



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA-R08-OAR-2019-0002; 9991-98-Region 8]

Federal Implementation Plan to Establish a Bank for Ozone Precursor Emission Reduction Credits from Existing Sources on Indian Country Lands within the Uinta Basin Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The purpose of this Advance Notice of Proposed Rulemaking (ANPRM) is to solicit broad feedback on different approaches to establishing a voluntary emission reduction credit (ERC) bank for ozone precursors, specifically volatile organic compounds (VOCs) and nitrogen oxides (NO_x), as part of a Clean Air Act (CAA) Federal Implementation Plan (FIP) applicable to stationary sources on Indian country lands within the Uintah and Ouray Indian Reservation (U&O Reservation) that are part of the Uinta Basin Ozone Nonattainment Area. The EPA designated portions of the “Uinta Basin” region nonattainment for the 2015 Ozone NAAQS, effective August 3, 2018. The ERCs described in this ANPRM could be generated and used for several air quality planning purposes: assisting in achievement of the ozone National Ambient Air Quality Standard (NAAQS), general conformity demonstrations, and nonattainment new source review (NNSR) permitting related to development of new VOC and NO_x emissions sources in Indian country portions of the Uinta Basin Ozone Nonattainment Area in Utah. We

are also inviting comment on the potential for the bank to interact with sources that are outside the nonattainment area or the U&O Reservation.

DATES: Comments must be received on or before **[Insert date 45 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R08-OAR-2019-0002, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from www.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, 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>.

FOR FURTHER INFORMATION CONTACT: Chris Dresser, U.S. EPA, Region 8, Air Program, Mail Code 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6385, dresser.chris@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, “reviewing authority,” “we,” “us” and “our” refer to the EPA.

ANPRM: Advance Notice of Proposed Rulemaking.

APA: The Administrative Procedure Act.

Act or CAA: Clean Air Act, unless the context indicates otherwise.

CBI: Confidential Business Information.

EIP: Economic Incentive Programs.

EPA: The United States Environmental Protection Agency.

ERC: Emission Reduction Credit.

FIP: Federal Implementation Plan.

NAAQS: National Ambient Air Quality Standards.

NAICS: North American Industry Classification System.

NESHAP: National Emission Standards for Hazardous Air Pollutants.

NO_x: Nitrogen oxides.

NPRM: Notice of Proposed Rulemaking.

NNSR: Nonattainment New Source Review.

NSR: New Source Review.

NTTAA: National Technology Transfer and Advancement Act.

OMB: Office of Management and Budget.

RACT: Reasonably Available Control Technology.

RFA: Regulatory Flexibility Act.

RFP: Reasonable Further Progress.

SIP: State Implementation Plan.

TAR: Tribal Authority Rule.

TAS: Treatment in the same manner as a state.

TIP: Tribal Implementation Plan.

TPY: Tons Per Year.

UDEQ: Utah Department of Environmental Quality's Division of Air Quality.

U&O Reservation or the Reservation: Uintah & Ouray Indian Reservation.

VOC: Volatile organic compound(s).

This preamble is organized as follows:

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I. General Information

A. Would this potential action apply to me?

Entities potentially affected by this upcoming proposed FIP consist of existing sources of emissions of ozone precursors (VOC and NO_x) on Indian country lands that are both (1) within

the U&O Reservation¹ and (2) part of the Uinta Basin Ozone Nonattainment Area. All the Indian country lands within the Uinta Basin Ozone Nonattainment Area of which the EPA is aware are within the U&O Reservation. Further, all of the Ute Indian Tribe Indian country lands of which the EPA is aware are located within the Reservation.² To the extent that there are Ute Indian Tribe dependent Indian communities under 18 U.S.C. 1151(b) or allotted lands under 18 U.S.C. 1151(c) that are located outside the exterior boundaries of the Reservation, those lands would not be covered by this FIP unless the EPA or the Tribe demonstrates that the Tribe has jurisdiction over the area. In addition, there are parts of the Uinta Basin Ozone Nonattainment Area that are not within Indian country. Any proposed FIP will not apply to any sources on non-Indian-country lands, including any non-Indian-country lands within the exterior boundaries of the Reservation. The EPA expects that entities with operations in the oil and natural gas production and natural gas processing segments of the oil and natural gas sector would be the primary depositors of ERCs in a U&O ERC bank, while new or modified major sources of VOC or NO_x emissions in various source categories would be the primary purchasers of banked ERCs to

¹ See discussion at section IV below, for more information on the establishment of the Reservation.

