

- Notice of Emission Averaging (NOA) Review Procedures, including State-Approved NOA Form; and
- General Program Evaluation Procedures.

### Conclusion

EPA is proposing to approve the Michigan SIP revision for ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, particulate matter and lead. This SIP revision implements Michigan's Emission Averaging and Emission Reduction Credit Trading Rules.

EPA is requesting public comment on the issues discussed in today's action. EPA will consider all public comments before taking final action. Interested parties may participate in the federal rulemaking procedure by submitting written comments to the EPA Regional office listed in the ADDRESSES section.

### Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. This proposed 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 proposed 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 proposes to approve 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). For the same reason, this proposed rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This proposed rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it 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 proposed rule also is not

subject to Executive Order 13045 (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. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. 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.*).

### List of Subjects in 40 CFR Part 52

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

**Authority:** 42 U.S.C. 7401-7671(q).

Dated: January 19, 2001.

**David A. Ullrich,**

*Acting Regional Administrator, Region 5.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[NH035-1-7161b; A-1-FRL-6942-4]

### Approval and Promulgation of Air Quality Implementation Plan; New Hampshire; Discrete Emissions Reductions Trading Program

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency is proposing to conditionally approve a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. This revision establishes regulations for an emissions trading program Env-A 3100, Discrete Emissions Reductions Trading Program, which provides a more cost-effective mechanism for sources to meet regulatory requirements for reducing oxides of nitrogen and volatile organic compound emissions. This action is being taken under the Clean Air Act (CAA). Public comments on this document are requested and will be considered before taking final action on this SIP revision.

**DATES:** Comments must be received on or before March 9, 2001.

**ADDRESSES:** Comments may be mailed to Susan Studlien, Deputy Director, Office of Ecosystem Protection (mail code CAA), U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Boston, MA 02203. Copies of the State submittal and EPA's technical support document are available for public inspection during normal business hours, by appointment at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, Region I, One Congress Street, 11th floor, Boston, MA and at the Air Resources Division, Department of Environmental Services, 6 Hazen Drive, PO Box 85, Concord, New Hampshire 03302-0095.

**FOR FURTHER INFORMATION CONTACT:** Donald Dahl at (617) 918-1657, or by electronic mail at [Dahl.Donald@EPA.GOV](mailto:Dahl.Donald@EPA.GOV).

### SUPPLEMENTARY INFORMATION:

#### Overview

The Environmental Protection Agency (EPA) is proposing to conditionally approve a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. This revision establishes regulations for an emissions trading program Env-A 3100, Discrete Emissions Reductions Trading Program.

The following table of contents describes the format for this **SUPPLEMENTARY INFORMATION** section:

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##### *Administrative Requirements*

EPA's Proposed Action

#### **What Action Is EPA Proposing Today?**

EPA is proposing a conditional approval of New Hampshire's Env-A 3100. On January 9, 1997, the New Hampshire Air Resources Division (ARD) submitted Env-A 3100 to EPA for approval into the New Hampshire SIP. Additional documentation was submitted to EPA by DES on February 24, 1998. This revision establishes regulations for an emissions trading program Env-A 3100, Discrete Emissions Reductions Trading Program (DER).

#### **Why Is EPA Proposing This Action?**

EPA is proposing this action to:

- Give the public the opportunity to submit written comments on EPA's proposed action, as discussed in the **DATES** and **ADDRESSES** sections,
- Fulfill New Hampshire's and EPA's requirements under the Clean Air Act (the Act),
- Make New Hampshire's DER Program federally-enforceable.

#### **What Is Emissions Trading?**

Air emission trading is a program where one source, for example a power plant, reduces its emissions below the level it is required to meet. This source then sells or trades these reductions as credits to another source which continues to release emissions above its required levels. In return for this flexibility, the second source must purchase additional credits beyond those needed to comply, therefore reducing overall emissions. Emissions trading uses market forces to reduce the overall cost of compliance for sources, while maintaining emission reductions and environmental benefits.

#### **What Is Discrete Emissions Reduction Trading?**

New Hampshire's Discrete Emissions Reduction Trading Program (DER Program) is similar to an Open Market Emission Trading Program as described in EPA's model Open Market Trading Rule (OMTR) which was proposed on August 25, 1995 (60 FR 44290). In a Discrete Emissions Reduction trading program, a source generates short-term emission reduction credits, called discrete emission reductions (DERs) by reducing its emissions. The source can then use these discrete credits at a later time, or trade them to another source to use at a later time. The trading program relies on many sources continuing to generate new discrete credits to balance

with other sources using previously generated discrete credits.

