



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R05-OAR-2007-1179; FRL-9685-7]

**Approval of Air Quality Implementation Plans; Wisconsin; Partial Disapproval of "Infrastructure" State Implementation Plan**

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

**ACTION:** Final rule.

**SUMMARY:** Pursuant to its authority under the Clean Air Act (CAA), EPA is taking final action to disapprove two narrow portions of submissions made by the Wisconsin Department of Natural Resources (WDNR) to address the section 110(a)(1) and (2) requirements of the CAA, often referred to as the "infrastructure" State Implementation Plan (SIP). Specifically, we are finalizing the disapproval of portions of WDNR's submissions intended to meet certain requirements of section 110(a)(2)(C) with respect to the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS) and 1997 24-hour PM<sub>2.5</sub> NAAQS. Among other conditions, section 110(a)(2)(C) of the CAA requires states to correctly address oxides of nitrogen (NO<sub>x</sub>) as a precursor to ozone in their respective prevention of significant deterioration (PSD) programs. EPA is finalizing disapproval of a portion of Wisconsin's submissions intended to satisfy this requirement. EPA is also finalizing disapproval of

a portion of Wisconsin's submissions because the SIP currently contains a new source review (NSR) exemption for fuel changes as major modifications where the source was capable of accommodating the change before January 6, 1975. The proposed rule associated with this final action was published on April 20, 2012.

**DATES:** This final rule is effective on [insert date 30 days from the date of publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2007-1179. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly-available only in hard copy. Publicly-available docket materials are available either electronically in www.regulations.gov or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 AM to 4:30 PM, Monday through Friday, excluding Federal holidays. We recommend that you telephone Andy Chang at (312) 886-0258 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Andy Chang, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-0258, chang.andy@epa.gov.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What is the background for this action?
  - II. What is our response to comments received on the proposed rulemaking?
  - III. What action is EPA taking?
  - IV. Statutory and Executive Order Reviews.
- I. What is the background for this action?**

Under sections 110(a)(1) and (2) of the CAA, and implementing EPA guidance, states were required to submit either revisions to their existing EPA approved SIPs necessary to provide for implementation, maintenance, and enforcement of the 1997 ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS, or certifications that their existing SIPs for ozone and particulate matter already met those basic requirements. The statute requires that states make these submissions within 3 years after the promulgation of new or revised NAAQS. However, intervening litigation over the 1997 ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS created uncertainty

about how states were to proceed.<sup>1</sup> Accordingly, both EPA and the states were delayed in addressing these basic SIP requirements.

In a consent decree with Earth Justice, EPA agreed to make completeness findings with respect to these SIP submissions. Pursuant to this consent decree, EPA published completeness findings for all states for the 1997 8-hour ozone NAAQS on March 27, 2008, and for all states for the 1997 PM<sub>2.5</sub> NAAQS on October 22, 2008.

On October 2, 2007, EPA issued a guidance document entitled "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards," making recommendations to states concerning these SIP submissions (the 2007 Guidance). Within the 2007 Guidance, EPA gave general guidance relevant to matters such as the timing and content of the submissions. Wisconsin made its infrastructure SIP submission for the 1997 ozone and PM<sub>2.5</sub> NAAQS on December 12, 2007. The State provided supplemental submissions to EPA on January 24, 2011, and March 28, 2011.

On April 28, 2011, EPA published its proposed action on the Region 5 states' submissions (see 76 FR 23757). Notably, we proposed to find that Wisconsin had met the requirements of

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<sup>1</sup> See, e.g., *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

section 110(a)(2)(C) concerning state PSD programs generally, and in particular the requirement to include NO<sub>x</sub> as a precursor to ozone (*see* 76 FR 23757 at 23760 - 23761), thereby satisfying the requirement that the State has an adequate PSD program pursuant to section 110(a)(2)(C) for both the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS.<sup>2</sup>

During the comment period for the April 28, 2011, proposed rulemaking, EPA received three sets of comments. Two of the commenters observed that although we had proposed to approve Wisconsin's infrastructure SIP as meeting the correct requirements for NO<sub>x</sub> as a precursor to ozone in the State's PSD program, Wisconsin's PSD SIP does not contain the most recent PSD program revisions required by EPA for this purpose. One of the commenters also noted that Wisconsin's existing SIP does not meet current EPA requirements with respect to NSR because Wisconsin has not included fuel changes as "major modifications" in its NSR program for certain sources under certain conditions. A detailed discussion of these comments as they relate to Wisconsin's SIP was included in the April 20, 2012, proposed rulemaking (*see* 77 FR 23647), which is the basis for this final action.

