Proposal leaves important modeling questions unaddressed. Earthjustice states EPA predicts that point source VOC emissions will remain exactly the same in 2032 and in all intermediate years as they were in 2014, at 77.56 tpd. In its TSD, EPA does not explain how it arrived at its modeling prediction and given the tremendous growth of industrial facilities along the Houston Ship Channel that are known to emit huge quantities of VOCs, it is difficult to see how this prediction holds. NO_X emissions from point sources steeply increase from 95.11 to 128.77 tpd between 2014 and 2020 and remain practically identical until 2032, but EPA offers no explanation for the disparity.

Response: As described in our Proposal and TSD, EPA evaluated the emission inventories 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.[25] 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.[26] 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.[27] 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 Emissions Inventory Guidance document at 26.

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 some 90% of point source NO_X emissions are covered under the Mass Emissions Cap and Trade (MECT) program.[28] The 2016 base year emissions were adjusted to estimate future daily emissions. TCEQ applied the entire MECT cap to the first interim year inventory (2020), which we believe is a conservative estimate. In over 10 years of implementation of the MECT, most facilities keep their emissions under the cap, to maintain compliance with the allowable limits. For NO_X emissions sources not listed in the MECT program, 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 HGB 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 [29] 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 HGB area for 2020, 2026, and 2032 are lower than those estimated for

[24] See ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act sections 110(a)(1) and 110(a)(2),'' Memorandum from Stephen D. Page, September 13, 2013. To view the guidance, see *https://www.epa.gov/sites/production/files/2015-12/documents/guidance_on_infrastructure_sip_elements_multipollutant_final_sept_2013.pdf.*

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

[26] 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.*

[27] 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 HGB 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.

[28] The MECT is mandatory under the Texas SIP for stationary facilities that emit NO_X in the HGB area which are subject to emission specifications in the Texas NO_X rules at 30 TAC Sections 117.310, 117.1210, and 117.2010; and which are located as a site where they collectively have an uncontrolled design capacity to emit 10 tpy or more of NO_X. The program sets a cap on NO_X emissions and facilities are required to meet NO_X allowances on an annual basis. Facilities may purchase, bank, or sell their allowances. 82 FR 21919, May 11, 2017.

[29] 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.

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.*

the first area in the country for which EPA will have approved termination of anti-backsliding per CAA requirements after *South Coast II* does not entail that the action itself is ''nationally applicable.''

Earthjustice next contends that even if it is true that EPA's final action is not nationally applicable but is locally or regionally applicable, that judicial review of this action should still reside in the D.C. Circuit because EPA's action is based on a determination of nationwide scope or effect. The commenter alleges that ''EPA has expressly proposed in its FR publication to base action on that determination (via either pathway).'' This is plainly untrue. Nowhere in the Proposal or in this final action did EPA make a finding that the action is based on a determination of nationwide scope or effect. The requirements under CAA section 307(b)(1) that would allow for review of a locally or regionally applicable action in the D.C. Circuit—*i.e.,* that EPA makes a finding that the action is based on a determination of nationwide scope or effect and that EPA publishes such a finding—have not been met. *See Dalton Trucking,* 808 F.3d at 882.

Comment: The TCEQ states that Table 1 in the Proposal (84 FR 22093, 22095) incorrectly lists the preliminary 2016–2018 1-hour ozone design value as 110 parts per billion (ppb) and the design value should be updated to 112 ppb.

Response: We agree and have updated the data (see Table 2) in this rulemaking action.

Comment: TCEQ, Baker Botts, and TXOGA submitted comments supporting our alternative Proposal to redesignate the HGB area to attainment for the revoked 1-hour and 1997 ozone standards.

Response: After carefully considering comments on this issue, we continue to believe that we cannot redesignate areas to attainment for the revoked ozone standards (80 FR 12264, 12296–97, 12304–05, March 6, 2015). When we revoked the ozone standards, we also revoked the designations for those standards (69 FR 23951, 23969–70, April 30, 2004 and 80 FR 12264, 12287, March 6, 2015). Therefore, the HGB area has no designation under the 1-hour or 1997 ozone NAAQS that can be changed through redesignation as governed by CAA section 107(d)(3)(E). Thus, we are not redesignating the HGB area to attainment for the revoked ozone standards. Where we find an area has met the requirements of CAA section 107(d)(3)(E), we can and believe we should terminate anti-backsliding requirements that are carried with these revoked standards.

Comment: The TCEQ stated that our past failure to provide for a legally valid mechanism for termination of anti-backsliding obligations for revoked standards has created uncertainty and our reluctance to redesignate for the revoked standards creates severe economic consequences for the public, regulated industry, and states. TCEQ added that (1) certainty on the issue of how the EPA must act to remove anti-backsliding requirements is an absolute necessity for states, potentially impacted regulated businesses, and citizens and (2) continued implementation of programs required for revoked, less stringent standards is costly and takes resources away from states and localities that are necessary to meet more stringent standards.

Response: We understand the value of regulatory certainty. We also understand that there is a cost for implementing required programs for revoked, less stringent standards. We have endeavored to provide flexibility to states on implementation approaches and control measures. The D.C. Circuit has upheld our revocation of previous ozone standards as long as sufficient anti-backsliding measures are maintained. In *South Coast II,* the court was clear that anti-backsliding measures could be shed if all five requirements for redesignation in CAA section 107(d)(3)(E) had been met. We are finding here that Texas has met all redesignation criteria necessary for termination of the anti-backsliding measures for the HGB area.

Comment: TCEQ, Baker Botts, and TXOGA (''Commenters'') state that (1) we continue to have authority to redesignate areas from ''nonattainment'' to ''attainment'' post-revocation of a NAAQS; and (2) if we determine we do not have authority to redesignate areas to attainment post-revocation, we clearly have authority to determine that an area has met all redesignation requirements necessary for termination of anti-backsliding requirements. Commenters state that EPA should redesignate the Houston area to attainment under the revoked 1-hour and 1997 ozone NAAQS. Commenters state that EPA provides no statutory basis not to redesignate the area under these NAAQS. Commenters state that the D.C. Circuit recently held that EPA must continue to revise an area's classification under a revoked standard should the area fail to timely attain, and that it is not clear why the D.C. Circuit's holding as to classifications should not be extended to designations. Commenters encourage EPA to determine that it also has the authority to, and should, revise the listings in Part 81 of the Code of Federal Regulations to show the HGB area as an attainment area under the revoked 1-hour and 1997 ozone NAAQS. Commenters contend that such an approach will more fully clarify that the area has satisfied all requirements with respect to the revoked NAAQS, mitigating the potential for future challenges or confusion due to uncertainty regarding the area's attainment status.

