

TAC Chapter 117. These non-substantive revisions do not affect the emission use calculations established for the ERC Program.

#### IV. Final Action

EPA is proposing to approve severable revisions to the Texas SIP submitted on October 24, 2006, and August 16, 2007. Specifically from the October 24, 2006 submittal, EPA is approving the amendments to section 101.302(a) and (f) that move the international emission reduction requirements to a new section, the amendments to section 101.302(d)(1)(C)(vi) that clarify EPA's role in approving emission quantification protocols, and the amendment to section 101.306(a)(5) that updates the approved uses for ERCs to include the HECT. EPA is also proposing to approve provisions for international emission reductions at new section 101.305 submitted on October 24, 2006. Additionally, we are proposing to approve the following nonsubstantive revisions to the Texas SIP submitted on August 16, 2007: revisions to sections 101.302(d)(1)(A) and 101.306(b)(3) to update the cross-references to recently recodified provisions in 30 TAC Chapter 117.

In a separate rulemaking, EPA is proposing action on the severable DERC Program revisions at 30 TAC sections 101.372, 101.373, 101.375, 101.376, and 101.378 submitted on October 24, 2006, and 30 TAC sections 101.372 and 101.376 submitted on August 16, 2007 (*see* EPA-R06-OAR-2010-0418).

At this time, EPA is not taking action on the revisions to the Emissions Banking and Trading of Allowances Program at 30 TAC sections 101.338 and 101.339 submitted on October 24, 2006. EPA is also not taking action at this time on the revisions to the general air quality definitions at 30 TAC Section 101.1 or the revisions to the System Cap Trading Program at 30 TAC sections 101.383, and 101.385 submitted on August 16, 2007. These severable revisions remain under review by EPA and will be addressed in separate actions.

#### V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal

requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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

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

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

Dated: March 18, 2010.

**Lawrence E. Starfield,**

*Acting Regional Administrator, Region 6.*

[FR Doc. 2010-6800 Filed 3-29-10; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2010-0148; FRL-9130-5]

### Approval and Promulgation of Air Quality Implementation Plans; Texas; Revisions to the Discrete Emission Credit Banking and Trading Program

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve severable portions of two revisions to the Texas State Implementation Plan (SIP) submitted by the State of Texas on October 24, 2006, and August 16, 2007. These revisions amend existing sections and create a new section in Title 30 of the Texas Administrative Code (TAC), Chapter 101—General Air Quality Rules, Subchapter H—Emissions Banking and Trading, Division 4—Discrete Emission Credit Banking and Trading, referred to elsewhere in this notice as the Discrete Emission Reduction Credit (DERC) Program. The October 24, 2006, submittal creates a new section for international emission reduction provisions and amends existing sections to prohibit the generation and use of DERCs from shutdown activities and further clarify procedures for using emission protocols. The August 16, 2007, submittal amends two sections of the DERC program to update cross-references to recently recodified 30 TAC Chapter 117 provisions. Additionally, EPA is proposing to find that the Texas Commission on Environmental Quality (TCEQ) has satisfied all elements of our September 6, 2006, final conditional approval of the DERC program with the submittal of the October 24, 2006, SIP submittal; and as such, the DERC program conditional approval is proposed for full approval. EPA has determined that these SIP revisions comply with the Clean Air Act and EPA regulations, are consistent with EPA policies, and will improve air quality. This action is being taken under section 110 and parts C and D of the Federal Clean Air Act (the Act or CAA).

**DATES:** Comments must be received on or before *April 29, 2010*.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R06-

OAR-2010-0148, by one of the following methods:

(1) <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

(2) *E-mail*: Mr. Jeff Robinson at [robinson.jeffrey@epa.gov](mailto:robinson.jeffrey@epa.gov). Please also cc the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below.

(3) U.S. EPA Region 6 "Contact Us" Web site: <http://epa.gov/region6/r6coment.htm>. Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

(4) *Fax*: Mr. Jeff Robinson, Chief, Air Permits Section (6PD-R), at fax number 214-665-6762.

(5) *Mail*: Mr. Jeff Robinson, Chief, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

(6) *Hand or Courier Delivery*: Mr. Jeff Robinson, Chief, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Such deliveries are accepted only between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions*: Direct your comments to Docket ID No. EPA-R06-OAR-2010-0148. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through <http://www.regulations.gov> or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files

should avoid the use of special characters and any form of encryption and should be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket*: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. A 15 cent per page fee will be charged for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area on the seventh floor at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal related to this SIP revision, and which is part of the EPA docket, is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

**FOR FURTHER INFORMATION CONTACT**: If you have questions concerning today's proposed rule, please contact Ms. Adina Wiley (6PD-R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD-R), Suite 1200, Dallas, TX 75202-2733. The telephone number is (214) 665-2115. Ms. Wiley can also be reached via electronic mail at [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

Throughout this document wherever, any reference to "we," "us," or "our" is used, we mean EPA.