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<sup>2</sup> EPA noted that each state's PSD program must meet certain basic program requirements, e.g., if a state lacks specific required provisions needed to address NO<sub>x</sub> as a precursor to ozone, the provisions of section 110(a)(2)(C) requiring an adequate permitting program must be considered not to be met, irrespective of the pollutant being addressed in the infrastructure SIP submission.

As a result of the comments received in response to our April 28, 2011, proposed rulemaking, we did not promulgate final action on those two limited aspects of Wisconsin's infrastructure SIP in our July 13, 2011, final rulemaking (see 76 FR 41075). We did, however, promulgate final action on all other applicable elements of Wisconsin's infrastructure SIP. In the July 13, 2011, rulemaking, we committed to address the issues raised in the comments concerning NOx as a precursor to ozone and the definition of "major modification" related to fuel changes for certain sources in Wisconsin in a separate action; our April 20, 2012, proposed rulemaking and this final rulemaking serve as that action.

On April 20, 2012, we proposed to disapprove the State's infrastructure SIP submission with respect to two narrow issues related to section 110(a)(2)(C). During the comment period on the April 20, 2012, proposed rulemaking, EPA received two comment letters. EPA addresses the significant and relevant comments in this final action, specifically in the following section.

## **II. What is our response to comments received on the proposed rulemaking?**

The public comment period for EPA's proposal to disapprove the narrow portions of the submittals from Wisconsin addressing the current regulatory requirements for NOx as a precursor to

ozone in PSD permitting and the definition of "major modification" related to fuel changes for certain sources<sup>3</sup> closed on May 21, 2012. EPA received two comment letters, one of which was not relevant to this rulemaking. A synopsis of the significant individual comments contained in the other letter, as well as EPA's response to each comment, is discussed below:

**Comment 1:** WDNR submitted a comment letter that states that although Wisconsin's SIP does not explicitly include all portions of the regulatory language EPA required states to adopt in the "Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard - Phase 2; Final Rule to Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter, and Ozone NAAQS; Final Rule for Reformulated Gasoline" (Phase 2 Rule) (see 70 FR 71612), WDNR does in fact consider NOx as a precursor of ozone in its permitting decisions. WDNR also states that it has consistently treated NOx as a precursor to ozone, and existing language in Wisconsin Administrative Code section NR 405.02(25i) clearly gives WDNR the authority to regulate NOx as a precursor for ozone, as it has been identified as such by EPA. WDNR further states that it is not aware of any situation where it has not

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<sup>3</sup> Although the evaluation of states' definitions of "major modification" related to fuel changes was not a criterion outlined in EPA's April 28, 2011 proposed rulemaking, this issue is intrinsically linked to states' PSD regulations, covered under section 110(a)(2)(C).

consistently used this existing authority in its major NSR program. Lastly, WDNR states that in response to EPA's and the public's concern over this issue, it currently has under development a revision to Wisconsin Administrative Code section NR 405.02(25i) to ensure that the language is wholly consistent with Federal language contained in 40 CFR 51.166, as required by the Phase 2 Rule. Upon revision and final adoption at the state level, WDNR has committed to submit the revisions to EPA for approval and incorporation into the SIP.

**Response 1:** EPA recognizes that Wisconsin currently has some authority to treat NOx as a precursor to ozone in permitting decisions, and EPA appreciates the State's efforts to ensure that NOx is correctly evaluated as a precursor to ozone in fact. However, the Phase 2 Rule obligates states to make explicit regulatory changes in order to clarify and remove any ambiguity concerning the requirement that NOx be treated as a precursor to ozone in permitting contexts in specific ways. The Phase 2 Rule requires states to submit SIP revisions incorporating the requirements of the rule, including these specific NOx as a precursor to ozone provisions, by June 15, 2007 (see 70 FR 71612 at 71683). As explained in our April 20, 2012, proposed rulemaking, states that had not incorporated the necessary changes specific to NOx as a precursor to ozone as required by the Phase 2 Rule were included in EPA's March 27, 2008,

"Completeness Findings for Section 110(a) State Implementation Plans for the 8-hour Ozone NAAQS" and received a finding of failure to submit related to section 110(a)(2)(C) for this reason (see 73 FR 16205).