Response: EPA disagrees with Commenters regarding our authority to redesignate an area under the revoked 1-hour and 1997 ozone NAAQS. As explained above, in revoking both the 1-hour and 1997 ozone standards, EPA revoked the associated designations 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 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 HGB 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 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.*

that the rational interpretation of section 172(e) for when EPA strengthens a standard is that it bars weakening of protections but does not authorize EPA to depart from the program Congress unambiguously required. The anonymous commenter also stated that EPA's 2010 guidance pertaining to section 185 fee programs is illegal as the CAA does not allow for any alternative methods.

Response: CAA section 172(e) provides that when the Administrator relaxes a NAAQS, the EPA must ensure that all areas which have not attained that NAAQS maintain ''controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.'' EPA agrees with the commenter that section 172(e) does not apply directly to supplanting one NAAQS with a stronger standard, but the EPA has long applied the principles of CAA section 172(e) following revocation of ozone standards. *See* 80 FR 12264 (March 6, 2015) (revoking the 1997 ozone NAAQS); 69 FR 23951 (April 30, 2004) (revoking the 1979 1-hour ozone NAAQS). Because EPA has historically applied the principles of section 172(e) to define what are reasonable anti-backsliding controls following revocation of the 1-hour and 1997 standards, we believe it is reasonable to continue to look to that provision to determine that it is reasonable to provide for equivalent alternative programs to address anti-backsliding requirements. For the past ten years, the EPA has interpreted the principles of section 172(e) as authorizing the Administrator to approve on a case-by-case basis and through rulemaking, alternatives to the applicable CAA section 185 fee programs associated with a revoked ozone NAAQS that are ''not less stringent.'' *See generally* 80 FR 12264, 12306 (March 6, 2015); 84 FR 12511 (April 2, 2019) (approval of a section 185 fee equivalent alternative program for the New York portion of the New York-Northern New Jersey-Long Island, NY-NJ-CT nonattainment area for the 1-hour ozone NAAQS); 77 FR 74372 (December 14, 2012) (same for the South Coast nonattainment area); 77 FR 50021 (August 20, 2012) (same for the San Joaquin Valley nonattainment area); and the January 5, 2010 EPA guidance on developing CAA section 185 fee programs for the 1-hour ozone standard (2010 guidance).[36] EPA's ability to approve section 185 fee equivalent alternative programs has been affirmed by the United States Court of Appeals for the Ninth Circuit in *Natural Res. Def. Council* v. *EPA,* 779 F.3d 1119 (9th Cir. 2015) (finding that ''[b]ecause EPA reasonably interpreted CAA § 172(e) to give it authority to approve programs that are alternative to, but not less stringent than, § 185 fee programs, EPA's approval of . . . such an alternative program, after reasoned consideration and notice and comment procedure regarding [the rule's] stringency and approach to fee collecting, was proper.'').

To the extent the anonymous commenter is challenging the 2010 guidance document itself, that is outside the scope of this action. Although the 2010 guidance pertaining to section 185 fee programs was previously vacated and remanded by the D.C. Circuit, the court's holding was based on procedural grounds. The court did not adversely rule on the permissibility of equivalent alternative programs, stating ''neither the statute nor our case law obviously precludes that alternative.'' *NRDC* v. *EPA,* 643 F.3d 311, 321 (D.C. Cir. 2011).

Comment: Earthjustice commented that even if EPA could allow an alternative fees program, EPA cannot approve the HGB alternative program because it is less stringent than what the CAA requires as it allows impermissible VOC and NO_X baseline aggregation. Earthjustice alleges that this is less stringent than CAA section 185, which requires each major stationary source of VOCs to reduce emissions or pay a fee. Earthjustice comments that section 182(f) similarly extends an independent fee obligation to each major stationary source of NO_X. Earthjustice further alleges that the HGB program allows aggregation of emissions across sources in different locations but under common control, which is less stringent than direct application of section 185. Earthjustice also commented that VOC and NO_X baseline aggregation creates serious environmental justice issues. The commenter noted under the HGB program major sources can offset higher VOC emissions by reducing NO_X emissions and that among VOCs are highly toxic compounds, like the carcinogen benzene.

Response: We do not believe anything in the Act precludes provisions that allow aggregation of VOC and NO_X emissions in calculating a source's baseline emissions. CAA section 185 expressly applies only to VOC, but section 182(f) extends the application of this provision to NO_X, by providing that ''plan provisions required under [subpart D] for major stationary sources of [VOC] shall *also* apply to major stationary sources . . . of [NO_X].'' [37] Nothing in the language of CAA sections 182(f) and 185 states that VOC and NO_X cannot be aggregated in the baseline calculation for a source and the commenters have not provided a reasoned explanation for why this would be so.

The overall goal of subpart 2 of Part D of Title 1 is to bring areas into attainment of the ozone standard. Both VOCs and NO_X are precursors in the formation of ozone and reductions of both are beneficial to reducing ozone in the HGB area. Therefore, we believe it is reasonable that Texas provided flexibility in establishing the baseline to allow aggregation of the pollutants.

With regard to aggregating emissions among major sources in different locations but under common control, this provides for some consistency with the HGB attainment plan for the 1-hour ozone standard (71 FR 52670, September 6, 2006). The 1-hour ozone plan achieved very significant reductions through Cap and Trade Programs for NO_X and for HRVOCs. (As noted earlier, HRVOCs react quickly to form ozone, thus making them important to control with regard to the 1-hour ozone standard.) These cap and trade programs allowed sources to trade NO_X and HRVOCs allowances amongst themselves, providing the flexibility for more controls to be applied to one source to offset less controls applied to another source. Overall, the Cap and Trade Program for NO_X was designed to achieve a nominal 80% reduction in area-wide point source NO_X emissions. The HRVOC Cap and Trade Program also achieved significant reduction of these emissions. The flexibility provided by these emissions trading programs was important to the success of the 1-hour ozone plan in achieving its aggressive goals to significantly reduce ozone levels and attain the 1-hour ozone standard. Given our prior SIP approval of the HGB area Cap and Trade Programs, which helped to achieve significant ozone emission reductions and eventual attainment of the 1-hour standard in the area, it is reasonable to approve the HGB equivalent alternative section 185 fee program that allows for similar aggregation of emissions from sources in different locations but under common control.

[36] ''Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS'', January 5, 2010 memorandum from Stephen D. Page, Director, EPA Office of Air Quality Planning and Standards, available at: *https://www.epa.gov/sites/production/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf.*

[37] Under CAA section 182(f) areas may obtain a ''NO_X waiver'' from these requirements, but such a waiver does not exist for the HGB area.

