Comments by the Texas Commission on Environmental Quality

Regarding DISApproval of Air Quality Implementation Plans:

Interstate Transport of Air Pollution for the

2008 Ozone National Ambient Air Quality Standards

EPA Docket ID No. EPA-R06-OAR-2012-0985

# I. Background

On April 11, 2016, the United States (U.S.) Environmental Protection Agency (EPA) published in the *Federal Register* a proposal to disapprove the portion of the Texas State Implementation Plan (SIP) submittal pertaining to interstate transport of air pollution that will significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone National Ambient Air Quality Standard (NAAQS) in other states. This disapproval would establish a two-year deadline for the EPA to promulgate a Federal Implementation Plan (FIP) for Texas to address the Federal Clean Air Act (FCAA) interstate transport requirements pertaining to significant contribution to nonattainment and interference with maintenance of the 2008 ozone NAAQS in other states, unless the EPA approves a SIP that meets these requirements before that time.

On March 12, 2008, the EPA revised the levels of the primary and secondary eight-hour ozone NAAQS from 0.08 parts per million (ppm) to 0.075 ppm (73 FR 16436). States are required to submit a SIP meeting the applicable ‘‘infrastructure’’ elements of FCAA Section 110(a)(1) and (2) within three years after promulgation of a new or revised NAAQS. On December 13, 2012, Texas submitted a SIP revision addressing the FCAA infrastructure requirements for the 2008 ozone NAAQS.

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on this proposed rule.

# II. Comments

1. The TCEQ does not support the proposed partial disapproval of Texas’ Infrastructure and Transport SIP revision for the 2008 ozone NAAQS pertaining to the FCAA, §110(a)(2)(D)(i)(I) requirement to address interstate transport.

The EPA proposes to disapprove the portion of Texas’ December 13, 2012 Infrastructure and Transport SIP revision submittal for the 2008 ozone NAAQS pertaining to the FCAA, §110(a)(2)(D)(i)(I) requirement to address the interstate transport of air pollution that will significantly contribute to nonattainment or interference with maintenance of the 2008 ozone NAAQS in other states. The TCEQ does not support the proposed partial disapproval and maintains that the transport analysis provided in the December 13, 2012 submittal adequately addressed the transport requirements of FCAA, §110(a)(2)(D)(i)(I). For this reason and as discussed in the TCEQ’s other comments below, the TCEQ does not support disapproval of the Texas Infrastructure and Transport SIP.

1. The EPA failed to issue guidance in a timely manner for states to use in developing infrastructure and transport SIP revisions for the 2008 ozone NAAQS.

Texas submitted its Infrastructure and Transport SIP revision for the 2008 ozone standard on December 13, 2012 in order to meet the January 4, 2013 deadline by which the EPA was court-ordered to issue findings of failure to submit infrastructure SIPs for the 2008 ozone NAAQS. The EPA issued guidance for states to use in developing infrastructure SIP revisions on September 13, 2013, eight months *following* the January 2013 deadline. In addition to the guidance being issued too late to be useful for 2008 ozone infrastructure SIP development, the document also did not provide guidance on transport. The EPA did not provide information to states regarding transport for the 2008 ozone NAAQS until 2015, through information provided in a January 22, 2015 memo, an August 4, 2015 notice of data availability (NODA), and the December 3, 2015 Cross State Air Pollution Rule (CSAPR) Update Rule proposal.

In order to meet statutory deadlines, states do not have the option of waiting for the EPA to provide guidance before proceeding with SIP development, review, and submittal and must proceed without the EPA’s formal guidance to develop submittals based on information available at the time. As a result of the EPA’s lack of timely transport guidance for the 2008 ozone standard and subsequent NODA regarding nonattainment and maintenance receptor linkages and contributions, Texas was forced to expend effort and resources to develop its SIP revision without knowing how the EPA would evaluate Texas’ transport obligation.

Overall, the EPA has routinely failed to issue timely guidance for SIP revisions and to even meet statutory SIP review deadlines in the FCAA. As a result, the EPA has disrupted the SIP development process nationwide, undermining the states’ ability to submit sufficient SIP revisions.

1. It is inappropriate for the EPA to state that the TCEQ’s analysis of ozone contributions to other areas is incomplete when it did not provide timely guidance stating what would constitute a complete analysis.

As previously stated, the EPA did not issue guidance until after the court-ordered deadline to issue findings of failure to submit infrastructure SIPs for the 2008 ozone NAAQS. Even then, the guidance did not contain any information on what the EPA believed would be an adequate analysis of ozone transport to other areas. In addition, the EPA’s modeling was not available until 2015, several years after the SIP submittal deadline. In the absence of guidance, Texas provided what was considered to be an adequate analysis of ozone transport to other states.

