By order of the Commission.

Issued: June 26, 2008.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R05–OAR–2007–0183; FRL–8575–3]**

## Approval and Promulgation of Air Quality Implementation Plans; Illinois; Revisions to Emission Reduction Market System

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

**ACTION:** Final rule.

**SUMMARY:** In 1997, Illinois adopted and submitted rules establishing a cap and trade program regulating emissions of volatile organic compounds (VOC). The program, known as the Emission Reduction Market System (ERMS), was designed to address VOC sources in the Chicago area with potential to emit at least 25 tons per year. Then, in 2004, the Chicago ozone nonattainment area was in effect reclassified from severe to moderate, which according to EPA guidance revised the applicable definition of major sources from 25 tons per year to 100 tons per year. This ''reclassification'' could have resulted in the program no longer including sources with potential to emit more than 25 but less than 100 tons per year. Instead, Illinois adopted rule revisions, submitted to EPA on January 10, 2007, which required that these sources remain part of the program. Illinois' rule revisions also addressed other potential ramifications of the ''reclassification.'' EPA is approving these rule revisions.

**DATES:** This final rule is effective August 6, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2007–0183. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (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 through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone John Summerhays, Environmental Scientist, at (312) 886–6067 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** John Summerhays, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6067, *summerhays.john@epa.gov*.

**SUPPLEMENTARY INFORMATION:** This supplementary information section is arranged as follows:



### I. Description and Review of Illinois' Submittal

On January 10, 2007, Illinois submitted revisions to Part 205 of Title 35 of the Illinois Administrative Code, entitled ''Emissions Reduction Market System'' (ERMS). ERMS is a cap and trade program addressing VOC emissions in the Chicago area. Under ERMS, Illinois issues allowances equivalent to 12 percent less than baseline VOC emission levels, and requires affected sources to hold allowances equivalent to their VOC emissions during the ozone season. The program thereby requires overall VOC emission levels to be reduced to 12 percent below baseline levels. Illinois adopted the original rules for this program on November 20, 1997, and submitted the rules to EPA on December 16, 1997. EPA approved those rules on October 15, 2001, at 66 FR 52359.

Part 205 requires participation of all major VOC sources in the Chicago area. More specifically, the version of Section 205.200 that Illinois adopted in 1997 stated that ''The requirements of this Part shall apply to any source * * * located in the Chicago ozone nonattainment area that is required to obtain a [Title V permit], and [has VOC emissions during the ozone season of at least 10 tons].'' The requirement for a Title V operating permit applies to major sources. Since the Chicago area at that time was classified as a severe ozone nonattainment area, major sources were defined to include sources with the potential to emit 25 tons per year or more of VOC.

In 2004, EPA classified the Chicago ozone nonattainment area as moderate for the 8-hour ozone standard, and effective in 2005 rescinded the severe classification for the 1-hour ozone standard. The definition of major sources for moderate ozone nonattainment areas includes sources with the potential to emit 100 tons per year or more of VOC. According to EPA guidance (see 69 FR 23951, April 30, 2004), the replacement of the prior classification of severe with a classification of moderate thus meant that sources with potential to emit at least 25 tons per year but less that 100 tons per year of VOC would no longer be major sources and would no longer be required to have Title V operating permits. As a result, the sources in the Chicago area in this size range would no longer be subject to the ERMS requirements, given the applicability criteria in section 205.200 as quoted above.

Illinois estimated that the loss of these intermediate sized sources from ERMS would result in a loss of 330 tons of VOC emission reduction per ozone season associated with these sources. Illinois sought to avoid this loss of sources from the program. Consequently, Illinois revised section 205.200 to redefine applicability to include sources with potential to emit at least 25 tons of VOC (and sources otherwise required to have a Title V permit) and at least 10 tons of VOC emissions during the ozone season. By this means, Illinois revised its applicability provisions to include the same set of sources as were included in 1997, notwithstanding the change in the classification of the Chicago ozone nonattainment area.

Under the 1997 rules, since by definition all the affected sources had a Title V permit, Illinois used the Title V permits to establish several elements of the ERMS program. Most notably, Illinois used the source's Title V permit to specify the number of allowances to be issued to the source (Cf. section 205.315) and the source-specific VOC monitoring methods (Cf. section 205.330).

