absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

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

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

Dated: September 27, 2005.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 05–19997 Filed 10–4–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R06–OAR–2005–TX–0029; FRL–7980–7]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to conditionally approve revisions to the Texas State Implementation Plan (SIP) concerning the Discrete Emission Credit Banking and Trading Program. Additionally, we are proposing approval of a subsection of Chapter 115 of the Texas Administrative Code (TAC), Control of Air Pollution from Volatile Organic Compounds, which cross-references the Discrete Emission Credit Banking and Trading Program. We are also proposing approval of a subsection of 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, which provides a definition referred to in the Discrete Emission Credit Banking and Trading Program.

DATES: Comments must be received on or before November 4, 2005.

ADDRESSES: Submit your comments, identified by Regional Materials in EDocket (RME) ID No. R06–OAR–2005–TX–0029, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Website: *http://docket.epa.gov/rmepub/* RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.
- U.S. EPA Region 6 ''Contact Us'' web site: *http://epa.gov/region6/r6coment.htm*. Please click on ''6PD'' (Multimedia) and select ''Air'' before submitting comments.
- E-mail: Mr. David Neleigh at *neleigh.david@epa.gov*. Please also cc the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- Fax: Mr. David Neleigh, Chief, Air Permitting Section (6PD–R), at fax number 214–665–6762.
- Mail: Mr. David Neleigh, Chief, Air Permitting Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- Hand or Courier Delivery: Mr. David Neleigh, Chief, Air Permitting 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 am and 4 pm weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to RME ID No. R06–OAR–2005–TX–0029. EPA's policy is that all comments received will be included in the public file without change, and may be made available online at *http://docket.epa.gov/rmepub/*, 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 RME, regulations.gov, or e-mail if you believe that it is CBI or otherwise protected from disclosure. The RME website and the Federal regulations.gov are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public file and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. Guidance on preparing comments is given in the **SUPPLEMENTARY INFORMATION** section of this document under the General Information heading.

Docket: All documents in the electronic docket are listed in the RME index at *http://docket.epa.gov/rmepub/*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in the official file which is available at the Air Permitting 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 am and 4:30 pm 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. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment: Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, Air Permitting Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue,

Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–2115; fax number 214–665–6762; e-mail address *wiley.adina@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

Outline

I. Discrete Emission Credit Banking and Trading Program
A. Proposed Action
1. What is EPA proposing to approve?
2. What is a conditional approval?
3. What future actions are necessary for the DERC program to fully meet EPA's expectations?
B. Summary of the Discrete Emission Credit Banking and Trading program
1. How does the DERC program work?
2. What is the history of the DERC program?
C. EPA's Analysis
1. How did EPA review and evaluate the DERC program?
2. What criteria did EPA use to analyze the DERC program?
3. What is EPA's analysis of the fundamental principle of integrity?
4. Will the DERC program violate the integrity of the MECT program?
5. What is EPA's analysis of the fundamental principle of equity?
6. What is EPA's analysis of the fundamental principle of environmental benefit?
7. What is EPA's analysis of the use of discrete emission credits for nonattainment new source review offsets?
8. What is EPA's analysis of the commitments TCEQ has made?
9. What is EPA's analysis of the cross-reference rule language in Chapters 115 and 116?
10. What is EPA's analysis of the DERC program with respect to section 110(l) of the Clean Air Act?
D. Conclusion
II. General Information
III. Statutory and Executive Order Reviews

I. Discrete Emission Credit Banking and Trading Program

A. Proposed Action

1. What is EPA proposing to approve?

The EPA is proposing conditional approval of the Discrete Emission Credit Banking and Trading Program, referred to as the Discrete Emission Reduction Credit (DERC) program, enacted at Texas Administrative Code (TAC) Title 30, Chapter 101 General Air Quality Rules, Subchapter H, Division 4, sections 101.370–101.374, 101.376, 101.378, and 101.379. Also at this time, EPA is proposing approval of 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds, Subchapter J, Division 4, section 115.950 (''Use of Emissions Credits for Compliance''), which cross-references the DERC program. EPA is also proposing approval of the definition of ''facility'' published at 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, Subchapter A, section 116.10(4). These revisions were provided in SIP revisions dated July 22, 1998; December 20, 2000; July 15, 2002; January 31, 2003; and December 6, 2004.

2. What is a conditional approval?

Under section 110(k)(4) of the Clean Air Act EPA may conditionally approve a plan based on a commitment from the State to adopt specific enforceable measures within one year from the date of approval. If EPA determines that the revised rule is approvable, EPA will propose approval of the rule. If the State fails to meet its commitment within the one year period, the approval is treated as a disapproval. There are at least two ways that the conditional approval may be converted to a disapproval.

- If the State fails to adopt and submit the specified measures by the end of one year (from the final conditional approval), or fails to submit anything at all, EPA will have to issue a finding of disapproval but will not have to propose the disapproval. That is because in the original proposed and final conditional approval, EPA will have provided notice and an opportunity for comment on the fact that EPA would directly make the finding of disapproval (by letter) if the State failed to submit anything. Therefore, at the end of one year from the conditional approval, the Regional Administrator (RA) will send a letter to the State finding that it had failed to meet its commitment and that the SIP submittal is disapproved. The 18-month clock for sanctions and the two year clock for a Federal Implementation Plan (FIP) start as of the date of the letter. Subsequently, a notice to that effect will be published in the **Federal Register**, and appropriate language will be inserted in the Code of Federal Regulations (CFR). Similarly, if EPA receives a submittal addressing the commitment but determines that the submittal is incomplete, the RA will send a letter to the State making such a finding. As with the failure to submit, the sanctions and FIP clocks will begin as of the date of the finding letter.
- Where the State does make a complete submittal by the end of the one year period, EPA will have to evaluate that submittal to determine if it may be approved and take final action on the submittal within 12 months after the date EPA determines the submittal is complete. If the submittal does not adequately address the deficiencies that were the subject of the conditional approval, and is therefore not approvable, EPA will have to go through notice-and-comment rulemaking to disapprove the submittal. The 18-month clock for sanctions and the two year clock for a FIP start as of the date of final disapproval.

In either instance, whether EPA finally approves or disapproves the rule, the conditional approval remains in effect until EPA takes its final action. Note that EPA will conditionally approve a certain rule only once. Subsequent submittals of the same rule that attempt to correct the same specifically identified problems will not be eligible for conditional approval.

3. What future actions are necessary for the DERC rule to fully meet EPA's expectations?

TCEQ has submitted a commitment letter to Region 6 outlining the steps that will be taken to achieve full approval. This letter, dated September 8, 2005, can be found in the RME docket. The commitments are:

1. Revising the language in section 101.373:

a. To prohibit the future generation of discrete emission reduction credits from permanent shutdowns;

b. To allow discrete emission reduction credits generated from permanent shutdowns before September 30, 2002, to remain available for use for no more than five years from the date of the commitment letter; and

2. TCEQ will perform a credit audit to remove from the emissions bank all discrete emission reduction credits generated from permanent shutdowns after September 30, 2002.

3. Revising the language in sections 101.302(f), 101.372(f)(7), and 101.372(f)(8) to clarify that EPA approval is required for individual transactions involving emission reductions generated in another state or nation, as well as those transactions from one nonattainment area to another or from attainment counties into nonattainment areas.

4. TCEQ will revise Form DEC–1, Notice of Generation and Generator Certification of Discrete Emission Credits; Form MDEC–1, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits; and Form DEC–2, Notice of Intent to Use Discrete Emission Credits, to include a waiver to the Federal statute of limitations defense for generators and users of discrete emission credits.

5. TCEQ will maintain its current policy of preserving all records relating to discrete emission credit generation

and use for a minimum of five years after the use strategy has ended.

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

TCEQ will submit these revisions to EPA on or before December 01, 2006. The conditional approval will automatically become a disapproval if the revisions are not completed and submitted to EPA by this date.

B. Summary of the Discrete Emission Credit Banking and Trading Program

1. How does the DERC program work?

The DERC rules establish a type of Economic Incentive Program (EIP), in particular an open market emission trading program as described in EPA's EIP Guidance document, ''Improving Air Quality with Economic Incentive Programs'' (EPA–452/R–01–001, January 2001). In an open market trading (OMT) program, a source generates short-term emission credits (called discrete emission credits, or DECs, in the Texas program) by reducing its emissions. Discrete emission credit is a generic term that encompasses reductions from stationary sources (discrete emission reduction credits or DERCs), and reductions from mobile sources (mobile discrete emission reduction credits or MDERCs). The source can then use these DECs at a later time, or trade them to another source to use at a later time. The trading program assumes that many sources will participate and continuously generate new DERCs or MDERCs to balance with other sources using previously generated discrete credits. DECs are quantified, banked and traded in terms of mass (tons) and may be generated and used statewide. Reductions of all criteria pollutants, with the exception of lead, may be certified as DECs.