For example, a power plant adds on additional controls that reduce oxides of nitrogen (NO<sub>x</sub>) emissions beyond Clean Air Act requirements. This emission reduction could generate discrete credits. The power plant trades these discrete credits to an industrial manufacturer that operates boilers to generate process steam. In the future, the manufacturer can use the discrete credits to meet its NO<sub>x</sub> control requirements. While the manufacturer is using the discrete credits, the power plant and other sources are also reducing emissions and generating discrete credits. But the manufacturer must also purchase an additional amount, 10 percent, of discrete credits above the number of credits they would otherwise need to comply. The manufacturer, or any other source, will never use this additional amount for compliance. This is known as a retirement of credit to benefit the environment. The total effect is to reduce emissions.

#### **What Are EPA's Proposed Conditions for Approval?**

EPA is proposing the following conditions that would need to be met before EPA can approve New Hampshire's DER Trading Program. These areas of New Hampshire's DER Program do not fully satisfy EPA's guidance. A Technical Support Document (TSD), prepared in support of this proposed action, contains a full description of EPA's conditions for approval. A copy of the TSD is available upon request from the EPA Regional Office listed in the **ADDRESSES** section.

##### *1. Using Approved Emission Quantification Protocols*

With regard to New Hampshire, the credit quantification protocol provisions of Env-A 3100 mirror EPA's August 1995 proposed model rule language concerning protocols. However, since the proposal there have been some changes made to EPA's guidance regarding emission quantification protocols in trading programs. See EPA's proposal to grant conditional approval of New Jersey's open market trading program, 66 FR 1796. One of the recent changes addresses the procedures for adopting alternative protocols in existing guidance. The notice for New Jersey's program states that EPA approval is required prior to allowing a source to deviate from an established EPA emission quantification protocol. ENV-A 3107.02(b) states that EPA approval is not needed in advance when a source wants to deviate from

established protocols in calculating emission credits. In order to receive full approval, New Hampshire must require that deviations to existing protocols first be approved by EPA prior to their use.

### 2. Delayed Trading

EPA guidance requires emission trading programs to require sources to purchase credits prior to the source having to use those credits to comply with their emission limits. ENV-A 3104.11 allows a source, when credits are unavailable, to delay the purchase of credits after the period the source needed them to comply with emission limits resulting from New Hampshire's Reasonable Available Control Technology requirements. If a source is dependent on using emission credits to comply with RACT requirements, it is the source's responsibility to ensure that credits will be available when it makes it's choice not to add emission controls to comply with the RACT requirements. Therefore, for full approval New Hampshire must require source's to have sufficient emission credits prior to the intended use period.

### 3. Claiming Ownership of Discrete Credits

Env-A 3100 states that a source is eligible to generate discrete credits. However, New Hampshire's DER Program is unclear in a situation when different parties try to claim the same emission reduction from a source as a credit. This issue is significant because the rights to credits generated by a particular credit generation strategy will be unclear in some cases. For instance, a manufacturer of a device or fuel additive that reduces automobile emissions might attempt to register credits based on the sale of the device or fuel additive within New Hampshire. However, an owner of a vehicle fleet might also attempt to register credits based on his or her installation of those same devices or use of fuel within the fleet. Registration of both sets of credits would double count the emission reductions, leading to the generation of excess credits.

For full approval, New Hampshire must address the issue of ownership claims in its regulation and make provisions for reporting ownership claims in the Notice and Certification of Generation.

### 4. Notifying Metropolitan Planning Organizations

To avoid double-counting the emission reductions generated by mobile sources in trading programs, the state must ensure coordination between the emission trading program and the

conformity analyses in the area in which the trading program takes place. Metropolitan Planning Organizations should not use any reductions they receive notice about, for transportation conformity. Similarly, the trading program should not allow use of reductions that the Metropolitan Planning Organizations rely on in a transportation conformity determination. New Hampshire should require a generator of mobile-source emission reductions to notify the Metropolitan Planning Organizations in the area, and the State Department of Transportation of the generator's intention to generate emission reductions. The generator must provide enough information to the Metropolitan Planning Organizations about the likely emission reductions from the activity to allow the Metropolitan Planning Organizations to adjust its regional conformity analyses appropriately. Once notified, the Metropolitan Planning Organizations may not use these emission reductions to satisfy the requirement for transportation conformity.

### 5. Notifying the Federal Land Manager

EPA has a policy of providing special protection for Class I areas (pristine environments such as international parks, large national parks and wilderness areas), as required under sections 160 through 169 of the Act. New Hampshire has two Class I areas—the Great Gulf Wilderness Area and Presidential Range-Dry River Wilderness Area. This policy includes keeping Federal Land Managers informed of activities that could affect air quality in Class I areas. In accordance with this policy, New Hampshire must revise Env-A 3100, or submit procedures as part of the SIP, which requires New Hampshire to send a notification to the relevant Federal Land Manager at least 30 days prior to any discrete credit use activity occurs approximately within 100 kilometers of a Class I area.