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.*

Comment: Earthjustice commented that the HGB alternative section 185 fee equivalent program irrationally focuses on mobile source programs for section 185 fee offsets given that a significant percentage of daily VOC and NO_X emissions are attributable to point sources, rather than mobile sources. The commenter acknowledges that EPA's previously-approved South Coast fee equivalent alternative program focused on mobile sources, and states that mobile sources accounted for 80% of pollution in the air district. The commenter alleges that targeting mobile source emissions in the HGB area reaches only a small amount of ozone precursor emissions and does not achieve the emissions reductions envisioned by CAA section 185.

Response: EPA has consistently provided that an alternative program may be found to be equivalent to direct application of section 185 if the state can demonstrate that expected fees and/or emissions reductions directly attributable to application of section 185 is comparable to or exceeded by the expected fees and/or emissions reductions from the proposed alternative program. *See* the 2010 guidance, 77 FR 50021 (August 20, 2012), 77 FR 74372 (December 14, 2012) and 84 FR 12511 (April 2, 2019). The commenter fails to point to anything in the Clean Air Act or the legislative history that indicates Congress intended for the collection of the fees from the point sources to be used for point sources. In fact, both are silent are how the collected fees are to be used. Therefore, we believe it is reasonable that, as long as either an equivalent amount of fees are collected or an equivalent amount of emissions are reduced, or some combination thereof, an alternative program that includes such fees or emission reductions from mobile sources is ''no less stringent'' than direct application of section 185 in line with the principles of CAA section 172(e).

In addition, we dispute the commenter's contention that reduction of emissions from mobile sources is not important in the HBG area. Tables 2, 3 and 4 in our Proposal provide point source, on-road mobile source and off-road mobile source emission inventories for the years 2011, 2014, 2020, 2026 and 2032 (84 FR 22093, 22097–98, May 16, 2019). As discussed previously, reductions in NO_X emissions and a small subset of VOC emissions termed HRVOCs have been determined to be the most effective means of reducing ozone levels in the Houston area. As a result, it is important to reduce emissions of NO_X from mobile sources. While emissions from mobile sources (on-road and off-road) are expected to continue decreasing, these emissions were and continue to be a significant source of ozone precursors in the HGB area, particularly with respect to NO_X. In 2011 (a year in which the area had not attained the 1-hour ozone standard), mobile sources accounted for 72% of the area's NO_X emissions. In 2014 (a year in which the area maintained the 1-hour ozone standard), mobile sources accounted for 65% of the area's NO_X emissions. In 2020, it is projected that mobile sources will account for 48% of the area's NO_X emissions. As (1) an objective of the HGB equivalent alternative section 185 fee program was to bring about attainment of the 1-hour ozone standard and (2) on-road and non-road mobile sources were a significant portion of the emissions preventing attainment of the 1-hour ozone standard, we believe that a program focused on fees and emission reductions from mobile source programs is rational and can be considered equivalent to section 185.

Comment: Earthjustice commented that the HGB alternative section 185 fee equivalent program unlawfully and arbitrarily departs from the CAA by substituting publicly funded dollars for privately paid fees. The commenter further stated that ''EPA provides no explanation (and there is none) of how it is equally stringent to shift a new obligation to pay fees away from the producers of harmful emissions to the broad citizenry, which already funds TERP and LIRAP.''

Response: We disagree that the HGB equivalent alternative section 185 fee program unlawfully and arbitrarily departs from the CAA by substituting publicly funded dollars for privately paid fees. The commenter does not explain why this distinction is significant and why it should lead EPA to the conclusion that Texas's program is not at least as stringent as a 185 program. As noted above, we have historically considered an equivalent alternative program to be permissible if the state can demonstrate that expected fees and/or emissions reductions directly attributable to applicable of section 185 would be equal to or exceeded by the expected fees and/or emissions reductions from the proposed alternative program. The Texas program is equally stringent as it provides greater or equivalent fees and emission reductions than those that would be provided by direct application of section 185.

We also note that there is no requirement in the CAA that penalty fees collected from major stationary sources under section 185 be used by the State for control of air pollution. However, in the HGB equivalent alternative section 185 fee program, mobile source program fees are used to fund emission reductions in the HGB area. These emission reductions helped the area attain and maintain the 1-hour ozone standard.

Comment: Earthjustice commented that carry over credits, which allow for accumulation of credits from mobile source programs from previous years to offset stationary source fees in future years, violate section 185 of the CAA. The commenter further stated that the offset and carry over features of the HGB alternative program ensure that fees will never be paid by Houston area stationary sources; the fee obligation is an annual obligation, not one that may be met by a one-time payment and accounting tricks; and that EPA has not explained how carry over credits are equally stringent as what the CAA requires.

Response: The commenter fails to explain the significance of annual accounting as opposed to ensuring, as EPA has done here, that an overall equivalent amount of fees and/or emissions reductions have been achieved over the lifetime of the equivalent alternative program. Under the Texas program, fees collected from mobile sources in the HGB area for emission reduction projects go into a Fee Equivalency Account. Money in this account then is used to offset the annual fee obligation of major stationary sources. Any surplus in the Fee Equivalency Account in one year is available to be used (or carried over) to offset the next year's annual fee obligation of major stationary sources. If there are insufficient funds in this account, major stationary sources would need to make up the difference.

Comment: Earthjustice commented that the HGB alternative section 185 fee program is not enforceable, including by citizens; the CAA requires SIPs to be enforceable; and to ensure such enforceability, EPA must require Texas to report and publicly post information about equivalency, track the efficacy of emission reduction projects funded by the putative alternative fee source and report and make publicly available such information.

Response: As implemented in 30 TAC Chapter 101 and explained in our TSD, the HGB equivalent alternative section 185 fee program is enforceable. The program was adopted by the appropriate State authority and is binding on subject sources. Texas submitted the program to EPA and through this action we are incorporating the program into the

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.