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#### **I. What Action Is EPA Taking?**

We are proposing to approve severable portions of two revisions to the Texas SIP submitted by the TCEQ on October 24, 2006 and August 16, 2007, specific to the DERC Program. The DERC Program, conditionally approved by EPA on September 6, 2006, establishes an open market trading program to provide flexibility for sources in complying with certain State and Federal requirements. In an open market trading program, a source generates emission credits by reducing its emissions during a discrete period of time. These credits, called discrete emission credits, or DECs, in the Texas program, are quantified in units of mass. Discrete emission credit (DEC) is a generic term that encompasses reductions from stationary sources (discrete emission reduction credits, or DERCs) and reductions from mobile sources (mobile discrete emission reduction credits, or MDERCs).<sup>1</sup> The revisions we are proposing to approve amend existing sections and create a new section in the DERC Program at Title 30 of the Texas Administrative Code (TAC), Chapter 101—General Air Quality Rules, Subchapter H—Emissions Banking and Trading, Division 4—Discrete Emission Credit Banking and Trading. The October 24, 2006 submittal creates a new section for international emission reduction provisions and amends existing sections to prohibit the generation and use of DERCs from shutdown activities and further clarifies procedures for using emission protocols. Additionally, EPA is proposing to find that the TCEQ has satisfied all elements of our September 6, 2006 final conditional approval of the DERC program with the submittal of the October 24, 2006 SIP submittal; and as such, the DERC program conditional approval is proposed for full approval.<sup>2</sup> The severable portions of the August 16, 2007 submittal that we are proposing to approve non-substantively revise the DERC Program to correctly update the

<sup>1</sup> In this action, when we refer to the program as the "DERC Rule" or the "DERC Program" we are speaking of the entire Discrete Emission Credit Banking and Trading Program, which encompasses both DERCs and MDERCs.

<sup>2</sup> Today's action proposes to find that the TCEQ has satisfied all conditions of the September 6, 2006 final DERC conditional approval. See 71 FR 52703. This action is separate from, and unrelated to, the Dallas/Fort Worth 1997 8-hour Ozone Attainment Demonstration conditional approval finalized by EPA on January 14, 2009, at 74 FR 1903.

cross-references to the stationary source nitrogen oxide (NO<sub>x</sub>) rules found in the Texas SIP at 30 TAC Chapter 117 as a result of the non-substantive recodification of Chapter 117 approved by EPA as part of the Texas SIP on December 3, 2008 (see 73 FR 73562). Additionally, in both the October 24, 2006 and August 16, 2007 SIP submittals TCEQ has made several non-substantive revisions to update grammar and document style. Consequently, we are proposing to approve the revisions to the Texas SIP at 30 TAC sections 101.372(a), 101.372(d), 101.372(f), 101.372(j), 101.373(a), 101.376(c)(4), and 101.378(b) and the creation of new section 101.375 submitted on October 24, 2006. Additionally, we are proposing to approve revisions to the Texas SIP at 30 TAC sections 101.372(d) and 101.376(d) submitted on August 16, 2007 by the TCEQ.

## II. What Did Texas Submit?

We are proposing to approve severable portions of two revisions to the Texas SIP specific to the DERC Program. The first revision we are proposing action on was adopted by the TCEQ on October 4, 2006, and submitted to EPA on October 24, 2006. At the same time that TCEQ adopted and submitted revisions to the DERC Program, revisions were also adopted and submitted for the Emission Credit Banking and Trading Program (referred to elsewhere in this notice as the Emission Reduction Credit (ERC) Program) and the Emissions Banking and Trading of Allowances (EBTA) Program. The revisions to the ERC and EBTA Programs are specific to separate, distinct trading programs and, as such, are severable from the DERC Program revisions. We are not proposing to act upon the severable revisions to the ERC Program at 30 TAC Chapter 101, Subchapter H, Division 1, sections 101.302, 101.305, and 101.306. EPA is processing a separate rulemaking to address the 2006 and 2007 ERC Program revisions (see EPA-R06-OAR-2010-0417). EPA has not yet taken action on the EBTA Program at 30 TAC Chapter 101, Subchapter H, Division 2 and therefore is not proposing action today on the repeal and replacement of section 101.338 and the revisions to section 101.339. The second revision upon which we are proposing action was adopted by the TCEQ on July 25, 2007, and submitted to EPA on August 16, 2007. Also at this time TCEQ adopted and submitted revisions to the general air quality definitions, the ERC Program, and the System Cap Trading (SCT) Program. We are not acting today upon revisions to the general air quality

definitions at 30 TAC Chapter 101, Subchapter A, section 101.1 because the DERC Program does not rely upon them (therefore the revisions are severable from the DERC Program) and previous revisions to section 101.1 are still pending for review by EPA. We are also not acting today upon the revisions to the ERC Program at 30 TAC Chapter 101, Subchapter H, Division 1, sections 101.302 and 101.306 because these revisions are severable from the DERC program and the October 24, 2006 SIP revision is still under EPA review. EPA intends to take a separate rulemaking action to address the 2006 and 2007 ERC Program revisions (see EPA-R06-OAR-2010-0417). EPA has not yet taken action on the System Cap Trading Program at 30 TAC Chapter 101, Subchapter H, Division 5 and therefore is not acting today upon the severable revisions to sections 101.383 and 101.385.

