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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R06-OAR-2005-TX-0022; FRL-7959-5]

#### Limited Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown and Malfunction Activities

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

**ACTION:** Final rule.

**SUMMARY:** This action finalizes limited approval of revisions to the Texas State Implementation Plan (SIP) concerning excess emissions which we proposed, through the parallel processing mechanism, on May 9, 2005. Specifically, we are finalizing limited approval of revisions to 30 TAC Chapter 101, General Air Quality Rules concerning excess emissions during startup, shutdown, and malfunction (SSM) activities. The action will have the effect of extending the expiration date of certain provisions from June 30, 2005 to no later than June 30, 2006. Texas has made this change to allow for additional time before these provisions expire from the SIP to submit a revised excess emissions rule for our approval into the SIP.

**DATES:** This rule is effective on September 26, 2005.

**ADDRESSES:** Copies of the 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 Commission on Environmental Quality (TCEQ), Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

**FOR FURTHER INFORMATION CONTACT:** Mr. Alan Shar of the Air Planning Section (6PD-L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733 at (214) 665-6691, [shar.alan@epa.gov](mailto:shar.alan@epa.gov).

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In this document “we,” “us,” and “our” refer to EPA.

#### I. Background Information

##### 1. What Actions Are We Taking in This Document?

On May 9, 2005 (70 FR 24348) we proposed limited approval of revisions to the Texas SIP pertaining to excess emissions during SSM activities. See 30 TAC, General Air Quality Rule 101, subchapter F, sections 101.221, 101.222, and 101.223. The currently approved Texas SIP provides that these three provisions of the State rules, that address excess emissions resulting from SSM related activities, will expire by their own terms on June 30, 2005. In granting a limited approval of those provisions of the State rule EPA interpreted those provisions to mean the subsections would expire from the approved SIP on that date (June 30, 2005).

Our May 9, 2005 (70 FR 24348) proposal addressed changes to each of these three provisions which would extend the expiration date to as late as June 30, 2006. Specifically, the State revised each of the three subsections to provide:

“This section expires on January 15, 2006, unless the commission submits a revised version of this section to the Environmental Protection Agency (EPA) for review and approval into the Texas state implementation plan. If the commission submits a revised version of this section, this section expires on June 30, 2006.”

See 30 TAC, General Air Quality Rule 101, Subchapter F, subsections 101.221(g), 101.222(h), and 101.223(e).

Today, we are taking final action on the May 9, 2005 (70 FR 24348) proposal. Because we proposed to approve these revisions prior to the time the State completed its state rulemaking process, we compared the final version of the adopted State submission with the submission on which the proposed rulemaking was based. The comparison reveals no changes in the State’s final submission. The change we are approving today will, in effect, extend the expiration date of the affected sections from June 30, 2005 to January 15, 2006, unless the State submits a replacement rule to EPA, which would have the effect of extending the

expiration date in the SIP to June 30, 2006.

The EPA believes it is important to reiterate our interpretation of the phrase in the State’s rule, “submits a revised version of this section.” If we receive a SIP submission of a state-adopted revised version of the specified sections prior to January 15, 2006, we will review the submission for completeness in accordance with our completeness regulations. See 40 CFR Part 51, Appendix V. If the State fails to submit an adopted rule by January 15, 2006, or submits a SIP that we determine is incomplete, the existing regulations will expire from the SIP effective January 15, 2006. If we find the submission complete, then the rule will expire from the SIP on June 30, 2006, or at an earlier date if so provided by a replacement rule that we approve into the Texas SIP prior to June 30, 2006.

The EPA intends to work with the State during the State’s rulemaking process to identify any issues that would prevent our full approval of the replacement rule. Although we cannot prejudge our ultimate decision on a future SIP submission prior to our review of such revisions and our consideration of any public comments in response to our proposed action on such submission, we will attempt to identify any issues that would prevent our full approval of the replacement rule during the State’s rulemaking process and any preliminary discussions we may have with the State.

We are granting limited, rather than full, approval of this SIP submittal. We are granting limited approval of this rule because we granted limited approval of the regulations which are modified by this revision. Although this action will extend the expiration date of sections 101.221, 101.222, and 101.223, the basis for our limited approval of the State’s excess emissions rules remains unchanged as explained in our March 30, 2005 (70 FR 16129) rulemaking action.

##### 2. What Documents Did We Use in the Evaluation of This Rule?

The EPA’s interpretation of the Act on excess emissions occurring during SSM is set forth in the following documents: a memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, entitled “Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions;” EPA’s clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation; EPA’s policy

memorandum reaffirming and supplementing the above policy, dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 1999 Policy); EPA's final rule for Utah's sulfur dioxide control strategy (Kennecott Copper), 42 FR 21472 (April 27, 1977), and EPA's final rule for Idaho's sulfur dioxide control strategy, 42 FR 58171 (November 8, 1977); and the latest clarification of EPA's policy issued on December 5, 2001. See the policy or clarification of policy at: <http://www.epa.gov/ttn/oarpg/t1pgm.html>.

To find the latest Federally approved Texas SIP concerning excess emissions see 70 FR 16129 (March 30, 2005).