² Under the CAA, lands held in trust for the use of an Indian tribe are reservation lands within the definition at 18 U.S.C. 1151(a), regardless of whether the land is formally designated as a reservation. See 63 FR 7254, 7258 (Feb. 12, 1998) (“Tribal Authority Rule”); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1285-86 (D.C. Cir. 2000). EPA’s references in this FIP to Indian country lands within the exterior boundaries of the U&O Reservation include any such tribal trust lands that may be acquired by the Ute Indian Tribe.

In 2014, the U.S. Court of Appeals for the D.C. Circuit addressed EPA’s authority to promulgate a FIP establishing certain CAA permitting programs in Indian country. *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F. 3d 185 (D.C. Cir. 2014). In that case, the court recognized EPA’s authority to promulgate a FIP to directly administer CAA programs on Indian reservations but invalidated the FIP as applied to non-reservation areas of Indian country in the absence of a demonstration of an Indian tribe’s jurisdiction over such non-reservation area. Because the current proposed rule would apply only on Indian country lands that are within the exterior boundaries of the U&O Reservation, *i.e.*, on reservation areas, the *Oklahoma* court decision is not implicated.

support Nonattainment New Source Review (NNSR) permitting. However, other source categories may choose to participate in either depositing ERCs or purchasing banked ERCs to support NNSR permitting of new or modified major or minor sources of VOC or NO_x emissions.

Table 1 – Source Categories Affected by this Anticipated Action

Industry Category	NAICS Code	Examples of Regulated Entities/ Description of Industry Category
Oil and Gas Production/Operations	21111	Exploration for crude petroleum and natural gas; drilling, completing, and equipping wells; operation of separators, emulsion breakers, desilting equipment, and field gathering lines for crude petroleum and natural gas; and all other activities in the preparation of oil and gas up to the point of shipment from the producing property. Production of crude petroleum, the mining and extraction of oil from oil shale and oil sands, the production of natural gas, sulfur recovery from natural gas, and the recovery of hydrocarbon liquids from oil and gas field gases.
Crude Petroleum and Natural Gas Extraction	211111	Exploration, development and/or the production of petroleum or natural gas from wells in which the hydrocarbons will initially flow or can be produced using normal pumping techniques or production of crude petroleum from surface shales or tar sands or from reservoirs in which the hydrocarbons are semisolids.
Natural Gas Liquid Extraction	211112	Recovery of liquid hydrocarbons from oil and gas field gases; and sulfur recovery from natural gas.
Drilling Oil and Gas Wells	213111	Drilling oil and gas wells for others on a contract or fee basis, including spudding in, drilling in, re-drilling, and directional drilling.
Support Activities for Oil and Gas Operations	213112	Performing support activities on a contract or fee basis for oil and gas operations (except site preparation and related construction activities) such as exploration (except geophysical

		surveying and mapping); excavating slush pits and cellars, well surveying; running, cutting, and pulling casings, tubes, and rods; cementing wells, shooting wells; perforating well casings; acidizing and chemically treating wells; and cleaning out, bailing, and swabbing wells.	This
Engines (Spark Ignition and Compression Ignition) for Electric Power Generation	2211	Provision of electric power to support oil and natural gas production where access to the electric grid is unavailable.	list
Fossil Fuel Electric Power Generation	221112	Operating fossil fuel powered electric power generation facilities using fossil fuels, such as coal, oil, or gas, in internal combustion or combustion turbine conventional steam process to produce electric energy. Electric energy production is provided to electric power transmission systems or to electric power distribution systems.	is
Petroleum Bulk Stations and Terminals	424710	Bulk liquid storage facilities primarily engaged in the merchant wholesale distribution of crude petroleum and petroleum products, including liquefied petroleum gas.	not

but rather provides a guide for readers regarding entities potentially affected by this anticipated action. If you have any questions regarding the applicability of this potential action to a particular entity, contact the appropriate person listed in the **FOR FURTHER INFORMATION CONTACT** section.