### 6. Accounting for Discrete Credits in Emission Inventory

The Act requires states to have an emissions inventory that specifically accounts for actual emissions of all major stationary sources and minor/area source categories. EPA's General Preamble guidance to the Act also requires the inventory to consider credits available for use as if they are in the air for all attainment demonstrations. Therefore all attainment modeling demonstrations must include all unused credits, that sources can eventually use, as actual

emissions. While this can inflate an area's actual emissions inventory above the level of what will probably occur, it does not inflate emissions above what could potentially occur. For emission trading purposes, EPA has and continues to require that attainment, reasonable further progress and rate-of-progress demonstrations use a worst-case emissions scenario. This is to discourage the accumulation of large banks of credits that could potentially ruin any attainment plan or demonstration if the credits were all used at the same time. For full approval of Env-A 3100, New Hampshire must submit to EPA additional information on how the emission inventories account for unused credits under New Hampshire's DER Program.

### 7. Rule May Allow Use of Credits To Avoid Permitting Requirements

Env-A 3104.10 contains a list of situations where DERs cannot be used. Env-A.3104.10(b) correctly states that DERs cannot be used to avoid the applicability of NSR requirements. This is consistent with EPA's policy that emission credits cannot be used to avoid the applicability of a Clean Air Act Requirement. Credits can only be used to comply with requirements. However, New Hampshire's rule does not prohibit the use of DERs to avoid a source's applicability to New Hampshire's title V operating permit program (state regulation Env-A 609). For full approval, New Hampshire must add to Env-A 3104.10 a prohibition on using DERs to avoid the title V operating permit program.

### 8. Rule Allows for Trading NO<sub>x</sub> Emission Reductions To Meet VOC Reduction Requirements

Env-A 3104.10(f) allows for NO<sub>x</sub> reductions to be used to meet VOC reduction requirements using a NO<sub>x</sub> to VOC ratio of 1:1. EPA recognizes that inter-precursor trading can be done under very limited circumstances. First, the pollutants being traded must impact the environment in the same way. In New Hampshire's rule, inter-precursor trading is limited to trading NO<sub>x</sub> emission decreases for VOC emission increases. Science and the Clean Air Act (CAA) recognize that both NO<sub>x</sub> and VOC emissions combine in the atmosphere to create ozone and that in some areas reducing one of these pollutants is more important. In fact, CAA § 182(c)2(C) provides for states with ozone problems to substitute NO<sub>x</sub> reductions for VOC reductions in their Attainment and Reasonable Further Progress Plans. Second, EPA believes that any proposed inter-precursor

emission trade should be analyzed for the extent of impact from each pollutant involved in the trade. For example, it would not make sense to allow a trade of a decrease of 1 ton of pollutant A for an increase of one ton of pollutant B if pollutant B has a greater environmental impact than pollutant A. New Hampshire's rule allows for a one ton decrease in NO<sub>x</sub> to be traded for a one ton increase of VOC. Both VOC and NO<sub>x</sub> impact the concentration of ozone.

Based on this policy, in 1997, EPA told New Hampshire that in order for EPA to accept New Hampshire's trading program, an analysis would have to be performed to demonstrate that NO<sub>x</sub> emissions impact ozone formation more than or the same as VOC emissions. On February 24, 1998, New Hampshire submitted to EPA an analysis of trading NO<sub>x</sub> for VOC emissions. The analysis is based on a series of urban airshed modeling runs which demonstrate that NO<sub>x</sub> emissions have a greater effect than VOC reductions on reducing ground level ozone in New Hampshire. Based on this supporting documentation, EPA finds that a 1:1 ratio of NO<sub>x</sub> for VOC is supportable in New Hampshire. This means that a one ton decrease in NO<sub>x</sub> emissions can be used for a one ton increase of VOC emissions.

Env-A 3104.10(f), however, also allows the state to increase the ratio of NO<sub>x</sub> to VOC from 1:1 to something greater, based on another analysis. The state rule requires any additional analysis to follow some general criteria. The problem with this provision is that inter-precursor emission trades using a ratio different from 1:1 could occur without the opportunity for EPA or public review. It is critical that the public and EPA are given the opportunity to review any analysis used to support inter-precursor emission trading.