1. The EPA prematurely prepared a FIP before even proposing action on Texas’ timely submitted SIP revision to address 2008 eight-hour ozone standard transport requirements. Despite the EPA’s claims of not pre-judging submitted SIPs, the EPA took unwarranted action by proposing the 2008 ozone CSAPR FIP for states that had SIPs awaiting EPA action.

Texas submitted its Infrastructure and Transport SIP revision for the 2008 eight-hour ozone NAAQS to the EPA on December 13, 2012. The EPA had almost three years to review the SIP revision prior to the EPA’s December 3, 2015 proposal of the CSAPR Update Rule FIP to address transport under the 2008 ozone standard. The EPA took no action on Texas’ transport submittal until this proposed disapproval, four months after proposing this FIP. Had the EPA reviewed the 2008 ozone nonattainment SIP revision before proposing this FIP, the purpose of which is to correct deficiencies in such a SIP, Texas would have had the opportunity contemplated by the FCAA to correct any problems with its SIP in a timely fashion and avoid the imposition of the FIP. The EPA claimed in the proposed CSAPR Update FIP that states would have time to review previously submitted SIPs, and make any necessary corrections to bring states into compliance with the proposed FIP requirements before the FIP becomes final, ignoring the timelines necessary for proper development of any necessary modeling or potential control strategies, including required notice and comment opportunities for the public. However, the EPA proposed the CSAPR Update FIP before even notifying Texas of what corrections it deemed necessary for approval. As the EPA acknowledged in the FIP proposal, the FCAA requires the Administrator to promulgate a FIP after the Administrator finds that a state has failed to make a required submission, finds that the plan does not satisfy the minimum criteria, or disapproves a SIP submission in whole or in part. Texas did submit a SIP for approval by the Administrator, and the Administrator failed to either find that the plan does not meet the minimum criteria or disapprove the SIP submission prior to proposing the CSAPR Update FIP and including Texas. To justify the proposed CSAPR Update FIP, the EPA stated “[t]o the extent that EPA has not finalized action on these submitted SIPs, these states can evaluate their submissions in light of this proposal…” (80 FR 75720). By proposing CSAPR Update FIP and including Texas, the EPA essentially required that Texas conform its SIP to the proposed FIP without first properly taking action on the SIP as required by the FCAA.

1. The EPA inappropriately states that Texas should have considered possible contributions to downwind areas that are not designated nonattainment but may nonetheless measure exceedances of the NAAQS.

The EPA fails to mention how Texas might have accomplished this theoretical exercise particularly without EPA guidance on how to develop its transport SIP. This is particularly true when, as it did in this instance, the EPA relies on nationwide modeling to determine potential exceedances in areas that are attaining the NAAQS that is not made available to states prior to the statutory due dates for state transport SIPs. The EPA may now consider the CSAPR schema to be appropriate guidance for transport regulation, however, it is still not possible for states to effectively respond with timely transport SIPs.

In addition, as mentioned in comment 3, when the EPA did issue formal guidance in 2013, it did not explain what type of transport analysis would be considered satisfactory.

1. The EPA states that Texas failed to give independent consideration to possible contributions that may interfere with maintenance in downwind areas. However, the EPA has consistently failed to identify any balance between local controls in areas with potential maintenance problems and reductions that it is requiring of states upwind that it models as contributing at least 1% of the relevant NAAQS to these areas with modeled, not monitored, issues.

The EPA has claimed in its December 2015 CSAPR Update proposal (80 FR 75706) that it is giving independent effect to potential nonattainment and maintenance monitors; however, there is actually no “independent effect” since nonattainment and maintenance receptors are treated exactly the same way as far as linkages to states are defined and emission budgets are set. While the EPA goes to great lengths to distinguish the two classes of receptors (monitors), this distinction amounts to nothing more than a name game, and the implications for an upwind state are the same. A state is linked to a monitor if and only if the highest of the projected future year design values is greater than 75 ppb, and all linkages are treated identically except for being listed in separate tables for “nonattainment” and “maintenance” monitors. Simply labeling monitors differently but making no other distinctions hardly amounts to “independent effect.” The EPA itself acknowledges this fact (80 FR 75730), stating that “… two receptors … are expected to have average design values below the NAAQS with the adjusted base case. However, these receptors are still expected to have maximum design values exceeding the NAAQS with the adjusted base case. Because both of these receptors are also considered maintenance receptors for the purposes of this proposal, their status as identified air quality concerns and ***the status of states linked to these receptors is unchanged*** by the adjusted base case.” [Emphasis added]

The EPA states that all responsibility for meeting the NAAQS will not fall on upwind states (see 80 FR 75709). However, the EPA has linked upwind states, including Texas, to areas that are marginal nonattainment areas for both nonattainment and maintenance. In fact, in the 2008 CSAPR Update Texas is linked to one single “nonattainment” monitor, which is in an area designated as marginal nonattainment (Sheboygan County, Wisconsin (551170006)). The possible modeled linkage to Denver, Colorado that the EPA has identified for the first time in current proposal is also a linkage to a marginal nonattainment area. Additionally, Texas is linked to nine “maintenance” monitors in four areas designated as marginal nonattainment (Camden County, New Jersey (340071001); Gloucester County, New Jersey (340150002); Ocean County, New Jersey (340290006); Queens County, New York (360810124); Richmond County, New York (360850067); Suffolk County, New York (361030002); Hamilton County, Ohio (390610006); Allegheny County, Pennsylvania (420031005); and Philadelphia County, Pennsylvania (421010024)), and to one “maintenance” monitor in one area designated as attainment (Allegan County, Michigan (260050003)). Although Texas is also linked to two “maintenance” monitors in one area designated as moderate nonattainment (Baltimore County, Maryland (240053001); Harford County, Maryland (240251001)), on March 18, 2015, the EPA published a clean data determination for the Baltimore area. Should the EPA finalize that determination, all nonattainment planning requirements for that area would be suspended so long as the area remains in attainment of the 2008 eight-hour ozone standard. This would leave only major source New Source Review (NSR) offsets and Lowest Achievable Emission Rate (LAER) requirements for new or modified major sources as potentially affecting sources within the nonattainment area and would not require any specific emissions reduction within the nonattainment area in the absence of major modifications or new construction of major sources.

Linkages to marginal nonattainment areas means that the EPA is requiring emission reductions from upwind states, including Texas, to assist states that do not have to make emission reductions or institute control strategies of their own to reduce ozone in the absence of major modifications or new construction of major sources. The only nonattainment requirements that marginal nonattainment areas have to meet are the major source NSR offsets and LAER requirements for new or modified major sources within the nonattainment areas. This may, in fact, affect no sources in these areas, as only new and modified construction of sources that meet the nitrogen oxides and volatile organic compounds major source thresholds will have to make any allowances because of these areas’ nonattainment status.

Lastly, the EPA has not promulgated a rule that identifies a required or recommended methodology for states (or even the EPA, itself) to give independent consideration to possible contributions that may interfere with maintenance in downwind areas. It is arbitrary and capricious to propose disapproval for failure to meet a standard or requirement that did not exist at the time the statutory obligation matured.

1. The EPA has not proven that a contribution by upwind states of 1% of the relevant NAAQS will “interfere with” maintenance in identified maintenance areas.

The EPA continues to conflate the requirements necessary to ensure that an upwind area is not “contributing to nonattainment” with the requirement to not “interfere with maintenance.” Texas does not dispute that upwind states are required to not “interfere with maintenance” in downwind areas. However, the EPA has not demonstrated that a 1% of the NAAQS contribution to modeled emissions in maintenance areas is appropriate for linking an upwind state to a maintenance monitor. Nor has the EPA demonstrated that the amount of reductions necessary to cure a contribution to nonattainment is also appropriate to ensure that an upwind state is not interfering with maintenance. The 1% contribution is arbitrary.

1. The TCEQ supports the use of ambient air quality monitoring data as the only valid basis for making nonattainment designations and identifying nonattainment and maintenance receptors.

The TCEQ does not support the use of modeling as the basis for designations or identifying receptors for transport. Such actions have serious consequences to industry, the economy of an area, its citizens, and the state. These actions should only be made based on data from 40 CFR Part 58 compliant (regulatory) monitoring. Using modeling for these actions could result in major capital expenditures for industry to “fix” something that may not be a real problem. To base these actions on modeling is inconsistent with historical and present EPA policies. For example, the EPA does not redesignate when an area models attainment as part of an attainment demonstration SIP. The EPA uses monitoring data to verify attainment before redesignating.

1. The EPA failed to give Texas comments on the adequacy of its analysis and its use of data in areas geographically close to Texas during the public comment period for the SIP.

The EPA did not comment on the adequacy of the TCEQ’s analysis or its use of data from states geographically close to Texas during the public comment period for the Infrastructure and Transport SIP. The EPA made no mention that Texas should provide analysis for other areas in addition to the ones that they already analyzed. The lack of EPA comment led the TCEQ to believe that the submitted analysis was adequate to show how Texas contributes to other states’ ozone concentrations.