This program provides flexibility for sources in complying with certain State and Federal requirements. Traditionally DECs have been used for alternate RACT compliance for volatile organic compounds (VOCs) and nitrogen oxides (NO_X). The DERC rule also allows DECs to be used to exceed allowable emission levels, as new source review (NSR) offsets, and in lieu of allowances in the Houston/Galveston/Brazoria NO_X MECT program.

In this action, when we refer to this program as ''the DERC rule'' or ''the DERC program'' we are speaking of the entire Discrete Emission Credit Banking and Trading program, which encompasses both DERCs and MDERCs.

2. What is the history of the DERC program?

The DERC program was first adopted by the State at 30 TAC Section 101.29 on December 23, 1997. Effective January 18, 2001, Section 101.29 was repealed and Chapter 101, Subchapter H, Divisions 1, 3, and 4 were created. This action created separate divisions for the ERC, Mass Emissions Cap and Trade (MECT) in the Houston/Galveston/Brazoria (HGB) area, and DERC programs. Amendments to the MECT were adopted on October 18, 2001; these amendments also included changes made primarily for clarification to Sections 101.370, 101.372, and 101.373 in the DERC program. The DERC program was amended again effective April 14, 2002, to include the provisions in Texas Senate Bill 1561 for air emissions trading across international boundaries. The submittal, which was effective on January 17, 2003, completely reorganized the DERC and ERC program rules into more standardized formats parallel to each other, with a rule structure which followed a process of recognizing, quantifying, and certifying reductions as credits while explaining the guidelines for trading and using creditable reductions. The most recent submittal of December 06, 2004, amended Sections 101.370, 101.373, 101.373, and 101.376. The DERC program adoption and each of the subsequent revisions were submitted to EPA for approval into the SIP; however, this proposed conditional approval is the first time we have acted on this program.

C. EPA's Analysis

1. How did EPA review and evaluate the DERC program?

Generally, SIP rules must be enforceable and must not relax existing requirements. See Clean Air Act sections 110(a), 110(l), and 193.

A guidance document that we used to define evaluation criteria is ''Improving Air Quality with Economic Incentive Programs'' (EPA–452/R–01–001, January 2001) (EIP Guidance). This guidance applies to discretionary economic incentive programs (EIPs) adopted to attain national ambient air quality standards (NAAQS) for criteria pollutants, but the EIP Guidance is not EPA's final action on discretionary EIPs. Final action as to any such EIP occurs when EPA acts on it after its submission as a SIP revision. Because the EIP Guidance is non-binding and does not represent final agency action, EPA is using the guidance as an initial screen to determine whether potential approvability issues arise. A more detailed review of the DERC program as compared to the EIP Guidance is in the Technical Support Document (TSD) for the TCEQ Discrete Emission Credit Banking and Trading Program. The TSD is available as specified in the section of this document identified as **ADDRESSES.**

2. What criteria did EPA use to analyze the DERC program?

Fundamental principles that apply to all EIPs are integrity (meaning that credits are based on emission reductions that are surplus, enforceable, quantifiable, and permanent), equity, and environmental benefit. These fundamental principles can apply to an EIP in its entirety (the programmatic level) or to individual sources (the source-specific level). EPA evaluated the DERC program against these three fundamental principles, specific concerns applicable to open market trading programs, and applicable Clean Air Act requirements. Our complete analysis of the DERC program is contained in the TSD for this action.

3. What is EPA's analysis of the fundamental principle of integrity?

The fundamental principle of integrity consists of the qualities of surplus, enforceable, quantifiable, and permanent.

Integrity Element One—Surplus

The element of surplus does not apply to the DERC program in its entirety because OMT programs are not designed to achieve program-wide emission reductions. However, the element of surplus does apply at the source-specific level. Emission reductions are surplus if the reductions are not presently relied upon in any other air quality-related programs such as the SIP, SIP-related requirements such as transportation conformity, other adopted TCEQ measures not in the SIP, Federal rules that focus on reducing precursors of criteria pollutants such as new source performance standards, or a consent decree. Emission reductions measured by sources on a retrospective basis are surplus if the source's actual emissions are below its baseline allowable or historical actual emissions—whichever is lower—and the retrospective inventories reflect actual emission information as appropriate.

Sections 101.372(c)(1)(A) and (c)(2)(A) of the DERC rules require that a reduction be real, quantifiable, and surplus at the time the DERC or MDERC is generated. Surplus is defined in section 101.370(33) as an emission reduction that is not otherwise required of a facility or mobile source by state or Federal law, regulation, agreed order, and not otherwise relied on in the SIP. Thus, the DERC rule requires that at the time of generation, reductions satisfy the source-specific integrity element of surplus. Requirements for emission reduction baselines are specified in sections 101.373(b) and 101.374(b).

Integrity Element Two—Enforceable

Emission reductions use, generation, and other required actions in the EIP are enforceable on a programmatic basis if they are independently verifiable, define program violations, and identify those liable for violations. For enforceability, both the State and EPA should have the ability to apply penalties and secure appropriate corrective actions where applicable. Citizens should also have access to all the emissions-related information obtained from the source so that citizens can file suits against sources for violations. Required actions must be practicably enforceable in accordance with other EPA guidance on practicable enforceability. At the source-specific level, the source must be liable for violations, the liable party must be identifiable, and the State, the public, and EPA must be able to independently verify a source's compliance. Additionally, in OMT programs owners/operators of sources generating OMT credits must ensure the truth and accuracy of statements regarding actions taken to generate discrete credits and are liable for meeting their emission limits. Owners/operators of sources using OMT credits must ensure the validity of discrete credit generation and use and are liable for meeting their emission limits. The EIP Guidance outlines enforcement elements common to all trading EIPs in Chapter 6.0. In addition to addressing the programmatic and source-specific enforcement provisions discussed above, trading EIPs must incorporate provisions for assessing liability, provisions to assess penalties against participating sources, and provisions for sources with title V permits.

The monitoring and testing protocols established in 30 TAC Chapters 115 and 117 are adequate for independent verifications of emission reductions certified as DERCs or MDERCs and for demonstrating practicable enforceability. The DERC rule identifies those liable at section 101.372(l), and information to be made available to the public/citizens is addressed at section 101.372(i). The DERC rule does provide in section 101.372(l)(2) that a user is in violation of the rule if the user does not possess enough DECs to cover the compliance need for the use period. If the user possesses an insufficient quantity of DECs to cover its compliance need, the user will be out of compliance for the entire use period. Each day the user is out of compliance may be considered a violation.

The application of penalties or obtaining corrective action and citizen filing of lawsuits are not addressed in the DERC rules. Texas enforcement provisions are not typically in the State's individual rules but are separately codified. Texas Water Code Chapter 7 contains the State's statutory provisions for enforcement of the DERC program. In particular, TWC section 7.051 provides for the assessment of administrative penalties by the TCEQ, and section 7.032 provides for injunctive relief by the TCEQ. The TCEQ enforcement rule at 30 TAC section 70.5 incorporates remedies found in the State statutes (Texas Water Code and the Texas Health and Safety Code), and permits referrals to EPA for civil, judicial or administrative action. It is our conclusion that TCEQ has adequate legal authority to enforce its DERC program. Once we approve the DERC program into the SIP, EPA will be able to enforce it under section 113 of the Clean Air Act.

For the above reasons, and as further explained in the TSD, EPA has concluded that the DERC program is consistent with Clean Air Act requirements and EIP Guidance expectations for the integrity element of enforceability.

Integrity Element Three—Quantifiable

On a programmatic basis, emissions and emission reductions attributable to an EIP are quantifiable if the source can reliably and replicably measure or determine them. The generation or use of emission reductions by a source or group of sources is quantifiable on a source-specific basis if each source can reliably calculate the amount of emissions and/or emission reductions occurring during the implementation of the program, and replicate the calculations. The EIP Guidance further states that when quantifying results, sources must use the same methodology used to measure baseline emissions, unless there are good technical reasons that this approach is not appropriate. In OMT EIPs, sources must quantify their activity level and their historical, actual, and allowable emission rates per activity levels; OMT credit generators must quantify their emissions before and during implementation of the reduction strategy; and OMT credit users must quantify the amount of credits they will need to cover their total emissions when using discrete credits. Common elements for quantifying results of an EIP are included in Chapter 5.0 of the EIP Guidance. All EIPs should incorporate provisions for predicting results, addressing uncertainty, approving quantification protocols, and emission quantification methods.

For a reduction to be certified as a DEC, the reduction must be real, quantifiable, and surplus at the time the DEC is generated. Quantifiable is defined as an emission reduction that can be measured or estimated with confidence using replicable methodology under section 101.370(25). The emission quantification provisions established in 30 TAC Chapters 115 and 117 are sufficient to reliably and replicably measure the emission reduction. The DERC program definition of quantifiable and the quantification provisions above are sufficient to satisfy the quantifiability requirements at the programmatic and source-specific levels. Additionally, generators/users wanting to use quantification protocols alternate to 30 TAC Chapter 115 and Chapter 117 must follow the quantification requirements at section 101.372(d)(1)(C). EPA approval of such alternate protocols is required. The formulas used to calculate DERC generation, DECs needed, and DECs used incorporate the use of the baseline, actual, and allowable activity levels as applicable. The calculation for DERC generation includes the difference between the baseline emission rate and the emission reduction strategy emission rate. This ensures that the DERC generator quantifies their emissions before and during implementation for the reduction strategy. Section 101.376(d)(1)(D) requires that the application to use DECs include the amount of DECs needed. For the above reasons, and as further explained in the TSD, EPA has concluded that the DERC program is consistent with Clean Air Act requirements and EIP Guidance expectations for the integrity element of quantifiability.