Therefore, for full approval, New Hampshire must revise Env-A 3104.10(f) to remove the ability for the state to allow for inter-precursor trading at a ratio greater than a 1:1 ratio of NO<sub>x</sub> for VOC emissions. In the future, if New Hampshire demonstrates that a different ratio is more appropriate, New Hampshire should revise Env-A 3100 to reflect the new analysis and submit the rule change to EPA for approval as a revision to the New Hampshire SIP.

#### **What Other Clarifications Should New Hampshire Make in Their Program?**

In addition to the issues which EPA is conditionally approving Env-A 3100, there is one area of the rule that New Hampshire should clarify. New Hampshire should clarify in Env-A 3110 that it is a violation for each and

every day within an averaging period if a source does not meet the requirements of the trading rule (e.g., have sufficient discrete emission reductions, keep records, etc) for that averaging period. That is, a source will have 30 days of violations if a monthly averaging limit is not met and 365 days of violations if an annual limit is not met. While EPA understands that this is what New Hampshire meant in Env-A 3110, this provision is not an approval issue, and clarification would make the DER program more understandable.

#### **How Can New Hampshire Get Full Approval for Their Program?**

EPA is proposing conditional approval of New Hampshire's DER Program, provided New Hampshire commits to correct the deficiencies discussed in the "What are EPA's Proposed Conditions for Approval?" section, in writing, on or before March 9, 2001. New Hampshire must then correct the deficiencies and submit them to EPA within one year of EPA's final action on the DER Trading Program SIP revision.

If New Hampshire submits a commitment to comply with EPA's conditions, EPA will publish a final conditional approval of New Hampshire's DER Program. EPA will consider all information submitted prior to any final rulemaking action as a supplement or amendment to the January 9, 1997 and February 24, 1998 submittals. If New Hampshire does not make the required commitment to EPA, EPA is proposing to disapprove the DER Program.

#### **What Guidance Did EPA Use To Evaluate New Hampshire's Program?**

EPA's basis for evaluating New Hampshire's DER Program is whether it meets the SIP requirements described in section 110 of the Act. In 1994, EPA issued Economic Incentive Program (EIP) rules and guidance (40 CFR part 51, subpart U), which outlined requirements for establishing EIPs that States are required to adopt in some cases to meet the ozone and carbon monoxide standards in designated nonattainment areas. There is no requirement for New Hampshire to submit an EIP, so its DER Program need not necessarily follow the EIP rule. However, since subpart U also contains guidance on the development of voluntary EIPs, New Hampshire did follow certain aspects of the EIP guidance in the development and submittal of its DER Program. Lastly, on September 15, 1999 EPA proposed changes to the 1994 EIP.

EPA also published on August 3, 1995, a proposed policy on open market trading programs and on August 25, 1995, a model open market trading rule. EPA's proposed policy describes the elements of an open market trading program that EPA considers to be desirable and necessary for a program to be approvable as a SIP revision. The proposed policy also allowed States to adopt rules that varied from the proposed model rule. In a March 10, 1998-letter from Richard D. Wilson, Acting Assistant Administrator for Air and Radiation to Congressman Thomas J. Bliley, EPA clarified its policy on open market trading. The letter said that EPA will work with states to develop open market programs tailored to their individual circumstances and use the August 1995 proposal as guidance.

Also available for reference is EPA's September 18, 1997 Proposed Action on the State of Michigan's Trading Rules and EPA's January 9, 2001 Proposed Action on the State of New Jersey's Trading Rules.

For further discussion of how these documents provide the basis of today's proposed action, see the section "What is the Basis for Today's Proposal?"

#### **What Is EPA's Evaluation of New Hampshire's Program?**

EPA has determined New Hampshire's new Env-A 3100 regulation for New Hampshire's DER Program is consistent with EPA's guidance, except for the deficiencies discussed in the "What are EPA's Proposed Conditions for Approval?" section. New Hampshire's DER Program is based upon and is consistent with EPA's proposed Open Market Policy and Model Rule of 1995, EPA's proposal of 1997 on Michigan's Program, EPA's proposal of 2001 on New Jersey's Program, and EPA's proposal of 1999 to revise the EIP.

New Hampshire's Env-A 3100 contains provisions for definitions, generation, transfer, verification and use of discrete credits, the registry, geographic restrictions, recordkeeping, public availability, demonstrating compliance and penalties.

Given the documentation in the SIP submittal and the provisions of New Hampshire's DER Program, EPA believes New Hampshire has demonstrated the State's other regulations will achieve at least the same quantity of NO<sub>x</sub> and volatile organic compound (VOC) emission reductions, with or without the DER Program. Furthermore, given the extra reductions inherent in New Hampshire's reasonably available control technology (RACT) program, the

State will continue to meet the reasonable further progress and SIP attainment requirements. Based upon these analyses and documentation, and a requirement to conduct a periodic program audit, EPA believes that New Hampshire's DER Program will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act.