### 3. Who Submitted Comments to Us?

We received written comments on our May 9, 2005 (70 FR 24348) proposed limited approval of the Texas SIP revision. The comments were submitted by the Environmental Integrity Project, Galveston-Houston Association for Smog Prevention, Sierra Club Lone Star Chapter, Blue Skies Alliance, Downwinders at Risk, Community In-Power and Development Association, Public Citizen's Texas Office, and Texas Public Interest Research Group (the Commenters) during the public comment period.

### 4. What Is Our Response to the Submitted Written Comments?

Our responses to the written comments concerning the proposed May 9, 2005 (70 FR 24348), Texas SIP revision are as follows:

*Comment #1:* The Commenters agree that we should grant a limited approval of the extended expiration date in subsections 101.221(g) and 101.223(e), but claim that for the following reasons (see Comments #2, 3, and 4) we should disapprove the extension of the expiration date in subsection 101.222(h).

*Response to Comment #1:* We appreciate the Commenters' support of limited approval of subsections 101.221(g) and 101.223(e). See our responses to Comments #2, 3, and 4 of this document concerning subsection 101.222(h).

*Comment #2:* The Commenters state that an affirmative defense cannot apply to emissions exceedances of the Federally promulgated performance-based or technology driven standards

such as New Source Performance Standards (NSPS), and National Emissions Standards for Hazardous Air Pollutants (NESHAP). While EPA's interpretation of Texas' rules is clear from EPA's statements in the final limited approval (70 FR at 16132), EPA should not approve a revision to the Texas rules unless Texas clarifies on the face of the rule that any affirmative defense does not apply to Federally promulgated performance-based or technology driven standards or other Federal requirements.

*Response to Comment #2:* We agree that in order to receive a full approval of the rule, Texas needs to revise the rule to make clear that the affirmative defense is not available for violations of Federally promulgated performance-based or technology driven standards such as NSPS and NESHAP. In this action, we are only considering a brief extension of the existing rule for which we issued a limited approval on March 30, 2005. Because the extension of the expiration date is brief, we do not believe the underlying flaws in the rule mandate a disapproval of the extension and that it is appropriate to grant a limited approval of the revised expiration date. However, we note that EPA will not approve any further extensions of the expiration date in the absence of the State correcting the defects in the current rule. See section 1 of our May 9, 2005 (70 FR 24349).

*Comment #3:* The Commenters state that subsection 101.222(c) exempts excess emissions during scheduled maintenance, startup, and shutdown from permitting requirements, if certain criteria are met, and conclude that such exemptions could jeopardize SIP's ability to attain and maintain compliance with the SIP. In addition, the commenters note that EPA's SSM guidance makes clear that scheduled maintenance, startup and shutdown activities should be accounted for in the plan and design, and an affirmative defense should not be available. The Commenters state that because subsections 101.222(c) and (e) violate the Act and EPA's guidance, EPA cannot approve an extension of the expiration date for these provisions.

*Response to Comment #3:* We agree with many of the points raised by the Commenters regarding the underlying flaws with subsections 101.222(c) and (e), and those flaws were the basis for our limited, rather than full approval of the State's excess emissions rules. See section 3 of our March 30, 2005 (70 FR 16130-16131).

However, we do not think the brief extension of the expiration date at issue

here will have a significant effect and that it is appropriate to grant a limited approval of the revised expiration provision. As noted above, however, we will not grant any further extensions of the expiration date in the absence of a submitted SIP revision correcting the defects in the rule. See section 1 of our May 9, 2005 (70 FR 24349).

*Comment #4:* The Commenters state that because subsections 101.222(b) and (d) limit the ability of citizen and EPA enforcement, EPA cannot approve the extension of the expiration date for these provisions under section 101.222(h).

*Response to Comment #4:* In part, we based our rationale for a limited, rather than a full, approval of Texas SSM rule on concerns similar to those expressed by the Commenters. See our explanation at 70 FR 16130. As provided above, however, we do not believe these flaws with the rule for which we granted a limited approval mandate that we disapprove the brief extension of the expiration date.

This concludes our responses to the written comments we received during public comment period concerning May 9, 2005 (70 FR 24348), Texas proposed SIP revision.

### 5. What Areas in Texas Will These Rule Revisions Affect?

These rule revisions affect all sources of air emissions operating within the State of Texas that are subject to emission reduction requirements under the State's SIP approved regulations.

## II. Final Action

Today, we are finalizing limited approval of the deletion of existing SIP subsections 101.221(g), 101.222(h), and 101.223(e) and the addition of revised subsections 101.221(g), 101.222(h), and 101.223(e) into the Texas SIP. We published the proposal for this limited approval on May 9, 2005 (70 FR 24348).

## III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule

will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 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. The EPA will submit a report containing this rule 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. section 804(2).

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 October 25, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Excess emissions, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 10, 2005.