II. Purpose of This Advance Notice of Proposed Rulemaking

The EPA is issuing this ANPRM to solicit comment on how to best design and implement an ERC banking and trading program for stationary sources located on the Indian

country portion of the Uinta Basin Ozone Nonattainment Area³. (As discussed previously, the Indian country lands within the Uinta Basin Ozone Nonattainment Area to which a U&O ERC bank would apply are on the U&O Reservation. There are, in addition, portions of the nonattainment area that are outside of Indian country; sources in those areas are subject to state law.⁴) Allowing sources to use an EPA-run bank to credit eligible emissions reductions would serve three purposes:

1. The requirement to obtain offsets (as ERCs) for permitting new or modified major sources would likely incentivize industry to voluntarily implement controls on existing operations, which would lead to emissions reductions sooner than would otherwise occur. We expect, based on the existing emissions inventory, that the primary generators of ERCs will be minor oil and natural gas production sources, while the primary users of ERCs as compensating emissions reductions will be new or modified major sources.
2. The ability to bank emissions credits would facilitate continued economic development by providing a market for compensating emissions reductions and offsets, such as those required to construct new and modified major sources in the nonattainment area. The Uinta Basin Ozone Nonattainment Area is classified as a Marginal nonattainment area for the 2015 ozone NAAQS. At the Marginal level of nonattainment, offsets for permitting

³ Effective August 3, 2018, certain parts of the Uinta Basin were classified as a Marginal nonattainment area for the 2015 ozone NAAQS. 83 FR 25776, 25837 (June 4, 2018); *see also* information and links posted at <https://www.epa.gov/ozone-designations/additional-designations-2015-ozone-standards>.

⁴ As noted previously, our expectation is that the bank will apply only to stationary sources on Indian country lands within the U&O Reservation that are part of the Uinta Basin Ozone Nonattainment Area, but we are taking comment on the potential for the bank to interact with sources that are outside the nonattainment area or the U&O Reservation.

new or modified major sources could be purchased and used at a ratio of 1.1 ton of emissions reductions of an ozone precursor to every 1 ton of new emissions added to the Basin.⁵ This requirement for major source offsets ensures a declining emissions trend, while still allowing new major source development.⁶ As discussed below, other options exist to increase the effectiveness of this program as a means of reducing emissions and improving air quality.

3. The ability to bank emissions credits for later use to satisfy CAA general conformity requirements applicable to federal actions would minimize delays in such actions.

To ensure the integrity of the program and its consistency with the CAA, to qualify as ERCs, emissions reductions are required to be quantifiable, enforceable, permanent, and surplus of CAA requirements.⁷

⁵ CAA section 182(a)(4), 42 U.S.C. 7511a(a)(4) (setting general offset requirement for Marginal Areas).

⁶ Although minor sources are not subject to this major source individual offset requirement, the EPA believes that 1:1 compensating emissions reductions could be the simplest way to show that a new minor source does not “cause or contribute” to a NAAQS violation. The EPA is open to ideas about other ways to make this demonstration.