EPA has also determined, with the exceptions discussed in the "What are EPA's Proposed Conditions for Approval?" section, the emission quantification protocol criteria, monetary penalty structure, geographic scope of trading, early reduction credit, and program audit provisions of New Hampshire's DER Program are consistent with EPA's guidance.

A TSD, prepared in support of this proposed action, contains the full description of New Hampshire's submittal and EPA's evaluation. A copy of the TSD is available upon request from the EPA Regional Office listed in the ADDRESSES section.

### **New Hampshire's Open Market Emissions Trading Program**

#### *How Do Sources Generate Credits?*

Sources participating in the DER Program generate discrete credits by reducing emissions below a baseline over a discrete time period. The generation baseline is established by existing requirements, and is determined by the lower of allowable emissions or actual past emissions. Sources which generate discrete credits must submit a "Notice" to the state, which includes information about the source generating the reductions, the methods of generating the reductions, the amount of reductions, and the methods used to measure the reductions. An official representative of the source must certify the following:

- Information in the Notice is true, accurate and complete,
- Emission reductions generated are real and surplus,
- The emission quantification protocol used to calculate the emissions reductions, and
- A prohibited generation strategy is not the basis for the emission reduction.

#### *How Do Sources Use Credits?*

New Hampshire's DER Program requires discrete credits to be assigned a unique serial number by the state before they are used. The source using the credits must hold the credits prior to the compliance period for which the credits are going to be used. The user must submit a notice of intent to use the

credits at least 30 days prior to the use period. Sources that wish to trade or use discrete credits must provide notices to the state with information about the source's intent to use discrete credits, as well as the source's use of the discrete credits. The notices must also include:

- Number of discrete credits to be used,
- The requirements the source will comply with through the use of discrete credits,
- Copy of the generation Notice for the discrete credits used,
- Statements that the discrete credits were not previously used or retired, and
- Certifications similar to the other Notices.

A generating source can use discrete credits at a later time, or trade them to another source to use at a later time. The source using discrete credits must purchase an additional 10 percent of discrete credits above the number of credits they would otherwise need to comply. This additional amount is not used for compliance, but retired to benefit the environment.

#### *What Are the Other Requirements of New Hampshire's Program?*

New Hampshire's DER Program also contains requirements on the geographic scope of trading, recordkeeping, public availability of information, and quantification protocols.

Sources can trade VOC or NO<sub>x</sub> discrete credits. Discrete credits must be designated as either ozone season (May 1 through September 30) or non-ozone season credits. Discrete credits generated outside of the ozone season cannot be used during the ozone season.

#### *How Does New Hampshire's Program Protect the Environment?*

New Hampshire submitted these rules as a SIP revision to allow sources which emit ozone precursors—NO<sub>x</sub> and VOCs—flexibility in complying with requirements already in the SIP. The program provides emissions sources with a financial incentive to reduce emissions below levels required by applicable Federal and State requirements and below the source's actual emissions of the recent past. Sources that make these extra reductions going beyond requirements generate discrete credits that they can use later or sell to other sources. Discrete credits may be used by sources to comply with emissions limits. The program is not a means of limiting emissions; instead, trading is meant to provide an opportunity to comply with existing emission limits in a more cost effective manner.

However, the DER Program protects the environment in several ways:

- New Hampshire has demonstrated that in each ozone season the number of discrete credits generated will be equal to or greater than the number used,
- The calculation of the number of discrete credits needed for use is conservative since the source must retire an additional 10 percent of credits, and
- The DER Program specifically requires credits to be surplus to reductions already relied on in the SIP.

#### *How Is New Hampshire's Program Enforced?*

New Hampshire's DER Program divides compliance responsibilities between the generator and user of discrete credit. In general, the generator and user are responsible for actions within his or her control, and a generator or user is in violation of Env-A 3100 if they do not fulfill their respective responsibilities.

The generator is responsible for ensuring that it has created discrete credits according to the DER Program and that the discrete credits are real, surplus, and properly quantified.

The user is responsible for ensuring that its use of discrete credits complies with the provisions of the DER Program, including the prohibitions on use (Env-A 3104.10). A user is also responsible for ensuring a discrete credit is not used unless the credit is verified, the credit was not previously used or retired, and the discrete credit is valid. In any enforcement action, the generator and user bear the burden of proof on each of their respective responsibilities

#### *How Does New Hampshire's Program Interact With Title V Permits?*

The purpose of the Title V permitting program, codified in 40 CFR Part 70, is to ensure that a single document identifies all applicable requirements under the Act for sources that are "major sources" or are otherwise required to obtain a federally enforceable operating permit. Part 70 contains provisions designed to streamline the process of modifying operating permits for facilities that wish to participate in an emissions trading program like the New Hampshire's DER program. See, e.g., 40 C.F.R. §§ 70.6(a)(8), 70.7(e)(2)(B).