Integrity Element Four—Permanent

To satisfy the EIP Guidance expectations for permanence, a compliance flexibility EIP must ensure that no emission increases (compared to emissions if there was no EIP) occur

over the time defined in the SIP. On a source-specific basis, the permanence expectations are met if the sources participating in the EIP commit to actions or achieve reductions for a future period of time as defined in the EIP.

The DERC certification procedures under section 101.373(d) ensure that the credits generated are permanent, thus ensuring that there were no increases in emissions during the DERC generation period. Similar provisions are provided for MDERC certification in section 101.374(e).

4. Will the DERC program violate the integrity of the MECT program?

In our initial MECT approval (66 FR 57252, Nov. 14, 2001), EPA deferred action on the use of DERCs and MDERCs for compliance with the MECT until our action on the DERC rule. In addition to the original MECT submission, TCEQ has submitted revisions to section 101.356 twice since EPA's approval of the MECT program. In this document, we are reviewing the use of DERCs and MDERCs in TCEQ's MECT program for the Houston/Galveston/Brazoria (HGB) ozone nonattainment area. We will review and act on the revisions to the MECT program in a separate action (RME Docket R06–OAR–2005–TX–0023). The use of DERCs and MDERCs in the MECT program will not be Federally approved until the approval of both the DERC rule and the revisions to the MECT program.

The DERC and MECT programs are OMT and multi-source cap-and-trade programs, respectively, as described in the EIP Guidance. Section 4.1 of the EIP Guidance explains that certain types of EIPs may not be combined because their characteristics and requirements are incompatible and cites OMT and multi-source cap-and-trading as an example of such incompatible programs. Therefore, the fact that the MECT program provides for the use of DERCs and MDERCs in lieu of allowances at section 101.356(h), with corresponding provisions in the DERC rule at section 101.376(b), is contrary to the general statement in the EIP Guidance about the incompatibility of OMT and multi-source cap-and-trade programs.

The EIP Guidance discourages the use of OMT credits in a multi-source cap-and-trade program based on concerns that the use of OMT credits in the cap program could potentially undermine the integrity of the cap, thus preventing the goals that the cap was established to achieve. EPA is concerned that including OMT credits in a cap-and-trade system could lead to:

- The possibility that more OMT credits will be used in a given year than are generated;
- The possibility that sources will shift production from one source to another, generating credits at the reduced source while no real net benefit in air quality is achieved; and
- The possibility that reductions at unregulated sources will not be real reductions and that they will be used to offset increases at regulated sources.

When a program includes elements that are not consistent with the approaches outlined in our guidance, EPA may still approve the rule if it is consistent with CAA requirements and the rationales underlying the provisions in EPA guidance. In this case, we must determine whether the use of OMT credits (DERCs or MDERCs) in lieu of allowances will, because of the above concerns, undermine the goal of the MECT program, which is attainment of the one-hour ozone standard in the HGB area. EPA should also consider whether there are adequate safeguards to ensure that the additional flexibility provided by the interplay between the DERC and MECT programs will not undermine the HGB reasonable further progress plan and attainment demonstration.

Regarding the HGB reasonable further progress plan, we approved the plan on February 14, 2005 (70 FR 07407). The HGB area met its rate of progress (ROP) target by a wide margin (over 100 tons per day) so the institution of DERCs in the MECT would not be expected to interfere with ROP.

As for the attainment demonstration, the reduction in industrial NO_X emissions relied on in it is achieved by the MECT program, which provides a cap on NO_X emissions. Beginning in 2002, the amount of allowances (the authorization to emit one ton of NO_X during a control period, which is the calendar year) under the cap decreases to the final cap level in 2007. The final 2007 cap level was set, based on photochemical modeling and other evidence, at a level determined necessary for the area to meet the one-hour ozone standard. Even after the change from 90 percent to 80 percent NO_X control strategy, the final MECT level is among the most stringent levels of NO_X controls on industrial emissions in the United States.

Because of the stringency of the MECT NO_X controls, Texas linked the DERC and MECT programs, in an effort to provide additional flexibility to sites subject to the program while encouraging the development and use of cleaner technologies to reduce NO_X emissions from sources not covered by the cap-and-trade program. Only DERCs and MDERCs generated in the HGB area are available for use in lieu of allowances.

At the time the MECT rules were developed, the number of DERCs available for use in the HGB area totaled over 37,000 tons (all generated by stationary sources; no MDERCs had been generated). Additionally, sources had the ability to make early reductions and continue banking DERCs until the January 1, 2002, implementation date of the MECT. After implementation of the MECT, sources subject to the cap no longer had the ability to generate DERCs because those reductions would take the form of unused allowances. The potential for capped sites to hold these banked DERCs for use in 2005 and beyond was significant enough to negatively impact the HGB ROP and attainment demonstration. To guard against more DERCs being used in a given year than are being generated, which might affect the goal of attainment, Texas included the following provisions in the MECT rule limiting the use of NO_X DERCs in lieu of allowances.

First, beginning in 2005, use of DERCs within the MECT is limited to 10,000 DERCs collectively for all sites within the HGB area. This provision eliminates the potential for sites subject to the MECT to use a large quantity of DERCs in a single year and negatively impact the HGB ROP plan and attainment demonstration. All requests to use DERCs (or MDERCs) in the MECT must be made by October 1 of the control period for which the DERCs (or MDERCs) would be used. In terms of the 10,000 DERC limit, TCEQ will approve requests to use DERCs in the amount of 250 tons or less for a given control period. After October 1, when all requests to use DERCs have been received, TCEQ determines how to respond to any requests to use DERCs in an amount exceeding 250 tons. TCEQ may reduce any such request so that the total amount of all DERCs used collectively does not exceed 10,000. If all the requests to use DERCs in a given control period are less than the 10,000 limit, TCEQ will then address requests for more than 250 tons. For these requests, TCEQ determines the number of remaining DERCs under the 10,000 limit that were not approved in the requests of 250 tons or less. These extra DERCs may be apportioned based on the percentage of DERCs in excess of 250 requested for use by those sites relative to the total amount of extra DERCs available.

Second, depending on when the DERCs were generated, the MECT rule requires the use of DERCs at specified

ratios. Beginning in 2005, DERCs generated before January 1, 2005, are required to be used at a ratio of four DERCs to one allowance. The ratio of DERCs to allowances increases to a 10 to 1 ratio for DERCs generated before 2005 and used in the 2007, or subsequent, control periods. For example, if DERC usage equaling the full 10,000 limit is approved for use in the 2007 control period, the overall cap would be increased by 1,000 allowances. Any DERCs generated after January 1, 2005, are available for use within the MECT at a one to one ratio, but are still included in the 10,000 DERC collective limit. We believe these ratios guard against the possibility that the availability of historic reductions would permit the use of more DERCs in a year than are generated, which could interfere with attainment or reasonable further progress.

As a further safeguard against the possibility of undermining the attainment demonstration by allowing the use of more DERCs in any given year than are generated, Texas added an additional 2.7 tons per day into the attainment model beyond the emissions that would be allowed based on source allocations. This additional 2.7 tons per day represents the maximum amount of pre-2005 DERCs available for use in the attainment year 2007. To arrive at this number, TCEQ divided the 10,000 DERC limit by 10 (the 2007 reduction ratio) and then by 365 (days per year) to yield a total of 2.7 tons per day that could be reintroduced into the cap. DERCs generated after 2005 by sources outside of the cap could not be quantified as those reductions would be generated through voluntary measures. TCEQ therefore assumed that all DERCs that would be used in the 2007 control period were pre-2005 DERCs. Including these added emissions in the attainment modeling is analogous to cap-and-trade programs that set aside a percentage of the modeled emissions for new source growth or other purposes.

The MECT program also provides that MDERCs can be used in lieu of allowances at a ratio of one MDERC to one allowance. MDERCs are not included in the 10,000 DERCs limit in any given year. TCEQ incorporated MDERCs into the MECT to provide incentives for mobile reductions. Although there is no set limit for MDERC usage under the MECT, from our experience with open market trading programs, we can reasonably predict that a relatively small quantity of MDERCs will be generated. Consistent with our prediction, we note that only 60 tons of NO_X MDERCs have been banked as of August 1, 2005.

