

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2005-TX-0013; FRL-9228-4]

### Approval and Promulgation of Air Quality Implementation Plans; Texas; System Cap Trading Program

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to disapprove severable portions of two revisions to the Texas State Implementation Plan (SIP) submitted by the State of Texas on May 1, 2001, and August 16, 2007, that create and amend the System Cap Trading (SCT) Program at Title 30 of the Texas Administrative Code, Chapter 101—General Air Quality Rules, Subchapter H—Emissions Banking and Trading, Division 5, sections 101.380, 101.382, 101.383, and 101.385. EPA is proposing disapproval of the SCT program because the program lacks several necessary components for emissions trading programs as outlined in EPA's Economic Incentive Program Guidance. 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 December 20, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R06-OAR-2005-TX-0013, 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/r6comment.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-2005-TX-0013. 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 submittals related to this SIP revision, and which are part of the EPA docket, are 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.

### Table of Contents

- I. What action is EPA proposing?
- II. What did Texas submit?
- III. What is the System Cap Trading Program?
- IV. What is EPA's evaluation of the System Cap Trading Program?
- V. TCEQ's Planned Withdrawal of the System Cap Trading Program
- VI. Proposed Action
- VII. Statutory and Executive Order Reviews

### I. What action is EPA proposing?

EPA is proposing to disapprove severable portions of two revisions to the Texas SIP submitted by the State of Texas on May 1, 2001, and August 16, 2007, specific to the System Cap Trading (SCT) Program. Specifically, we are proposing to disapprove 30 TAC sections 101.380, 101.382, 101.383, and 101.385 submitted on May 1, 2001; and the amendments to 30 TAC sections 101.383 and 101.385 submitted on August 16, 2007. Our analysis as presented in this proposed rulemaking action finds the SCT Program to be inconsistent with EPA's Economic Incentive Program Guidance, "Improving Air Quality with Economic Incentive Programs" (EPA-452/R-01-001, January 2001) and our past

approval actions on Texas trading programs.

## II. What did Texas submit?

We are proposing to disapprove severable portions of two revisions to the Texas SIP specific to the SCT Program. The first SIP submission we are proposing to disapprove was adopted by the Texas Commission on Environmental Quality (TCEQ) on March 21, 2001, and submitted to EPA on May 1, 2001, at 30 TAC sections 101.380, 101.382, 101.383, and 101.385. The second revision upon which we are proposing disapproval was adopted by the TCEQ on July 25, 2007, and submitted to EPA on August 16, 2007, at 30 TAC sections 101.383 and 101.385. The May 1, 2001, and August 16, 2007, SIP submittals create and amend the SCT Program.

In addition to the sections identified above as the subject of today's proposed disapproval, the TCEQ's submissions on May 1, 2001, and August 16, 2007, also included other provisions for which we are not proposing action today. Specifically, on May 1, 2001, the TCEQ also adopted and submitted revisions to 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds, sections 117.109, 117.110, and 117.139. We are not proposing action today on the revisions to Chapter 117 because these revisions are severable from the SCT Program and EPA has already taken a separate approval action (see 73 FR 73562 on December 3, 2008). On August 16, 2007, the TCEQ also adopted and submitted revisions to the general air quality definitions, the Emission Credit Banking and Trading Program (referred to as the Emission Reduction Credit (ERC) Program elsewhere in this document) and the Discrete Emission Credit Banking and Trading Program (referred to as the Discrete Emission Reduction Credit (DERC) Program elsewhere in this document). We are not proposing action today upon revisions to the general air quality definitions at 30 TAC Chapter 101, Subchapter A, section 101.1 because the SCT Program does not rely upon them (therefore the revisions are severable from the SCT Program) and previous revisions to section 101.1 are still pending for review by EPA. We are not proposing action 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 SCT Program and EPA has already taken a separate approval action (see 75 FR 27647 on May 15, 2010). We are also not proposing action today upon the revisions to the DERC Program at 30

TAC Chapter 101, Subchapter H, Division 4, sections 101.372 and 101.376 because these revisions are severable from the SCT Program and EPA has already taken a separate approval action (see 75 FR 27644 on May 15, 2010).

A copy of the May 1, 2001, and August 16, 2007, SIP submittals can be obtained from the Docket, as discussed in the "Docket" section above. A discussion of the specific Texas rule changes that we are proposing to disapprove is included below.