A copy of the October 24, 2006 and August 16, 2007 SIP submittals as well as our Technical Support Document (TSD) can be obtained from the Docket, as discussed in the "Docket" section above. A discussion of the specific Texas rule changes that we are approving is included in the TSD and summarized below.

### A. October 24, 2006 SIP Submittal

#### 1. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.372—General Provisions

The existing SIP-approved version of section 101.372 was adopted by the TCEQ on December 13, 2002, and conditionally approved by EPA on September 6, 2006 (see 71 FR 52703). The revisions to section 101.372(a) and (f) adopted by the TCEQ on October 4, 2006, delete the information pertaining to international emission reductions and move these provisions to new section 101.375. Additionally, section 101.372(d)(1)(C)(vi) is revised to clarify EPA's approval process of the quantification protocols for the DERC Program. Several non-substantive revisions for grammar and style were also made by the TCEQ in this submittal.

#### 2. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.373—Discrete Emission Reduction Credit Generation and Certification

The existing SIP-approved version of section 101.373 was adopted by the TCEQ on November 10, 2004, and conditionally approved by EPA on September 6, 2006 (see 71 FR 52703). The revisions to section 101.373(a) prohibit the generation of DERCs from

shutdown activities; specifically, section 101.373(a)(1) is amended to delete permanent shutdowns as a method of generating DERCs and section 101.373(a)(2) is amended to update the prohibited generation strategy list to include permanent shutdowns.

#### 3. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.375—Emission Reductions Achieved Outside the United States

On October 4, 2006, TCEQ adopted new section 101.375. This new section contains the previously SIP-approved international emission reduction provisions from sections 101.372(a) and (f) and updates the international provisions consistent with the requirements of Texas Senate Bill 784.

#### 4. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.376—Discrete Emission Credit Use

The existing SIP-approved version of section 101.376 was adopted by the TCEQ on November 10, 2004, and conditionally approved by EPA on September 6, 2006 (see 71 FR 52703). The proposed SIP revision adopted by the TCEQ on October 4, 2006, amends section 101.376(c)(4) to update cross-references to 30 TAC Chapter 106 in the list of prohibited DEC use strategies.

#### 5. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.378—Discrete Emission Credit Banking and Trading

The existing SIP-approved version of section 101.378 was adopted by the TCEQ on December 13, 2002, and conditionally approved by EPA on September 6, 2006 (see 71 FR 52703). The revisions to section 101.378(b) revise the lifetime of a discrete emission credit to prohibit the use of discrete emission credits generated from shutdowns; specifically, section 101.378(b)(1) states that discrete emission credits generated from shutdowns prior to September 30, 2002, will be available for use until September 8, 2010, and section 101.378(b)(2) prohibits the use of shutdown discrete emission credits generated after September 30, 2002.

### B. August 16, 2007 SIP Submittal

#### 1. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.372—General Provisions

The revisions to section 101.372 adopted by the TCEQ on July 25, 2007, further revise the revisions adopted by the TCEQ on October 4, 2006. The 2007 revisions non-substantively amend section 101.372(d)(1)(A) to correctly cross-reference the recodified stationary source nitrogen oxide (NO<sub>x</sub>) rules to the

Texas SIP at 30 TAC Chapter 117. Additionally, section 101.372(d)(1)(B) was non-substantively amended to include the correct title for the stationary source volatile organic compound rules to the Texas SIP at 30 TAC Chapter 115.

2. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.376—Discrete Emission Credit Use

The revisions to section 101.376 adopted by the TCEQ on July 25, 2007, further revise the revisions adopted by the TCEQ on October 4, 2002. The 2007 revisions non-substantively amend section 101.376(d)(2)(A) to correctly cross-reference the recodified stationary source NO<sub>x</sub> rules to the Texas SIP at 30 TAC Chapter 117.