TCEQ has also committed to making certain revisions to the DERC program to ensure that DECs used are real and surplus, consistent with the assumptions in the attainment demonstration. These revisions will include:

- Prohibiting the generation of DERCs from permanent shutdowns;
- Ensuring that reductions can only come from process changes or the installation of control equipment that result in less emissions per unit of production, thus preventing reductions from production shifting as a method of DEC generation;
- Clarifying provisions that allow for public comment and EPA approval of quantification protocols to ensure that the reductions used for DEC generation are quantifiable.

Additionally, section 101.363 requires TCEQ to audit the MECT program every three years. If the use of DERCs or MDERCs is shown to negatively impact attainment, TCEQ will remove this flexibility from the program.

With the restrictions outlined above, we believe that using DERCs and MDERCs in lieu of allowances provides additional flexibility in compliance with the MECT program without undermining the goal of attaining the one-hour ozone standard in the HGB area. EPA also believes that the restrictions placed on the use of DECs in the MECT will prevent such use from damaging the integrity of the MECT program and the HGB attainment demonstration. Because the basis for the use of DECs in the MECT is, in part, the modeling and attainment demonstration for the HGB area, EPA cannot grant a final approval of this provision of the MECT program until EPA issues a final approval of the attainment modeling provided as a mid-course review SIP revision. The attainment demonstration and MECT revisions are being concurrently proposed for approval (RME Dockets R06-OAR–2005-TX–0018 and R06-OAR–2005-TX–0023).

5. What is EPA's analysis of the fundamental principle of equity?

The equity principle is composed of two elements—general equity and environmental justice.

Equity Element One—General Equity

General equity means that an EIP ensures that all segments of the population are protected from public health problems and no segment of the population receives a disproportionate share of a program's disbenefits. OMT EIPs should specifically protect communities from disproportionate impacts from emission shifts and foregone emission reductions.

Consideration of health impacts from DEC use are included throughout the DERC rule. A facility wishing to use reductions of one pollutant to meet the reduction requirement of another pollutant must use urban airshed modeling to obtain TCEQ and EPA approval. If the facility generating the reductions is located outside the United States, the substitution must result in a greater health benefit and be of equal or greater benefit to the overall air quality of the area. Once the TCEQ meets the commitments outlined earlier, EPA review and approval will be required any time a reduction generated outside the United States is requested for use. EPA intends to address any such requests through a SIP revision, which will provide an opportunity for public participation. The public information requirements in section 101.372(h) and the information that must be submitted to the TCEQ for inclusion in the credit registry on the use and banking of DECs in sections 101.376 and 101.379 demonstrates the importance of public participation in the DERC program.

Equity Element Two—Environmental Justice

The environmental justice element applies if the EIP covers VOCs and could disproportionately impact communities populated by racial minorities, people with low incomes, and/or Tribes. EIPs that include hazardous air pollutants (HAPs) must also satisfy the expectations of Appendix 16.2 of the EPA EIP Guidance, which addresses prevention and/or mitigation of impacts from potential or actual trades involving HAPs, sufficient information made available for meaningful review and participation, public participation, and periodic program evaluations. OMT EIPs should also protect communities of concern from disproportionately high and adverse impacts from emission shifts and foregone emission reductions.

Because the DERC program allows for the generation and use of DECs from VOCs and/or HAPs, the rule must be evaluated against environmental justice expectations. The DERC rule satisfies all elements of the HAP Framework. For compliance with the prevention and/or mitigation of potential impacts, the TCEQ has placed limits on NO_X and VOC DEC usage in ozone nonattainment areas and similar DEC usage limits in attainment or unclassified areas to exceed permit allowables. Additionally, the trading of DECs may be discontinued if the program audit identifies problems in a localized area of

concern. The TCEQ addresses the expectations for sufficient information made available for meaningful review and participation by requiring under section 101.372(i) that all information submitted with notices, reports, and trades regarding the nature, quantity of emissions, and sales price for DECs is public information. This information is available upon request or on the TCEQ website. Public participation is an integral feature of the DERC rule in the design, implementation, and evaluation of the program. During the development of the SIP revisions under consideration in this action, the TCEQ held four public meetings in Austin, Channelview, and Houston, TX. The TCEQ also has an extensive stakeholder list of approximately 150 contacts who receive copies of all TCEQ rulemaking actions for comment and participation in development. The public also has the opportunity to comment on quantification protocols used under section 101.372(d) and has the ability to review the program evaluations under section 101.379.

As an added measure that demonstrates general equity and environmental justice, TCEQ has developed the Toxicological Risk Assessment (TARA) Effects Evaluation Procedure. Under this process, which is authorized under section 382.0518(b)(2) of the Texas Health and Safety Code, TCEQ may not grant a permit to a facility and a facility may not begin operating unless it is demonstrated that emissions will not have an adverse impact on public health and welfare. This demonstration is accomplished by (1) establishing off-property ground-level-air concentrations of constituents resulting from the proposed emissions, and (2) evaluating these concentrations for the potential to cause adverse health or welfare effects. The TARA Effects Evaluation is used to evaluate the use of DECs in an air permit. The TCEQ guidance document ''How to Determine the Scope of Modeling and Effects Review for Air Permits'' (RG–324, Oct. 2001) has a detailed discussion of the TARA Effects Evaluation procedures.

6. What is EPA's analysis of the fundamental principle of environmental benefit?

All EIPs must be environmentally beneficial and can demonstrate this principle through more rapid emission reductions or faster attainment than would have occurred without the EIP. The DERC EIP meets the expectations for the environmental benefit principle. The ability to generate DECs provides an incentive for early compliance and more rapid emission reductions. Additionally, users of DECs must retire an additional 10 percent of DECs as an environmental benefit under section 101.376(d)(2)(D).

7. What is EPA's analysis of the use of discrete emission credits for nonattainment new source review offsets?

Appendix 16.14 of the EIP Guidance outlines EPA's expectations for the use of emission credits in the NSR program. In addition to meeting the requirements of the NSR program, a source wishing to use OMT credits to meet NSR offset requirements must:

- Meet all other OMT requirements.
- Meet the geographic limitation and other criteria contained in section 173 of the CAA.
- Obtain sufficient OMT credits for at least one year of operation before receiving its permit.
- Commit in its NSR permit to obtain sufficient additional OMT credits to cover each subsequent year of operation by December 31 of the previous year. This means that the OMT credits used for NSR offsets must be obtained in advance of the year for which they will be used.
- Ensure that emissions reductions used as OMT credits are not otherwise required by the CAA.

The DERC program meets the requirements of an OMT program, as shown in the TSD for this action. Table IV–3 of the TSD specifically addresses how sources demonstrate that DECs are surplus and not otherwise required by the CAA. Section 101.376 of the DERC program provides that DECs can be used as NSR offsets if the following requirements are met:

- The user must obtain the executive director's advance approval covering use of specific DECs for at least one year of operation of the new or modified facility;
- The amount of DECs needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user must also purchase and retire enough DECs to meet the offset ratio requirement in the user's ozone nonattainment area. The user must purchase and retire either the environmental contribution of 10 percent or the offset ratio, whichever is higher; and
- The NSR permit must meet the following requirements:
- The permit must contain an enforceable requirement that the facility obtain at least one additional year of offsets before continuing operation in each subsequent year;
- Before issuance of the permit the user must identify the DECs; and
- Before start of operation the user must submit a completed DEC–2 Form, Notice of Intent to Use Discrete Emission Credits, along with the original certificate.

The structure of the DERC program also addresses the requirements in section 173 of the CAA concerning NSR offsets. In particular, section 173(a)(1)(A) requires that ''by the time the source is to commence operation'' the total allowable emissions in the area must be less than total emissions as of the time of the application to construct, so as to represent reasonable further process under section 171. Further, section 173(c) requires that by the time the source commences operation its new emissions must be offset by ''actual'' reductions in the area. Thus, as to offsets, section 173 requires that emission reductions occur in sufficient quantity to ensure that new or modified sources do not add to the total emissions in the airshed.

Because OMT programs such as the DERC program provide for banking and trading of reductions that occur over a discrete span of time, it is possible that when they are used as NSR offsets such reductions may have occurred several years before the commencement of the new emissions that they are being used to offset. It is important that such time lags between generation of the DECs and their use as offsets not interfere with the purposes of the NSR program. These purposes include ensuring that new sources in nonattainment areas do not significantly add to the overall level of emissions in the area.

The ultimate test as to whether offsetting emissions reductions are sufficient under section 173(a)(1)(A) is whether they represent ''reasonable further progress as defined in section 171.'' The definition of ''reasonable further progress'' in section 171(1) plainly refers to the air quality goal of attainment of the NAAQS. Accordingly, real reductions should be the focus. We consider banked DERCs and MDERCs to be real reductions. Therefore, we only need to determine whether the potential time lag between generation and use of DERCs and MDERCs as offsets may interfere with attainment or otherwise impede the achievement of the goals of the NSR program.

