



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2011-0347; FRL-9765-3]

**Approval and Promulgation of Air Quality Implementation Plans;
Wisconsin; Milwaukee-Racine Nonattainment Area; Determination of
Attainment for the 2006 24-Hour Fine Particle Standard**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On April 24, 2012, EPA proposed to determine that the Milwaukee-Racine, Wisconsin area had attained the 2006 24-hour fine particle (2006 PM_{2.5}) National Ambient Air Quality Standard (NAAQS). EPA received several comments on the original proposal, including one suggesting that the suspension of certain Clean Air Act (CAA) requirements cannot be applied in this instance because it only pertains to the 1997 PM_{2.5} NAAQS and not to the 2006 PM_{2.5} NAAQS. As a result, we are reproposing a narrow portion of our original determination to address this issue. We will address all comments received on the original proposal and this proposal in our final notice.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2011-0347, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: aburano.douglas@epa.gov.
3. Fax: (312)408-2279.
4. Mail: Douglas Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. Hand Delivery: Douglas Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 AM to 4:30 PM, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No.

EPA-R05-OAR-2011-3047. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business

Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, 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 www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket 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. For additional instructions on submitting comments, go to Section I of the SUPPLEMENTARY INFORMATION section of this document.

Docket: 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., CBI 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 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 Gilberto Alvarez, Environmental Scientist, at (312) 886-6143 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Gilberto Alvarez, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6143, alvarez.gilberto@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 Should I Consider as I Prepare My Comments for EPA?
- II. What Action Is EPA Taking?
- III. What Is the Background for this Action?

IV. Statutory and Executive Order Reviews.

I. What Should I Consider as I Prepare My Comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date, and page number).
2. Follow directions - EPA 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.

II. What Action Is EPA Taking?

On April 24, 2012, at 77 FR 24436, EPA proposed to determine that the Milwaukee-Racine, Wisconsin area had attained the 2006 PM_{2.5} NAAQS. EPA received several comments on the original proposal, including one suggesting that 40 CFR 51.1004(c) cannot be applied in this instance because it only pertains to the 1997 PM_{2.5} NAAQS and not to the 2006 PM_{2.5} NAAQS. 40 CFR 51.1004(c) pertains to the suspension of certain CAA requirements including the requirements for Wisconsin to submit an attainment demonstration, associated reasonably available control measures (RACM) to include reasonably available control technology (RACT), a reasonable further progress (RFP) plan, contingency measures, and any other planning State Implementation Plans (SIPs) related to attainment of the 2006 PM_{2.5} NAAQS, and continues until such time, if any, that EPA subsequently determines that the area has violated the 2006 PM_{2.5} NAAQS.

Our original proposal did not clearly explain EPA's views on the applicability of CFR 51.1004(c) to the 2006 PM_{2.5} NAAQS. As a result, in this re-proposal, EPA today is explaining its views and soliciting comment on this specific issue. We will address all comments received on the original proposal and this proposal in our final notice.

III. What Is the Background for this Action?

In April 2007, EPA issued its PM_{2.5} Implementation Rule for the 1997 PM_{2.5} standard. 72 FR 20586; (April 25, 2007). In March 2012, EPA published implementation guidance for the 2006 PM_{2.5} standard. See Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, "Implementation Guidance for the 2006 24-Hour Final Particle (PM_{2.5}) National Ambient Air Quality Standards (NAAQS)" (March 2, 2012). In that guidance, EPA stated its view "that the overall framework and policy approach of the 2007 PM_{2.5} Implementation Rule continues to provide effective and appropriate guidance on the EPA's interpretation of the general statutory requirements that states should address in their SIPs. In general, EPA believes that the interpretations of the statute in the framework of the 2007 PM_{2.5} Implementation Rule are relevant to the statutory requirements for the 2006 24-hour PM_{2.5} NAAQS" *Id.*, page 1. With respect to the statutory provisions applicable to 2006 PM_{2.5} implementation, the guidance emphasized that "EPA outlined its interpretation of many of these provisions in the 2007 PM_{2.5} Implementation Rule. In addition to regulatory provisions, EPA provided substantial general guidance for attainment plans for PM_{2.5} in the preamble to the final the [sic] 2007 PM_{2.5} Implementation Rule." *Id.*, page 2. In keeping with the principles set forth in the guidance, and with respect to the

effect of a determination of attainment for the 2006 PM_{2.5} standard, EPA is applying the same interpretation with respect to the implications of clean data determinations that it set forth in the preamble to the 1997 PM_{2.5} standard and in the regulation that embodies this interpretation. 40 CFR 51.1004(c).¹ EPA has long applied this interpretation in regulations and individual rulemakings for the 1-hour ozone and 1997 8-hour ozone standards, the PM-10 standard, and the lead standard. While EPA recognizes that the regulatory provisions of 51.1004(c) do not explicitly apply to the 2006 PM_{2.5} standard, the statutory interpretation that it embodies is identical for both the 1997 PM_{2.5} and 2006 PM_{2.5} standards.