### III. What Is EPA's Evaluation of These SIP Revisions?

#### A. October 24, 2006 SIP Submittal

1. 30 TAC Chapter 101, Subchapter H, Division 1, Section 101.302—General Provisions

The October 4, 2006, revisions to sections 101.372(a), 101.372(d), 101.372(f) and 101.372(j) are approvable. Sections 101.372(a) and 101.372(f) were revised to delete the information pertaining to international emission reductions and relocate these provisions to new section 101.375. This consolidation of the international emission reduction provisions improves the clarity of the DERC Program by creating a new section specific to international emission reductions. Section 101.372(d)(1)(C)(vi) was revised to clarify EPA's role in the approval of emission quantification protocols. While the previous SIP-approved provisions were accurate and consistent with EPA's Economic Incentive Program (EIP) Guidance ("Improving Air Quality with Economic Incentive Programs" (EPA-452/R-01-001, January 2001)), the revised language has been restructured to more closely follow the provisions for approving emission quantification protocols at section 5.2(c) of the EIP Guidance. The non-substantive revisions to sections 101.372(d)(1)(C)(iv) and 101.372(j) update the formatting and grammar of the DERC General Provisions.

The revisions to section 101.372 described above were made pursuant to TCEQ's September 8, 2005, commitment letter for the DERC Program conditional approval (included in the docket for this action). In this commitment letter, TCEQ committed to revising, among others things, section 101.372 to more clearly require EPA approval for

transactions and to clarify the EPA's role in approving emission quantification protocols. Please see section IV. of this notice for a discussion of how the TCEQ has addressed the elements of DERC conditional approval and the September 8, 2005, commitment letter.

2. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.373—Discrete Emission Reduction Credit Generation and Certification

The October 4, 2006, revisions to sections 101.373(a)(1) and 101.373(a)(2) are approvable. The revisions to section 101.373(a)(1) and (a)(2) amend the allowable and prohibited generation strategy lists to reflect that permanent shutdowns are a prohibited DERC generation strategy. These amendments are consistent with the Open-Market Trading provisions at section 7.5(b) of the EIP Guidance.

The revisions to section 101.373 described above were made pursuant to TCEQ's September 8, 2005, commitment letter for the DERC Program conditional approval (included in the docket for this action). In this commitment letter, TCEQ committed to revising the DERC program to prohibit the future generation of DERCs from shutdowns. Please see section IV. of this notice for a discussion of how the TCEQ has addressed the elements of DERC conditional approval and the September 8, 2005, commitment letter.

3. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.375—Emission Reductions Achieved Outside the United States

New section 101.375 adopted on October 4, 2006, is approvable. EPA finds that in addition to relocating the SIP-approved international emission reduction language from section 101.372, new section 101.375 has expanded the scope of our original DERC program approval to allow the use of international reductions in lieu of DERCs to occur in attainment areas within 100-km of the Texas-Mexico border, consistent with the requirements of Texas Senate Bill 784. However, the continued requirement at section 101.375 for EPA approval before any such use is consistent with the intent of our DERC program conditional approval on September 6, 2006. EPA approval continues to be through a case-specific SIP revision that must clearly demonstrate through a detailed CAA section 110(l) analysis that the use of such international reductions will not jeopardize attainment or maintenance of the National Ambient Air Quality Standards or any other applicable

standards. As noted in our September 6, 2006, final conditional approval of the DERC Program " \* \* \* international trades present an especially difficult case. For instance, currently there is no mechanism for demonstrating that reductions made in another country are surplus or enforceable. Nonetheless, emission reductions in other countries could offer substantial air quality benefits in the United States." See 71 FR 52703, 52705. In approving this revision to the DERC program, "EPA is recognizing the concept of international trading and describing a framework (*i.e.*, the submission of a SIP revision demonstrating among other things the validity and enforceability of foreign reductions) for such trading, in the event that a suitable and approvable mechanism is ever developed for resolving concerns including enforceability and surplus. Until such a mechanism is developed and approved by EPA, however, EPA will not approve international trades under the DERC rule." See 71 FR 52703, 52705. Further, it is important to note, that even though we are approving the use of international reductions in lieu of DERCs along the Texas-Mexico border, the use of these reductions must still meet the requirements of the CAA. Therefore, the international reductions are not available for use as Federal NSR offsets since section 173(c)(1) of the CAA requires that offset reductions come from the same nonattainment area as the proposed source or modification or another nonattainment area with an equal or higher nonattainment classification.

4. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.376—Discrete Emission Credit Use

The October 4, 2006, revisions to section 101.376(c)(4) are approvable. TCEQ correctly updated the cross-references to Chapter 106 in response to our final conditional approval notice. In our final notice we stated that "We are not approving section 101.376(c)(4) into the Texas SIP because the cross-references to 30 TAC Chapter 106 Permit by Rule, sections 106.261(3) or (4) or section 106.262(3) are incorrect and do not exist in State law, the Texas SIP, or the Texas Federal Operating Permits program. Consequently, unless and until the State adopts and submits a revision to EPA for approval as a SIP revision and EPA approves it, the use of discrete emission credits to exceed the provisions in certain types of pre-construction permits termed Permits by Rule is not available under the Texas SIP."