We do not expect that many sources will choose to use DECs for NSR offsets. Emission credits representing ongoing, perpetual reductions—such as the credits generated under the 30 TAC Chapter 101, Subchapter H, Division 1 Emission Credit Banking and Trading program—are the traditional choice for

NSR offsets. By contrast, EPA believes that few DECs will be used as offsets, because few facilities will want to face potentially having to shut down if no credits are available in later years. We note that since the DERC program began operation in 1997 no source has applied to use DECs as NSR offsets. Nonetheless, we are evaluating the potential impact of usage of this feature of the DERC program. We conclude that the program is consistent with section 173 and NSR goals, for the following reasons.

A. Substantial Likelihood of Continuing Reductions in Each Nonattainment Area

First, and most important, we expect that, under the DERC program, new discrete emission reductions, and other reductions that are equivalent to discrete reductions, will be generated on an ongoing basis. The generation of new reductions is important to counterbalance the potential effect of the use as offsets of reductions that took place entirely in the past. If new reductions are generated regularly, then the system as a whole will satisfy the section 173 offset requirements even if some of the DERCs and MDERCs in the system are from previous years.

In each of the nonattainment areas in Texas where DERCs and MDERCs might be used as offsets, there is a reasonable basis to conclude that DERCs and MDERCs will be generated on a recurring basis at least until the area reaches attainment. Because of the expected low utilization of DERCs and MDERCs as offsets, it is not necessary to show that DERCs and MDERCs will be generated in quantities equal to existing banked quantities—a much smaller amount of recurring generation will be sufficient. We will address each of the nonattainment areas in Texas separately.

Houston/Galveston/Brazoria (HGB) 8-Hour Ozone Nonattainment Area

The HGB area is a moderate nonattainment area for ozone under the 8-hour standard. Its attainment deadline is 2010. In the HGB area, the existence of a robust trading market, with credits that are for relevant purposes fungible across several programs, leads EPA to conclude that additional reductions may reasonably be expected in the future. The NO_X Mass Emissions Cap and Trade (MECT) program and the large and diverse universe of sources will ensure that a robust trading market will exist until the area reaches attainment. Analysis of the HGB 2002 emissions inventory shows that for VOC emissions, approximately 41 percent of the inventory (239 tpd) is attributable to area sources, 23 percent (136 tpd) is attributable to point sources, 20 percent (115 tpd) is attributable to onroad mobile sources, and 16 percent of the inventory (93 tpd) is attributable to nonroad mobile sources. For NO_X emissions, approximately 35 percent of the inventory (398 tpd) is attributable to nonroad mobile sources, 30 percent (338 tpd) is attributable to point sources, 28 percent of the inventory (323 tpd) is attributable to onroad sources, and 8 percent (87 tpd) is attributable to area sources. (Please note that the emissions inventory data above is presented only for illustrative purposes. EPA is not proposing action on the 2002 emissions inventory in this document.) Typical point sources in the HGB area include refineries, chemical facilities, and electric generating facilities.

The MECT program applies to all sites in the HGB area with an uncontrolled design capacity to emit 10 or more tons of NO_X per year. The MECT is a declining cap: the first phase of NO_X reductions required under the cap was in 2002, and has been followed by step-downs that will continue through 2007. All sites subject to the MECT had the option of complying early and generating DERCs up to the 2002 start date. Since 2002, any reductions these sites make have been considered unused allowances under the MECT program, instead of being banked as DERCs. Sites participating in the MECT also have the option to use banked DERCs in lieu of MECT allowances. Additionally, sources not subject to the MECT (*e.g.*, mobile sources and area sources) can still generate DERCs in accordance with the generation strategies in the DERC rule. Therefore, we conclude, as to NO_X, that the emissions increases at sources that have used DERCs generated in the past for offsets will be offset by reductions in the future that will occur as unused allowances.

With regard to VOCs, TCEQ has also adopted two rules for controlling emissions of highly reactive volatile organic compounds (HRVOCs) in the HGB area. The short-term limit on HRVOC emissions established in 30 TAC Chapter 115 will be effective in 2006, and the HRVOC annual emissions cap and trade program will be effective in 2007. Sources subject to these rules can comply early and generate DERCs from early reductions up until the implementation dates. Therefore, we believe that sources will have incentives to generate VOC DERCs in the future, which will tend to offset the use of past DERCs for NSR purposes.

Dallas/Fort Worth (DFW) 8-Hour Ozone Nonattainment Area

Past patterns of DERC generation, combined with rules coming into effect in the future, suggest that it is likely that new reductions will continue to occur, although not in every year. From 2000 through 2005, some amount of DERCs were generated in every year except 2005 (which of course is not over yet). A relatively small amount was generated in 2004, but nonetheless the fact that substantial amounts of reductions were generated in each of the years 2000 through 2003 is a positive sign as to the ability of stationary sources in the DFW area to generate reductions. There are approximately 9,000 tons of NO_X and 10 tons of VOC DERCs banked in DFW; no MDERCs have been generated in DFW. Analysis of the DFW 2002 emissions inventory shows that for VOC emissions, approximately 53 percent of the inventory (216 tpd) is attributable to area sources, 26 percent (104 tpd) is attributable to onroad mobile sources, 13 percent (55 tpd) is attributable to nonroad mobile sources, and 8 percent of the inventory (30 tpd) is attributable to point sources. For NO_X emissions, approximately 45 percent of the inventory (207 tpd) is attributable to onroad mobile sources, 27 percent (121 tpd) is attributable to nonroad mobile sources, 19 percent of the inventory (83 tpd) is attributable to point sources, and 9 percent (40 tpd) is attributable to area sources. (Please note that the emissions inventory data above is presented only for illustrative purposes. EPA is not proposing action on the 2002 emissions inventory in this document.) Typical point sources in the DFW area are electric generating facilities and cement kilns. Electric generating facilities have generated approximately 85 percent of the NO_X DERCs in DFW to date.

To the extent there is a concern that these previous reductions were driven by early compliance with rules that are now in effect, and therefore that there is no incentive for future reductions, other rules coming into effect in the future should mitigate that concern. The DFW 5 percent increment of progress plan submitted to fulfill obligations under the 1-hour ozone standard extends the nonattainment area to the new counties of Ellis, Parker, Rockwall, Johnson, and Kaufman. Sources in the newly designated nonattainment counties now have a RACT compliance date of 2007. These sources could comply early with RACT requirements and generate DERCs up to the 2007 compliance date. The 8-hour ozone attainment deadline for DFW is 2010. The 8-hour ozone

attainment demonstration SIP has not yet been submitted, but it will presumably have control measures taking effect between now and 2010, which will drive reductions, and therefore potential early reductions, during that time.

In addition to the above reasons, to the extent discrete credits become widely used in the DFW area (as NSR offsets or otherwise), the ordinary function of the trading market could drive the creation of new DERCs and MDERCs. That is, demand for discrete reductions will provide a financial incentive for sources to generate such reductions.

Beaumont/Port Arthur (BPA) 8-Hour Ozone Nonattainment Area

Past patterns of DERC generation in the BPA area, combined with rules coming into effect in the future, suggest that it is likely that new reductions will continue to occur, although not in every year. From 1999 through 2005, some amount of DERCs were generated in every year except 2000 and 2005 (which of course is not over yet). The fact that substantial amounts of reductions were generated in most of these years is a positive sign as to the ability of stationary sources in the BPA area to generate reductions usable as DERCs. There are approximately 1,500 tons of NO_X DERCs banked in BPA; no MDERCs have been generated in BPA. Analysis of the BPA 2002 emissions inventory shows that for VOC emissions, approximately 44 percent of the inventory (57 tpd) is attributable to area sources, 34 percent (44 tpd) is attributable to point sources, 12 percent (16 tpd) is attributable to nonroad mobile sources, and 10 percent of the inventory (13 tpd) is attributable to onroad sources. For NO_X emissions, approximately 41 percent of the inventory (120 tpd) is attributable to nonroad mobile sources, 38 percent (109 tpd) is attributable to point sources, 16 percent of the inventory (46 tpd) is attributable to onroad mobile sources, and 5 percent (16 tpd) is attributable to area sources. (Please note that the emissions inventory data above is presented only for illustrative purposes. EPA is not proposing action on the 2002 emissions inventory in this document.) Typical point sources in the BPA area are refineries, chemical facilities, and electric generating facilities. Chemical manufacturers and refineries have generated all the DERCs in BPA to date.

To the extent there is a concern that these previous reductions were driven by early compliance with rules that are now in effect, and therefore that there is no incentive for future reductions, other rules coming into effect in the future should mitigate that concern. In particular, TCEQ has proposed to lower the RACT exemption for shipbuilding/repair and batch processes from 100 to 50 tons, which will cause some sources to be newly subject to RACT. These sources could comply early with RACT requirements and generate DERCs up to the 2006 compliance date.

Beaumont expects to reach attainment by the end of 2006, therefore, the time frame for using DERCs/MDERCs as NSR offsets in this area (and hence the scope of our concern about this usage) may prove to be fairly limited. If discrete credits do become widely used in the BPA area (as NSR offsets or otherwise), the ordinary function of the trading market could drive the creation of new DERCs and MDERCs. That is, demand for discrete reductions will provide a financial incentive for sources to generate such reductions.