⁷ For detailed discussion of the meaning of these terms (quantifiable, enforceable, permanent, and surplus) in this context, see *Improving Air Quality with Economic Incentive Programs*, EPA-452/R-01-001 (EPA Office of Air and Radiation, 2001) (“EIP Guidance,” available at <https://www.epa.gov/sites/production/files/2015-07/documents/eipfin.pdf>), chapter 4 (describing these “fundamental principles” of all banking and trading programs). For additional authorities establishing that CAA emission reduction credits must be quantifiable, enforceable, permanent, and surplus, see CAA section 173(c), 42 U.S.C. 7503(c) (requiring that emissions offsets in nonattainment permitting be “not otherwise required,” “in effect” by the time a source commences operation, and “enforceable”); 40 CFR 51.165(a)(3)(ii)(C)(1)(i) (requiring that SIPs and TIPs provide that emission reduction credits from shutdowns or operational curtailments must be surplus, quantifiable, enforceable, and permanent); 40 CFR part 51, subpart U (rules for “mandatory” economic incentive programs submitted as part of satisfying SIP requirements under CAA sections 182 and 187) (stating that programs must be “state and federally enforceable,” and that “[p]rograms in nonattainment areas for which credit is taken in attainment and RFP demonstrations shall be designed to ensure that the effects of the program are quantifiable and permanent over the entire duration of the program, and that the credit taken is limited to that which is surplus.”); *Emissions Trading Policy Statement*, 51 FR 43814, 43831 (Dec. 4, 1986) (“To assure that emissions trades do not contravene relevant requirements of the Clean Air Act, only reductions which are surplus, enforceable, permanent, and quantifiable can qualify as ERCs and be banked or used in an emissions trade.”); *Emissions Offset Interpretive Ruling*, 44 FR 3274, 3274-76 (Jan. 16, 1979)

The CAA allows the establishment of emissions banking and trading systems to meet applicable requirements, and allows for flexibility and tailoring of the program to specific geographic areas.⁸ As discussed in detail in Section V of this ANPRM, the EPA is requesting comments on a range of elements concerning whether and how an ERC banking rule should be designed and implemented for the Indian country portion of the Uinta Basin Ozone Nonattainment Area. We will take this feedback into consideration in developing a notice of proposed rulemaking (NPRM) for a FIP for crediting ozone precursor emissions reductions from existing Indian country sources within the Uinta Basin Ozone Nonattainment Area.

III. What is an Emission Reduction Credit Bank?

The following information is meant to give the reader a general overview of ERC banks. Specifics may vary depending on the design of the actual regulatory program.

Generally speaking, source owners or operators can generate emissions reductions using a number of approaches, including curtailing emissions or shutting down emissions units. These emissions reductions can then be certified as ERCs and deposited in a bank provided they meet relevant requirements. ERCs can thus be viewed as financial incentives that can be saved for later use as emissions offsets by the depositor or sold or traded at the market price to other sources needing emissions offsets.

(“Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours may be generally credited for offsets if they ... are surplus, permanent, quantifiable, and federally enforceable...”).
⁸ See, e.g., CAA sections 110(a)(2)(A), 42 U.S.C 7410(a)(2)(A), and 172(c)(6) (state implementation plans must have “control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights)”; see also EIP Guidance.

ERCs are generated when owners or operators of a facility or source reduce emissions of criteria pollutants⁹ or their precursors below any applicable regulatory requirements, while complying with all other applicable requirements of the CAA.¹⁰ ERCs can be generated from permanent shutdown and removal of equipment; upgrade or retrofit to more stringent emissions controls; or change of process, methods, or operating guidelines that would affect emissions. These control methods and technologies must result in real, quantifiable, enforceable, and permanent reductions in emissions, and the reductions must be surplus of CAA requirements.¹¹

The overall purpose of an ERC bank is to apply market-based strategies to encourage reductions in emissions for an area, which may help meet shared air quality goals. An ERC bank promotes flexibility and innovation in complying with state and federal air emissions requirements established in a SIP/FIP/TIP and SIP/FIP/TIP-approved air permitting programs. This flexibility should allow for the achievement of air quality goals (e.g., SIP/FIP/TIP requirements) more quickly and at a lower cost while still complying with all applicable requirements of the CAA.