While EPA has not approved sections 106.261 and 106.262 into the Texas SIP, we are able to approve the revisions to section 101.376(c)(4). By approving the revisions to section 101.376(c)(4) we are not approving a use of DERCs that conflicts with the Texas SIP, rather we are approving a listed prohibition of DERC usage that would further support the Texas SIP. Additionally, if an owner or operator of a facility wished to use DERCs in a manner that exceeded limitations from sections 106.261 or 106.262, the use would have to be approved by TCEQ and EPA; EPA anticipates our approval would only occur through a case-specific SIP revision following a demonstration from the owner/operator that useage of DERCs in this manner would not undermine the attainment strategy of the area or constitute a violation of CAA section 110(l).

5. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.378—Discrete Emission Credit Banking and Trading

The October 4, 2006, revisions to section 101.378 are approvable. The revisions to section 101.378(b)(1) and (b)(2) limit the lifetime of certain discrete emission credits generated from shutdowns. Discrete emission credits generated from shutdowns prior to September 30, 2002, remain available for use until September 8, 2010. Any discrete emission credits certified from shutdowns after September 30, 2002, may not be used. These amendments are consistent with the Open-Market Trading provisions at section 7.5(b) of the EIP Guidance.

The revisions to section 101.378 described above were made pursuant to TCEQ's September 8, 2005 commitment letter for the DERC Program conditional approval (included in the docket for this action). In this commitment letter, TCEQ committed to revising the DERC program to restrict the lifetime of previously generated shutdown DERCs. Please see section IV. of this notice for a discussion of how the TCEQ has addressed the elements of DERC conditional approval and the September 8, 2005 commitment letter.

*B. August 16, 2007 SIP Submittal*

1. 30 TAC Chapter 101, Subchapter H, Division 4, Section 101.372—General Provisions

The July 25, 2007 revisions to section 101.372(d)(1)(A) and (B) are approvable. As demonstrated further in our TSD, the non-substantive revisions to section 101.372(d)(1)(A) correctly cross-reference the recodified stationary source NO<sub>x</sub> rules in the Texas SIP at 30

TAC Chapter 117. The non-substantive revisions to section 101.372(d)(1)(B) correctly update the titles of the stationary source VOC rules in the Texas SIP at 30 TAC Chapter 115. These non-substantive revisions do not affect the approved emission quantification protocols established for the DERC Program.

2. 30 TAC Chapter 101, Subchapter H, Division 1, Section 101.376—Discrete Emission Credit Use

The July 25, 2007 revisions to section 101.376(d)(2)(A) are approvable. As demonstrated further in our TSD, these non-substantive revisions correctly cross-reference the recodified stationary source NO<sub>x</sub> rules in the Texas SIP at 30 TAC Chapter 117. These non-substantive revisions do not affect the emission use calculations established for the DERC Program.

**IV. What Is EPA's Evaluation of the TCEQ's Response to the DERC Conditional Approval?**

*A. What is a conditional approval?*

Under section 110(k)(4) of the Clean Air Act, EPA may conditionally approve a plan based on a commitment from the State to adopt specific enforceable measures within one year from the date of approval. The conditional approval remains in effect until EPA takes its final action—either a final approval or disapproval.

If EPA determines that the revised rule is approvable, EPA will propose approval of the rule through a notice and comment rulemaking. After responding to comments received, EPA will publish a final approval of the rule and the conditional approval is no longer in effect. However, if the State fails to meet its commitment within the one year period, then EPA must proceed with a disapproval action. EPA will propose disapproval of the rule through notice and comment rulemaking, and will finalize the disapproval after responding to all comments received. Note that EPA will conditionally approve a certain rule only once. Subsequent submittals of the same rule that attempt to correct the same specifically identified problems will not be eligible for conditional approval.

*B. What are the terms of the DERC program conditional approval?*

EPA conditionally approved the DERC program on September 6, 2006. Our conditional approval was based on a commitment letter submitted by the TCEQ on September 8, 2005. The September 8, 2005 commitment letter included the following provisions that

the TCEQ agreed to address by December 1, 2006. Additionally, TCEQ agreed to comply with these commitments during the conditional approval period. Specifically, TCEQ agreed to not approve any trades involving the types of reductions described in item (3) below, not approve any use of discrete shutdown credits that were generated after September 30, 2002, and to require the waiver described in item (4) below for generators and users of discrete emission credits.

1. Revise 30 TAC § 101.373 to prohibit the future generation of DERCs from permanent shutdowns and to allow DERCs generated and banked from permanent shutdowns prior to September 30, 2002 to remain available for use for no more than five years from the date of this letter.

2. The TCEQ will perform a credit audit to remove from the emissions bank all DERCs generated from permanent shutdowns after September 30, 2002. Even if the shutdown itself occurred before September 30, 2002, no DERCs can be generated from that event after September 30, 2002.