## III. What is the System Cap Trading Program?

The SCT Program was designed by the TCEQ to provide additional compliance flexibility to source owners and operators subject to the system caps established in 30 TAC Chapter 117. Under this program, sources under common ownership or control may be voluntarily grouped together in a system with a system cap on total emissions from the sources in the system. The Chapter 117 system caps establish daily, rolling 30-day average, and annual average emission caps depending upon the source's location. The Chapter 117 system caps enable participating sources to transfer emission allowables (the amount greater than zero that a source owner or operator's allowable emissions exceed the actual emissions over the applicable averaging time period) from source to source within the same system, provided the overall cap is not exceeded. The SCT Program at 30 TAC Chapter 101 provides an additional layer of compliance flexibility by allowing owners or operators of units subject to the Chapter 117 system caps to trade surplus emission allowables (the amount greater than zero that a source owner or operator's allowable emissions in a system cap emission limit specified in Chapter 117 is greater than the actual emissions in that system over the applicable averaging time period) with other system caps within the same attainment or nonattainment area to exceed the applicable Chapter 117 system cap limits. The SCT Program also streamlined the reporting requirements for the participating sources by only requiring notification to the TCEQ after the trades of surplus emission allowables between system caps were completed. The SCT Program has not been used by any source since the program was established in March 2001.

## IV. What is EPA's evaluation of the System Cap Trading Program?

We reviewed the SCT program with respect to EPA's EIP Guidance

"Improving Air Quality with Economic Incentive Programs" (EPA-452/R-01-001, January 2001) (EIP Guidance) (available in the docket for this rulemaking) and for consistency with our past approval actions on the Texas SIP-approved trading programs. Our analysis finds that the SCT Program is not consistent with the EIP Guidance or with our past actions on Texas trading programs. Namely, the SCT Program fails to:

- Satisfy the fundamental element of Surplus at 4.1(a) and (b) of the EIP Guidance because the participating sources are not clearly identified, and therefore EPA and the public are unable to determine that all emission reductions under the SCT program are surplus. It is essential that a trading program have a clearly identified group of participating sources to ensure that the reductions from these sources are surplus to all federal and state requirements, and to facilitate trading among participating sources to promote a robust market. Therefore, the SCT Program must clearly identify sources subject to the program. Currently, 30 TAC section 101.380(2) includes an incorrect citation and 30 TAC section 101.382 broadly references all of 30 TAC Chapter 117 instead of identifying the subject sections.
- Satisfy the fundamental element of Enforceability at 4.1(a) and (b) of the EIP Guidance because the SCT Program does not clearly identify violations and outline the penalties for the participating sources as described in Sections 5.1(c) and 6.1 of the EIP Guidance. Currently 30 TAC section 101.385 requires a source owner or operator to notify the TCEQ when a Chapter 117 system cap emission limit is exceeded as a result of participating in the SCT Program. However, there are no penalty provisions or other mechanisms to provide a disincentive for violating the emission limits.
- Provide an environmental benefit as described in Sections 5.1(a) and 6.5 of the EIP Guidance.
- Provide a program evaluation as described in Section 5.3(b) of the EIP Guidance. Such a program evaluation must occur every 3 years and provide remedies if the trading program does not have the intended results, per Section 5.3(c) of the EIP Guidance. A program evaluation or audit is an essential feature of a trading program because it provides the TCEQ the time and authority to review the functionality of the program and suggest remedies. Additionally, EPA has SIP-approved audit provisions in the ERC, Mass Emissions Cap and Trade (MECT), and DERC programs that specifically require

the TCEQ to evaluate the impact of the program on the state's ozone attainment demonstrations and authorizes the TCEQ to suspend trading in whole or in part if problems are identified. Because the SCT Program operates in attainment and nonattainment areas, we find that analysis of the program impacts on the state's ozone attainment demonstrations is an essential feature that must be included.

- Address requirements for monitoring, recordkeeping, and reporting consistent with Section 5.3(a) of the EIP Guidance.
- Provide TCEQ visibility of the trading process or establish reliable tracking mechanism for emissions trading consistent with Section 6.5(d) of the EIP Guidance. Participating sources in the SCT Program only notify the TCEQ after the trades between system caps occur. The TCEQ must have knowledge and visibility of the trading under this program to anticipate and respond to issues that result from trading between system caps.