As a result of EPA's own regulations, submission deadlines, and actions germane to the explicit identification of NO<sub>x</sub> as a precursor to ozone in Federally approved PSD programs, EPA is finalizing the disapproval of portions of Wisconsin's infrastructure SIP submission with respect to the NO<sub>x</sub> as a precursor to ozone provision requirements of section 110(a)(2)(C) for the 1997 ozone and PM<sub>2.5</sub> NAAQS.

EPA appreciates Wisconsin's efforts to develop SIP revisions that will be wholly consistent with the Federal language contained in 40 CFR 51.166. EPA will work actively with the State to ensure that the necessary SIP revisions are completed as expeditiously as possible. In the interim, we will work actively with the State to ensure that NO<sub>x</sub> is correctly treated as a precursor to ozone in a manner consistent with the requirements of the Phase 2 Rule.

**Comment 2:** In the same comment letter, WDNR recognizes that its definition of "major modification" as found in Wisconsin Administrative Code section NR 405.02(21)(b)5.a. does not include language that recognizes prohibitions on fuel use exemptions that may have been contained in Federally-issued PSD

permits issued prior to EPA's approval of Wisconsin's PSD SIP. However, WDNR does not agree with the notion that the omission in fact allows more exemptions than what is allowed by Federal rules.

WDNR states that under its title V operating permit program, all applicable requirements to a source are included in its operation permit. As a result, WDNR states that it clearly recognizes that requirements contained in a Federally-issued PSD permit would be an applicable requirement to the source and that it would be included in the source's title V operating permit, therefore making the requirement fully enforceable under State and Federal law.

WDNR states that this issue is a very narrow one, and that it is not aware of a single situation where an omission has occurred in practice. Further, WDNR believes that the omission in its definition of "major modification" was an oversight that occurred during rule writing, and cites a previous commitment to EPA to make a correction. Lastly, WDNR states that a correction to the definition in question has begun, and will be part of the same rulemaking effort that will address the NOx as a precursor to ozone provision.

**Response 2:** EPA agrees that this issue is a very narrow one, and that an omission in practice is perhaps nonexistent.

Nonetheless, as explained in EPA's April 20, 2012, proposed

rulemaking, this is an issue that has previously arisen, and that the State has acknowledged and agreed to address. WDNR's previous commitment to address the issue, dated June 1, 2011, did not include a date certain by which it would complete the requested revision of the State's regulation. As a result, EPA could not promulgate an approval or conditional approval of the section 110(a)(2)(C) portion of Wisconsin's infrastructure SIP for the 1997 ozone and PM<sub>2.5</sub> NAAQS with respect to this narrow issue.

EPA recognizes that in practice, WDNR has the authority and means to ensure adherence to the prohibitions on fuel use exemptions in certain instances, consistent with our own definition of "major modification." However, our regulations along with a previous request to the State to make appropriate revisions to the SIP necessary to address this issue result in finalizing the disapproval of Wisconsin's infrastructure SIP submissions for the 1997 ozone and PM<sub>2.5</sub> NAAQS. This narrow disapproval pertains to the NSR exemption for fuel changes as "major modifications" where the source was capable of accommodating the change before January 6, 1975. Once again, we note that this disapproval is a narrow one, and limited to the specific state regulatory language concerning the exemption.

EPA appreciates WDNR's efforts to correct the definition of "major modification" and will actively work with the State to

ensure that alignment of the State and Federal definition for "major modification" occurs as expeditiously as possible. In addition, we will work actively with the State as needed to ensure adherence to the prohibitions on fuel use exemptions in Federally-issued permits.