3. Revise 30 TAC §§ 101.302(f), 101.372(f)(7) and 101.372(f)(8) to clarify that EPA approval is required for individual transactions involving emission reductions generated in another state or nation, as well as those transactions from one nonattainment area to another, or from attainment counties into nonattainment areas. The TCEQ further understands that the EPA would require a state implementation plan revision prior to approving a transaction between another state or nation, as well as, those transactions between counties not located within the same nonattainment area.

4. The TCEQ will revise Form DEC-1, Notice of Generation and Generator Certification of Discrete Emission Credits; Form MDEC-1, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits; and Form DEC-2, Notice of Intent to Use Discrete Emission Credits, to include a waiver to the Federal statute of limitations defense for generators, and users of DERCs and mobile discrete emission reduction credits (MDERCs). Please be reminded that there is currently no applicable state statute of limitations in the State of Texas. In addition, the TCEQ will maintain its current policy of preserving all records relating to DERC and MDERC generation and use for a minimum of five years after the use strategy has ended.

5. Revise 30 TAC §§ 101.302 and 101.372 to clarify that a proposed quantification protocol may not be used

if the TCEQ Executive Director receives a letter from the EPA objecting to the use of the protocol during the 45-day adequacy review period or if the EPA proposes disapproval of the protocol in the **Federal Register**.

6. Revise 30 TAC § 101.306 to specify that Emission Reduction Credits may be used within the highly reactive volatile organic compounds Emissions Cap and Trade program as an annual allocation of allowances as provided under 30 TAC § 101.399.

### *C. Were the terms of the DERC conditional approval met?*

Following is an analysis of each DERC program element of the September 8, 2005, commitment letter and TCEQ's response. EPA is not including the ERC program elements (see commitments 3, 5, and 6 above) in our analysis of the DERC conditional approval. The ERC and DERC programs operate independently of each other and have been approved as separate, stand alone programs by EPA. The submission of these ERC provisions will not impact the functionality of the DERC program nor were these revisions to the ERC program necessary for the DERC program to be considered consistent with EPA regulations, policy and guidance. EPA has evaluated the October 24, 2006, ERC program revisions in a separate rulemaking (see EPA-R06-OAR-2010-0147).

1. Revise 30 TAC § 101.373 to prohibit the future generation of DERCs from permanent shutdowns and to allow DERCs generated and banked from permanent shutdowns prior to September 30, 2002, to remain available for use for no more than five years from the date of this letter.

TCEQ met this commitment of the conditional approval. TCEQ adopted the appropriate provisions and submitted the revised rules as a SIP revision within the time frame. TCEQ adopted revisions to section 101.373 that removed shutdowns as a method of generation and added the following language under the list of prohibited generation activities at section 101.373(a)(2): "permanent or temporary shutdowns or permanent curtailment of an activity at a facility". TCEQ adopted revisions to section 101.378(b)(1) that revise the lifetime of a DEC. Section 101.378(b)(1) states that "Discrete emission credits generated from shutdown strategies prior to September 30, 2002, will be available for use until September 8, 2010."

Note that the DERC calculation procedures at sections 101.373(c)(1), (3), and (4) discuss how DERCs are calculated from shutdowns.

Additionally, section 101.373(d)(3)(c) discusses how to certify the generation of DERCs from shutdown activities. EPA believes that the inclusion of this language was an oversight on TCEQ's part when responding to our conditional approval commitments. The DERC program at section 101.373(a)(2)(A) clearly prohibits the generation of DERCs from shutdowns. Therefore, EPA feels that TCEQ should remove this language at their earliest convenience, but that the prohibition on generation of shutdown DERCs is not impacted by this erroneous calculation.

2. The TCEQ will perform a credit audit to remove from the emissions bank all DERCs generated from permanent shutdowns after September 30, 2002. Even if the shutdown itself occurred before September 30, 2002, no DERCs can be generated from that event after September 30, 2002.

TCEQ met this commitment of the conditional approval. TCEQ adopted the appropriate provisions and submitted the revised rules as a SIP revision within the time frame. TCEQ confirmed in a letter dated February 5, 2010, that the credit audit was performed in January 2006 (this letter is available in the docket for this rulemaking). Additionally, TCEQ adopted two revisions to the SIP that will ensure that shutdowns after September 30, 2002, do not generate DERCs. First, the revision to section 101.373(a)(2) prohibits the future generation of DERCs from shutdowns (as discussed in item 1 above). Second, the TCEQ revised section 101.378(b)(2) so that "Discrete emission credits certified from facility shutdowns after September 30, 2002, may not be used."

3. Revise 30 TAC §§ 101.372(f)(7) and 101.372(f)(8) to clarify that EPA approval is required for individual transactions involving emission reductions generated in another state or nation, as well as those transactions from one nonattainment area to another, or from attainment counties into nonattainment areas. The TCEQ further understands that the EPA would require a state implementation plan revision prior to approving a transaction between another state or nation, as well as, those transactions between counties not located within the same nonattainment area.

