

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. NJ34-1-193, FRL-6929-3]

Approval and Promulgation of Implementation Plans; New Jersey; Open Market Emissions Trading Program; Revised Interpretation of Operating Permit Requirements for Emissions Trades

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency is proposing to conditionally approve New Jersey's State Implementation Plan (SIP) revision for ozone. This SIP revision relates to New Jersey's Open Market Emissions 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 proposes a conditional approval of the regulations which implement New Jersey's Open Market Emissions Trading Program, and will help to meet the national ambient air quality standard for ozone. This action also proposes a revised interpretation that the permits provisions of the Clean Air Act do not mandate that emissions quantification requirements resulting from the application of emissions trading program be included in the SIPs.

DATES: Written comments must be received on or before March 12, 2001. Representatives from EPA and New Jersey will hold public information sessions to meet with members of the public and discuss the proposed rule as follows:

Wednesday, February 7, 2001, 3:00 p.m. to 5:00 p.m., and 7:00 p.m.; and Thursday February 15, 2001, 3:00 p.m. to 5:00 p.m., and 7:00 p.m.

ADDRESSES: All comments should be addressed to:

Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region II Office, 290 Broadway, 25th Floor, New York, New York 10007-1866.

The public information session for February 7, 2001 will be held at the New Jersey Department of Environmental Protection Building, First Floor Hearing Room, 401 East State Street, Trenton, New Jersey; and the public information session for February 15, 2001 will be held at Newark City Hall, Room B29, 920 Broad Street, Newark, New Jersey.

Copies of the state submittal and supporting documents are available for inspection during normal business hours, at the following addresses:

Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007-1866.
New Jersey Department of Environmental Protection, Office of Air Quality Management, Bureau of Air Quality Planning, 401 East State Street, CN418, Trenton, New Jersey 08625.

FOR FURTHER INFORMATION CONTACT:

Richard Ruvo, Air Programs Branch, Environmental Protection Agency Region II, 290 Broadway, 25th Floor, New York, New York 10007-1866, (212) 637-4014.

SUPPLEMENTARY INFORMATION:

Overview

The Environmental Protection Agency (EPA) is proposing to conditionally approve the New Jersey State Department of Environmental Protection's (New Jersey's) Open Market Emissions Trading (OMET) Program.

The following table of contents describes the format for this

SUPPLEMENTARY INFORMATION section:

EPA's Proposed Action

What Action Is EPA Proposing Today?

Why Is EPA Proposing This Action?

What Is Emissions Trading?

What Is Open Market Emissions Trading?

What Are EPA's Proposed Conditions For Approval?

1. Using Approved Emission Quantification Protocols

2. Providing for Monetary Penalties

3. Claiming Ownership of Discrete Credits

4. Notifying Metropolitan Planning Organizations

5. Notifying the Federal Land Manager

6. Accounting for Discrete Credits in Emission Inventory

7. Including Toxic Disclosure Information in Notices

What Other Clarifications Should New Jersey Make in Their Program?

How Can New Jersey Get Full Approval for Their Program?

What Guidance Did EPA Use to Evaluate New Jersey's Program?

What Is EPA's Evaluation of New Jersey's Program?

New Jersey's Open Market Emissions Trading Program

How Do Sources Generate Credits?

How Do Sources Use Credits?

What Are the Other Requirements of New Jersey's Program?

How Does New Jersey's Program Protect the Environment?

How Is New Jersey's Program Enforced?

How Does New Jersey's Program Interact With Title V Permits?

How Does New Jersey's Program Provide for Emissions Quantification Protocols?

When Was New Jersey's Program Proposed and Adopted?

When Was New Jersey's Program Submitted to EPA and What Did it Include?

Other Significant Items Related to New Jersey's Program

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

How Does EPA's Proposed Action Affect Earlier Credits?

How Will New Jersey Audit the Program?

What is the Basis for Today's Proposal?

How Will New Jersey Address Future EPA Trading Guidance?

What is the Status of the 1994 Economic Incentive Program?

Conclusion

Administrative Requirements

EPA's Proposed Action

What Action Is EPA Proposing Today?

EPA is proposing a conditional approval of New Jersey's revision to the ozone State Implementation Plan (SIP) submitted to EPA on October 27, 1998 and supplemented on April 27, 2000. This SIP revision relates to New Jersey's new Subchapter 30 regulation for New Jersey's Open Market Emissions Trading (OMET) Program.

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 Jersey's and EPA's requirements under the Clean Air Act (the Act)
- Make New Jersey's OMET 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 Open Market Emissions Trading?