#### *How Does New Hampshire's Program Provide for Emissions Quantification Protocols?*

A key element in the design and implementation of trading programs, including open market trading programs, is methods for quantifying

amounts of emissions. Precisely determining these amounts would be important to determine the amount of emissions by which a source may be exceeding its SIP or permit limits, and therefore the amount of emissions reductions the source would need to acquire in an emissions trade in order to meet those limits; as well as the amount of emissions a source may generate to sell. These methods are often referred to as emissions quantification protocols, or, simply, protocols.

In its notice regarding the New Jersey Trading Program, EPA identified as an issue the question of whether protocols maybe included in a Title V permit in lieu of the SIP itself. For a more complete discussion of this, see the New Jersey Notice, 66 FR 1796. However, EPA proposes to approve New Hampshire's DER Program on the basis that at the time New Hampshire adopted and submitted it to EPA, New Hampshire relied on the guidance provided at that time. As a result, EPA proposes to approve the provisions of the DER Program that the SIP must include criteria for protocol development but not the protocols themselves.

#### *When Was New Hampshire's Program Adopted?*

New Hampshire adopted the DER program on January 13, 1997.

#### *When Was New Hampshire's Program Submitted to EPA and What Did it Include?*

EPA received New Hampshire's submittal of its DER Program SIP revision to EPA on January 28, 1997. The rule was deemed administratively and technically complete by operation of law on July 28, 1997. Additional information was submitted by New Hampshire on February 24, 1998.

New Hampshire's DER Program SIP revision included the following elements:

- Env-A 3100 and
- Modeling analysis to support inter-precursor emission trading, specifically, NO<sub>x</sub> emission decreases to meet VOC emission reduction requirements.

#### **Other Significant Items Related to New Hampshire's Program**

##### *How Does New Hampshire's Program Avoid Adverse Local Impacts of Hazardous Air Pollutant Emissions?*

In VOC trading programs, it is important to recognize that many VOCs are also classified as hazardous air pollutants (HAPs). EPA is committed to protecting the health and environment of local communities from any negative

impacts related to VOC trading. EPA is also committed to providing flexibility for local decision making that can allow for different circumstances in different localities.

While sources involved in VOC trading are required to meet all applicable current and future air toxics requirements, such as maximum achievable control technology (MACT), EPA believes VOC trading programs should build in additional safeguards for HAPs. In the September 15, 1999, proposed revisions to the EIP guidance, EPA outlined a draft framework for addressing HAP-related issues in VOC trading programs. The draft framework says VOC trading programs must contain the following general safeguards:

- A program review of the trading program to evaluate the impacts of VOC trades involving HAPs on the health and environment of local communities,
- Prevention and/or mitigation measures to address any negative impacts,
- Public participation in program design, implementation and evaluation, and
- Availability of sufficient information for meaningful review and participation.

EPA believes New Hampshire's DER Program is consistent with the proposed framework for addressing HAP-related issues in VOC trading programs as outlined below, even though New Hampshire adopted its DER Program prior to the proposed revisions to the EIP.

#### *Periodic Program Evaluation Provisions*

Env-A 3109 requires New Hampshire to audit the DER Program and assess the effects of toxic emission resulting from the DER Program. This audit is made available to the public within one year after the audit begins. Evaluation can also occur on a source-by-source basis through the public accessibility of the Notice and Certification of emission credit generation and use.

#### *Prevention and Mitigation Provisions*

New Hampshire's DER program is more restrictive than EPA's proposed open market trading model rule with respect to HAPs. The proposed model rule requires a user source to disclose the amount of HAPs emitted as a result of the use of discrete credits and certify compliance with the state's ambient air levels (AAL). AAL's are defined in New Hampshire's Regulated Toxic Air Pollutants, Env-A 1400. This state regulation requires existing, new, or modified sources to demonstrate that permitted emissions from the source do

not violate the ambient air limits established by Env-A 1400. The DER Program requires each source to certify that any emission trade will not effect the source's compliance with the AALs. The public is further protected because New Hampshire uses risk analysis as the basis for developing AALs.

#### *Public Participation Provisions*

In developing the DER program, New Hampshire created a work group called Emission Reduction Trading Advisory Committee, which met on a monthly basis during program development. New Hampshire also held a public hearing on October 10, 1996 to discuss the rule before finalizing the rule in 1997.