History and Basis of EPA's Clean Data Policy

Following enactment of the CAA Amendments of 1990, EPA promulgated its interpretation of the requirements for implementing the NAAQS in the general preamble for the Implementation of Title I of the CAA Amendments of 1990 (General Preamble) 57 FR 13498, 13564 (April 16, 1992). In 1995, based on the interpretation of CAA sections 171 and 172, and section 182 in the General Preamble, EPA set forth what has become known as its "Clean Data Policy" for the 1-hour ozone NAAQS. See

¹ While EPA recognizes that 40 CFR 51.1004(c) does not itself expressly apply to the 2006 PM_{2.5} standard, the statutory interpretation that it embodies is identical and is applicable to both the 1997 and 2006 PM_{2.5} standards.

Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard" (May 10, 1995). In 2004, EPA indicated its intention to extend the Clean Data Policy to the PM_{2.5} NAAQS. See Memorandum from Stephen Page, Director, EPA Office of Air Quality Planning and Standards, "Clean Data Policy for the Fine Particle National Ambient Air Quality Standards" (December 14, 2004).

Since 1995, EPA has applied its interpretation under the Clean Data Policy in many rulemakings, suspending certain attainment-related planning requirements for individual areas, based on a determination of attainment. See 60 FR 36723 (July 18, 1995) (Salt Lake and Davis Counties, Utah, 1-hour ozone); 61 FR 20458 (May 7, 1996) (Cleveland-Akron-Lorain, Ohio, 1-hour ozone); 61 FR 31831 (June 21, 1996) (Grand Rapids, Michigan, 1-hour ozone); 65 FR 37879 (June 19, 2000) (Cincinnati-Hamilton, Ohio-Kentucky, 1-hour ozone); 66 FR 53094 (October 19, 2001) (Pittsburgh-Beaver Valley, Pennsylvania, 1-hour ozone); 68 FR 25418 (May 12, 2003) (St. Louis, Missouri-Illinois, 1-hour ozone); 69 FR 21717 (April 22, 2004) (San Francisco Bay Area, California, 1-hour ozone), 75 FR 6570 (February 10, 2010) (Baton Rouge, Louisiana, 1-hour

ozone), 75 FR 27944 (May 19, 2010) (Coso Junction, California, PM₁₀).

EPA also incorporated its interpretation under the Clean Data Policy in several implementation rules. See Clean Air Fine Particle Implementation Rule, 72 FR 20586 (April 25, 2007); Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase 2, 70 FR 71612 (November 29, 2005). The Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld EPA's rule embodying the Clean Data Policy for the 1997 8-hour ozone standard. *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009). Other courts have reviewed and considered individual rulemakings applying EPA's Clean Data Policy, and have consistently upheld them in every case. *Sierra Club v. EPA*, 99 F. 3d 1551 (10th Cir. 1996); *Sierra Club v. EPA*, 375 F. 3d 537 (7th Cir. 2004); *Our Children's Earth Foundation v. EPA*, No. 04-73032 (9th Cir. June 28, 2005 (Memorandum Opinion)), *Latino Issues Forum v. EPA*, Nos. 06-75831 and 08-71238 (9th Cir. March 2, 2009 (Memorandum Opinion)).

EPA sets forth below a brief explanation of the statutory interpretations in the Clean Data Policy. EPA also incorporates the discussions of its interpretation set forth in prior

rulemakings, including the 1997 PM_{2.5} implementation rulemaking. See 72 FR 20586, at 20603-20605 (April 25, 2007).²

The Clean Data Policy represents EPA's interpretation that certain requirements of subpart 1 of part D of the CAA are by their terms not applicable to areas that are currently attaining the NAAQS.³ As explained below, the specific requirements that are inapplicable to an area attaining the standard are the requirements to submit a SIP that provides for: attainment of the NAAQS; implementation of all RACM; RFP; and implementation of contingency measures for failure to meet deadlines for RFP and attainment.