In an open market emission trading program, a source generates short-term emission reduction credits, called discrete emission reduction credits or DER's (discrete credits) 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. Open market programs rely on many sources continuing to generate new discrete credits to balance with other sources using previously generated discrete credits.

For example, a power plant burns a cleaner fuel for a summer to reduce oxides of nitrogen (NO_x) emissions. This emission reduction could generate discrete credits. The power plant trades these discrete credits to a paperboard manufacturer. In the future, the paperboard manufacturer can use the discrete credits to meet its NO_x control requirements. While the paperboard manufacturer is using the discrete credits, other sources are also reducing emissions and generating discrete credits. But the paperboard manufacturer must also purchase an additional amount, 10 percent, of discrete credits above the number of credits they would otherwise need to comply. The paperboard source, 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 seven conditions for approving New Jersey's OMET Program. These areas of New Jersey's OMET 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 and on EPA Region II's website at <http://www.epa.gov/region02/air/air.htm>.

1. Using Approved Emission Quantification Protocols

New Jersey's OMET Program contains emission quantification protocol development criteria in Subchapter 30.20. This provision is consistent with the approach outlined in Option 1 of EPA's proposed policy on open market trading programs (60 **Federal Register** (FR) 39668, August 3, 1995) and model open market trading rule (60 FR 44290, August 25, 1995), and the first requirement contained in EPA's proposed action for the State of Michigan's Emissions Averaging and Emission Reduction Credit Trading Rules (62 FR 48972, September 18, 1997).

New Jersey's OMET Program also requires mobile source generators and users to use a protocol which complies with EPA guidance. Therefore, with respect to mobile sources, New Jersey's OMET Program is consistent with Option 1 and Option 2 of EPA's proposed model rule and the first and second requirements contained in EPA's proposed action for Michigan.

With respect to stationary sources, New Jersey's OMET Program does not directly require protocols to comply with all applicable EPA guidance. New Jersey's adoption documents state it will review any EPA-approved protocols or guidance for stationary sources to determine whether it needs to incorporate it by reference, similar to what the State did with mobile sources. In addition, subchapter 30 already contains the requirement that discrete credits be real, surplus and properly quantified. The generator bears the burden of proving that it has in fact generated discrete credits in accordance with the rules and certified the discrete credits are real, surplus and properly quantified (Subchapter 30.21). Also, based on its experience in emissions trading programs, New Jersey has included protocol development criteria in subchapter 30.20 which addresses the general elements that would be characteristic to stationary sources and, therefore, contained in the stationary source protocol.

However, to further ensure that the criteria of real, surplus and quantified in New Jersey's OMET Program are met, New Jersey must also incorporate into subchapter 30.20 a requirement that if an EPA-approved protocol exists, sources must use that protocol for quantifying emission reductions at applicable stationary sources, and to allow sources to deviate from the EPA protocol only if they first get the approval of EPA.

2. Providing for Monetary Penalties

New Jersey's OMET Program establishes at subchapter 30.22 that any person who fails to comply with any provision of the OMET Program is subject to both civil administrative penalties and applicable criminal penalties. However, there are two provisions in subchapter 30 which provide for the temporary relief from monetary penalties.

Subchapter 30.11(f) requires a user source to hold the full quantity of discrete credits needed for compliance before using them, and must continue to hold them until the Notice of Use is due. But this provision also allows the source to purchase additional credits it may need for compliance, provided this

additional amount is multiplied by three. Subchapter 30.11(h) allows a 60-day period for sources to substitute good credits when New Jersey or EPA determines the credits are invalid for any reason. While these two provisions require the source to make up for the credits used, they provide an exception from the principle that a user source must be potentially subject to monetary penalties at any time when the user does not hold sufficient valid credits prior to the use of the credits.

New Jersey must revise subchapter 30 to include the potential for monetary penalties at any time when the user does not hold sufficient valid credits. Section 113 of the Act requires that all violations of the Act be potentially subject to monetary penalties equivalent to \$10,000 per violation per day under State law and \$27,500 per violation per day under Federal rules. Every requirement under a trading program is a requirement of the Act. Therefore, any violation of the trading provisions must be potentially subject to monetary penalties from the very first day of the violation.

A source committing a violation must be potentially subject to a monetary penalty. Whether the regulatory agency actually imposes a monetary penalty depends on enforcement discretion which covers considerations such as:

- The amount of money the source saved by committing the violation
- The amount of environmental damage caused by the violation
- Evidence of knowledge that the act was a violation
- Evidence of intentional fraud.