[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.*

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

every requirement an area is subject to is applicable for purposes of evaluating an area's request for redesignation, or in this case, a request to terminate an area's anti-backsliding requirements based on the redesignation criteria. Calcagni Memorandum at 4. EPA has consistently held that requirements designed to help an area plan for attainment—such as developing modeling demonstrating how the area will attain the NAAQS, adopting reasonably available control measures (RACM) that would advance attainment by one year or more, and demonstrating reasonable further progress towards attainment—are not applicable requirements under CAA section 107(d)(3)(E)(ii) and (v) because by definition those areas will already have attained the NAAQS in question. The Agency's position is based on the reasonable interpretation that Congress would not have intended to impose the substantial and costly administrative burden on states of adopting measures and making demonstrations that are aimed at progressing the area towards attainment when the area has already achieved the end goal of attainment. The EPA has also interpreted the submission of nonattainment area plan contingency measures, which apply if an area fails to timely achieve attainment or fails to demonstrate reasonable further progress to attainment, as not applicable requirements for purposes of redesignation.[41] Other requirements such as an approved nonattainment new source review program, which by definition ends upon redesignation, are also not required to be approved prior to redesignation.[42]

The CAA section 185 fee program must be implemented if an area fails to attain by its Severe or Extreme area attainment date. Like nonattainment new source review, the program is terminated once an area is redesignated to attainment. In the case of an area that is subject to a revoked NAAQS, the CAA section 185 fee program is an anti-backsliding requirement,[43] and anti-backsliding requirements associated with a revoked NAAQS are terminated by EPA's approval of a demonstration that all five redesignation criteria have been met. Additionally, the purpose of CAA section 185 is to provide incentives for emission reductions to occur that would provide for attainment and maintenance of an ozone standard in a Severe or Extreme nonattainment area that missed the attainment deadline for that standard. If a Severe or Extreme area has in fact attained the standard and has appropriate controls in place for maintaining the standard, the purpose of section 185 will have been met. Consistent with EPA's position with regard to other nonattainment area requirements that are not CAA applicable requirements that must be approved prior to redesignation, we believe an area need not have an approved SIP revision addressing the CAA section 185 provision in order to determine that all the redesignation criteria to be met since that determination will (1) terminate the fee collection requirement and (2) meet the purpose underlying the CAA section 185 program.

[41] John Seitz Memorandum, Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard (May 10, 1995).

[42] Mary Nichols, Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment (Oct. 14, 1994).

[43] *South Coast Air Quality Management District* v. *EPA,* 472 F.3d 882, 902 (D.C. Cir. 2006).

IV. Incorporation by Reference

In this rule, we are finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the revisions to the State of Texas regulations as described in the Final Action section above. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 6 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the air quality designation status of geographical areas and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements. While we are not in this action redesignating any areas to attainment, we are approving the state's demonstration that all five redesignation criteria have been met. Similar to a redesignation, the termination of anti-backsliding requirements in this action does not impose any new requirements.

With regard to the SIP approval portions of this action, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, where EPA is acting on the SIPs in this action, we are merely approving State law as meeting Federal requirements and are not imposing additional requirements beyond those imposed by State law.

For these reasons, this action as a whole:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because actions that are exempted under Executive Order 12866 are also exempted from Executive Order 13771;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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].	

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
Section 101.116	Failure to Attain Fee Payment	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.117	Compliance Schedule	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.118(a)(1) and (a)(3).	Cessation of Program	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	SIP does not include 101.118(a)(2) or 101.118(b).
Section 101.120	Eligibility for Equivalent Alternative Obligation.	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.121	Equivalent Alternative Obligation	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
Section 101.122	Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation.	5/22/2013	2/14/2020, [Insert **Federal Register** citation].	
*	*	*	*	*	*	*

* * * * * (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
*	*	*	*	*	*	*
Houston-Galveston-Brazoria Redesignation Request and Maintenance Plan for the 1-hour and 1997 8-hour Ozone Standards.	Houston-Galveston-Brazoria, TX.	12/12/2018	2/14/2020, [Insert **Federal Register** citation].	

* * * * *

■ 3. Section 52.2275 is amended by revising paragraphs (j) and (n) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(j) *Determination of Attainment.* Effective November 19, 2015, the EPA has determined that the Houston-Galveston-Brazoria 1-hour ozone nonattainment area has attained the 1-hour ozone standard.

* * * * *

(n) Termination of Anti-backsliding Obligations for the Revoked 1-hour and 1997 8-hour ozone standards. Effective March 16, 2020 EPA has determined that the Houston-Galveston-Brazoria 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 Houston-Galveston-Brazoria 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. Section 81.344 is amended:

■ a. In the table titled ''Texas—Ozone (1-Hour Standard)'' by:

■ i. Removing the footnote number ''2'' in the title heading ''Texas-Ozone (1-Hour Standard)'' and adding in its place footnote number ''1'';

■ ii. Under column headings ''Designation'' and ''Classification'' in the both headings for ''Date,'' removing the footnote number ''1'' and adding in its place the footnote number ''2'';

■ iii. Revising the entry for ''Houston-Galveston-Brazoria Area, TX''; and

■ iv. Revising footnotes 1, 2, and 4.

■ b. Amend table titled ''Texas—1997 8-Hour Ozone NAAQS [Primary and Secondary]'' by:

■ i. Adding footnote ''1'' to the table heading;

■ ii. Revising footnotes 1 and 4; and

■ iii. Revising the entry for ''Houston-Galveston-Brazoria Area, TX,'' including the removal of footnote 7.

The revisions and additions read as follows:

§ 81.344 Texas.

* * * * *

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,

Attachment 2

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.

I. Background and Summary of Final Action

The background for this action is discussed in detail in our June 24, 2019 Proposal (84 FR 29471, ''Proposal''). In that document we proposed to: (1) Approve the plan for maintaining both the revoked 1979 1-hour and 1997 8-hour ozone NAAQS [1] through 2032 in the DFW area; (2) Determine that the DFW area is continuing to attain both the revoked 1-hour and 1997 ozone NAAQS; (3) Determine that Texas (''the State'') has met the CAA criteria for redesignation of the DFW area for the 1-hour and 1997 8-hour ozone NAAQS; and, (4) Terminate all anti-backsliding obligations for the DFW area for both the 1-hour and 1997 ozone NAAQS.

In this final action, we are approving the plan for maintaining both the 1-hour and 1997 ozone NAAQS through the year 2032 in the DFW area. We are also determining that the DFW area continues to attain both the 1-hour and 1997 ozone NAAQS and has met the five criteria in CAA section 107(d)(3)(E) for redesignation for these Standards. The EPA revoked the 1-hour and 1997 ozone NAAQS along with associated designations and classifications (69 FR 23951, April 30, 2004; and, 80 FR 12264, March 6, 2015), and thus, the DFW area has no designation under both the 1-hour or 1997 ozone NAAQS that can be changed through redesignation as governed by CAA section 107(d)(3)(E). Therefore, we are not promulgating a redesignation of the DFW area under CAA section 107(d)(3)(E). However, because the DFW area has met the five criteria in section 107(d)(3)(E) for redesignation, we are terminating all anti-backsliding obligations for the DFW area for both the revoked 1-hour and 1997 ozone NAAQS.