As mentioned in Section I, we expect that a principal use of emission reduction credits will be to offset new and modified major source emissions as part of NNSR permitting. Sections 172(c)(5) and 173 of Part D of title I of the CAA and EPA's implementing regulations at 40 CFR 51.165 contain the NSR requirements for areas designated nonattainment for a NAAQS. NNSR

⁹ While lead is a criteria pollutant, ERC banks should not address lead emissions. *See* EIP Guidance.

¹⁰ An ERC must not conflict with or override other CAA requirements that may apply to an area or source(s) (e.g., part D nonattainment NSR offset requirements or part C PSD requirements) regardless of the attainment classification of an area. *See* EIP Guidance at 15.

¹¹ *See* n. 7, above.

only applies to pollutants or their precursors for which the area is designated as nonattainment for a NAAQS under the CAA. The NNSR program has specific emissions thresholds for determining which new sources or modifications of existing sources are “major” based on the nonattainment classification of the specific pollutant.¹² Once a stationary source is subject to the major NNSR program, the source must meet several criteria to receive a preconstruction permit. The most significant of these requirements are the application of the Lowest Achievable Emissions Rate (LAER) to the stationary source or project and the requirement to offset potential emissions increases from the project with decreases in actual emissions from the same or other stationary sources located in the same nonattainment area or a nonattainment area of equal or higher classification.

Under existing EPA regulations, source owners seeking permits for construction of new or modified minor sources in a nonattainment area of Indian country must demonstrate that the source will not cause or contribute to a NAAQS violation. 40 CFR 49.155(a)(7)(ii). The EPA’s Indian Country Oil and Natural Gas True Minor Source FIP allowed streamlined permitting of new and modified minor oil and natural gas sources on Indian country lands within the U&O Reservation before the designation of the Uinta Basin Ozone Nonattainment Area, but that FIP does not currently provide for streamlined permitting of sources in the nonattainment area.¹³

¹²The “major stationary source” threshold for a marginal and moderate nonattainment areas is 100 tpy for a pollutant or precursor. NNSR also applies to existing major stationary sources that undertake a “major modification,” which occurs when the change ultimately results in a “significant net” emissions increase of the nonattainment pollutant (significance rates are defined in 40 CFR 51.165(a)(1)(v)). The significance threshold is lower in certain nonattainment areas with higher degrees of nonattainment, with the specific level based on the area’s nonattainment classification.

¹³ See 40 CFR 49.101(b)(1)(v).

Instead, those sources must obtain source-specific permits before beginning construction, under the rules at 40 CFR 49.151 through 49.165.¹⁴

IV. Background on the U&O Reservation

The Ute Indian Tribe is a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934,¹⁵ with its Constitution and By-Laws adopted by the Tribe on December 19, 1936, and approved by the Secretary of the Interior on January 19, 1937.¹⁶ The Uintah and Ouray Indian Reservation was formerly the Uintah Valley and Uncompahgre Reservations, which were established in 1861 and 1882, respectively.¹⁷ The Tribe's Constitution and By-Laws reorganized three Ute Tribes into one, and clarified that tribal jurisdiction within the U&O Reservation extends to the territory within the original Uintah and Uncompahgre Reservations, which was later enlarged through the Hill Creek Extension Act of 1948.¹⁸ The U&O Reservation currently includes all Indian country lands within its exterior boundaries, as

¹⁴ On May 8, 2018, EPA proposed to amend the Indian Country Oil and Natural Gas True Minor Source FIP to allow the FIP to apply in the Uintah Basin Ozone Nonattainment Area. *See* 83 FR 20775.

¹⁵ *See* 83 FR 34863, 34866 (July 23, 2018) (list of federally recognized tribes); 48 Stat. 984, 25 U.S.C. 5123 (Indian Reorganization Act).

¹⁶ Constitution and By-Laws of the Ute Indian Tribe, available at <https://www.loc.gov/law/help/american-indian-const/37026342.pdf>.