EPA recognizes New Jersey includes the independent verifier requirement to provide confirmation of the correct generation and quantification of discrete credits to prevent the generation and use of invalid credits. However, while the verification step may minimize the likelihood of the use of invalid credits, there is still the possibility of sources using invalid credits. Under subchapters 30.11(f) and (h) it is possible for a source to buy credits that may not be valid, to claim to have bought valid credits that may be invalid credits, or to buy fewer credits than the amount needed for compliance. When New Jersey determines the source is holding invalid credits or when the source discovers it needs additional credits for compliance after the use of the credits, the source only has to buy the additional valid credits which they should have bought in the first place (only now the source can buy the credits at a later date).

Trading programs should encourage sources to ensure that they hold

sufficient credits in advance of use and that they use valid credits. The potential for Federal and state penalties immediately upon the discovery of a violation is an incentive which the regulatory agency cannot achieve by merely requiring the purchase of replacement credits. Therefore, New Jersey must revise subchapter 30, to address sections 30.11(f) and (h), and include the potential for monetary penalties at any time when the user does not hold sufficient valid credits.

New Jersey should also revise subchapter 30 (or Subchapter 3 at N.J.A.C. 7:27A) to clarify what constitutes a violation and provide the potential to assess daily penalties. In some cases, a user's failure to comply with subchapter 30 may prevent the use of discrete credits for compliance with an emission limit. In such cases, if the user exceeds the emission limit it would be in violation of existing provisions and the existing rules contain penalties for such violations. Also, the general sections at subchapter 3.5 specify that each violation constitutes a separate and distinct offense, and each day during which a violation continues will constitute an additional, separate, and distinct offense. However, New Jersey should clarify that during a particular compliance period, if a source does not hold sufficient valid credits at any time, the source is subject to a violation. New Jersey should also clarify that if the source is using credits to comply with a requirement over an extended compliance period, such as a 30-day rolling average, then the source could be subject to a violation of the entire compliance period.

3. Claiming Ownership of Discrete Credits

Subchapter 30.4(a) states the owner or operator of a source is eligible to generate discrete credits and claim ownership. In addition, a person that does not own or operate a source may generate discrete credits by reducing emissions from either (1) a reduction in mobile source activity levels in an activity reduction plan approved by EPA and the State, or (2) a reduction in an electric generator's activity level resulting from electrical energy efficiency measures.

However, New Jersey's OMET Program does not include a requirement specifying which parties are eligible to generate discrete credits in situations where more than one party has a potential claim. 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 that

reduces automobile emissions might attempt to register credits based on the sale of the device within New Jersey. However, an owner of a vehicle fleet might also attempt to register credits based on his or her installation of those same devices within the fleet. Registration of both sets of credits would double count the emission reductions, leading to the generation of excess credits.

New Jersey must address the issue of ownership claims in its regulation and make provisions for reporting ownership claims in the Notices of Discrete Credit Generation.

4. Notifying Metropolitan Planning Organizations

New Jersey must require notification of the relevant Metropolitan Planning Organizations and Departments of Transportation in the event of mobile source generation activities. 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 use reductions the Metropolitan Planning Organizations rely on in a transportation conformity determination. New Jersey 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 Jersey contains a Class I area—the Brigantine National Wildlife Refuge. 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 Jersey must revise subchapter 30, or submit procedures as part of the SIP, which require 30-day prior notification to the relevant Federal Land Manager before any discrete credit use activity occurs approximately within 100 km 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. New Jersey must submit to EPA additional information on how the emission inventories account for unused credits under New Jersey's OMET Program.

7. Including Toxic Disclosure Information in Notices

Subchapter 30.7(b)(1) and 30.14(b)(4) require the Notices which document the generation and use of discrete credits to include information on any increase in emissions of any hazardous air pollutant as a result of generating or using discrete credits. However, EPA's proposed open market policy also requires the Notices to include information on any forgone emission reductions in hazardous air pollutants due to the generation or the use of discrete credit, instead of non-discrete credit compliance with otherwise applicable requirements. New Jersey must revise the provisions on Notice requirements to include information on forgone emission reductions.

What Other Clarifications Should New Jersey Make in Their Program?

New Jersey should clarify the following provisions in Subchapter 30. While these provisions are not approval issues, clarification would make the OMET program more understandable and enforceable.