El Paso CO and PM_{10} Nonattainment Area

El Paso is currently classified as a moderate nonattainment area for carbon monoxide (CO) and particulate matter with a diameter of less than 10 micrometers and smaller (PM_{10}). El Paso has monitored attainment of the CO standard for approximately the past five years and is expected to submit a request for redesignation by the end of 2005. EPA approved El Paso's 179(b) plan for PM_{10} on January 18, 1994 (59 FR 2532), which demonstrated that the area would achieve the PM_{10} standard except for emissions contribution from geologic dust from Mexico. TCEQ also intends to pursue redesignation under the PM_{10} standard in the future. Since the DERC program began in 1997, no CO or PM_{10} DECs have been generated.

With the future redesignation requests the timeframe for using DERCs/MDERCs as NSR offsets in the El Paso area (and hence the scope of our concern about this usage) may prove to be fairly limited. If discrete credits do become widely used in the El Paso area (as NSR offsets or otherwise), the ordinary function of the trading market could drive the creation of new DERCs and MDERCs. That is, demand for discrete reductions will provide a financial incentive for sources to generate such reductions. Also, because there are no DERCs or MDERCs generated in El Paso, the concern that older banked reductions could reenter the market is not applicable.

B. Geographic Restrictions

The geographic restrictions outlined in section 101.372(f) provide further safeguards against inappropriate use of DECs as offsets, by ensuring that reductions used for offsets come from the same source or from other sources in the same nonattainment area. On completion of the conditions outlined earlier in this document, TCEQ Executive Director and EPA approval will be required for sources wishing to use reductions generated in another state or nation, from another nonattainment area, or from attainment counties into nonattainment areas. The DERC program relies on many sources continuing to generate new DERCs and MDERCs to balance with other sources using previously generated discrete credits. Proper functionality of the DERC program will ensure that reductions used as offsets will not negatively impact an area's attainment strategy.

C. DECs Are Equivalent to Real Reductions in Allowables

EPA believes that although generating a DEC does not change the allowable emissions in a facility's permit, it is nonetheless appropriate to treat the temporary reduction in facility emissions that a DEC represents as a limited reduction in the allowable emissions of the generating facility. The rationale for this conclusion is that a DEC is banked after it is generated, but the facility must be able to quantify its reductions and demonstrate that emissions before and after a reduction strategy produced a certain amount of reductions. Thus, by nature of how the DEC is generated, there is in effect a temporary limit on the facility's emissions.

D. Program Audit

EPA's EIP Guidance directs that to avoid problems associated with inter-temporal trading, the program should analyze, minimize, track, and if necessary correct potential problems. The DERC program, at section 101.379, requires an audit of the program every three years. The TCEQ Executive Director may suspend or discontinue the use of DECs if a problem relating to DEC use is identified during the triennial audit.

For the above reasons, EPA believes that the DERC program provides offsets that (except for their discrete nature) are in principle equivalent to offsets provided by traditional means, and that the program is consistent with section 173. With the restrictions outlined above, and the environmental benefit provision for DEC use, EPA believes that TCEQ has addressed our expectations for using DECs as NSR offsets.

8. What is EPA's analysis of the commitments TCEQ has made?

A. International Discrete Emission Reductions and Other Discrete Reductions From Outside the Area of Use

The DERC rule provides at section 101.372(f) that emission reductions from another county, state, or nation may be used, subject to certain conditions. The current wording of the rule is unclear on when prior approval from EPA will be required. Upon completion of the condition outlined above, prior approval from EPA will be required when discrete emission credits or reductions from another county, state, or nation are requested for use. EPA has addressed the possibility of such cross-jurisdictional trades in Appendix 16.16 of the EIP Guidance. Satisfaction of the provisions of Appendix 16.16 is necessary to ensure that cross-jurisdictional trades are consistent with the fundamental integrity, equity, and environmental benefit principles described in the EIP Guidance. This condition requiring EPA review of such trades will be the mechanism by which EPA ensures that inappropriate trades do not take place. In particular, EPA intends to require a further SIP revision (either a detailed trading program, such as an interstate MOU, or a trade-specific submission) before approving any international trades, interstate trades, or intrastate trades that involve reductions from beyond the nonattainment area.

International trades present an especially difficult case. For instance, currently there is no approvable mechanism for demonstrating that reductions made in another country are surplus or enforceable. Nonetheless, emission reductions in other countries could potentially offer substantial air quality benefits in the United States. In approving the DERC rule, EPA is recognizing the concept of international trading and describing a framework (*i.e.*, the submission of a SIP revision demonstrating among other things the validity and enforceability of foreign reductions) for such trading, in the event that a suitable mechanism is developed for resolving concerns regarding enforceability and surplus. Until such a time, however, EPA does not expect to be able to approve specific international trades under the DERC rule.

B. Generation and use of DERCs from permanent shutdowns

The EIP Guidance states that the generation of discrete emission reduction credits from shutdowns and activity curtailments is not an appropriate feature of OMT programs because:

- OMT EIPs are intended to encourage innovative and creative emission reductions, and shutdowns generally do not fall into this category.
- Other types of trading programs may allow shutdowns to generate emission reductions.

Shutdowns are also problematic for OMT programs because of the possibility that a facility may shut down in one area, generate and sell credits, but then relocate operations to other areas or states. Additionally, when activity level increases cause emission increases, mitigating reductions are typically not required. Thus, allowing the generation of tradable credits as a result of activity level decreases (including shutdowns) may tend to promote emissions increases. Such patterns of activity related to shutdowns have the potential to interfere with attainment.

Section 1.6 of the EIP Guidance states that:

> From now on, EPA will only approve EIPs that are in substantial agreement with this guidance. We recognize you may have spent considerable effort to develop your EIP. However, since this EIP guidance was not complete at the time, you may not have included all the requirements contained in this guidance. If you have submitted an EIP to EPA, but it has not been approved yet, you must:
>
> - Consult with your Regional office to determine if any changes are needed for approval
> - Revise your EIP SIP to make the required changes before resubmitting it to EPA.

Consistent with the intent of this statement, EPA recognizes that TCEQ began developing the DERC program before the January 2001 publication of the EIP Guidance. More specifically, the Texas DERC program has been operational since 1997. Accordingly, we have considered the policies behind the EIP Guidance's statement that OMT credits from shutdowns are not appropriate. We have also considered the EPA Office of Inspector General report titled, ''Open Market Trading Program for Air Emissions Needs Strengthening'' (No. 2002–P–00019, September 30, 2002), as well as EPA air program responses to that report.

After considering the legal and policy issues, we have concluded that it is appropriate to conditionally approve the DERC rule based on the following commitments from TCEQ:

- Revising the language in section 101.373 to prohibit the future generation of DERCs from permanent shutdowns (''shutdown DERCs'') and to allow shutdown DERCs generated before September 30, 2002, to remain available for use for up to five years from the date of the commitment letter; and
- To perform a credit audit to remove from the emissions bank all shutdown DERCs generated after September 30, 2002.

EPA believes that these conditions address the majority of our policy concerns relating to the use of shutdown DERCs in OMT programs. These conditions address the issue of incentives because sources can no longer generate DERCs from shutdowns. We also believe that the issue of whether the use of the existing shutdown DERCs would interfere with attainment in the HGB nonattainment area has been addressed because TCEQ modeled a conservative estimate of the use of DERCs, including shutdown DERCs, and found no interference with attainment. (See Section IV of the TSD—Technical Summary, Does the DERC EIP SIP Submittal Violate the Integrity of Other Programs.) Additionally, reductions from shutdowns of facilities not included in the SIP cannot generate DERCs. Future attainment demonstrations for other areas will have to consider and account for any potential impact from use of DERCs as well.

EPA further believes that September 30, 2002, is an acceptable cut-off date for the use of shutdown DERCs because it reflects the publication date of the OIG report and the various EPA air program responses, which served as notice that in EPA's view shutdowns should not generate OMT credits. Additionally, it reflects the necessary response time for TCEQ to adopt and submit SIP revisions, and for EPA to process these submittals.

The five year phase-out period for the use of shutdown DERCs generated and banked before September 30, 2002, is also consistent with EPA's goals regarding the effects of credit expiration on the market. As explained in the EIP Guidance, EPA supports unlimited credit lifetimes in trading programs because it tends to reduce emissions spiking around the time of credit expiration, and because credits with an unlimited lifetime promote an efficient trading market. Here, EPA believes that the five year phase-out (as opposed to a shorter-term phase-out) will reduce the potential for emissions spiking and will help promote an efficient trading market, because companies can manage DERC usage across an extended time period. Additionally, in the HGB area, the flow controls established by TCEQ will help ensure that emissions spiking does not occur. (See the following section for a discussion of other issues

related to credits with an unlimited lifetime.)