TCEQ met the DERC-specific portion of this commitment. Section 101.372(f) outlines the geographic scope of the DERC rule and generally provides that, with the exception of international reductions pursuant to section 101.375, only reductions generated in the State of Texas can be certified as DERCs. Section 101.372(f)(7) was unchanged by TCEQ

and continues to provide that reductions from other counties, states, or nations can be used in any attainment or nonattainment county provided a demonstration showing improvement in air quality has been approved by the TCEQ ED and EPA. The use of international reductions under section 101.372(f)(7) is further modified by the restrictions at section 101.375.

Section 101.372(f)(8) was moved to new section 101.375. Section 101.375 establishes two ways that a facility could use an international reduction. First, a facility could use reductions of a criteria pollutant or precursor of a criteria pollutant to meet requirements of the same criteria pollutant. This option would be used if a facility had a NO<sub>x</sub> requirement in Texas and could find NO<sub>x</sub> reductions in Mexico or an ozone requirement in Texas and could find VOC reductions in Mexico. Alternately, a facility could use reductions of a criteria pollutant or its precursors to substitute for reductions in other criteria pollutants. For example, this situation would be one in which a source could be subject to a PM<sub>2.5</sub> requirement and wants to use CO reductions to satisfy the requirement. Generally, both of these uses (the same criteria pollutant or the substitution) requires approval by EPA and the TCEQ ED; the source must demonstrate that the reduction is real, permanent, enforceable, quantifiable, and surplus to any applicable Mexican, Federal, State, or local law; demonstrate that the use of the reduction does not cause localized health impacts; submit all supporting information for calculations and modeling; and be located within 100km of the Texas-Mexico border.

There are additional requirements for the case where a facility wants to substitute the international reduction of a criteria pollutant or its precursor for the obligations of a different criteria pollutant (the example above in which the facility used CO reductions for a PM<sub>2.5</sub> requirement). The facility must either show that the reduction is substituted for the reduction requirement of another criteria pollutant and the substitution results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area; or, the source must show that the reduction of a criteria pollutant (or precursor) for which the area is nonattainment is substituted for another criteria pollutant (or precursor) requirement for which an area is nonattainment.

Even though section 101.372(f)(7) was not revised, EPA approval is clearly required for uses of reductions from other counties, states, or other nations.

Uses of international reductions under section 101.372(f)(7) are further modified by the restrictions at section 101.375, which also clearly require EPA approval.

4. The TCEQ will revise Form DEC-1, Notice of Generation and Generator Certification of Discrete Emission Credits; Form MDEC-1, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits; and Form DEC-2, Notice of Intent to Use Discrete Emission Credits, to include a waiver to the Federal statute of limitations defense for generators, and users of DERCs and mobile discrete emission reduction credits (MDERCs). Please be reminded that there is currently no applicable state statute of limitations in the State of Texas. In addition, the TCEQ will maintain its current policy of preserving all records relating to DERC and MDERC generation and use for a minimum of five years after the use strategy has ended.

TCEQ met this commitment of the conditional approval. In a letter dated February 5, 2010, the TCEQ stated that even though the commitment included modifying Form MDEC-1, such form has never been created. However, Form MDEC-1 will include a waiver of the Federal statute of limitations defense if at any time in the future the TCEQ creates said form. Also in the February 5, 2010, letter, the TCEQ stated that the Forms DEC-1 and DEC-2 were modified in or before February 2007, but that the exact modification date could not be determined since the TCEQ does not keep copies of old versions of the form. Additionally, the TCEQ modified Form DEC-3, Notice of Use of Discrete Emission Credits, to include the same waiver of the Federal statute of limitations defense even though modification of Form DEC-3 was not part of the commitment. Copies of the modified DEC-1, DEC-2, and DEC-3 forms were included with the letter. Note that the February 5, 2010, letter and attachments is available in the FDMS docket for this action.

The TCEQ confirmed that during the time period between September 2006 and February 2007, there were no DERC generations submitted. So, even though Form DEC-1 was not revised until February 2007, there was not an instance where DERC generation did not have the appropriate waiver. However, between September 2006 and February 2007, there were 18 DEC-2 forms submitted to the TCEQ without the waiver of Federal statute of limitations defense language. But, under the DERC program, any notification of intent to use DERCs submitted on a DEC-2 form, must be followed by a notification of

use through the submission of a DEC-3 form. All 18 DEC-2 forms were followed by submissions of the DEC-3 forms with the appropriate waiver language.