- Subchapter 30.20(f)(2)(i) and (ii) reference alternative monitoring plans and test methods approved by New Jersey. New Jersey should clarify that these references are already part of the SIP, and are not Director discretion issues.
- Subchapter 30.4(a)(1) and the "curtailment" definition refer to mobile source activity level reductions approved by New Jersey. New Jersey should specify that while these actions may be eligible to generate discrete credit, the generation strategy must still comply with any applicable EPA guidance concerning mobile source emission quantification protocols.
- New Jersey should revise the definition of "SIP" as a plan developed by the State and approved by EPA.
- New Jersey should clarify the definition of "surplus" includes emission reductions in excess of an established program baseline which are not required by SIP requirements or State regulations, relied upon in any applicable attainment plan or demonstration, or credited in any reasonable further progress or milestone demonstration so as to prevent the double-counting of emission reductions.
- New Jersey should clarify that in the definition of "Volatile organic compound," EPA, not the State, has the final decision on an acceptable VOC test method.
- New Jersey should clarify the units for the definitions of "activity" and "economic output" correspond to the applicable emission rate.
- New Jersey should clarify the provisions for determining the baseline period to be consistent with how New Jersey historically determines normal source operation in the State's rules.

How Can New Jersey Get Full Approval for Their Program?

EPA is proposing conditional approval of New Jersey's OMET Program, provided New Jersey commits to correct the deficiencies discussed in the "What are EPA's Proposed Conditions for Approval?" section, in writing, on or before February 8, 2001. New Jersey must then correct the deficiencies and submit them to EPA within one year of EPA's final action on the OMET SIP revision.

If New Jersey submits a commitment to comply with EPA's conditions, EPA

will publish a final conditional approval of New Jersey's OMET Program. EPA will consider all information submitted prior to any final rulemaking action as a supplement or amendment to the October 27, 1998 submittal. If New Jersey does not make the required commitment to EPA, EPA is proposing to disapprove the OMET Program.

What Guidance Did EPA Use To Evaluate New Jersey's Program?

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 Jersey to submit an EIP, so its OMET Program need not necessarily follow the EIP rule. However, since subpart U also contains guidance on the development of voluntary EIPs, New Jersey did follow certain aspects of the EIP guidance in the development and submittal of its OMET Program.

EPA also published an August 3, 1995 proposed policy on open market trading programs and an August 25, 1995 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 says 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. This proposal includes additional Agency guidance on several open market trading provisions.

EPA's basis for evaluating New Jersey's OMET Program, is whether it meets the SIP requirements described in section 110 of the Act. More specifically, EPA used the EIP of 1994 as guidance for voluntary EIPs. In those areas where the EIP does not address certain provisions in an open market system, EPA used (as stated in the March 10, 1998 Bliley letter) the proposed policy on open market trading as relevant guidance, in coordination with the proposal on Michigan's

Program, and other guidance documents, to determine the approvability of New Jersey's OMET Program. 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 Jersey's Program?

EPA has determined New Jersey's new subchapter 30 regulation for New Jersey's OMET Program is consistent with EPA's guidance, except for the deficiencies discussed in the "What are EPA's Proposed Conditions for Approval?" section. New Jersey's OMET Program is based upon and is consistent with EPA's EIP guidance of 1994, EPA's proposed open market policy of 1995, and EPA's proposal of 1997 on Michigan's Program.

New Jersey's subchapter 30 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 Jersey's OMET Program, EPA believes New Jersey has demonstrated the State's other regulations will achieve at least the same quantity of NO_x and volatile organic compound (VOC) emission reductions, with or without the OMET Program, including the early reduction strategies under the OMET Program. Furthermore, given the extra reductions inherent in New Jersey'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 the commitment for a periodic program audit, EPA believes that New Jersey's OMET 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 Jersey's OMET Program are consistent with EPA's guidance.

EPA has determined the amendments and administrative changes made to subchapters 16 (VOC RACT), 18 (emission offset program), and 19 (NO_x RACT) to be consistent with Subchapter

30, are consistent with EPA's guidance. EPA will discuss the amendments and administrative changes made to subchapter 22 (operating permits) in a future proposed rule on the operating permit program revisions to part 70.

Finally, EPA has determined the provisions submitted on April 27, 2000 as a supplement to the SIP revision, allowing municipal waste combustors to use discrete credits to comply with certain Federal NO_x emission standards, are consistent with EPA's guidance.

A TSD, prepared in support of this proposed action, contains the full description of New Jersey'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 and on EPA Region II's website at <http://www.epa.gov/region02/air/air.htm>.

New Jersey's Open Market Emissions Trading Program

How Do Sources Generate Credits?

Sources participating in the OMET 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 a private Registry identified by New Jersey, 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 source used an emission quantification protocol, according to subchapter 30, to calculate the emissions reductions.
- A prohibited generation strategy is not the basis for the emission reduction.

How Do Sources Use Credits?