#### V. TCEQ's Planned Withdrawal of the System Cap Trading Program

During the preparation of this proposed rule notice, Region 6 staff had several discussions with TCEQ staff about the SCT program, EPA's evaluation of it, and the possibility of EPA proposing a conditional approval of the program under section 110(k)(4) of the Clean Air Act.<sup>1</sup> In response, Mr. Mark Vickery, the TCEQ Executive Director, submitted a letter to EPA Region 6 on November 2, 2010, available in the docket for this rulemaking. In this letter, the TCEQ stated that they are unable to address EPA's concerns with the SCT Program through rulemaking action within the time period specified under section 110(k)(4) of the Clean Air Act. Moreover, TCEQ noted that its review of the SCT Program indicated no use of the program by affected companies. Finally, the TCEQ stated that it will seek approval from the Commissioners to withdraw the SCT Program SIP submittals from EPA's consideration and complete rulemaking to repeal the rules.

Notwithstanding TCEQ's planned withdrawal, because that withdrawal may not occur before December 31, 2010 (when EPA is scheduled to take final action on these submissions under the consent decree in *BCCA Appeal Group v. EPA*, No. 3–08CV1491 (N.D. Tex.)),

EPA is proposing action on these submissions at this time. If the submissions are not withdrawn, and if the December 31, 2010 deadline remains in place, EPA will take final action in December 2010.

#### VI. Proposed Action

EPA is proposing to disapprove severable revisions to the Texas SIP submitted on May 1, 2001, and August 16, 2007. Specifically from the May 1, 2001, submittal, EPA is disapproving 30 TAC sections 101.380, 101.382, 101.383, and 101.385 that create the SCT Program. EPA is also proposing to disapprove provisions revisions to the SCT Program at 30 TAC sections 101.383 and 101.385 as submitted on August 16, 2007. We note that if TCEQ formally withdraws these two SCT Program SIP submittals as discussed in the November 2, 2010, letter from TCEQ, before EPA takes final action we will not need to take final action on these submissions.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a mandatory requirement of the Act starts a sanctions clock and a Federal Implementation Plan (FIP) clock. The provisions in May 1, 2001, and August 16, 2007, SIP submittals creating and amending the SCT Program were not submitted to meet a mandatory requirement of the Act. Therefore, if EPA takes final action to disapprove the submitted SCT Program SIP submittals, no sanctions and FIP clocks will be triggered.

#### VII. Statutory and Executive Order Reviews

##### A. Executive Order 12866, Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

##### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because this proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

##### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct

a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This proposed SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the Clean Air Act prescribes that various consequences (e.g., higher offset requirements) may, or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

##### D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 "for State, local, or tribal governments or the private sector." EPA has determined that the proposed disapproval action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action proposes to disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no

<sup>1</sup> Section 110(k)(4) authorizes EPA to approve a plan revision based on a commitment by a state to adopt specific enforceable measures by a date certain, but not later than one year after the date of the conditional approval.

additional costs to State, local, or tribal governments, or to the private sector, result from this action.

#### *E. Executive Order 13132, Federalism*

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that 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.”

This action does not have federalism implications. It 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, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

#### *F. Executive Order 13175, Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is proposing to disapprove would not 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. Thus, Executive Order 13175 does not apply to this action.

#### *G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This proposed SIP disapproval under section 110 and

subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

#### *H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA’s role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP

under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it 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.

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

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

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

Dated: November 10, 2010.

**Lawrence E. Starfield,**

*Acting Regional Administrator, Region 6.*

[FR Doc. 2010–29146 Filed 11–17–10; 8:45 am]

**BILLING CODE 6560–50–P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA–R07–OAR–2010–0932, FRL–9228–5]**

### **Approval and Promulgation of Implementation Plans; Kansas: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision**

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a draft revision to the State Implementation Plan (SIP), submitted by the Kansas Department of Health and Environment (KDHE) on October 4, 2010 for parallel processing. The proposed SIP revision (Kansas Administrative Regulation 28–29–350) to Kansas’s Prevention of Significant Deterioration (PSD) program provides the state of Kansas with authority to regulate GHG emissions under the PSD program. The proposed SIP revision also establishes appropriate emission thresholds and time-frames for which stationary sources and modification projects become subject to Kansas’s PSD permitting requirements for their GHG emissions, in accordance with the provisions of the “PSD and Title V Greenhouse Gas Tailoring Final Rule” published June 3, 2010, in the **Federal Register** at 75 FR 31514. EPA is proposing approval through a parallel processing action.

**DATES:** Comments must be received on or before December 20, 2010.