To determine the criteria under CAA section 107(d)(3)(E) are met, we determine: (1) That the area has attained the NAAQS; (2) that we have fully approved the applicable implementation plan for the area under CAA section 110(k); (3) that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and Federal air pollutant control regulations and other permanent and enforceable reductions; (4) that the area has a fully approved maintenance plan meeting the requirements of CAA section 175A; and, (5) that the state containing such area has met all requirements applicable to the area under CAA section 110 (Implementation plans) and part D (Plan Requirements for Nonattainment Areas).

As discussed in our Proposal, the Technical Support Document (TSD), and in the remainder of this preamble, the five criteria listed above have been met. In past actions, we have determined that the area has attained the 1-hour and 1997 ozone NAAQS due to permanent and enforceable measures (Criteria 1 and 3). As discussed in the Proposal and in this final action, air quality in the DFW area has been meeting the 1-hour standard since 2006 and the 1997 ozone standard since 2014. As documented in the Proposal and the TSD, numerous State, Federal and local measures have been adopted and implemented including, but not limited to, nitrogen oxide (NO_X) limits on all Portland cement kilns in Ellis County, and federal on- and off-road emissions control programs. These programs have resulted in significant reductions and resulted in attainment of the 1-hour and 1997 ozone standards.

We are also finding that the area has met all requirements under CAA section 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 DFW 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''). [2] As described in this memo, 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.

Finally, we are fully approving the maintenance plan for the DFW area. As discussed in the Proposal, we agree that Texas has provided a plan that demonstrates that the DFW 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 DFW area should the area monitor a violation of these standards in the future.

II. Response to Comments

We received comments from Earthjustice (on behalf of Downwinders at Risk and the Sierra Club); and the Texas Commission on Environmental Quality (TCEQ or State). These comments are available for review in the docket for this rulemaking. Our responses to all relevant comments follow. Any other comments received were either deemed irrelevant or beyond the scope of this action, but are also included in the docket for this action.

We proposed to find that the DFW area met all five redesignation criteria in CAA section 107(d)(3)(E) for the revoked ozone standards, and 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*''), [3] that the anti-backsliding obligations for the DFW area associated with these standards should therefore be terminated. In the alternative, we proposed to redesignate the DFW area to attainment for the revoked ozone standards, taking comment on whether we had authority to do so. In this action, based upon comments received, we are finalizing the first option.

Comment: Earthjustice states that ozone is a serious health problem in Dallas.

Response: We agree that ozone is a significant health issue in the DFW area, but we also recognize that significant progress has been made in reducing ozone levels in the area. This action recognizes that the DFW area has attained both the revoked 1-hour and 1997 ozone NAAQS. We also recognize that further air quality improvement is necessary in the area to meet the two current 2008 and 2015 ozone NAAQS and to protect public health. The DFW area was designated as nonattainment

[1] Throughout this document, we refer to the 1979 1-hour ozone NAAQS as the ''1-hour ozone NAAQS'' and the 1997 8-hour ozone NAAQS as the ''1997 ozone NAAQS.''

[2] 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.*

[3] ''*South Coast I*'' refers to *South Coast Air Quality Management District* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006).

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).

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 DFW 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. 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. 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.

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 DFW area to attainment no further response to this specific comment is required.

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

Response: The EPA is not changing the designation for the DFW 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 Serious 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 DFW 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 DFW 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 DFW 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 note that we have considered the consequence of terminating anti-backsliding protections specifically raised by the commenter, *i.e.,* the Serious classification requirements for NNSR. The commenter submitted their comments in a July 24, 2019 letter. In a final rule published August 23, 2019 we reclassified the area to Serious for the 2008 ozone standard (84 FR 44238). Thus, the Serious NNSR and other Serious ozone nonattainment requirements apply now and will continue to apply after this final rule.[7]

Comment: Earthjustice states that unhealthy levels of ozone and other air pollutants disproportionally affect communities of color in the DFW nonattainment area. Specifically, Earthjustice expressed concern about disproportionate impacts on the historic freedman town of Joppa, which is located southeast of downtown Dallas. Earthjustice includes a document with their submitted comments titled, ''EJSCREEN Report (Version 2017),'' dated March 05, 2018. The report shows environmental and demographic raw data (*e.g.,* the estimated concentration of ozone in the air), and shows what percentile each raw data value represents. These percentiles provide perspective on how the selected block group (Joppa) compares to the entire State, EPA region, and nation. For example, if Joppa is at the 95th percentile nationwide, this means that only 5 percent of the US population has a higher block group value than the average person in Joppa. The variables included in the report are particulate matter (PM), ozone, diesel PM, several categories within the National Air Toxics Assessment (NATA),[8] lead paint, wastewater discharge, and proximity to the following: traffic and traffic volume; Superfund sites; and Risk Management Plan facilities (potential chemical accident management plan). Earthjustice states that the weakened NNSR requirements will allow more VOC emissions and emissions of listed hazardous air pollutants than otherwise would be permitted, and the community of Joppa would bear a disproportionate burden of these 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 DFW 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 PM and all other variables in the Commenter's EJSCREEN Report, with the exception of ground-level ozone, are outside the scope of this action.

The EJSCREEN Report provided by the commenter examined the geographic distribution of several pollutants and other variables and whether the community in Joppa is disproportionately impacted by these pollutants and variables. The approvability of this action is based on requirements for ozone and the revoked standards being considered here. As discussed elsewhere, because EPA reclassified the DFW area to Serious for the 2008 ozone NAAQS in 2019, new sources built in the DFW area must meet NNSR requirements consistent with the Serious area classification (84 FR

[7] The NNSR requirements in the existing Texas SIP contain 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. The EPA approved Texas SIP includes 30 TAC Section 116.12 (Nonattainment and Prevention of Significant Deterioration Review Definitions) and 30 TAC Section 116.150 (New Major Source or Major Modification in Ozone Nonattainment Area). These provisions require new major sources or major modifications at existing sources in the DFW area to comply with the lowest achievable emission rate and obtain emission offsets at the Serious classification ratio of 1.2 to 1.

[8] NATA is EPA's ongoing review of air toxics in the United States. EPA developed NATA as a screening tool for state, local and tribal air agencies. NATA's results help these agencies identify which pollutants, emission sources and places they may wish to study further to better understand any possible risks to public health from air toxics. For more information see *https://www.epa.gov/national-air-toxics-assessment.*

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.