Even though the DEC-1 and DEC-2 forms were not modified by the December 2006 deadline specified in the commitment letter, EPA finds that the intent of this commitment has been satisfied. The intent of this commitment was to ensure that all DERC generation and use activities were covered by a waiver of the Federal statute of limitations defense. Since no DERCs were generated during this time, there was no need for a DEC-1 form. The 18 DEC-2 forms provide notification that a source intends to use DERCs, the verification that the use occurred is through the submission of a DEC-3 form. TCEQ verified that all 18 DEC-2 forms were followed by the submission of a modified DEC-3 form—thereby covering all DERC usage activities with the waiver of the Federal statute of limitations defense.

5. Revise 30 TAC § 101.372 to clarify that a proposed quantification protocol may not be used if the TCEQ Executive Director receives a letter from the EPA objecting to the use of the protocol during the 45-day adequacy review period or if the EPA proposes disapproval of the protocol in the **Federal Register**.

TCEQ met this commitment of the conditional approval. TCEQ adopted the appropriate provisions and submitted the revised rule as a SIP revision within the time frame. TCEQ revised section 101.372(d)(vi) to state that “quantification protocols shall not be accepted for use with this division if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPA proposes disapproval of the protocol in the **Federal Register**.”

#### V. Final Action

EPA is proposing to approve severable revisions to the Texas SIP submitted on October 24, 2006, and August 16, 2007. Specifically from the October 24, 2006 submittal, EPA is approving the amendments to section 101.372(a) and (f) that move the international emission reduction requirements to a new section, the amendments to section 101.372(d)(1)(C)(vi) that clarify EPA's role in approving emission quantification protocols, the amendments to section 101.373 to prohibit the generation of DERCs from shutdowns, the amendment to section 101.376(c)(4) that updates the cross-references to Chapter 106 provisions, the amendments to section 101.378(b) to

limit the lifetime of previously generated shutdown DERCs, and non-substantive revisions to sections 101.372(d) and 101.372(j). EPA is also proposing to approve provisions for international emission reductions at new section 101.375 submitted on October 24, 2006. The October 24, 2006, DERC Program revisions satisfy the elements of the September 8, 2005, commitment letter; as such, EPA is proposing the DERC program for full approval. Additionally, we are proposing to approve the following nonsubstantive revisions to the Texas SIP submitted on August 16, 2007: revisions to sections 101.372(d)(1)(A) and 101.376(d)(2)(A) to update the cross-references to recently recodified provisions in 30 TAC Chapter 117 and revisions to section 101.372(d)(1)(B) to update the cross-referenced title to provisions in Chapter 115.

In a separate rulemaking, EPA is proposing action on the severable ERC Program revisions at 30 TAC sections 101.302, 101.305, and 101.306 submitted on October 24, 2006, and 30 TAC sections 101.302 and 101.306 submitted on August 16, 2007 (see EPA-R06-OAR-2010-0417).

At this time, EPA is not taking action on the revisions to the Emissions Banking and Trading of Allowances Program at 30 TAC sections 101.338 and 101.339 submitted on October 24, 2006. EPA is also not taking action at this time on the revisions to the general air quality definitions at 30 TAC Section 101.1 or the revisions to the System Cap Trading Program at 30 TAC sections 101.383, and 101.385 submitted on August 16, 2007. These severable revisions remain under review by EPA and will be addressed in separate actions.

#### VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

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

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

Dated: March 18, 2010.

**Lawrence E. Starfield,**

*Acting Regional Administrator, Region 6.*

[FR Doc. 2010-6801 Filed 3-29-10; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

[EPA-HQ-OAR-2009-0746; FRL-9131-8]

RIN 2060-AP91

#### Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections, Sections 112(g) and 112(j)

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

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the rule governing case-by-case emission limits for major sources of hazardous air pollutants under section 112(j) of the Clean Air Act. Specifically, we are proposing revisions to the section 112(j) rule to clarify and streamline the process for establishing case-by-case emission limits in the case of the complete vacatur of a section 112(d) rule applicable to a major source category initially listed pursuant to section 112(c)(1). In addition, we are also proposing revisions that would eliminate provisions of the section 112(j) rule that have become obsolete or are redundant.

**DATES:** Comments must be received on or before April 29, 2010, unless a public hearing is requested by April 14, 2010. If a hearing is requested on the proposed amendments, written comments must be received by May 14, 2010. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before April 29, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2009-0746, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *Agency Web Site:* <http://www.epa.gov/oar/docket.html>. Follow the instructions for submitting comments on the EPA Air and Radiation Docket Web Site.

- *E-mail:* [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov). Include Docket ID No. EPA-HQ-OAR-2009-0746 in the subject line of the message.

- *Fax:* Fax your comments to: (202) 566-9744, Docket ID No. EPA-HQ-OAR-2009-0746.

- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW.,

Washington, DC 20460, Docket ID No. EPA-HQ-OAR-2009-0746. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, OMB, Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.

- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OAR-2009-0746. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although