¹⁷ The U&O Reservation was established for the Ute Indian Tribe under Executive Order in 1861, 1 Kapp. 900, as confirmed by the Act of May 5, 1864, 13 Stat. 63, and under Executive Order of January 5, 1882, then enlarged through the Hill Creek Extension Act of 1948, 62 Stat. 72. The Reservation has been addressed in multiple federal court decisions, including *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1155 (D. Utah 1981); *Ute Indian Tribe v. Utah*, 716 F.2d 1298 (10th Cir. 1983); *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986); *Hagen v. Utah*, 510 U.S. 399 (1994); *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473 (D. Utah 1996); *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998); *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1451 (U.S. Mar. 21, 2016); and *Ute Indian Tribe v. Myton*, 835 F.3d 1255 (10th Cir. 2016), *cert. dismissed*, 137 S.Ct. 2328 (2017). As a result of this line of cases, there are some non-Indian-country lands within the exterior boundaries of the Uintah and Ouray Indian Reservation.

¹⁸ 62 Stat. 72.

defined by the 1861 and 1882 Executive Orders, the Act of May 5, 1864, the Hill Creek Extension Act of 1948, and subsequent court decisions.¹⁹

Pursuant to CAA section 301(d),²⁰ the EPA is authorized to treat eligible Indian tribes in the same manner as states (“treatment as state” or TAS) for purposes of implementing CAA provisions over their entire reservations and over any other areas within their jurisdiction.²¹ The Ute Indian Tribe has not applied for TAS for the purpose of administering a TIP under the CAA. Thus, there is currently no EPA-approved plan implementing the functions and provisions of the CAA on Indian country lands within the U&O Reservation. We anticipate that the U&O ERC banking rule for which the EPA is providing this advance notice of proposed rulemaking and soliciting comment would apply to the Indian country lands within the exterior boundaries of the U&O Reservation that are part of the Uinta Basin Ozone Nonattainment Area.

V. Areas Where the EPA is Requesting Comment

For purposes of formulating a Reservation-specific ERC banking rule, the EPA is seeking comment on the following issues:

- A. Conceptual support for an EPA-run U&O ERC bank: Should the EPA proceed with plans to propose a rule establishing such a voluntary ERC bank? The EPA seeks comment on whether industry (and potentially others) would use an ERC bank for the Indian country lands within the U&O Reservation that are part of the Uinta Basin Ozone Nonattainment Area. Are there

¹⁹ See n. 16, above.

²⁰ See 42 U.S.C. 7601(d).

²¹ See 63 FR 7254-57 (Feb. 12, 1998) (explaining that CAA section 301(d) includes a delegation of authority from Congress to eligible Indian tribes to implement CAA programs over all air resources within the exterior boundaries of their reservations).

any reasons not to create a U&O ERC bank, or are there suggestions to handle surplus emission reduction crediting through another approach? Finally, are there existing state-run ERC banking systems that may serve as a good example for developing a U&O ERC bank?

- B. Participation in the U&O ERC bank: The EPA expects that the principal clients of a U&O ERC bank would be industrial sources within the Indian country portions of the Uinta Basin Ozone Nonattainment Area depositing emission reduction credits for sale or for later use to support future development, as well as new and modified industrial sources needing offsets necessary to obtain a major NNSR permit. We seek comment on what other entities (besides companies implementing voluntary emissions controls and/or companies needing offsets to support new development) should be permitted to participate in a U&O ERC bank. Such entities might include non-governmental organizations, federal government agencies, local government, the Ute Indian Tribe and others. Are there any reasons to preclude any entities from purchasing ERC credits from such a bank?
- C. ERC bank format: The EPA seeks comment on the format and features of a U&O ERC bank. It is expected that (as with most ERC banks) a database would be created to track and manage ERCs, through their deposit, trading and use, that will be publicly available online. The EPA solicits comment on this expectation. Additionally, should the owner of an ERC be required to deposit the ERC into the bank before using it as an offset, in order to centralize tracking? Or, if an emissions reduction is created for a specific project, can it be evaluated as part of the project and avoid the U&O ERC bank? The EPA seeks comments on what information should be maintained in the database for each banking action.

D. Creditable emissions reductions: The EPA intends to propose a rule that specifically outlines what emissions reductions qualify as creditable for deposit in a U&O ERC bank. Generally, qualifying ERCs are limited to emissions reductions that are real, quantifiable, enforceable, permanent, and surplus of CAA requirements. Such ERCs are typically generated by permanently shutting down equipment, modifying a process (i.e., using a lower VOC/sulfur containing material), or by adding emissions controls beyond those required by any applicable regulation.

Some state-run ERC banks require that a certain percentage of reductions be removed and made ineligible for future use to ensure an environmental benefit to the banking system. For instance, if an operator achieves a 10 tpy reduction by implementing an emissions control on a given source, some percentage (such as 10%) may be retired for environmental benefit, and only 9 tpy would be deposited in the ERC bank for future offsets or compensating emissions reductions. This ensures that more accelerated progress is made towards attainment. The EPA seeks comment on whether this practice should be implemented for a U&O ERC bank, and if so, at what percentage?

Given the seasonal nature of ozone generation in the Uinta Basin, are there legally and technically supported approaches to allowing seasonal emissions reductions to be credited? Should seasonal limitations be placed on the program? For instance, should the rule prevent summertime reductions from being used to support the addition of wintertime emissions? How should the ERC banking rule treat emissions reductions that occur from emissions unit shutdowns? What requirements should apply to shut-down equipment to ensure it meets the requirement to be a permanent reduction? There are restrictions on the use of reductions

occurring from equipment shutdowns in 40 CFR 51.165(a)(3)(ii)(C)(1), such as only being eligible for use if the shutdown occurred after the last day of the baseline year for the plan. Additionally, use of reductions from equipment shutdowns must be restricted to prohibit operation of that unit elsewhere in the nonattainment area. Should the use of reductions from shut-down equipment be restricted further, such as disallowing operation in a broader area outside of the nonattainment area, or requiring destruction of the unit?

- E. Trading of ERCs: A principal use of an ERC bank would be to allow companies in need of emissions offsets to construct new and modified sources to purchase those credits from companies that have permanently reduced emissions and deposited those ERCs in the bank. The EPA expects that a U&O ERC bank would allow the purchase and exchange of ERCs, and such exchanges would be publicly documented. The EPA further anticipates that the price of ERCs would be determined by the open market based on the demand for such ERCs. The EPA intends to propose to require documentation from both the company selling a credit and the company acquiring the credit in order to process that transaction and would make publicly available such information – including the number of ERCs purchased, the method of emissions reduction, and the purchase price. The EPA seeks comment on this expectation and any input on what additional information should be provided to document transactions within the anticipated U&O ERC bank database.
- F. Use of ERCs: In addition to using banked ERCs as offsets for new and modified major sources, these emissions reductions may also be used to show that a new or modified minor source does not cause or contribute to an ozone NAAQS violation, or to satisfy general conformity requirements. If such reductions are not available within the existing inventory of

a company's emissions sources or are needed by a federal agency to demonstrate general conformity for a specific action, the U&O ERC bank could be used to facilitate the purchase of available ERCs. In such a case, the necessary amount of ERCs would be purchased from one (or more) entities in possession of ERCs. Documentation of the transaction would be provided to the EPA, and those credits would be withdrawn from the bank when used to support a permit action. The EPA intends to propose a U&O ERC banking rule that describes the specifics of this process, consistent with the principles and requirements described in the EIP Guidance.²² However, the EPA solicits comments on any additional considerations and flexibilities that should be made to allow this process to function efficiently for participants within the U&O Reservation. A primary goal of the program is to allow eligible ERCs to be certified for eventual use as offsets in accordance with major NNSR and general conformity requirements. Are there any other uses of an ERC that EPA should be evaluating, such as for discretionary use in minor NNSR?

G. Withdrawal of ERCs from the bank: The EPA intends to evaluate banked credits for compliance with the "surplus of Clean Air Act" requirement at the time of their use as compensating offsetting emissions (e.g., upon issuance of a permit). In the event of future promulgation of emissions controls as part of a federal or tribal implementation plan, or to satisfy CAA requirements such as reasonably available control technology (RACT) or RFP, the EPA does not expect sources that have already provided offsets to need to pursue

²² All offsets used for the purpose of satisfying general conformity requirements must meet the regulatory requirements relating to offsets in 40 CFR 93.158(a)(5)(iii).

additional offsetting emissions. The EPA seeks comment on this anticipated expectation and on whether any other factors should be considered. We also seek comment as to whether banked credits should be discounted or expire after some period of time, even if they remain surplus of CAA requirements.

H. Emissions reductions achieved before the effective date of final U&O ERC banking rule: The EPA expects that because the final 2015 Ozone Implementation Rule²³ defines a primary base year of 2017, that year will likely be an appropriate base year for the Uinta Basin Ozone Nonattainment Area banking and trading program. To allow for near-term surplus emissions reductions that would benefit air quality, the EPA intends to include as a component of the proposed rule that qualifying emissions reductions achieved before the final rule's effective date, but after the nonattainment baseline year, may be banked; effectively, any emissions reduction achieved after January 1, 2018. The EPA seeks comment on the inclusion of this flexibility.

I. Geographic considerations and interaction with Utah-managed CAA planning requirements: As explained previously, we anticipate that any proposed U&O ERC bank would only apply to sources on Indian country lands within the U&O Reservation that are within the Uinta Basin Ozone Nonattainment Area. There may, however, be situations where sources on land managed by Utah have a need for ERCs and wish to purchase them from a source in Indian country. Conversely, sources covered by the EPA-run bank may wish to purchase ERCs from

²³ Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements. 83 FR 62998 (Dec. 6, 2018). <https://www.govinfo.gov/content/pkg/FR-2018-12-06/pdf/2018-25424.pdf>.

a source managed by Utah. From a scientific standpoint, ozone precursor emissions are generally uniformly mixed across jurisdictions beneath the inversion during high-ozone events in the Uinta Basin Ozone Nonattainment Area; the original location within the nonattainment area of emissions (and emissions reductions) is irrelevant to the nonattainment area's overall ozone design values. However, as a legal matter, the EPA is limited in the scope of applying any potential U&O ERC bank rulemaking to sources in Indian country. Accordingly, we seek comment on whether, and under what criteria and constraints, an EPA-run bank for sources on the Indian country portion of the Uinta Basin Ozone Nonattainment Area should interact with any state-run bank that may be developed for sources on land under Utah CAA regulatory jurisdiction. We also seek comment on whether the EPA should pursue collaboration with Utah in allowing for cross-jurisdictional exchange of ERCs. Finally, is there any justification to allow the use, or banking of credits outside of the Uinta Basin Nonattainment Area, but within the general geographic extent of the Uinta Basin?

- J. General comments: The EPA also invites the public's comment on any other questions associated with developing an emissions banking and trading program to address the goals described previously in the "Purpose" section of this ANPRM.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, Oct. 4, 1993), the OMB has determined that this is not a "significant regulatory action." Because this ANPRM does not propose or impose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various statutes and Executive Orders that normally apply to rulemaking do

not apply in this case. Should the EPA subsequently determine to pursue a rulemaking, the EPA will address the statutes and Executive Orders as applicable to that rulemaking.

The EPA seeks any comments or information that would help the Agency ultimately to assess the potential impact of a rule on small entities pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*); to consider voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note); to consider environmental health or safety effects on children pursuant to Executive Order 13045, entitled “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997); or to consider human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, Feb. 16, 1994).

The Agency will consider such comments during the development of any subsequent proposed rule.

List of Subjects in 40 CFR Part 49

Environmental protection, Administrative practices and procedures, Air pollution control, Indians, Indians-law, Indians-tribal government, Intergovernmental relations, reporting and recordkeeping requirements.

Dated: May 18, 2019.

Debra Thomas,
Acting Regional Administrator,
EPA Region 8.