DFW area to Severe under the 1997 ozone NAAQS based upon monitoring data for 2010–2012 (80 FR 8274, February 17, 2015). Less than a month later, EPA revoked the 1997 8-hour ozone standard along with the associated designations and classifications effective on April 6, 2015 (80 FR 12264, 12296; March 6, 2015). It was EPA's interpretation at the time that we could not revise the classification of an area under a revoked ozone NAAQS and reclassification of an area upon its failure to attain by the attainment date was not retained as a regulatory anti-backsliding measure (80 FR 12264, 12297; March 6, 2015). Therefore, EPA did not finalize the February 2015 reclassification proposal. Beginning with the time period 2012–2014, monitored levels in the DFW area have met the revoked 1997 ozone standard. We proposed to make a clean data determination on April 28, 2015 (80 FR 23487) and we finalized that clean data determination in September 2015 (*see* 80 FR 52630), based upon the 2012–2014 monitoring data. A clean data determination suspends the requirement to submit SIPs that are designed to help an area achieve attainment, such as demonstrations of how an area will attain (attainment demonstrations) and showings of reasonable further progress to attainment, because the stated purpose of those elements will have already been fulfilled for an area that is attaining the standard. The current preliminary 2017–2019 design value for the area is 77 ppb as air quality has continued to improve in the DFW area.

On February 16, 2018, in the *South Coast II* decision, the D.C. Circuit determined that EPA erred in waiving the obligation to reclassify an area to a higher classification for the 1997 ozone NAAQS based on a failure to meet the 1997 attainment deadlines and as such EPA should continue to reclassify areas if they fail to attain the revoked 1997 standard. The court also vacated the portion of the rule that provided for the ''redesignation substitute'' approach to terminating anti-backsliding measures. As discussed elsewhere, the court made clear that anti-backsliding measures could only be terminated if all five criteria for redesignation under CAA section 107(d)(3)(E) have been met. At the time of the *South Coast II* decision, the DFW area had been monitoring attainment of the revoked 1997 ozone standard for four years, and had obtained redesignation substitutes for both revoked ozone NAAQS in 2016 (81 FR 78688, November 8, 2016).

In response to the court decision, Texas moved quickly to address the court's concerns regarding the redesignation substitutes that had been approved for the DFW area. Within 13 months of the *South Coast II* decision, Texas proposed and finalized at the state-level a demonstration that all five statutory criteria for redesignation for each of the revoked NAAQS had been met, including the preparation of a SIP revision to address maintenance of both NAAQS for the area through 2032. In this action, we are determining the DFW area has met the five CAA criteria for redesignation for both NAAQS and therefore we are terminating all anti-backsliding obligations for those NAAQS.

The commenter discusses two specific anti-backsliding measures associated with a Severe classification, the CAA section 185 failure to attain fee program and the CAA section 182(d)(1) VMT program. Earthjustice states that this proposal cannot proceed without such programs for the DFW area, because in commenter's view, the programs are required because EPA ''still has never addressed its failure to reclassify the area to severe.''. To require these programs at this time, however, when the area has met the 1997 standard for more than five years and the State has provided a demonstration that all five criteria for redesignation have been met, including a maintenance plan demonstrating that the area will continue to meet the standard for 10 more years, would be an unnecessary and unproductive exercise. The D.C. Circuit's rationale in requiring EPA to continue to reclassify areas under a revoked NAAQS and consequently impose more stringent emission controls, like those cited by commenters, was in service of ''constrain[ing] ozone pollution'' in order to attain that NAAQS. *South Coast II,* 882 F.3d at 1147 (''If EPA were allowed to remove the [attainment] deadlines * * * a state could go unpenalized *without ever attaining the NAAQS.*'') (emphasis added).

Moreover, even if EPA were to make a determination *today* that the DFW area failed to attain by its 2013 Serious area attainment date and to reclassify the DFW area to Severe, that determination alone would not immediately render Texas in default of the section 185 fee program and the section 182 VMT requirements, as commenters suggest. When EPA makes a determination that an area has failed to attain and reclassifies that area, the Act prescribes that the Administrator may establish new deadlines for the submission of SIPs to meet the requirements of the new classification. CAA section 182(i). So were EPA to make such a determination, we would establish some period of time for Texas to submit the section 185 fee program and the VMT programs. Under EPA's longstanding interpretation of the CAA 107(d)(3)(E) criteria, states requesting redesignation to attainment must meet only the applicable requirements of the Act that come due prior to the submittal of a complete redesignation request. *See* September 4, 1992 Calcagni memorandum at 2. (''For purposes of redesignation, a State must meet all requirements of section 110 and Part D that were applicable prior to submittal of the complete redesignation request. When evaluating a redesignation request, Regions should not consider whether the State has met requirements that come due under the Act after submittal of a complete redesignation request.''); September 17, 1993 Michael Shapiro memorandum.[14] (''Specifically, before EPA can act favorably upon any State redesignation request, the statutorily-mandated control programs of section 110 and part D *(that were due prior to the time of the redesignation request)* must have been adopted by the State and approved by EPA into the SIP'') (emphasis added). Given that for a revoked NAAQS EPA is using the five statutory redesignation criteria to determine whether anti-backsliding should be terminated, we think it is reasonable to apply the same interpretations that we would in the redesignation context. Here, EPA never finalized a reclassification of the DFW area to Severe and never established SIP submission deadlines for Texas to submit a 185 program or a VMT program. Even if we were to do so now, because Texas has already submitted its demonstration that it is meeting all five statutory redesignation criteria and its request to terminate the area's anti-backsliding for the 1997 ozone NAAQS, under EPA's long-standing interpretation of the 107(d)(3)(E) criteria, those SIP programs are not within the scope of requirements considered by EPA in evaluating whether the criteria have been met.

Other states have faced somewhat similar situations in the past. One analogous example is the St. Louis area, which was designated as a Moderate ozone nonattainment area for the 1979 1-hour ozone NAAQS. This area failed to attain by its attainment date, and EPA

[14] *See* the September 17, 1993 memorandum from Michael Shapiro, ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992'' at *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2_old/19930917_shapiro_sips_redesignation_ozone_co_naa.pdf.*

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)'').

suspending the second and third elements—the RFP and attainment elements of the section 182(d)(1)(A) VMT SIP requirements.[16] As noted above, a clean data determination suspends the requirement to submit attainment-related planning SIPs for so long as the area continues to attain, and those requirements are permanently terminated when EPA finds that the redesignation criteria have been met. Therefore, even if we had reclassified the DFW area to Severe for the 1997 ozone NAAQS or were to do so now, and the first element of the VMT SIP at that point became or would become a required submission, these latter two VMT elements would not have been required to be submitted due to the clean data determination for the 1997 ozone NAAQS, and they are terminated now because the DFW area has met the CAA five criteria for redesignation.