New Jersey's OMET Program requires discrete credits to be verified by a New Jersey licensed professional engineer or certified public accountant, before they are used. The verifier must be independent of the generator source. In verifying a batch of discrete credits, the verifier must make a diligent inquiry that goes beyond simply relying on the generator's representations. The verifier must submit a Notice to the Registry.

Sources that wish to trade or use discrete credits must provide Notices to

the Registry 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.
- 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 Jersey's Program?

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

Sources can trade VOC or NO_x 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 Jersey's Program Protect the Environment?

New Jersey submitted these rules as a SIP revision to allow sources which emit ozone precursors—NO_x 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 OMET Program protects the environment in several ways:

- New Jersey 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.
- The OMET Program specifically requires credits to be surplus to reductions already relied on in the SIP.
- The emission inventory must reflect the generator's emissions before they can generate credit.

How Is New Jersey's Program Enforced?

New Jersey's OMET Program divides compliance responsibilities between the generator, verifier and user of discrete credit. In general, the generator, verifier and user are responsible for actions within his or her control, and a generator, verifier or user is in violation of subchapter 30 if they do not fulfill their respective responsibilities.

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

The verifier is responsible for making the Notice of Discrete Credit Verification true, accurate and complete and using diligent inquiry to check that the generated 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 OMET Program, including requirements on the geographic scope of trading (subchapter 30.17) and the prohibitions on use (subchapter 30.13). A user is also responsible for ensuring a discrete credit is not used unless the Registry shows that the user holds the discrete credit, the credit is verified, the credit was not previously used or retired, and the discrete credit is valid.

In any enforcement action, the generator, verifier and user bear the burden of proof on each of their respective responsibilities. The verification step does not replace the liability of the generator or the user under the OMET Program.

How Does New Jersey'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 subject to 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 programs like the New Jersey OMET program. *See, e.g.*, 40 CFR 70.6(a)(8), 70.7(e)(2)(B). New Jersey has revised several provisions in its operating permits regulation, N.J.A.C. title 7, chapter 27, subchapter 22, in an effort to establish appropriate procedures for facilities to make changes to their operating permits so that they can participate in the OMET program. These revisions to the New Jersey operating permits regulation will be reviewed separately to determine whether they are consistent with the federal operating permits regulations and the Clean Air Act.

How Does New Jersey'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.

The 1992 preamble to the part 70 rulemaking (57 FR 32250, July 21, 1992) (1992 Permits Rule Preamble) discusses emission quantification methods in the context of reviewing emissions trading within a permitted facility to meet its SIP limits, where the approved SIP authorizes such trading or emission averaging.

The provisions of 40 CFR 70.4(b)(12)(ii) would allow a source to trade emissions within the permitted facility to meet its SIP limits, where the permit does not already provide for such emissions trading but the SIP does. This method would allow a source which had not anticipated needing to trade emissions within the facility to take advantage of emissions trading provisions in the SIP after a 7-day notice, without having to modify its permit to include new compliance provisions to enforce for the emissions trade. For trades to occur under § 70.4(b)(12)(ii), the Part 70 preamble explains that:

Any such SIP would have to include compliance requirements and procedures for such trades * * * these procedures must assure that any trade is quantifiable, accountable, enforceable and based on replicable procedures for ensuring the

emission reductions that the trading program was intended to provide, including necessary test methods, monitoring, recordkeeping, and reporting." *See* 57 FR 32250, 32268 (July 21, 1992).

Similarly, the 1992 Permits Rule Preamble allowed States to use the minor permit modification process to make changes to operating permits to allow facilities to participate in emissions trading programs, if the underlying SIP or EPA rule explicitly provided that minor permit modification procedures could be used. 57 FR at 32287. The 1992 Permits Rule Preamble also stated that trading programs approved in SIPs and EPA regulations would have to contain compliance requirements and protocols to assure that market-based programs were quantifiable, accountable, enforceable and based on replicable procedures for determining emission reductions expected from the program. *Id.*

In 1995, EPA proposed guidance for state open market trading programs submitted for EPA approval as part of the SIP. The 1995 proposal provides guidance on the emissions quantification criteria identified in the part 70 preamble in the context of designing SIP-based programs to allow trading among facilities. Specifically, the 1995 guidance allows for a state's SIP-approved open market trading rule to contain only the criteria and process for sources to develop protocols. This guidance recommends that the protocols, which contain the specifics of quantifiable and replicable procedures, need not be included in the SIP, but instead may be included with the permit at the time of the emission trade.