### **III. What action is EPA taking?**

For the reasons discussed in the proposed rulemaking, EPA is taking final action to disapprove two narrow portions of Wisconsin's infrastructure SIP submissions for the 1997 ozone and PM<sub>2.5</sub> NAAQS with respect to section 110(a)(2)(C). Specifically, we are finalizing disapproval of portions of Wisconsin's submissions because the current SIP does not satisfy the requirements of the Phase 2 Rule for explicit identification of NOx as a precursor to ozone in PSD permitting. We are also finalizing disapproval of portions of Wisconsin's submissions because the current SIP contains an impermissible NSR exemption for fuel changes as "major modifications" where the source was capable of accommodating the change before January 6, 1975. These grounds for disapproval are narrow, and pertain only to these specific deficiencies in Wisconsin's SIP. The State has begun the process for rectifying these two issues, and we will work with the State to rectify these issues promptly.

Under section 179(a) of the CAA, final disapproval of a submission that addresses a requirement of a Part D Plan

(section 171 - section 193 of the CAA), or is required in response to a finding of substantial inadequacy as described in section 110(k)(5) starts a sanction clock. The provisions in the submissions we are disapproving were not submitted by Wisconsin to meet either of those requirements. Therefore, no sanctions under section 179 will be triggered.

The full or partial disapproval of a SIP revision triggers the requirement under section 110(c) that EPA promulgate a Federal Implementation Plan (FIP) no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. As previously mentioned, Wisconsin has begun the process to rectify each of these deficiencies. Further, EPA anticipates acting on WDNR's submissions to address these two issues within the 2-year time frame prior to our FIP obligation on these very narrow issues. In the interim, EPA expects WDNR to address NOx as a precursor to ozone correctly for PSD permitting consistent with the requirements of the Phase 2 Rule, and to ensure adherence to the prohibitions on fuel use exemptions in Federally-issued permits. The State has indicated that it will be addressing both issues correctly in permitting decisions in the interim, so EPA anticipates that the practical implications of these disapprovals should be minimal.

**IV. Statutory and Executive Order Reviews.****Executive Order 12866: Regulatory Planning and Review**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and, therefore, is not subject to review by the Office of Management and Budget.

**Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use**

Because it is not a "significant regulatory action" under Executive Order 12866 or a "significant energy action," 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).

**Regulatory Flexibility Act**

This action merely disapproves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this 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.*).

**Unfunded Mandates Reform Act**

Because this rule disapproves 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 (Pub. L. 104-4).

**Executive Order 13175: Consultation and Coordination With Indian Tribal Governments**

This 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 (59 FR 22951, November 9, 2000).

**Executive Order 13132: Federalism**

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 disapproves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

**Executive Order 13045: Protection of Children From Environmental Health and Safety Risks**

This 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 disapproves a state rule implementing a Federal Standard.

**National Technology Transfer Advancement Act**

In reviewing state submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. 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 state submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a state submission, to use VCS in place of a state submission that otherwise satisfies the provisions of the CAA. 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.

**Paperwork Reduction Act**

This 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.*).

**Congressional Review Act**

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 rule 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. section 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days from the date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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,  
Particulate Matter, Reporting and recordkeeping requirements.

Dated: May 30, 2012.

Susan Hedman,  
Regional Administrator, Region 5.

Therefore, 40 CFR part 52 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.*

2. Amend § 52.2591 by adding paragraphs (c) and (d) to read as follows:

**§ 52.2591 Section 110(a)(2) infrastructure requirements.**

\* \* \* \* \*

(c) Disapproval. EPA is disapproving the portions of Wisconsin's infrastructure SIP for the 1997 ozone NAAQS with respect to two narrow issues that relate to section 110(a)(2)(C):

(1) The requirement for consideration of NO<sub>x</sub> as a precursor to ozone; and

(2) The definition of "major modification" related to fuel changes for certain sources.

(d) Disapproval. EPA is disapproving the portions of Wisconsin's infrastructure SIP for the 1997 PM<sub>2.5</sub> NAAQS with respect to two narrow issues that relate to section 110(a)(2)(C):

(1) The requirement for consideration of NO<sub>x</sub> as a precursor to ozone; and

(2) The definition of "major modification" related to fuel changes for certain sources.

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