If the State were now required to address section 182(d)(1)(A)'s first element, the requirement to offset any growth in emissions from growth in VMT or numbers of vehicle trips, following a bump up to a Severe classification, the first step would be to determine if there had been an increase in motor vehicle emissions in the area due to growth in VMT or vehicle trips between the base year used in SIP planning and 2014, the area's attainment year. As EPA has explained in its guidance on the VMT offset element,[17] it would only be necessary to adopt and implement a program of offsetting transportation control measures or other transportation control strategies if it is determined that there had been an increase in motor vehicle emissions due to increase in VMT or vehicle trips during that period. Again, however, because the area has not been reclassified as a Severe nonattainment area, no analysis of whether there has been such an increase in emissions from growth in VMT is required under the Act, no determination regarding such an analysis has been made or is required, and consequently no requirement to offset any such undetermined growth in emissions through implementation of TCMs has been triggered. Therefore, it is flatly incorrect for the commenter to assert that a Severe area VMT program must be implemented before EPA can take final action in this rule.

The commenter additionally argues that EPA has an overdue legal obligation to promulgate a FIP for the 185 fee and VMT programs. EPA has no authority to issue a FIP for these Severe area requirements. We have authority to promulgate a FIP only after we (1) find that a State has failed to make a required SIP submission or find that the SIP submission does not satisfy the minimum criteria found in 40 CFR 51, Appendix V (a ''finding of failure to submit'') or (2) disapprove a SIP submission in whole or in part. After making such a finding or disapproving a SIP submission we are required to promulgate a FIP within 2 years unless we approve a SIP submission that corrects the deficiency. *See* CAA section 110(c)(1). We have not made a finding of failure to submit for a 185 fee or VMT program nor have we disapproved a SIP revision addressing either of these programs for the DFW area. Thus, we do not have the authority to promulgate a FIP for these programs in the DFW area.[18]

Comment: Earthjustice states that EPA arbitrarily flouts important considerations relevant to this rulemaking, and states that this action's consequences on interstate and intrastate ozone transport are not considered. Earthjustice states that EPA failed to consider how redesignation will affect Texas' interstate ozone transport obligations under existing regulations and how redesignation of the DFW area will affect attainment in other Texas areas, such as San Antonio and Houston, both of which struggle with existing ozone pollution and are in nonattainment for several standards. Earthjustice states EPA must consider the interstate and intrastate consequences of redesignating and relaxing anti-backsliding controls in the DFW area.

Response: We are not redesignating the DFW area for the revoked 1-hour and 1997 ozone NAAQS. We disagree that EPA is required under the CAA to consider the effect of this action on interstate and intrastate ozone transport before it may terminate the DFW area's anti-backsliding requirements with respect to the two revoked ozone NAAQS in question, and we do not agree that such considerations are relevant to this rulemaking. At the outset, we note that the State is projecting DFW area ozone precursor emissions will decrease, reducing the DFW area's impact on other areas.

Interstate ozone transport is addressed under CAA section 110(a)(2),[19] and Texas' interstate transport obligations under the Act are not in any way altered by this action. To the extent that Texas has outstanding interstate ozone transport obligations under CAA section 110(a)(2)(D), they remain obligated to address those statutory requirements after finalization of this action.

The TCEQ has also adopted Serious Area attainment plans for the Houston and DFW areas for the 2008 8-hour ozone standard, and those submittals—including any obligation to address intrastate transport as necessary to attain the NAAQS—will also be evaluated in separate actions.

Comment: Earthjustice states that EPA's Proposal leaves important modeling questions unaddressed. Earthjustice states EPA predicts that point source NO_X emissions will increase slightly between 2014 and 2020, then expects these NO_X emissions to remain identical until 2032. In its TSD, EPA does not explain how it arrived at its modeling prediction and given the tremendous growth of industrial facilities in the Dallas area due, in part, to oil and gas extraction activities it is difficult to see how this prediction holds. Similarly, EPA fails to explain how VOC emissions from point sources will remain essentially identical between 2014 and 2032. Earthjustice also questions whether these predictions are technically sound or with a ''margin of error'' that might result in putting the Dallas area in nonattainment for either or both standards if future relaxed new source review permit controls are put in place.

Response: As described in our Proposal and TSD, EPA evaluated the

[16] ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard'' Memorandum from John Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995. To view the memo please visit *https://www.epa.gov/ground-level-ozone-pollution/reasonable-further-progress-attainment-demonstration-and-related.*

[17] *See* page 7 of ''Implementing Clean Air Act Section 182(d)(1)(A): Transportation Control Measures and Transportation Control Strategies to Offset Growth in Emissions Due to Growth in Vehicle Miles Travelled'', Office of Transportation and Air Quality, EPA–420–B–12–053, August 2012. This guidance is available at *https://nepis.epa.gov/Exe/ZyPDF.cgi/P100EZ4X.PDF?Dockey=P100EZ4X.PDF.*

[18] Although the commenter does not explicitly argue for this, they seem to suggest that EPA should consider the VMT and 185 fee programs as having already been due in the past and Texas to be delinquent in submitting such programs, even though EPA never finalized a reclassification for the DFW area. Because of the complexity of the CAA's SIP provisions and the interrelationship between federal and state action, the EPA believes it is inappropriate to impose any retroactive effect on decisions in a manner that would create deadlines that have long passed. EPA has historically refused to do this, and courts have supported this position. *See, e.g., Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002).

[19] *See* ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act sections 110(a)(1) and 110(a)(2),'' Memorandum from Stephen D. Page, September 13, 2013. This document is available at *https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf.*

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.*

NAAQS effective September 23, 2019 (84 FR 44238). Therefore, the commenter's concern that we should wait to finalize our proposal until the area is reclassified under the 2008 NAAQS is satisfied.

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 DFW'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 DFW 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 DFW area, and terminates the relevant anti-backsliding obligations for the DFW area, thereby replacing the prior invalid approvals for the DFW 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 DFW area.

As such, we do not agree that this action is reviewable exclusively in the D.C. Circuit. *See* CAA section 307(b)(1). 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 DFW area and it approves the submitted CAA section 175A(d) maintenance plan for the DFW area into the Texas SIP. The legal and immediate effect of the action terminates anti-backsliding controls for only the DFW area with respect to two revoked NAAQS and amends the 40 CFR part 81 tables accordingly for only the DFW area. Nothing in this action has legal effects in any area of the country outside of the DFW 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 the second area in the country for which EPA will have approved termination of anti-backsliding per CAA requirements after *South Coast II* does not entail that the action itself is ''nationally applicable.''

Earthjustice next contends that even if it is true that EPA's final action is not nationally applicable but is locally or regionally applicable, that judicial review of this action should still reside in the D.C. Circuit because EPA's action is based on a determination of nationwide scope or effect. The commenter alleges that ''EPA has expressly proposed in its FR publication to base action on that determination (via either pathway).'' This is plainly untrue. Nowhere in the Proposal or in this final action did EPA make a finding that the action is based on a determination of nationwide scope or effect. The requirements under CAA section 307(b)(1) that would allow for review of a locally or regionally applicable action in the D.C. Circuit—*i.e.,* that EPA makes a finding that the action is based on a determination of nationwide scope or effect and that EPA publishes such a finding—have not been met. *See Dalton Trucking,* 808 F.3d at 882.