By notice dated September 15, 1999, EPA published notice of, and opportunity for comment on, the Draft Economic Incentive Program Guidance. 64 FR 50086 (Draft EIP Guidance). Under this draft guidance proposal, States with EIPs would submit protocols as SIP revisions, although in certain limited circumstances trading could proceed on an interim basis if specified procedures were followed before EPA took action on those SIP submittals. Draft EIP Guidance, section 6.2(c).

The 1992 Permits Rule Preamble stated that Title V required emissions quantification protocols to be included in the SIP in order for intra-facility trading to be available through the seven-day notice procedure. It could be interpreted that similar requirements would apply for inter-facility trading. The 1992 Permits Rule Preamble also expressed EPA's view that emissions quantification protocols should be included in SIPs in order for the minor

permit modification process to be used to allow facilities to participate in inter-facility trading programs, if the underlying SIP or EPA rule explicitly provided that minor permit modification procedures could be used. Today, EPA proposes to clarify that Title V does not require that protocols be included in the SIP. Rather, the requirements of Title V would be satisfied with the inclusion of protocols in the permits themselves. EPA is not, however, proposing today to revise the provisions of the Draft EIP Guidance, which recommend that protocols be included in the SIP to meet the requirements of CAA section 110 (including section 110(a)(2)(A), mandating "enforceable emissions limitations"). In subsequent guidance or rulemaking, which could include further action on the Draft EIP Guidance, EPA intends to clarify the relationship between protocols and SIP revisions for purposes of the section 110 requirements.

In addition, EPA proposes to approve New Jersey's OMET Program on the basis that at the time New Jersey adopted and submitted it to EPA, New Jersey relied on the guidance provided in 1995. As a result, EPA proposes to approve the provisions of the OMET Program that the SIP must include criteria for protocol development but not the protocols themselves.

When Was New Jersey's Program Proposed and Adopted?

On August 2, 1995, New Jersey's Governor signed legislation requiring the State to promulgate an open market emissions trading program. After a public workshop on September 19, 1995, New Jersey proposed the OMET Program on February 20, 1996 and held a public hearing on March 7, 1996. New Jersey requested public comments by March 21, 1996. New Jersey adopted the OMET program on July 1, 1996 with an operative date of August 2, 1996. New Jersey published Correction Notices on August 5, 1996, November 18, 1996 and June 2, 1997.

On July 6, 1999, New Jersey proposed amendments to the OMET Program and held a public hearing on August 5, 1999. New Jersey requested public comments by August 20, 1999. New Jersey adopted the amendments on April 7, 2000 with an operative date of June 6, 2000.

When Was New Jersey's Program Submitted to EPA and What Did It Include?

New Jersey submitted its OMET Program SIP revision to EPA on October 27, 1998. EPA determined the submittal

administratively and technically complete on December 22, 1998.

New Jersey's OMET Program SIP revision included the following elements:

- New Subchapter 30
- Amended Subchapters 3, 16, 18, 19 and 22
- A memorandum of understanding between the States of Connecticut and New Jersey
- Ten applications for discrete credit generation strategies from May 1, 1992 through August 2, 1996, as supporting information
- A detailed evaluation of the EIP requirements, including a summary of trading activity to date.

On April 27, 2000, New Jersey submitted a SIP revision to EPA containing amendments to Subchapter 30. EPA is including two provisions of the amended Subchapter 30 SIP revision as a supplement to the October 27, 1998 SIP revision. These two specific provisions relate to allowing municipal waste combustors to use discrete credits to comply with certain Federal NO_x emission standards, as these Federal rules specifically acknowledge the ability of New Jersey owners and operators to comply with the Federal NO_x standard using discrete credits.

EPA is including these provisions as part of the rulemaking for the October 27, 1998 SIP revision to make these provisions federally-enforceable and therefore available as an option for sources in New Jersey to meet the December 19, 2000 final compliance date for Increment 5 of 40 CFR 62.14108(a)(5) of subpart FFF.

Other Significant Items Related to New Jersey's Program

How Does New Jersey'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
- Availability of sufficient information for meaningful review and participation.

New Jersey's OMET 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. New Jersey's OMET Program prohibits the generation or use of discrete credits which would result in more than a "*de minimis*" increase in HAP emissions. These *de minimis* levels are the same as the levels which make a source subject to MACT requirements. New Jersey's OMET Program also requires disclosure of smaller increases in HAP emissions resulting from discrete credit generation or use.

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

Periodic Program Evaluation provisions: New Jersey's OMET Program includes a periodic program evaluation in the form of an audit to occur at least every three years.

New Jersey defined this program audit as part of the initial program design and will include any appropriate analyses and/or criteria contained in EPA guidance on audits. Evaluation can also occur on a source-by-source basis through the public accessibility of the Registry on the Internet at www.omet.com. Regulators and the public are able to track the generation and use of discrete credits to review the implementation of specific trades.