Since (under EPA's guidance) sources with potential emissions between 25 and 100 tons per year were no longer subject to a requirement for a Title V permit, the State needed an alternative means of specifying source-specific ERMS provisions. Illinois therefore adopted section 205.316, to provide that sources included in ERMS but not required to obtain a Title V permit were required either to request a Title V permit anyway or to apply for a federally enforceable state operating

permit (FESOP). The FESOP is to specify the provisions (relating for example to the number of allowances allocated to the source and the source-specific monitoring requirements) that would otherwise be specified in the Title V permit.

Title V of the Clean Air Act provides for defining some operations with trivial or no emissions as insignificant activities. The 1997 version of section 205.220 of Illinois' rules exempts these activities from ERMS, based on the exemption under Title V. Illinois intended that these activities continue to be exempt from ERMS, irrespective of whether a source is subject to the requirement for a Title V permit. Therefore, Illinois revised Section 205.220 to provide that any activity meeting the criteria in Part 201 Subpart F of Title 35 of the Illinois Administrative Code for insignificant activities may be exempted from the ERMS program, whether the source is subject to a Title V permit or a FESOP.

In ozone nonattainment areas classified as severe, major new sources and existing sources undergoing major modifications must obtain 1.3 tons of offsets for every ton of new emissions. In ozone nonattainment areas classified as moderate, major new sources and existing sources undergoing major modifications need only obtain 1.1 tons of offsets for every ton of new emissions. New source review rules require that any change in offset ratio applies only prospectively, to sources permitted after the change in ratio, and that a source permitted before the change in ratio must continue to have offsets in at least the ratio that applied at the time the source was permitted.

Under section 205.150 of the 1997 ERMS rules, major new sources and sources undergoing major modifications were required to obtain 1.3 allowances for every ton of new emissions. Illinois' revised rules provide for modified ratios as the applicable ratios change. Section 205.150(f)(1) of the revised rules states: ''If the nonattainment classification of the Chicago area for ozone is changed such that the required offset ratio is no longer 1.3 to 1 and a new offset ratio applies, as specified in 35 Ill. Adm. Code 203.302, that ratio shall then apply in lieu of the 1.3 to 1 ratio set forth in subsections (c)(2), (d)(1), and (e) of this Section. Such new ratio shall not apply to any part of a source or any modification already subject to the 1.3 to 1 ratio or other previously effective offset ratio established prior to the effective date of the new ratio.'' Section 205.150(f)(2) provides that the ratio becomes 1 to 1 if the Chicago area is redesignated to attainment.

These revisions address the ramifications of a revised classification according to EPA guidance as cited above. However, while Illinois was adopting these rule revisions, EPA's ozone implementation guidance was being challenged in court. On December 22, 2006, with clarification on June 8, 2007, the Court of Appeals for the District of Columbia Circuit ruled against elements of EPA's ozone implementation guidance, including the ''backsliding'' inherent in allowing an area originally classified as severe and subsequently classified as moderate to apply the less stringent major source definition for moderate areas. *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006).

This court ruling has no effect on the approvability of Illinois' ERMS rule revisions. Illinois' revised ERMS rules assure the incorporation of all sources with potential to emit at least 25 tons of VOC per year (and at least 10 tons of VOC during the ozone season), irrespective of whether the major source definition for permitting purposes is 25 or 100 tons per year. Thus, Illinois' rules assure inclusion of a fixed set of sources, irrespective of the source size used in the definition of major sources. Illinois' revised ERMS rules also assure that any new source or major modification must obtain allowances such that the ratio of allowances to the quantity of new emissions matches the offset ratio that applies under the permitting requirements that are in effect at the time the new source or major modification is permitted.

Illinois requested that EPA defer rulemaking on section 205.150(e). This section provides that new sources providing offsets by holding trading program allowances in the proper ratio need not also provide offsets in their new source permit. Illinois made a similar request for deferral of EPA rulemaking on this section in conjunction with its 1997 submittal of ERMS rules. While a new source may use a shutdown for both purposes, purchasing the necessary allowances from a shutdown source and simultaneously using the shutdown in the new source permit to satisfy offset requirements, the deferral of rulemaking provides that the two requirements must be met independently.