#### *Information Availability Provisions*

New Hampshire's program requires each generator and user of emission credits to analyze the impact on air toxic emissions resulting from VOC emission trading. In cases where a source is required to have an operating permit, New Hampshire requires the emission trade information to be attached to the permit.

As of this writing, EPA believes New Hampshire's DER Program is consistent with EPA's current thinking on addressing HAP-related issues in VOC trading programs. As EPA develops additional guidance, EPA will provide this guidance to New Hampshire as the State continues to discuss these and other issues in the program audit and, where appropriate, require New Hampshire to revise the DER Program.

#### *How Does EPA's Proposed Action Affect Earlier Credits?*

Upon a final approval of New Hampshire's DER SIP revision, Env-A 3100 will be federally-enforceable. Since Env-A 3100 is a SIP flexibility mechanism, compliance with its terms is essential in order to avoid complying with other applicable requirements of the SIP. Also, the generator may have other responsibilities related to proper quantification of the discrete credits. EPA suggests that the generators and any users of the discrete credits review these specific discrete credit generation strategies before Env-A 3100 becomes subject to EPA enforcement.

#### *How Will New Hampshire Audit the Program?*

Env-A 3109 requires New Hampshire to conduct a program audit every three years, beginning no later than 1999. New Hampshire has submitted a program audit that summarizes emission trades through 1998.

### *What is the Basis for Today's Proposal?*

As discussed in the section "What Guidance Did EPA Use to Evaluate New Hampshire's Program?" the 1994 EIP includes requirements for mandatory EIPs and guidance for voluntary EIPs. 40 CFR part 51, subpart U; 59 FR 16690. EPA proposed revised guidance to accommodate open market trading programs, by notices dated August 3, 1995, 60 FR 39668, and August 25, 1995, 60 FR 44290. EPA received comments on both of these proposals. EPA proposed action on a Michigan emission trading program by notice dated September 18, 1997, 62 FR 48972. EPA proposed action on a New Jersey emission trading program by notice dated January 9, 2001, 66 FR 1796. EPA also proposed revisions to the EIP on September 15, 1999, 64 FR 50086.

In addition, in a letter to Congressman Thomas J. Bliley, dated March 10, 1998, Richard D. Wilson, EPA's Acting Assistant Administrator for Air and Radiation, stated that EPA would "work with the States to develop open market programs tailored to their individual circumstances. In this process EPA and the States are using the August 1995 [open market trading] proposal as guidance and taking into account both State circumstances and the many useful comments we received in response to the proposal."

New Hampshire adopted its SIP on January 13, 1997 and submitted it to EPA on January 21, 1997. In response to requests by EPA, New Hampshire supplemented the submittal with modeling analysis to support inter-precursor trading on February 24, 1998.

By notice dated September 15, 1999, EPA proposed revised guidance for economic incentive programs. 64 FR 50086. That proposal would revise in certain respects the Agency guidance provided in the 1994 EIP, the 1995 open market trading program proposals and the guidance provided in the 1997 EPA proposal to approve the Michigan program and the 2001 EPA proposal to approve the New Jersey program. The public comment period on the September 15, 1999 proposal ended December 10, 1999. EPA is currently considering the public's comments in developing a final revision to the EIP guidance.

In developing its DER SIP revision, New Hampshire relied on EPA's statements that New Hampshire could base its SIP revision on the 1995 open market trading proposal. New Hampshire's submittal of the SIP revision also accorded with EPA's representations to Congressman Bliley that States could use the 1995 guidance

to assist them in developing their open market trading programs. EPA mostly evaluated the SIP revision against the guidance available at the time of the program's development and submittal. In light of this reliance, EPA is today proposing to approve the New Hampshire's SIP revision, except for the deficiencies discussed in the "What are EPA's Proposed Conditions for Approval?" section. In doing so, EPA is proposing to apply, on an interim basis, both the 1995 open market trading program proposals, the 1999 proposed revisions to the EIP, and the guidance contained in the 1997 EPA proposal to approve the Michigan program and the 2001 EPA proposal to approve the New Jersey program, recognizing that some aspects of these proposals may be further revised by the policies of the 1999 EIP proposal, if and when it is finalized.

### *How Will New Hampshire Address Future EPA Trading Guidance?*

EPA believes the basis for today's proposed action is a reasonable approach in the interest of supporting trading programs. However, due to EPA's lack of experience with open market trading programs and the many issues that such programs raise, EPA will use any future final revised EIP guidance as a basis for re-evaluating New Hampshire's DER Program, in coordination with the State, to ensure that its operation is consistent with the Clean Air Act and federal regulation. EPA will notify the State of any deficiencies in the DER Program, within 18 months after EPA issues a final revised EIP guidance. As with any SIP, EPA may require New Hampshire to revise the DER Program where necessary and re-submit the DER Program according to the requirements and deadlines under section 110(k)(5) of the Act. According to section 110(k)(5), New Hampshire may have up to 18 months to revise and re-submit the DER Program after EPA notifies the State of any deficiencies.

