



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2017-0192; FRL-9962-32-Region 6]

Approval and Promulgation of Implementation Plans; Texas; Revisions to Emissions Banking and Trading Programs for Area and Mobile Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the Texas State Implementation Plan (SIP) Emissions Banking and Trading Programs submitted for parallel processing on March 10, 2017. Specifically, we are proposing to approve revisions that clarify and expand the existing provisions for the generation and use of emission credits from area and mobile sources.

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2017-0192, at <http://www.regulations.gov> or via email to wiley.adina@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make.

The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Adina Wiley, 214-665-2115, wiley.adina@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Adina Wiley, 214-665-2115, wiley.adina@epa.gov. To inspect the hard copy materials, please schedule an appointment with Ms. Adina Wiley or Mr. Bill Deese at 214-665-7253.

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

I. Background

A. CAA and SIPs

Section 110 of the CAA requires states to develop and submit to the EPA a SIP to ensure that state air quality meets the National Ambient Air Quality Standards (NAAQS). These ambient standards currently address six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. Each federally-approved SIP protects air

quality primarily by addressing air pollution at its point of origin through air pollution regulations and control strategies. The EPA-approved SIP regulations and control strategies are federally enforceable.

The Texas SIP includes several discretionary emissions trading programs developed consistent with the EPA's Economic Incentive Program (EIP) Guidance, that are designed to promote flexibility and innovation in complying with State and Federal air emission requirements established in the SIP and the SIP-approved air permitting programs.¹ This proposed action will address revisions to two of the Texas emissions trading programs – the Texas Emission Credit (EC) and Discrete Emission Credit (DEC) Programs that were submitted to the EPA on March 10, 2017, with a request for parallel processing. The EPA is proposing approval at the same time that the Texas Commission on Environmental Quality (TCEQ) is completing the corresponding public comment and rulemaking process at the state level. The March 10, 2017, SIP revision request will not be complete and will not meet all the SIP approvability criteria until the state completes the public process and submits the final, adopted SIP revision with a letter from the Governor or Governor's designee to EPA. The EPA is proposing to approve the SIP revision request after completion of the state public process and final submittal. Please see the Technical Support Document (TSD) accompanying this rulemaking for an identification of the specific sections impacted by this proposed rulemaking.

B. Overview of the Texas Emissions Banking and Trading Programs

¹ "Improving Air Quality with Economic Incentive Programs" (EIP Guidance) (EPA-452/R-01-001, January 2001) is the EPA guidance document for reviewing and approving discretionary EIP submittals. The EIP Guidance applies to the establishment of a discretionary EIP for attaining or maintaining the NAAQS for criteria pollutants. The EIP Guidance supersedes and takes precedence over the discretionary EIP guidance provided in prior documents such as the 1994 EIP (April 7, 1994, 59 FR 16690, 40 CFR part 51, subpart U) and the guidance in the emission trading policy statement (ETPS) (December 4, 1986, 51 FR 43813).

1. The EC Program

The EC Program enacted at 30 Texas Administrative Code (TAC) Chapter 101, Subchapter H, Division 1 allows owners or operators of a facility or mobile source to generate emission credits by reducing emissions of criteria pollutants or their precursors, with the exception of lead, below any applicable regulations or requirements. Emission credits are generated and banked in terms of rate (tons per year). The ECs encompass reductions generated and banked from stationary sources as emission reduction credits (ERCs) or generated and banked from mobile sources as mobile emission reduction credits (MERCs). The ECs from the bank have traditionally been used as offsets for the permitting of major new or modified facilities in nonattainment areas. ECs have also been banked and traded for alternative compliance with Reasonably Available Control Technology (RACT) requirements. The EPA initially approved the EC program on September 6, 2006 (71 FR 52698) with updates approved on May 18, 2010 (75 FR 27647). The EPA has taken a separate action via a direct final rulemaking to address the revisions to the EC Program adopted on June 5, 2015 and submitted to the EPA as a SIP revision on August 14, 2015. *See* 82 FR 21919, May 11, 2017.

On March 8, 2017, the TCEQ Commissioners voted to propose for adoption revisions to the EC Program that clarify and augment the existing regulations pertaining to the generation and use of ECs from area and mobile sources. The TCEQ submitted this proposal package on March 10, 2017 with a request for parallel processing.