**Lawrence Starfield,**

*Acting Regional Administrator, Region 6.*

■ 40 CFR part 52 is amended:

**PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

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

**Subpart SS—Texas**

■ 2. The table in § 52.2270(c) entitled "EPA Approved Regulations in the Texas SIP" is amended by revising the entries for sections 101.221, 101.222, and 101.223 to 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
* * *	<b>Chapter 101—General Air Quality Rules</b>	* * *	* * *	* * *
* * *	<b>Subchapter F—Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities</b>	* * *	* * *	* * *
Section 101.221 .....	Operational Requirements .....	06/03/05	08/26/05, [Insert FR citation from published date].	With Expiration Date.
Section 101.222 .....	Demonstrations .....	06/03/05	08/26/05, [Insert FR citation from published date].	With Expiration Date.
Section 101.223 .....	Actions to Reduce Excessive Emissions.	06/03/05	08/26/05, [Insert FR citation from published date].	With Expiration Date.
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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[TX 126-1-7690; FRL-7960-4]

**Approval and Promulgation of Air Quality Implementation Plans; Texas; Dallas-Fort Worth Voluntary Mobile Emission Reduction Program**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Texas. This revision approves the Dallas-Fort Worth (DFW) Voluntary Mobile Emission Reduction Program (VMEP) which is relied upon to achieve the National Ambient Air Quality Standard (NAAQS) for ozone in the DFW nonattainment area.

**DATES:** This rule is effective on September 26, 2005.

**ADDRESSES:** Copies of the documents relevant to this action are in the official file which is available at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214-665-7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

Copies of any State submittals and EPA's technical support document are also available for public inspection at the State Air Agency listed below

during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

**FOR FURTHER INFORMATION CONTACT:** Sandra Rennie, Air Planning Section (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7367; fax number 214-665-7263; e-mail address *rennie.sandra@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

**Outline of Topics**

- I. What Action Is EPA Taking and Why?
- II. What Are the Federal Requirements?
- III. What Is the Background for This Action?
- IV. What Did the State Submit?
- V. What Does the DFW VMEP Include?
- VI. What Comments Did EPA Receive in Response to the January 18, 2001, Proposed Rule?
- VII. EPA's Final Rulemaking Action
- VIII. Statutory and Executive Order Reviews

**I. What Action Is EPA Taking and Why?**

We are approving the DFW VMEP into the Texas SIP. We are taking this action because the State submitted a SIP revision that relies on the VMEP to achieve the NAAQS in the DFW ozone nonattainment area.

**II. What Are the Federal Requirements?**

Section 172 of the Act provides the general requirements for nonattainment plans. Section 172(c)(6) and section 110 require SIPs to include enforceable emission limitations, and such other control measures, means or techniques as well as schedules and timetables for compliance, as may be necessary to provide for attainment by the applicable attainment date. Today's action involves approval of one of a collection of controls adopted by the State to achieve the ozone standard in the DFW nonattainment area as required under section 172. EPA approval of this SIP revision is governed by section 110 of the Act.

**III. What Is the Background for This Action?**

In the **Federal Register** published on January 18, 2001 (66 FR 4756) we proposed to approve a Voluntary Mobile Emissions Reduction Program (VMEP) in nine counties (including the DFW 4-county area) as local initiatives. The counties are Collin, Dallas, Denton, and Tarrant along with the surrounding counties of Ellis, Johnson, Kaufman, Parker, and Rockwall.

Voluntary mobile source strategies that attempt to complement existing regulatory programs through voluntary, non-regulatory changes in local transportation activities or changes in in-use vehicle and engine composition constitute the VMEP. EPA concludes that the Clean Air Act allows SIP credit for new approaches to reducing mobile source emissions. This flexible approach is consistent with section 110. Up to 3% of the total future year emissions reductions required to attain the appropriate NAAQS may be claimed under the VMEP policy.<sup>1</sup>

Specifically, the guidance suggests key points be considered for approval of credits. The credits should be quantifiable, surplus, enforceable, permanent, and adequately supported. The State must timely assess and backfill any shortfall pursuant to enforceable commitments in the SIP in the event that the projected emission reductions are not achieved. In addition, VMEPs must be consistent with attainment of the standard and with the Rate of Progress requirements and not interfere with other Clean Air Act requirements.

**IV. What Did the State Submit?**

The State submitted program descriptions that projected emission reductions attributable to each specific voluntary program. These program descriptions were included in the DFW 1-hour ozone SIP revision submitted April 25, 2000.

**V. What Does the DFW VMEP Include?**

The following Table lists the programs and projected credits. Programs submitted with no credit assigned are also listed.

**VOLUNTARY MOBILE EMISSION REDUCTION PROGRAMS AND CREDITS CLAIMED**

Program type	VOC benefits (tons per day)	NO <sub>x</sub> benefits (tons per day)
Alternative Fuel Program .....	0.18	0.18
Employee Trip Reduction .....	0.29	0.53
Public Education Campaign/Ozone Season Fare Reduction .....	0.08	0.15

<sup>1</sup> Memorandum from Richard D. Wilson, Acting Assistant Administrator for Air and Radiation,

dated October 24, 1997, entitled "Guidance on Incorporating Voluntary Mobile Source Emission

Reduction Programs in State Implementation Plans (SIPs)."