

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[TX-126-1-7477; FRL-7254-4]

Finding of Failure to Implement a State Implementation Plan; Texas, Houston/Galveston Nonattainment Area; Ozone**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

SUMMARY: The EPA proposes to find that the approved severe area ozone State Implementation Plan for the Houston/Galveston area is not being implemented according to its terms. If EPA makes final this proposed non-implementation finding, Texas will have to correct the identified deficiencies within 18 months or the first set of sanctions will begin pursuant to sections 179(a) and (b) of the Clean Air Act (Act).

DATES: Written comments must be received on or before September 3, 2002.

ADDRESSES: Written comments on this action should be addressed to Mr. Thomas H. Diggs, Chief, Air Planning Section (6PD-L), at the EPA Region 6 Office listed below. Copies of documents relevant to this action, are available for public inspection during normal business hours at the following locations.

Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733.

Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park Circle, Austin, Texas 78753.

Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

FOR FURTHER INFORMATION CONTACT: Guy R. Donaldson, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733. Telephone Number (214) 665-7242, E-mail Address: Donaldson.Guy@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document "we," "us," and "our" means EPA.

Table of Contents**I. Summary**

- A. What portion of the approved State Implementation Plan are we finding Texas is not fully implementing?
- B. Why is it important that Texas fully implement this program?
- C. What are the consequences if we make final this proposed finding of failure to implement?

- D. How can Texas correct this deficiency?
- II. Administrative Requirements**
- A. Executive Order 12866
 - B. Executive Order 13045
 - C. Executive Order 13132
 - D. Executive Order 13175
 - E. Executive Order 13211
 - F. Regulatory Flexibility
 - G. Unfunded Mandates
 - H. National Technology Transfer and Advancement Act

I. Summary**A. What Portion of the Approved State Implementation Plan Are we Finding Texas Is not Fully Implementing?**

We are proposing to find that Texas is not fully implementing the Texas Emission Reduction Program. Section 110(a)(2)(E) of the Act requires a SIP to have adequate funding. The TERP program was passed as part of Senate Bill 5 during the 77th Texas Legislative Session in 2001. This measure was submitted to EPA as part of a SIP revision in a letter from the Governor of Texas dated October 4, 2001. We approved this revision to the SIP on November 14, 2001 (66 FR 57159) through parallel processing. This legislation included, (1) a grant program designed to accelerate the early introduction and use of lower emitting diesel technologies in the nonattainment and near nonattainment areas of Texas, (2) a grant program to fund improved energy efficiency in public buildings, (3) purchase and lease incentives to encourage the introduction of clean light duty cars into the Texas fleet and, (4) funding for research into new air pollution reducing technologies.

The bill provided funding mechanisms for the program and the State anticipated that about \$133 million in new fees would be collected to fund the emission controls contemplated. Unfortunately, the major funding source, a tax on out-of-state vehicle registrations was found to be in violation of the commerce clause of the Fourteenth Amendment of United States Constitution and Article I. Section 3 of the Texas Constitution. See *H.M. Dodd Motor Co. Inc. and Autoplex Automotive, LP. v. Texas Department of Public Safety, et al.*, Cause No GNID2585(200th Judicial District Court, Travis County, February 21, 2002). Without sufficient funding TNRCC will not be able to achieve all of the emission reductions projected for the TERP in the State Implementation Plan.

B. Why Is it Important That Texas Fully Implement This Program?

The TERP program is a vital portion of the State Implementation Plan. At the time the Legislature enacted SB 5, it

mandated the removal of two control measures the State was relying on in its attainment plan: a ban on construction activities during the morning hours and a requirement that owners and operators of diesel non-road equipment of 50 Horsepower or greater accelerate the purchase of engines meeting Tier 2 and 3 emission standards. For more information on Tier 2 and Tier 3 Standards, see 40 CFR 89.112. The state anticipated that approximately 19 tons per day of the TERP reductions would be needed to compensate for the loss of emission reductions from the two control measures. The EPA estimated that, with the previously anticipated funding level, the TERP program could achieve 27-36 tons per day of emission reductions in the HG area.

It was expected that the remaining reductions in excess of 19 tons per day would contribute significantly to reducing the emission reduction shortfall in the HG SIP. The State has estimated that an additional 56 tons per day of emission reductions need to be adopted in the HG area to meet the National Ambient Air Quality Standard. The State has committed to adopt, by May 2004, rules to address this shortfall. Texas committed to submit adopted controls to meet 25% of the shortfall by December 2002 and the State anticipated that the remaining TERP reductions could be used to meet all or part of that commitment.

The remaining TERP reductions provide, among other things, incentives for the owners and operators of heavy duty diesel equipment to upgrade their equipment with new engines or with retrofit devices to reduce emissions. Diesel engines have been targeted because of their relatively high NO_x emissions and because their long operating life makes the widespread introduction of new cleaner engines into the fleet through normal turnover a lengthy process. With the current level of funding, Texas will not be able to accelerate the introduction of a sufficient number of cleaner diesel engines into the fleet to achieve the emission reductions necessary to demonstrate attainment by November 15, 2007.

C. What Are the Consequences if We Make Final This Proposed Finding of Failure To Implement?

Under the authority of section 179(a)(4) of the Act, if we make a finding that a provision of an approved plan is not being implemented, then the deficiency identified in the finding must be corrected within 18 months or sanctions will begin to apply. There are two types of sanctions: Highway

Sanctions (section 179(b)(1)) and Offset Sanctions (section 179(b)(2)).