C. Unlimited Lifetime for DECs

A DEC is available for use after the Notice of Generation and Generator Certification of Discrete Emission Credits Form, has been received, deemed creditable by the TCEQ Executive Director, and deposited in the commission credit registry in accordance with section 101.378(a), and may be used anytime thereafter. DECs do not expire; all credits are deposited in the credit registry and reported as available credits until they are used or withdrawn.

Section 16.15 of the EIP Guidance recognizes that allowing an unlimited lifetime for OMT credits provides certainty and flexibility to the sources participating in the program and reduces the risk of emission spiking that could occur before the expiration date of the credit. It also recognizes that an unlimited lifetime of OMT credits could present an enforcement problem because of the Federal statute of limitations at 28 U.S.C. Section 2462, which typically requires Federal enforcement actions under environmental statutes to commence within 5 years of a violation. (This concern does not apply in the same way to State programs because there is no comparable statute of limitations under Texas law.) In addition, enforcement actions taking place many years after the generation or use of DECs could be hindered by evidentiary problems such as the lack of available records. Therefore, because of the unlimited lifetime of DECs under the Texas program, EPA has placed a condition on approval of the rule. To address the Federal enforceability concerns, TCEQ has committed to:

- Revise Form DEC–1, Notice of Generation and Generator Certification of Discrete Emission Credits; Form MDEC–1, Notice of Generation and Generator Certification of Mobile Discrete Emission Credits; and Form DEC–2, Notice of Intent to Use Discrete Emission Credits, to include a waiver to the Federal statute of limitations defense for generators and users of DECs. The assertion of any such defense will render the initial trade void from the very beginning, and the subsequent use of such emission reductions will be a violation.

- TCEQ will maintain its current policy of preserving all records relating to DEC generation and use for a minimum of 5 years after the use strategy has ended.

Again, TCEQ has agreed to comply with these conditions during the conditional approval period.

9. What is EPA's analysis of the rule language in Chapters 115 and 116?

The rule language published at 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds, Subchapter J, Division 4, section 115.950, submitted by TCEQ on December 20, 2000, is approvable. This subsection cross-references the use strategies for DERCs and MDERCs in section 101.376, which we are proposing to approve. These use strategies provide that DERCs and MDERCs can be used to meet VOC requirements in Chapter 115.

The definition of ''facility'' published at 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction, Subchapter A, section 116.10(4), submitted by TCEQ on July 22, 1998, is approvable. This definition is approvable as defining what is a ''facility'' for purposes of permitting under Chapter 116. This satisfies the provisions of 40 CFR § 51.160(e) by identifying the types of facilities, building, structures, or installations which will be subject to review.

10. What is EPA's analysis of the DERC program with respect to section 110(l) of the Clean Air Act?

Section 110(l) of the Clean Air Act states:

> Each revision to an implementation plan submitted by a State under this Act shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.

Thus, under section 110(l), this SIP revision must not interfere with attainment or reasonable further progress or any other applicable requirement of the Act.

As a general matter, the satisfaction of the environmental benefit principle and the other integrity principles applicable to trading programs will tend to demonstrate that a trading program will do no worse than maintain existing air quality. Accordingly, EPA has determined that discretionary EIPs that are consistent with the EIP Guidance are consistent with section 110(l):

> Congress did not address specific requirements for EIPs in the CAA. Consistent with our mandate, the EPA has interpreted what an EIP should contain in order to meet the requirements of the CAA. This document is a guidance document that sets forth EPA's non-binding policy for EIPs. This document does not represent final EPA action on the requirements for EIPs. Rather, this document identifies several different types of economic incentive programs, and proposes elements for each type that, if met, EPA currently believes would assure that the program would meet the applicable CAA provisions. The guidance phrases these elements in the imperative—that is, using the terms ''must'' or ''shall''. This is done only to signify that EPA would propose to approve a SIP submittal of a program containing the indicated elements on grounds that under section 110(l) of the CAA, the SIP revision does not interfere with any applicable requirement concerning attainment, reasonable further progress, or any other applicable requirement.

(EIP Guidance, section 1.9.) Thus, if the DERC program is consistent with the EIP Guidance it will satisfy section 110(l). Although the DERC program is an OMT program as described in the EIP Guidance, it deviates in several respects from that guidance. Namely, the DERC program allows the use of DECs in the HGB MECT, the generation and use of DERCs from permanent shutdowns, the use of discrete reductions from beyond the nonattainment area, and the use of DECs as NSR offsets. Therefore, we must determine if these areas of difference from the guidance could reasonably be expected to interfere with attainment, reasonable further progress, or any other applicable CAA requirement. As a preliminary matter we note that a user of DECs must retire 10 percent more credits than are needed, which provides a built-in source of reductions and therefore tends to promote attainment. That meliorative tendency noted, we will address in the section 110(l) context each of the areas of significant departure from the EIP guidance.

First, as described earlier in this action, the use of DERCs in lieu of MECT allowances has been modeled for impact on the HGB attainment demonstration and reasonable further progress plan. See RME docket R06–OAR–2005-TX–0018 for the attainment demonstration. EPA believes that with the flow control restrictions on the use of DERCs in the MECT, and considering the modeling presented in the attainment demonstration, this deviation does not render the rule inconsistent with section 110(l).

Second, the generation and use of DERCs from permanent shutdowns is also a deviation from the EIP Guidance. (See section I.C.8 of this action.) One condition we have placed on our approval of the DERC program is that TCEQ prohibit future generation of DERCs from permanent shutdowns. Additionally, the DERCs currently banked from permanent shutdowns will

only be available for use for a limited time. Because banked DERCs are modeled as actual emissions that could reenter the airshed, all nonattainment areas must evaluate use of shutdown DERCs in the modeling. The attainment demonstration for HGB is being proposed concurrently with this action. TCEQ will need to evaluate impact of DERC use in BPA and DFW as attainment demonstrations are submitted. Only a minimal number of shutdown DERCs have been banked in attainment areas. With the five-year phase out period allowed under the conditional approval and the limitations on DERC use at section 101.376, the use of these DERCs should be sufficiently restricted as to satisfy section 110(l).

Third, the use of discrete reductions from beyond the nonattainment area is also a condition for rule approval. EPA approval is required anytime a source requests to use discrete reductions from beyond the nonattainment area, or from another state or nation. EPA intends to address any such requests through a SIP revision, which will demonstrate consistency with section 110(l).

Fourth, the use of DERCs and MDERCs as NSR offsets is permitted by the EIP Guidance, but only to the extent that other sections of the CAA are satisfied. Our discussion earlier shows that the use of DECs is consistent with sections 171 and 173. Therefore, this use is also consistent with section 110(l). Further, any such use of DECs would be in connection with an NSR permit, which itself includes a review to ensure noninterference with attainment.

Having reviewed the DERC rule in connection with the EIP Guidance and section 110(l) of the act, we conclude that for purposes of determining consistency with section 110(l) the rule is consistent with the guidance. To further support this determination, we will discuss the rule in connection with specific locations and criteria pollutants. Discrete emission credits can be generated from reductions of any criteria pollutant or precursor of a criteria pollutant, with the exception of lead. Therefore, we have evaluated the DERC rule for its impact on attainment and reasonable further progress for CO, ozone, NO_2, NO_X, PM, SO_2, and VOC.

As to ozone, attainment demonstrations under the 8-hour standard currently in effect are not yet due. Pending that date, EPA believes that preservation of the status quo air quality while new plans are being developed will prevent interference with the States' obligations to develop timely attainment demonstrations and reasonable further progress plans and to attain as expeditiously as practicable. Accordingly, for 8-hour ozone nonattainment areas in Texas, EPA believes that a demonstration that this rule will not worsen existing air quality is sufficient. As to the HGB nonattainment area, a fuller discussion of this analysis appears in EPA's evaluation of the HGB attainment demonstration submitted for the 1-hour ozone standard (RME Docket R06–OAR–2005–TX–0018). That rulemaking contains EPA's proposed determination that the area will attain the 1-hour ozone standard and that the current attainment strategy does not interfere with attainment of the 8-hour standard in the HGB area. In addition, EPA has already approved TCEQ's 1-hour reasonable further progress plan for HGB (70 FR 07407, February 14, 2005).

Under the DERC rule, one ozone precursor may be used to meet the reductions of another precursor (*i.e.*, a facility could use NO_X reductions to satisfy a VOC requirement or vice versa), subject to an urban airshed modeling demonstration and TCEQ Executive Director and EPA approval. In very limited cases, the rule allows for such interpollutant trading across the U.S.-Mexico border without specifically requiring urban airshed modeling, but any such trades would be subject to EPA approval, as further described below. DEC usage is also subject to geographic restrictions. Generally, DECs generated in an attainment area can be used in that area or any other attainment area. DECs generated in a nonattainment area can only be used in that nonattainment area or in any attainment area. TCEQ Executive Director and EPA approval will be required any time a DEC generated outside a nonattainment area is requested for use within that nonattainment area. EPA intends to address any such request through a SIP revision, which would require a demonstration of consistency with section 110(l). TCEQ will also conduct an audit of the DERC program every three years. The audit will specifically evaluate the impact of DEC generation and use on the State's attainment demonstration. If problems are identified, the TCEQ Executive Director may suspend or discontinue the trading of DECs as a remedy.