Prevention and Mitigation provisions: The prevention provision in New Jersey's OMET Program of unacceptable impacts from potential or actual trades or other types of transactions including HAPs is an up-front prohibition on the generation and use of discrete credits which are accompanied by an increase in HAPs above a *de minimis* level.

Retrospective mitigation will also occur through the program audit.

Public Participation provisions: New Jersey provided for public participation in the design of the OMET Program through a public workshop on September 19, 1995 to have an open discussion of the issues with interested parties on open market trading. After the workshop, New Jersey proposed their OMET Program on February 20, 1996 and held a public hearing on March 7, 1996. After adopting the OMET program on July 1, 1996, New Jersey established a stakeholder workgroup which has generally met every other month since the adoption of the OMET Program. These meetings are open to the public and discuss implementation of the OMET Program and ways to improve its environmental and economic effectiveness. New Jersey's program audit will also include an opportunity for public review and comment.

Information Availability provisions: New Jersey's OMET Program provides for the availability of sufficient information. Subchapter 30 contains numerous provisions which require the Notices filed with the Registry to contain the sufficient and appropriate information. These Notices specifically contain information and statements related to the emissions of HAPs. Also, subchapter 30.19 requires all information to be publicly available.

As of this writing, EPA believes New Jersey's OMET 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 Jersey as the State continues to discuss these and other issues in the program audit and, where appropriate, require New Jersey to revise the OMET Program.

How Does EPA's Proposed Action Affect Earlier Credits?

New Jersey submitted ten applications for discrete credit generation strategies from May 1, 1992 through August 2, 1996 as part of the OMET SIP submittal. New Jersey submitted these discrete credit generation strategies to EPA in response to EPA guidance on credits generated prior to rule adoption, and as supplemental information to support the OMET SIP submittal.

EPA reviewed these ten credit generation strategies, independent of its review of the OMET SIP revision, to see how sources were implementing the OMET Program. EPA, in its role of program oversight, decided to conduct this review to provide a comprehensive

evaluation of New Jersey's OMET Program.

In the review of the ten strategies, EPA first determined whether each strategy was consistent with the criteria contained in subchapter 30.6(b)(2) for emission reductions generated between May 1, 1992 and August 2, 1996. EPA confirmed that each of the ten strategies met the criteria for submitting a Notice of Certification of Discrete Credit Generation to New Jersey by October 31, 1996. Further, EPA acknowledges these ten strategies to be the only discrete credit generation strategies which meet the criteria of subchapter 30.6(b)(2), and would not expect any other pre-adoption credits to exist.

EPA determined there were varying degrees of deficiencies in each of the ten credit generation strategies. The deficiencies in each strategy ranged from minor calculation errors to missing information to inconsistencies between the strategy and subchapter 30 and EPA guidance. If EPA discovered a deficiency in any of the strategies, it was not a deficiency with the protocol development criteria contained in subchapter 30, but an issue with the specifics of the strategy. Independent of the review of the OMET SIP revision, EPA notified New Jersey in an October 20, 1999 letter of the deficiencies as a result of EPA's review. In this correspondence, EPA summarized its approach to the review of the ten strategies, identified the deficiencies of each strategy and described its expectations for New Jersey and the sources to address the deficiencies. EPA clarified that the Agency is not proposing to approve or disapprove the strategies as part of the proposed action on subchapter 30. Rather, EPA provided this information to give the participants in the OMET Program an opportunity to address any deficiencies (according to the provisions of the OMET Program) prior to final approval of the OMET SIP revision.

EPA expects the sources to address the deficiencies contained in the correspondence prior to the verification or the use of the subject discrete credits. In fact, verifiers should consider EPA's comments in its review, to fulfill the requirement that the verification of generated discrete credits be based on diligent inquiry by the verifier.

Upon a final approval of New Jersey's OMET SIP revision, subchapter 30 will be federally-enforceable. Since subchapter 30 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 and the verifier may have other responsibilities

related to proper quantification and verification of the discrete credits. EPA suggests the generators, verifiers and any users of the discrete credits review these specific discrete credit generation strategies before subchapter 30 becomes subject to EPA enforcement.

How Will New Jersey Audit the Program?

New Jersey's October 27, 1998 SIP submittal letter contains an enforceable commitment to meet reasonable program audit requirements established in Federal regulations and/or guidance. New Jersey will ensure that an audit is performed at least every three years which meets applicable EPA guidance, and will provide timely post-audit reports to the EPA. New Jersey recognizes its responsibility to ensure that the OMET Program, as implemented, is consistent with the goals of rate of progress and of attainment in New Jersey, in respect to the national ambient air quality standard for ozone and does not result in continued non-attainment in New Jersey and downwind areas. At a minimum, New Jersey will include the following elements in the audit:

- An evaluation of the net effect of the New Jersey OMET Program on actual emissions
- Verification that in each ozone season the number of discrete credits generated will be equal to or greater than the number used; and,
- An evaluation of the cost savings.

Also, the audit will determine whether there is a shortfall between the results claimed for the New Jersey OMET Program and the actual results obtained during program implementation. If there is a shortfall, New Jersey will submit to EPA, with the post-audit report, measures to remedy program deficiencies and, if applicable, measures to make up any emissions shortfall within a specified period of time consistent with relevant reasonable further progress and attainment requirements.

Since New Jersey's commitment to do a program evaluation includes reference to "any applicable EPA guidance on audits," New Jersey and EPA will not only use the guidance contained in the 1995 proposed open market policy, but could use the guidance contained in the 1999 proposed EIP as part of the program evaluation. In addition, New Jersey should specifically evaluate the inclusion of energy efficiency measures in the OMET Program as part of the periodic program audit.

What Is the Basis for Today's Proposal?

As discussed in the section "What Guidance Did EPA Use to Evaluate New Jersey'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 proposed action on a Michigan emission trading program by notice dated September 18, 1997, 62 FR 48972. EPA received comments on both of these proposals.

Subsequent to these proposals, 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 Jersey adopted its SIP on July 1, 1996 and submitted it to EPA on October 27, 1998. In response to requests by EPA, New Jersey supplemented the submittal with minor revisions on April 27, 2000.

By notice dated September 15, 1999, EPA proposed revised guidance for economic incentive programs. 62 FR 50086. This 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. 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 OMET SIP revision, New Jersey relied on EPA's statements that New Jersey could base its SIP revision on the 1995 open market trading proposal. On several occasions during the adoption process, EPA and State officials confirmed EPA's support for New Jersey's reliance on the 1995 proposal (September 21, 1995 note to the file regarding a public workshop in Trenton, New Jersey; and, March 15, 1996, March 21, 1996, April 30, 1996, and May 22, 1996 letters from EPA to New Jersey.) By the same token, New Jersey's submittal of the SIP revision 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 evaluated the SIP revision against the guidance available at the time of the program's development and submittal. This guidance included both EPA's 1995 open market trading proposal, and the guidance provided in the **Federal Register** notice accompanying the 1997 EPA proposal to approve Michigan's trading program. In light of this reliance, EPA is today proposing to approve the New Jersey 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 and the guidance contained in the 1997 EPA proposal to approve the Michigan program, in light of New Jersey's reliance on those two proposals, 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 Jersey 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 Jersey's OMET 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 OMET Program, within 18 months after EPA issues a final revised EIP guidance. As with any SIP, EPA may require New Jersey to revise the OMET Program where necessary and re-submit the OMET Program according to the requirements and deadlines under section 110(k)(5) of the Act. According to section 110(k)(5), New Jersey may have up to 18 months to revise and re-submit the OMET 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 Jersey OMET 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 Jersey 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 conditionally approve the New Jersey SIP revision for Subchapter 30 and approve revisions to Subchapters 16, 18, and 19. This SIP revision implements New Jersey's OMET Program. EPA is proposing conditional approval of New Jersey's OMET Program, provided New Jersey commits to correct the deficiencies discussed in the "What are EPA's Proposed Conditions for Approval?" section, in writing, on or before February 8, 2001. New Jersey must then correct the deficiencies and submit them to EPA within one year of EPA's final action on the OMET SIP revision.

If New Jersey submits a commitment to this effect, EPA will publish a final conditional approval of New Jersey's OMET Program. EPA will consider all information submitted prior to any final rulemaking action as a supplement or amendment to the October 27, 1998 submittal. If New Jersey does not make the required commitment to EPA, EPA is proposing in the alternative to disapprove the OMET 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 attending the public information sessions discussed in the **DATES** section, and by submitting written comments to the EPA Regional office listed in the **ADDRESSES** section.

Administrative Requirements

Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the

environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

Executive Order 13132

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.” Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

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, 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. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

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.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of

the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action proposed 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 Federal action proposes to approve pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to

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

Paperwork Reduction Act

This action does not add any information collection requirements or increase burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and therefore is not subject to these requirements.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 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. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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: December 28, 2000.

Carol M. Browner,
Administrator.

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