In accordance with our regulations implementing the sanction provisions of the Act, if the State has not corrected the deficiencies in the TERP program within 18 months of the effective date of a final finding, the 2 to 1 offset sanction in CAA section 179(b) will apply in the HG area (40 CFR 52.31(d)(1)). This sanction requires a company that is constructing a new or modifying an existing facility over a certain size to reduce emissions in the area by two tons for every one ton of VOC or NO_x the new/modified facility will emit. The current offset ratio in the HG area is 1.3 to 1.

If Texas has not corrected the deficiencies within six months after the offset sanction is imposed, then the highway sanction will apply in the HG nonattainment area (40 CFR 52.31(d)(1)). This sanction prohibits the U.S. Department of Transportation from approving or funding all but a few specific types of transportation projects.

The order of sanctions, offset sanctions first then highway sanctions, is set in EPA's regulations at 40 CFR 52.31. If sanctions have been imposed, they will be lifted when we determine, after the opportunity for public comment, that the implementation deficiencies have been corrected. The imposition of sanctions may be stayed or deferred based on a proposed determination that the State will correct the implementation deficiencies (40 CFR 52.31(d)(4)).

D. How Can Texas Correct This Deficiency?

The State has an opportunity in the 2003 78th Legislative Session to develop funding mechanisms that would provide sufficient funds for the TERP measure included in the currently approved SIP, which again accounts for approximately 19 tons per day of emission reductions. Alternatively, the State can revise the State Implementation Plan by either adopting new measures to replace the TERP in its entirety, or by adopting new measures sufficient to account for any loss in emission reductions associated with that portion of the TERP that is unfunded. Because the HG SIP already includes stringent controls on virtually every source category, finding additional measures will be very difficult. New measures could include implementing fuels measures, implementing stricter transportation controls, such as "no drive" days, and/or reducing the industrial cap in the HG area.

II. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

C. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the

process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not establish any new requirement with which the State must comply nor does it alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Rather, consistent with the Clean Air Act requirements, this action proposes that the State is not complying with provisions already approved in the SIP. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

D. Executive Order 13175

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000). Thus, Executive Order 13175 does not apply to this rule.

E. Executive Order 13211

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

F. Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP findings of failure to implement under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply find failure to implement requirements that already apply under the approved SIP. Therefore, because

the Federal SIP finding of failure to implement does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

G. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the finding of failure to implement action proposed does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to find failure to implement pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements.

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

Dated: July 25, 2002.

Gregg A. Cooke,

Regional Administrator, Region 6.

[FR Doc. 02-19439 Filed 7-31-02; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX-140-1-7540; FRL-7254-5]

Proposed Approval, or in the Alternative, Disapproval of State Implementation Plan; Texas; Dallas/Fort Worth Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to take one of two alternative actions regarding the Dallas/Fort Worth (DFW) State Implementation Plan (SIP). First, the EPA proposes to approve the Texas Emission Reduction Program (TERP) submission if the State provides a funding mechanism that will ensure funding at or above the level contemplated in the State's SIP submission. Second, in the alternative, EPA proposes to disapprove the SIP submission of the TERP because the state does not have adequate funding as required by the Clean Air Act. Because the TERP is necessary to achieve emission reductions relied on in the attainment demonstration for the DFW area, EPA also proposes to disapprove the DFW attainment demonstration SIP if funding at or above the level contemplated in the attainment demonstration is not reinstated or other equivalent emission reduction measures are enacted. If EPA makes final these proposed disapprovals, Texas will have to correct the identified deficiencies within 18 months or the first set of sanctions will begin pursuant to sections 179(a) and (b) of the Clean Air Act (Act) and conformity will lapse.

DATES: Written comments must be received on or before September 3, 2002.

ADDRESSES: Written comments should be addressed to Mr. Thomas H. Diggs, Chief, Air Planning Section (6PD-L), at the EPA Region 6 Office listed below. Copies of documents relevant to this action are available for public inspection during normal business hours at the following locations.

Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733. Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT:

Herbert R. Sherrow, Jr., Air Planning Section (6PD-L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, telephone (214)665-7237. e-mail: sherrow.herb@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document "we," "us," and "our" refers to EPA.

What Is the Background for This Action?

The DFW attainment demonstration SIP was submitted on April 25, 2000.

On April 30, 2000, the Governor of Texas submitted to us two SIP rule revisions. The rules established non-road construction equipment operating limitations and accelerated purchase and operation of non-road compression-ignition fleet equipment in the DFW area.

The accelerated purchase rule required those in the DFW ozone nonattainment area who own or operate non-road equipment powered by compression-ignition engines 50 hp and up to meet certain requirements regarding Tier 2 and Tier 3 emission standards. For more information on the Tier 2 and Tier 3 emission standards, see 40 CFR 89.112, "Oxides of nitrogen, carbon monoxide, hydrocarbon, and particulate matter exhaust emission standards."

The rule phased-in Tier 2,3 engines on a schedule earlier than the federal schedule, depending on horsepower. The rule would have the effect of accelerating the turnover rate of compression-ignition engine, non-road equipment. Generally, the rule affected diesel equipment 50 hp and larger used in construction, general industrial, lawn and garden, utility, and material handling applications.

The purpose of the construction ban rule was to establish a restriction on the use of construction equipment (non-road, heavy-duty diesel equipment rated at 50 hp and greater) as an air pollution control strategy until after 10 o'clock a.m. As a result, production of ozone precursors would be stalled until later in the day when optimum ozone formation conditions no longer existed, ultimately reducing the peak level of ozone. The restrictions were to apply from June 1 through October 31.

The rule allowed operators to submit an alternate emissions reduction plan by