Illinois made a corollary change, changing the term ''Chicago ozone nonattainment area'' to the term ''Chicago area.'' The term ''Chicago area'' is defined to mean the same area as the previous term ''Chicago ozone nonattainment area,'' but the revised term more clearly signifies that the program will remain in effect even if the Chicago area is redesignated as an attainment area.

In addition to the rules identified above, Illinois made conforming revisions to multiple other rules. These revisions generally replace the term ''Chicago nonattainment area'' with the term ''Chicago area'' or mention FESOPs as a possible vehicle for specifying source-specific provisions to implement the ERMS rules.

EPA finds these changes approvable. The change in the applicability provisions merely assures that the original program applicability criteria continue to apply, notwithstanding any change in the classification or designation of the area. The requirement for sources with potential emissions between 25 and 100 tons per year to obtain a permit (either a Title V permit or a FESOP) is a reasonable means of implementing the ERMS requirements at any time when these sources are not required to obtain a Title V permit. Illinois' provision for offset ratios, wherein new source emissions are offset at the ratio that reflects the offset ratio that is mandated at the time the permit authorizing the new source emissions is issued, properly matches offset requirements. The use of the term ''Chicago area'' also properly clarifies that the program continues even if the area is redesignated to attainment.

EPA proposed to approve these rule revisions on January 30, 2008, at 73 FR 5471. On the same day, at 73 FR 5435, EPA also published a direct final rule approving these rule revisions. However, EPA then realized that the notice of direct final rulemaking, in comments on an EPA memorandum discussing the above court ruling, unintentionally commented on a national issue regarding ramifications of the court ruling. Therefore, EPA withdrew its direct final rule on February 29, 2008, at 73 FR 11042. Since the comments did not affect the underlying rationale for the proposed rule, i.e. because EPA proposed to find Illinois' revised ERMS rules to retain the same benefits without regard for what size is used to define major sources, EPA retained its proposed rule. EPA received no comments on this proposed rule. EPA continues to believe that Illinois' revised rules should be approved.

**II. What Action Is EPA Taking?**

EPA is approving Illinois' revisions to the ERMS program, except that EPA is deferring action on section 205.150(e).

Illinois did not change every rule in Part 205. The State submitted only those rules that it changed. Thus, the revised rules being approved here must be

viewed in conjunction with the unrevised rules approved at 40 CFR 52.720(c)(158).

### III. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 5, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 23, 2008.

**Bharat Mathur,**

*Acting Regional Administrator, Region 5.*

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

## PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

## Subpart O—Illinois

■ 2. Section 52.720 is amended by adding paragraph (c)(180) to read as follows:

**§ 52.720 Identification of plan.**

* * * * *

(c) * * *

(180) On January 10, 2007, Illinois submitted revisions to its rules for the Emission Reduction Market System. These revisions assure that sources in the Chicago area with potential emissions of VOC between 25 and 100 tons per year will remain subject to the program, irrespective of changes in the area's ozone nonattainment classification or designation and any associated changes in whether such sources are defined to be major sources. EPA is again deferring action on section 205.150(e).

(i) Incorporation by reference.

(A) Illinois Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board, Subchapter b: Alternative Reduction Program, Part 205 Emissions Reduction Market System, Sections:

205.120 Abbreviations and Acronyms
205.130 Definitions
205.150 Emissions Management Periods (except for 205.150(e))
205.200 Participating Source
205.205 Exempt Source
205.210 New Participating Source
205.220 Insignificant Emission Units
205.300 Seasonal Emissions Component of the Annual Emissions Report
205.310 ERMS Applications
205.315 CAAPP Permits for ERMS Sources
205.316 Federally Enforceable State Operating Permits for ERMS Sources
205.318 Certification for Exempt CAAPP Sources
205.320 Baseline Emissions
205.330 Emissions Determination Methods
205.335 Sampling, Testing, Monitoring and Recordkeeping Practices
205.337 Changes in Emissions Determination Methods and Sampling, Testing, Monitoring and Recordkeeping Practices
205.400 Seasonal Emissions Allotment
205.405 Exclusions From Further Reductions
205.410 Participating Source Shutdowns
205.500 Emissions Reduction Generator
205.510 Inter-Sector Transaction
205.610 Application for Transaction Account
205.700 Compliance Accounting
205.730 Excursion Reporting
205.750 Emergency Conditions
205.760 Market System Review Procedures

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