As to criteria pollutants other than ozone, the only nonattainment area in Texas is El Paso, which is currently designated nonattainment for carbon monoxide (CO) and particulate matter with a diameter of 10 micrometers and smaller (PM_{10}). El Paso has monitored attainment of the CO standard for approximately the past five years and is expected to submit a request for redesignation by the end of 2005.

No DECs of any sort have yet been banked in El Paso. Therefore, before any DECs could be used there, reductions in an amount ten percent greater than the eventual use would have to occur. In light of El Paso's five-year record of monitored attainment with the CO standard, we conclude that such potential DEC usage would not interfere with attainment or reasonable further progress. As to PM_{10}, potential DEC usage will not interfere with attainment of the PM_{10} standard. EPA approved a SIP revision for El Paso on January 18, 1994, finding under section 179(b) of the CAA that the plan provided for attainment but for emissions from Mexico consisting primarily of geologic dust (59 FR 2532). As demonstrated by the 179(b) plan and by the fact that no one has banked PM_{10} emissions, there are very few sources in the El Paso area that could serve as generators of PM_{10} DECs, and therefore there is no reasonable prospect that the use of PM_{10} DECs will interfere with attainment of that standard.

We have also considered whether the potential use of DECs to exceed allowable emission levels under 30 TAC § 101.376(b)(1) is contrary to section 110(l) in that it could allow sources to exceed limits in their CAA Title V permits, which are ''applicable requirements'' under the Act. We conclude that this aspect of the rule does not violate section 110(l), for the following reasons. First, EPA has addressed the interface of Title V permits and trading programs in the EIP guidance, which provides:

> If a facility that has a title V operating permit wishes to participate in your approved EIP, you must modify the facility's operating permit to include the detailed compliance provisions necessary to assure compliance with the EIP. Thus, the permit becomes a valuable tool to ensure the source meets the requirements of the EIP.
>
> Once the permit includes terms and conditions necessary to implement the EIP (as described below), the source may typically make individual trades under the EIP without the need for future formal permit revisions. This is true because most trading activity under such a permit would already be addressed and allowed by the specific terms and conditions of the permit and such trading would not normally conflict with the permit. This is the principle expressed by section 70.6(a)(8) of the CFR, which states that permit revisions are not required for trading program changes that are ''provided for'' in the permit.

(EIP Guidance, Appendix 16.8.) Texas has modified its Title V permit template so as to address the permissible use of DECs to meet Title V permit requirements. As further explained in the TSD for this action, we find that the

Texas permit language satisfies the concerns identified in Appendix 16.8.

In reaching this conclusion, we also considered that a Title V permit is not itself a source of substantive limits. Rather, it incorporates applicable requirements under other permits and programs. In Texas, as elsewhere, many of the allowable emission levels in Title V permits are determined through New Source Performance Standards (NSPS), Best Available Control Technology (BACT), Lowest Achievable Emission Rate (LAER), or National Emission Standards for Hazardous Air Pollutants (NESHAPs). Under the Texas rules, DECs may not be used for compliance with any of these programs. The rule does allow DECs to be used for compliance with Reasonably Available Control Technology (RACT) standards, in accordance with EPA's guidance. Specifically, the guidance provides that ''[i]f your EIP allows sources to avoid direct application of RACT technology, your EIP must ensure that the level of emission reductions resulting from implementation of the EIP will be equal to those reductions expected from the direct application of RACT'' (EIP Guidance, Appendix 16.7). The Texas program ensures consistency with that element of the EIP Guidance through the requirement that a user of DECs must retire 10 percent more credits than are needed. Accordingly, any use of DECs for RACT compliance will have been preceded by a ten percent greater reduction.

The above discussion concerns criteria pollutants for which an area is classified as nonattainment. As for pollutants for which an area is in attainment, EPA believes that the DERC rule is consistent with section 110(l). Discrete credit use in attainment areas could potentially result in temporary local increases in such attainment pollutants, but only in the sense of authorizing limited exceedances of state-only permit requirements. That is, in attainment areas in Texas, the Federally enforceable permit limits are all based on programs, such as BACT and NSPS, for which DEC use is not authorized under the Texas rule. DEC use for attainment pollutants can therefore only affect non-SIP requirements. Irrespective of the DERC rule, such non-SIP requirements are subject to change without undergoing a 110(l) analysis. Accordingly, the DERC SIP revision is not itself causing any increases in attainment pollutants that might be contrary to section 110(l).

For the above reasons, and based also on the analysis in the HGB rulemaking, we conclude that the Texas DERC rule represents an environmental improvement on the status quo, and does not interfere with attainment, reasonable further progress, or any other requirement of the Act. TCEQ will need to evaluate DEC generation and use for the BPA and DFW nonattainment areas in the appropriate attainment demonstrations and reasonable further progress plans.

D. Conclusion

EPA reviewed the DERC program revisions with respect to the expectations of the EIP Guidance document and the requirements of the Clean Air Act. EPA has concluded after review and analysis that the DERC program is conditionally approvable. EPA is proposing to approve the revisions to sections 101.371, 101.372, 101.378, and 101.379 submitted by TCEQ on January 31, 2003, for rule log number 2002–044–101–AI; and the revisions to sections 101.370, 101.373, 101.374, and 101.376 submitted by TCEQ on December 6, 2004, for rule log number 2003–064–101–AI.

EPA has also reviewed the subsection in 30 TAC Chapter 115 which provide cross-references to the DERC program, and has concluded that this subsection is approvable. We are proposing to approve section 115.950 submitted by TCEQ on December 20, 2000, for rule log number 1998–089–101–AI. Because this subsection involves the use of discrete emission credits and emission credits for compliance, the use of emission credits for compliance with Chapter 115 is not approved until the Emission Credit Banking and Trading program has been approved. The rules for emission credit generation and use are being considered in a separate **Federal Register** notice.

EPA has also reviewed the definition of facility provided in 30 TAC Chapter 116, and has concluded that this subsection is approvable. We are proposing to approve section 116.10(4) submitted by TCEQ on July 22, 1998, for rule log number 98001–116–AI.

II. General Information

A. Tips for Preparing Your Comments

When submitting comments, remember to:

1. Identify the rulemaking by File ID number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

B. Submitting Confidential Business Information (CBI)

Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the official file. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described

in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

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

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

Dated: September 27, 2005.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 05–19998 Filed 10–4–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R05–OAR–2005–IN–0006; FRL–7981–7]

Determination of Attainment, Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Indiana; Redesignation of the Evansville Area to Attainment of the 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: EPA is extending the comment period for a proposed rule published September 9, 2005 (70 FR 53605). On September 9, 2005, EPA proposed to approve the State of Indiana's request to redesignate the Evansville area (Vanderburgh and Warrick Counties) to attainment of the 8-hour ozone National Ambient Air Quality Standard. In conjunction with the proposed approval of the redesignation request for the Evansville area, EPA proposed to approve the State's ozone maintenance plan for the 8-hour ozone NAAQS through 2015 in this area as a revision to the Indiana State Implementation Plan. EPA also proposed to approve 2015 Volatile Organic Compounds and Oxides of Nitrogen Motor Vehicle Emissions Budgets, which are supported by and consistent with the 10-year maintenance plan for this area, for purposes of transportation conformity. In response to a September 9, 2005, request from Valley Watch, Inc., EPA is extending the comment period for 7 days.

DATES: The comment period is extended to October 18, 2005.

ADDRESSES: Submit comments, identified by Regional Material in EDocket (RME) ID No. R05–OAR–2005–IN–0006, to: John M. Mooney, Chief, Criteria Pollutant Section, (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. E-mail: *mooney.john@epa.gov.* Additional instructions to comment can be found in the notice of proposed rulemaking published September 9, 2005 (70 FR 53605).

FOR FURTHER INFORMATION CONTACT: Edward Doty, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6057, *Doty.Edward@epa.gov.*

Dated: September 29, 2005.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 05–20094 Filed 10–4–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 4

RIN 1094–AA49

Implementation of the Equal Access to Justice Act in Agency Proceedings

AGENCY: Office of the Secretary, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Hearings and Appeals (OHA) is proposing to amend its existing regulations that implement the Equal Access to Justice Act to bring them up to date with amendments to the statute that have been enacted since OHA adopted the existing regulations in 1983.

DATES: You should submit your comments by December 5, 2005.

ADDRESSES: You may submit comments, identified by the number 1094–AA49, by any of the following methods:

—Federal rulemaking portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

—E-mail: *John_Strylowski@ios.doi.gov*. Include ''RIN 1094–AA49'' in the subject line of the message.

—Fax: 703–235–9014.

—Mail: Director, Office of Hearings and Appeals, Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203.

—Hand delivery: Director, Office of Hearings and Appeals, Department of the Interior, 801 N. Quincy Street, Suite 400, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203, Phone 703–235–3750. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: