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ENVIRONMENTAL PROTECTION AGENCY

40 CFR part 52

[EPA-R09-OAR-2017-0130; FRL-9967-68-Region 9]

Revisions to California State Implementation Plan; Bay Area Air Quality Management District; Emission Reduction Credit Banking

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing action on a revision to the Bay Area Air Quality Management District (BAAQMD or District) portion of the California State Implementation Plan (SIP). We are proposing a conditional approval of one rule. This revision consists of updates to provisions governing the issuance and banking of Emission Reduction Credits for use in the review and permitting of major sources and major modifications under part D of title I of the Clean Air Act (CAA). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by **[Insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R09-OAR-2017-0130 at <https://www.regulations.gov>, or via email to R9AirPermits@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from Regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other

information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the “FOR FURTHER INFORMATION CONTACT” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region 9, (415) 972-3534, yannayon.laura@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms “we,” “us,” and “our” refer to EPA.

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I. The State's Submittal

A. What rule did the State submit?

On April 22, 2013, the California Air Resources Board (CARB) submitted an amended rule, BAAQMD Regulation 2, Rule 4 (Rule 2-4), for approval as a revision to the BAAQMD portion of the California SIP under the CAA. Regulation 2 contains the District's air quality permitting programs. Rule 2-4 contains requirements applicable to the banking of Emission Reduction Credits (ERCs) for use in the District's air quality permitting programs.

Table 1 lists the rule addressed by this proposal with the dates that it was adopted by BAAQMD and submitted to the EPA by CARB, which is the governor's designee for California SIP submittals.

Table 1 - Submitted Rule

Regulation & Rule Number	Rule Title	Adopted /Amended	Submitted
Regulation 2, Rule 4 (Rule 2-4)	Permits, Emissions Banking	12/19/12	4/22/13

On June 26, 2013, Regulation 2, Rule 4 was deemed to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review. The submittal includes evidence of public notice and adoption of the amended rule. While we can only take action on the most recently submitted version of each regulation (which supersedes earlier submitted versions), we have reviewed materials provided with previous submittals.

B. What is the existing BAAQMD rule governing banking of Emission Reduction Credits in the California SIP?

The existing SIP-approved banking rule in the Bay Area consists of the rule identified in Table 2. This rule includes requirements for the generation and use of ERCs in nonattainment areas.

Consistent with the District's stated intent to have the submitted banking rule replace the existing SIP-approved banking rule in its entirety, EPA's conditional approval of the regulation identified in Table 1 would have the effect of entirely superseding our prior approval of the same rule in the current SIP-approved program.

Table 2 - Existing SIP Rule

Regulation & Rule Number	Rule Title	BAAQMD Adoption Date	EPA Approval Date	FR Citation
2-4	Permits, Emissions Banking	6/15/1994	1/26/1999	64 FR 3850

C. What is the purpose of this proposed rule?

The purpose of this proposed rule is to present our evaluation under the CAA and EPA's regulations of the amended banking rule submitted by CARB on April 22, 2013, as identified in Table 1. We provide our reasoning in general terms later in this preamble and provide a more detailed analysis in our Technical Support Document (TSD), which is available in the docket for this proposed rulemaking.

II. EPA's Evaluation

A. How is EPA evaluating the rule?

In general, banking rules allow a permitting authority to evaluate whether certain emission reductions meet the offset integrity criteria found in 40 CFR 51.165(a)(3)(ii)(C)(1)(i) and CAA section 173(c)(1) at the time of ERC issuance, and, if found to meet these criteria, to certify that finding by issuing an ERC Certificate. This process provides the Certificate-holder with a greater degree of certainty as to the validity of their ERCs for future use as offsets. Since

the intent of a banking program is to pre-review an emission reduction to determine whether it will meet the offset integrity criteria, we considered these criteria in our evaluation. In addition, we used EPA's Emissions Trading Policy Statement (ETPS),¹ which provides guidance on emissions trading, including the banking of ERCs for future use. EPA also evaluated the rules for compliance with the CAA requirements for SIP revisions in CAA sections 110(a)(2) and 110(l), and the additional requirements laid out in 40 CFR 51.165(a)(3).

Our TSD, which can be found in the docket for this rule, contains a more detailed evaluation and discussion of the approval criteria.

B. Does the rule meet the evaluation criteria?

With respect to procedural requirements, CAA sections 110(a)(2) and 110(l) require that revisions to a SIP be adopted by the State after reasonable notice and public hearing. Based on our review of the public process documentation included in the April 22, 2013 submittal, we find that the BAAQMD has provided sufficient evidence of public notice, and an opportunity for comment and a public hearing prior to adoption and submittal of these rules to EPA.

With respect to substantive requirements, we have evaluated Rule 2-4 to ensure it does not conflict with the requirements applicable to offsets in accordance with the CAA and regulatory requirements that apply to nonattainment NSR permit programs under part D of title I of the Act. For the most part, the submitted banking rule satisfies the applicable requirements and will strengthen the SIP by updating the rule and adding requirements to address fine particulate matter (PM_{2.5}). However, the submitted banking rule also contains three deficiencies that prevent full approval. Further in this preamble, we discuss generally our evaluation of

¹ 51 FR 43814, December 4, 1986.

BAAQMD's submitted rule and describe the identified deficiencies. Our TSD contains a more detailed evaluation and recommendations for program improvements.

First, Rule 2-4 is deficient because, while it defines the term ERCs as emission reductions “that are in excess of the reductions required by applicable regulatory requirements, and that are real, permanent, quantifiable, and enforceable,” it does not contain any enforceable provisions requiring the Air Pollution Control Officer to determine that the emission reductions under review meet the offset integrity criteria prior to issuing an ERC Certificate.

Second, Rule 2-4 is deficient because it incorporates the emission reduction calculation procedures found in Rule 2-2 subsection 605.2. On August 1, 2016, EPA finalized a limited approval and limited disapproval of BAAQMD's Rule 2-2 – *New Source Review*² because it contained deficiencies regarding the calculation of emission reductions. Specifically, EPA disapproved Rule 2-2 subsection 605.2 because it allows existing “fully-offset” sources to generate ERCs based on the difference between the post-modification potential to emit (PTE) and the pre-modification PTE. This may result in crediting emission reductions that are not “actual” reductions, as required by the Act. *See* 42 U.S.C. 7503(c)(1).

Third, Rule 2-4 is deficient because Section 2-4-302.3 allows ERC Certificates to be issued that do not adequately ensure the permanency of an emission reduction due to a facility closure.

With respect to the substantive requirements of CAA section 110(l), we have determined that our approval of Rule 2-4, as described in more detail in our TSD, represents a strengthening of the rule as compared to the District's current SIP-approved banking rule that we approved on January 26, 1999 (64 FR 3850), and that our conditional approval of the current SIP submittal

² 81 FR 50339, August 1, 2016.

would not interfere with any applicable requirement concerning attainment and Reasonable Further Progress or any other applicable requirement of the Act.

III. Proposed Action and Public Comment

Because the rule deficiencies described previously are inappropriate for inclusion in the SIP, EPA cannot grant full approval of this rule under section 110(k)(3) of the Act. However, in a letter dated August 28, 2017, the District committed to adopt and submit specific enforceable measures to address these deficiencies. The District committed to submit these revisions to CARB by October 1, 2018. In addition, in a letter dated August 29, 2017, CARB committed to submit the adopted rule revisions to EPA no later than November 1, 2018. Accordingly, pursuant to section 110(k)(4) of the Act, EPA is proposing a conditional approval of the submitted rule. We are proposing to conditionally approve the submitted rule based on our determination that separate from the deficiencies listed previously, the rule: ensures that issued ERCs will meet the criteria laid out in 40 CFR 51.165(a)(3)(ii)(C)(I)(i) at the time of ERC issuance; satisfies the requirements of 40 CFR 51.165(a)(3)(i); satisfies the applicable requirements found in the ETPS; and satisfies the requirements of 40 CFR 51.165(a)(3)(ii)(C)(I)(ii), which requires pre-base year shutdown credits to be explicitly added back in to the most recent applicable air quality plans. Moreover, we conclude that if the District submits the changes it has committed to submit, these deficiencies will be cured.

In support of this proposed action, we have concluded that our conditional approval of the submitted rule would comply with section 110(l) of the Act because the amended rule, as a whole, would not interfere with continued attainment of the National Ambient Air Quality Standards in the Bay Area. The intended effect of our proposed conditional approval action is to update the applicable SIP with current BAAQMD rules and provide BAAQMD the opportunity

to correct the identified deficiencies, as discussed in their commitment letter dated August 28, 2017. If we finalize this action as proposed, our action would be codified through revisions to 40 CFR 52.220 (Identification of plan) and 40 CFR 52.232 (Part D conditional approval).

If the State meets its commitment to submit the required measures by November 1, 2018, the revisions to Rule 2-4 will remain a part of the SIP until EPA takes final action approving or disapproving the new SIP revisions. However, if the District fails to submit these revisions within the required timeframe, the conditional approval will automatically become a disapproval, and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval.

There are no sanctions or Federal Implementation Plan (FIP) implications should the conditional approval become a disapproval. Sanctions would not be imposed under CAA section 179(b) because the submittal of Rule 2-4 is discretionary (i.e., not required to be included in the SIP). *See* ETPS, 51 FR 43,813 at 43,825 (“[S]tates are by no means required to adopt banking procedures, but . . . banks may help states and communities realize important planning and environmental benefits.”). A FIP would not be imposed under CAA section 110(c)(1) because the disapproval does not reveal a deficiency in the SIP that such a FIP must correct. Specifically: (1) the deficiencies identified herein do not impact or undermine the requirement that offsets satisfy the requirements of 40 CFR 51.165, including the requirement that offsets must satisfy the offset integrity criteria enumerated in 40 CFR 51.165(a)(3)(ii)(C)(I)(i) at the time of use; and (2) Rule 2-4 is not a required CAA submittal because states and air districts have the discretion, but are not required, to adopt banking rules.

We will accept comments from the public on the proposed conditional approval of Rule 2-4 for the next 30 days.

IV. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference BAAQMD Regulation 2, Rule 4 (Permits, Emissions Banking), which is discussed in section I.A. of this preamble. The EPA has made, and will continue to make, this document generally available electronically through <https://www.regulations.gov> and in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

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

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

Dated: August 31, 2017.

Deborah Jordan,
Acting Regional Administrator,
Region IX.

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