2. The DEC Program

The DEC Program enacted at 30 TAC Chapter 101, Subchapter H, Division 4 allows an owner or operator of a facility or mobile source to generate discrete emission credits by reducing emissions of criteria pollutants or their precursors, with the exception of lead, below any

applicable regulation or requirement. Discrete emission credits (DECs) are quantified, banked and traded in terms of mass (tons), not a rate as is the case with ECs. DECs may be generated from stationary sources and banked as discrete emission reduction credits (DERCs) or may be generated from mobile sources and banked as mobile discrete emission reduction credits (MDERCs). Traditionally DECs have been used for RACT compliance for Volatile Organic Compounds (VOCs) and nitrogen oxides (NO_x); DECs can also be used to offset new major sources or major modifications to existing sources in nonattainment areas. The EPA initially approved the DEC Program on September 6, 2006, with updates approved on May 18, 2010 (75 FR 27644). The EPA is addressing, in a separate direct final action, revisions to the DEC program that were submitted on December 22, 2008; May 14, 2013; and August 14, 2015. *See* 82 FR 21919, May 11, 2017.

On March 8, 2017, the TCEQ Commissioners voted to propose for adoption revisions to the DEC Program that clarify and augment the existing regulations pertaining to the generation and use of DECs from area and mobile sources. The TCEQ submitted this proposal package on March 10, 2017 with a request for parallel processing.

II. The EPA's Evaluation

Both the Texas EC and DEC SIP programs contain existing language to provide for the generation of emission reductions from area and mobile sources. The TCEQ is proposing revisions to the existing regulations to clarify the processes for area and mobile source credit generation and quantification in an effort to incentivize increased utilization of the program. The accompanying TSD for this action includes a detailed analysis of the proposed revisions submitted for EPA's consideration for parallel processing.² In many instances the revisions are

² The accompanying Technical Support Document is available in the rulemaking docket, EPA-R06-OAR-2017-0192.

minor or non-substantive in nature and do not change the intent of the original SIP-approved EC or DEC programs. Following is a summary of our analysis for those revisions that we view as substantive revisions to the existing SIP-approved programs.

A. Addressing Uncertainty in Area and Mobile Source Emission Estimates

The area and mobile source inventories used by TCEQ for attainment planning are based on emission estimates and models rather than actual reported emissions data. To reduce the uncertainty in the emission estimates in the overall area and mobile source inventories, the TCEQ is proposing revisions to the definition of “State Implementation Plan (SIP) emissions” at 30 TAC Sections 101.300(30) and 101.370(31) to discount the overall area and mobile source pool available for generating reductions; 75% of the respective area source and non-road mobile source emissions inventory is eligible to generate emission reductions, and 85% of the on-road mobile source emissions inventory is eligible to generate emission reductions. The TCEQ is also proposing at 30 TAC Sections 101.303(b), 101.304(b), 101.373(b), and 101.374(b) that the emission and activity rates used to determine the historical adjusted emissions for area and mobile source generation strategies will be determined from two consecutive years from the past five years. The lookback window may be extended up to 10 years if the source has detailed operational records to demonstrate the actual emissions.

The EPA proposes that the overall reduction factor in the area and mobile source inventories available for credit generation is appropriate and approvable. We also propose that limiting the lookback window to five years, with the ability to extend up to 10 years if detailed operational records are available, is appropriate and approvable. In both instances, the TCEQ has identified an area of uncertainty and presented a reasonable method for mitigating the uncertainty and ensuring the credits generated under the EC and DEC programs represent real

reductions that will benefit the airshed. Restricting the lookback window to five years addresses the differences in emission estimations used for area and mobile sources and the reported actual emissions in the point source universe. The option to extend the lookback window up to 10 years for detailed operational records will also encourage and incentivize more detailed emissions monitoring and recordkeeping for area and mobile sources.