Comment: The TCEQ states that our past failure to provide for a legally valid mechanism for termination of anti-backsliding obligations for revoked standards has created uncertainty and our reluctance to redesignate for the revoked standards creates severe economic consequences for the public, regulated industry, and states. TCEQ added that (1) certainty on the issue of how the EPA must act to remove anti-backsliding requirements is an absolute necessity for states, potentially impacted regulated businesses, and citizens and (2) continued implementation of programs required for revoked, less stringent standards is costly and takes resources away from states and localities that are necessary to meet more stringent standards.

Response: We understand the value of regulatory certainty. We also understand that there is a cost for implementing required programs for revoked, less stringent standards. We have endeavored to provide flexibility to states on implementation approaches and control measures. The D.C. Circuit has upheld our revocation of previous ozone standards as long as sufficient anti-backsliding measures are maintained. In *South Coast II,* the court was clear that anti-backsliding measures could be shed if all five requirements for redesignation in CAA section 107(d)(3)(E) had been met. We are finding here that Texas has met all redesignation criteria necessary for termination of the anti-backsliding measures.

Comment: TCEQ states that (1) we continue to have authority to redesignate areas from ''nonattainment'' to ''attainment'' post-revocation of a NAAQS and (2) if we determine we do not have authority to redesignate areas to attainment post-revocation, we clearly have authority to determine that an area has met all redesignation requirements necessary for termination of anti-backsliding requirements. TCEQ states that EPA should redesignate the DFW area to attainment under the revoked 1-hour and 1997 ozone NAAQS. TCEQ states that EPA has the authority to, and should, revise the listings in Part 81 of the Code of Federal Regulations to show the DFW area as an attainment area under the revoked 1-hour and 1997 ozone NAAQS and make clarifying changes to the Part 81 tables to promote public understanding of what measures are required for areas under revoked standards.

Response: EPA disagrees with Commenter regarding our authority to redesignate an area under the revoked 1-hour and 1997 ozone NAAQS. As explained above, in revoking both the 1-hour and 1997 ozone standards, EPA revoked the associated designations

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.*

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 DFW 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 DFW 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 DFW 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 DFW area.

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 DFW 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 DFW 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 DFW 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 DFW area have been met for these two revoked standards.

C. Termination of Anti-Backsliding Obligations

We are terminating the anti-backsliding obligations for the DFW 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 and 1997 ozone NAAQS (81 FR 78688, November 8, 2016.).

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the air quality designation status of geographical areas and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements. While we are not in this action redesignating any areas to attainment, we are approving the state's demonstration that all five redesignation criteria have been met. Similar to a redesignation, the termination of anti-backsliding requirements in this action does not impose any new requirements.

With regard to the SIP approval portions of this action, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, where EPA is acting on the SIPs in this action, we are merely approving State law as meeting Federal requirements and are not imposing additional requirements beyond those imposed by State law.

For these reasons, this action as a whole:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because actions that are exempted under Executive Order 12866 are also exempted from Executive Order 13771;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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 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.

* * * * *

TEXAS—1997 8-HOUR OZONE NAAQS

[Primary and secondary] [1]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
* *	*	* *	*	*
Dallas-Fort Worth, TX:	See footnote 5	See footnote 5	See footnote 5	See footnote 5.
Collin County.[5]				
Dallas County.[5]				
Denton County.[5]				
Ellis County.[5]				
Johnson County.[5]				
Kaufman County.[5]				
Parker County.[5]				
Rockwall County.[5]				
Tarrant County.[5]				
* *	*	* *	*	*
* *	*	* *	*	*

[5] The Dallas-Fort Worth, TX area was designated and classified as a Moderate nonattainment area effective June 15, 2004. The area was classified as Serious nonattainment effective January 19, 2011. The area has since attained the 1997 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 May 6, 2020.

* * * * *

[FR Doc. 2020–06198 Filed 4–3–20; 8:45 am]

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
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NEW ORLEANS, LA 70130

April 16, 2020

Mr. Matthew Z. Leopold
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Mr. Andrew Wheeler
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No. 20-60303 Sierra Club, et al v. EPA, et al
Agency No. 85 Fed. Reg. 8411

Dear Mr. Leopold, Mr. Pruitt, and Mr. Wheeler,

You are served with the following document(s) under FED. R. APP. P. 15:

Petition for Review.

Special Guidance for Filing the Administrative Record: Pursuant to 5th Cir. R. 25.2, Electronic Case Filing (ECF) is mandatory for all counsel. Agencies responsible for filing the administrative record with this court are requested to electronically file the record via CM/ECF using one or more of the following events as appropriate:

Electronic Administrative Record Filed;
Supplemental Electronic Administrative Record Filed;
Sealed Electronic Administrative Record Filed; or
Sealed Supplemental Electronic Administrative Record Filed.

Electronic records must meet the requirements listed below. Records that do not comply with these requirements will be rejected.

- Max file size 20 megabytes per upload.
- Where multiple uploads are needed, describe subsequent files as "Volume 2", "Volume 3", etc.
- Individual documents should remain intact within the same file/upload, when possible.
- Supplemental records must contain the supplemental documents only. No documents contained within the original record should be duplicated.

Electronic records are automatically paginated for the benefit of counsel and the court and provide an accurate means of citing to the record in briefs. A copy of the paginated electronic record is provided to all counsel at the time of filing via a Notice of Docket Activity (NDA). Upon receipt, counsel should save a copy of the paginated record to their local computer.

Agencies unable to provide the administrative record via docketing in CM/ECF may instead provide a copy of the record on a flash drive or CD which we will use to upload and paginate the record.

If the agency intends to file a certified list in lieu of the administrative record, it is *required* to be filed electronically. Paper filings will not be accepted. See FED. R. APP. P. 16 and 17 as to the composition and time for the filing of the record.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

Counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED. R. APP. P. and 5TH CIR. R. 12. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, we will remove your name from our docket.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of

counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk

Mary Stewart

By: _____
Mary C. Stewart, Deputy Clerk
504-310-7694

Enclosure(s)

cc w/encl:
Mr. Neil Gormley

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 20-60303

SIERRA CLUB; DOWNWINDERS AT RISK; TEXAS ENVIRONMENTAL JUSTICE ADVOCACY SERVICES,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, Administrator of the United States Environmental Protection Agency,

Respondents