### *What is the Status of the 1994 Economic Incentive Program?*

The 1994 EIP established, through notice-and-comment action, rules for mandatory EIPs and guidance for voluntary EIPs. Any final action that EPA may take to approve the New Hampshire DER Program, to the extent that action differs from the guidance portion of the 1994 EIP, would revise that portion of the 1994 EIP action only for purposes of today's action on the New Hampshire SIP submittal. EPA's proposed 1999 EIP guidance, once completed through notice-and-comment

action, may further revise the guidance portion of the 1994 EIP action.

### **Conclusion**

EPA is proposing to approve conditionally the New Hampshire SIP revision for Env-A 3100. This SIP revision implements New Hampshire's DER Program. EPA is proposing conditional approval of New Hampshire's DER Program, provided New Hampshire commits to correct the deficiencies discussed in the "What are EPA's Proposed Conditions for Approval?" section, in writing, on or before March 9, 2001. New Hampshire must then correct the deficiencies and submit them to EPA within one year of EPA's final action on the DER SIP revision.

If New Hampshire submits a commitment to this effect, EPA will publish a final conditional approval of New Hampshire's DER Program. EPA will consider all information submitted prior to any final rulemaking action as a supplement or amendment to the January 21, 1997 submittal. If New Hampshire does not make the required commitment to EPA, EPA is proposing in the alternative to disapprove the DER Program.

EPA is requesting public comment on the issues discussed in today's action. EPA will consider all public comments before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA Regional office listed in the ADDRESSES section.

### **Administrative Requirements**

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. 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 (Public Law 104-4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63

FR 27655, May 10, 1998). This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it 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 (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. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. 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.*).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: January 19, 2001.

**Mindy S. Lubber,**

*Regional Administrator, EPA-New England.*  
[FR Doc. 01-3160 Filed 2-6-01; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[DE043-1030b; FRL-6941-4]

#### Approval and Promulgation of Air Quality Implementation Plans; Approval and Promulgation of Air Quality Implementation Plans; Delaware; Revisions to New Source Review

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to convert its conditional approval of Delaware's revised New Source Review (NSR) regulations to a full approval and to incorporate those regulations into the Delaware State Implementation Plan (SIP). In the Final Rules section of this **Federal Register**, EPA is taking direct final action to convert the conditional approval to full approval as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

**EFFECTIVE DATE:** Comments must be received in writing by March 9, 2001.

**ADDRESSES:** Written comments should be addressed to Makeba Morris, Chief, Permits and Technology Assessment Branch, Mailcode 3AP11, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

**FOR FURTHER INFORMATION CONTACT:** Linda Miller, (215) 814-2068, at the EPA Region III address above, or by e-mail at miller.linda@epa.gov.

**SUPPLEMENTARY INFORMATION:** For further information on EPA's proposed

action to convert its conditional approval of revisions to Delaware's New Source Review Program to a full approval, please see the information provided in the direct final action, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: January 17, 2001.

**Bradley M. Campbell,**

*Regional Administrator, Region III.*

[FR Doc. 01-3159 Filed 2-6-01; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[I.D. 012301A]

#### Western Pacific Fishery Management Council; Public Meetings and Hearing

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of public meeting/public hearing.

**SUMMARY:** The Western Pacific Fishery Management Council (Council) will hold its 108th meeting February 12 through February 15, 2001, in Honolulu, HI.

**DATES:** The Council's Standing Committees will meet on February 12, 2001, from 7:30 a.m. to 5:30 p.m. The full Council meeting will be held on February 13, 2001, from 9 a.m. to 5 p.m. and February 14 and 15, 2001, from 8:30 a.m. to 5 p.m. A public hearing will be held on February 13, 2001, at 4 p.m. on a framework amendment to extend the Northwestern Hawaiian Islands (NWHI) lobster fishery closure. See **SUPPLEMENTARY INFORMATION** for specific dates and times for these meetings and the hearing.

**ADDRESSES:** The Council meeting, Standing Committee meetings, and public hearing will be held at the Ala Moana Hotel, 410 Atkinson Drive, Honolulu, HI; telephone: 808-955-4811.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director; telephone: 808-522-8220.

**SUPPLEMENTARY INFORMATION:**

#### Dates and Times

##### Committee Meetings

The following Standing Committees of the Council will meet on February 12, 2001. Enforcement/Vessel Monitoring