*B. Limiting the Sources and Strategies Eligible for Generating ECs or DEC*s

The TCEQ has submitted proposed revisions to the General Provisions of the EC and DEC programs at 30 TAC Sections 101.302(c) and 101.372(c) to identify the source categories ineligible for generating ECs or DEC. Examples of ineligible source categories include residential area sources and on-road mobile sources that are not part of an industrial, commercial, nonprofit, institutional, or municipal/government fleet. Additionally, the TCEQ has proposed at 30 TAC Section 101.303(a)(2)(D) that ERCs may not be generated from shutdowns of specific types of inelastic area sources that are driven by population demands.³ A list of inelastic area sources will be maintained by the TCEQ on the agency website; the TCEQ has proposed a methodology where any person can petition the TCEQ Executive Director to add or remove source categories from the list.

The EPA proposes to find that the TCEQ has appropriately revised the EC and DEC programs to identify the sources and types of emission reduction strategies eligible for participation within the programs. The TCEQ has proposed to limit the eligible source categories to those where the sources have required established emissions monitoring and recordkeeping provisions and the TCEQ has the authority to ensure the reductions will be federally enforceable

³ Inelastic is an economic term used to describe when the supply and demand for a good or service is independent of the price. In the context of the proposed Texas rules, an inelastic area source is a source that will exist regardless of economic factors. Gas stations and dry cleaners are examples of inelastic area sources because the population will demand these services regardless of price.

and permanent, as applicable, through construction permits or other certifications. These limits will ensure that the emission reductions generated are real, quantifiable, surplus, and permanent as required by the Texas SIP.

The exclusion of shutdowns from inelastic area sources is an appropriate method to prevent demand shifting – an outcome where one inelastic source (for example, a dry cleaner or gas station) will shut down and the same type of source will open down the street based on population needs and economic considerations. There is no net reduction in emissions in this scenario; by prohibiting inelastic area source shutdowns from generating reductions the TCEQ is protecting the airshed by ensuring generated and banked ERCs will be real, permanent and surplus. The proposed methodology for developing and maintaining the inelastic area source category list is also approvable; the proposed methodology provides a replicable mechanism for public input.

C. Addressing Uncertainty in the Area and Mobile Source Generation Strategy

The TCEQ is proposing additional adjustment factors to address uncertainty in credit generation and quantification at 30 TAC Sections 101.303(c), 101.304(c), 101.372(c) and 101.374(c). For emission reductions from the shutdown of area or mobile sources, the TCEQ is proposing that the amount of ECs or MDERCs will be reduced by 15%. For emission reductions of area or mobile sources using alternative methods for emissions quantifications, the TCEQ is proposing that the amount of ECs or DECAs will be reduced by 15%. If the source is subject to both adjustment factors, the TCEQ proposes the total combined reduction will be 20%.

The EPA proposes to find that the proposed adjustment factors applied to credit generation and certification are approvable. The adjustment factor applied for the shutdown of area or mobile sources will mitigate the possibility of unanticipated demand shifting. The

adjustment factor applied for alternative methods of emissions quantification will address the uncertainty associated with emission estimation techniques and could serve to incentivize the use of more robust emissions monitoring and reporting consistent with point source requirements. These adjustment factors will help ensure that the TCEQ certifies emission reductions that are real, surplus, quantifiable, and permanent as required by the CAA and the Texas SIP.

D. Exceptions to Application Deadlines and Emission Credit Lifetimes

The Texas SIP currently provides that ECs will have a lifetime of 60 months (5 years) from the date of the emission reduction, see 30 TAC Section 101.309(b). The TCEQ has proposed limited exceptions to the EC application deadline and credit lifetimes at 30 TAC Sections 101.303(d) and 101.304(e). The TCEQ has demonstrated that the extended application deadlines and credit lifetimes would apply to a small subset of the potential EC population for a specified time period. These extensions in lifetime are proposed to assist in program implementation, incentivize expeditious plugging of oil and gas wells, and to equitably process the EC applications submitted during the stakeholder and rule development process. Each of the applications with the extended lifetime will be processed by the TCEQ in accordance with the proposed regulations; the TCEQ will apply the overall discount to the area or mobile source inventories and apply the adjustment factors to address uncertainty in the emission estimations and unanticipated activity shifting. The TCEQ also has existing SIP-authority at 30 TAC Section 101.302(g), proposed to be renumbered as 101.302(i), to require recordkeeping beyond the nominal 5 year lifetime of the EC. In its preamble to the proposed state rule, the TCEQ interprets this existing SIP-authority to require recordkeeping for the entirety of the extended EC lifetime and states this requirement would be annotated in the federally enforceable certification paperwork required by the TCEQ executive director; thereby ensuring that the recordkeeping for

the ECs with the extended lifetime continues to satisfy the CAA and the Texas SIP.⁴ The proposed limited exceptions to the EC application deadline and credit lifetimes at 30 TAC Sections 101.303(d) and 101.304(e) are approvable. We are making a preliminary finding that the TCEQ has appropriately defined the scope of the EC program and has the authority to require recordkeeping for the life of the generated ECs to ensure compliance with the CAA and the Texas SIP.

E. Clarification of the DEC Program to provide for the generation of MDERCs from shutdowns

The TCEQ is proposing to clarify the existing SIP-approved language for MDERC generation at 30 TAC Section 101.374(c)(1) to explicitly provide for the generation of MDERCs from shutdowns, including permanent shutdowns and temporary curtailments of activity from a mobile source. The TCEQ must still review each MDERC generated from a shutdown to determine whether the reduction is real, quantifiable, surplus and enforceable before certifying the reduction, consistent with the Texas SIP and the CAA.

The EPA is proposing to approve the clarification of the MDERC generation language to provide for generation of credits from mobile source shutdowns. Sources have traditionally not availed themselves of the current SIP provisions for generating MDERCs, therefore any generation of emission reductions (including those from the shutdown of mobile sources) would likely be considered innovative and novel. The DEC program is an open market trading program designed to promote creative and innovative emission strategies. We believe that emission reduction strategies for the shutdown of mobile sources is consistent with the intent of the EIP because these strategies could result in a benefit to the specific airshed and promote and incentivize mobile source reductions. The emission adjustment factor of 15% proposed by the

⁴ See 42 *TexReg* 1340, March 24, 2017.

TCEQ will address any uncertainties associated with the generation of MDERCs from shutdowns or concerns about activity shifting, further ensuring that the reduction strategies generate real, enforceable and surplus reductions.

F. Analysis under section 110(l) of the CAA

Our analysis indicates that the March 8, 2017 regulations proposed for adoption by TCEQ have been developed in accordance with the CAA and submitted on March 10, 2017 with a request for parallel processing. The Texas EC and DEC programs are SIP-approved programs that provide for compliance flexibility and generation and use of emission credits in the SIP-approved nonattainment New Source Review permitting program. The proposed revisions to the EC and DEC programs further clarify and update the existing programs specific to the generation and use of emission reductions from area and mobile sources. These submitted proposed revisions do not change the fundamental premise or structure of the approved programs. Therefore, we find that the proposed revisions to the EC and DEC programs will not interfere with attainment, reasonable further progress or any other applicable requirements of the Act.

III. Proposed Action

The EPA has made the preliminary determination that the March 10, 2017, proposed revisions to the Texas SIP and request for parallel processing are in accordance with the CAA and consistent with the CAA and the EPA's policy and guidance on emissions trading. Therefore, under section 110 of the Act, the EPA proposes to approve the following revisions to the Texas SIP that were proposed for adoption on March 8, 2017 and submitted for parallel processing on March 10, 2017:

- Revisions to 30 TAC Section 101.300;
- Revisions to 30 TAC Section 101.302;

- Revisions to 30 TAC Section 101.303;
- Revisions to 30 TAC Section 101.304;
- Revisions to 30 TAC Section 101.306;
- Revisions to 30 TAC Section 101.370;
- Revisions to 30 TAC Section 101.372;
- Revisions to 30 TAC Section 101.373;
- Revisions to 30 TAC Section 101.374; and
- Revisions to 30 TAC Section 101.376.

The EPA is proposing this action in parallel with the state's rulemaking process. We cannot take a final action until the state completes its rulemaking process, adopts its final regulations, and submits these final adopted regulations as a revision to the Texas SIP. If during the response to comments process, the state rule is changed significantly from the proposed rule and the rule upon which the EPA proposed, the EPA may have to withdraw our initial proposed rule and repropose based on the final SIP submittal.

IV. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the Texas regulations as described in the Proposed Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or in hard copy at the EPA Region 6 office.

V. Statutory and Executive Order Reviews

Under the CAA, 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, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- 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);
- 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, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 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).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: May 24, 2017.

Samuel Coleman,

Acting Regional Administrator, Region 6.

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