CAA section 172(c)(1), the requirement for an attainment demonstration, provides in relevant part that SIPs "shall provide for attainment of the [NAAQS]." EPA has interpreted

² See also 75 FR 31288 (June 3, 2010) (Providence, Rhode Island, 1997 8-hour ozone), 75 FR 62470 (October 12, 2010) (Knoxville, Tennessee, 1997 8-hour ozone), 75 FR 53219 (August 31, 2010) (Greater Connecticut Area, 1997 8-hour ozone), 75 FR 54778 (September 9, 2010) (Baton Rouge, Louisiana, 1997 8-hour ozone), 75 FR 64949 (October 21, 2010) (Providence, Rhode Island, 1997 8-hour ozone), 76 FR 11080 (March 1, 2011) (Milwaukee-Racine and Sheboygan Areas, Wisconsin, 1997 8-hour ozone), 76 FR 31273 (May 31, 2011) (Pittsburgh-Beaver Valley, Pennsylvania, 1997 8-hour ozone), 76 FR 33647 (June 9, 2011) (St. Louis, Missouri-Illinois, 1997 8-hour ozone), 76 FR 7145 (November 15, 2011) (Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina, 1997 8-hour ozone), 77 FR 31496 (May 29, 2012) (Boston-Lawrence-Worcester, Massachusetts, 1997 8-hour ozone). See also, 75 FR 56 (January 4, 2010) (Greensboro-Winston-Salem-High Point, North Carolina, 1997 PM_{2.5}), 75 FR 230 (January 5, 2010) (Hickory-Morganton-Lenoir, North Carolina, 1997 PM_{2.5}), 76 FR 12860 (March 9, 2011) (Louisville, Kentucky-Indiana, 1997 PM_{2.5}), 76 FR 1850 (April 5, 2011) (Rome, Georgia, 1997 PM_{2.5}), 76 FR 31239 (May 31, 2011) (Chattanooga, Tennessee-Georgia-Alabama, 1997 PM_{2.5}), 76 FR 31858 (June 2, 2011) (Macon, Georgia, 1997 PM_{2.5}), 76 FR 36873 (June 23, 2011) (Atlanta, Georgia, 1997 PM_{2.5}), 76 FR 38023 (June 29, 2011) (Birmingham, Alabama, 1997 PM_{2.5}), 76 FR 5542 (September 7, 2011) (Huntington-Ashland, West Virginia-Kentucky-Ohio, 1997 PM_{2.5}), 76 FR 60373 (September 29, 2011) (Cincinnati, Ohio-Kentucky-Indiana, 1997 PM_{2.5}), 77 FR 18922 (March 29, 2012) (Harrisburg-Lebanon-Carlisle-York, Allentown, Johnstown and Lancaster, Pennsylvania, 1997 PM_{2.5}).

³ This discussion refers to subpart 1 because subpart 1 contains the requirements relating to attainment of the 2006 PM_{2.5} NAAQS.

this requirement as not applying to areas that have already attained the standard. If an area has attained the standard, there is no need to submit a plan demonstrating how the area will reach attainment. In the General Preamble (57 FR 13564), EPA stated that no other measures to provide for attainment would be needed by areas seeking redesignation to attainment since "attainment will have been reached." See also Memorandum from John Calcagni, "Procedures for Processing Requests to Redesignate Areas to Attainment," (September 4, 1992), at page 6.

A component of the attainment plan specified under section 172(c)(1) is the requirement to provide for "the implementation of all RACM as expeditiously as practicable". Since RACM is an element of the attainment demonstration, see General Preamble (57 FR 13560), for the same reason the attainment demonstration no longer applies by its own terms, RACM also no longer applies to areas that EPA has determined have attained the NAAQS. Furthermore, EPA has consistently interpreted this provision to require only implementation of such potential RACM measures that could advance attainment.⁴ Thus, where an area is already attaining the standard, no additional RACM measures are

⁴ This interpretation was adopted in the General Preamble, see 57 FR 13498, and has been upheld as applied to the Clean Data Policy, as well as to nonattainment SIP submissions. See *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009); *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002).

required. EPA's interpretation that the statute requires only implementation of the RACM measures that would advance attainment was upheld by the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. EPA*, 314 F.3d 735, 743-745, 5th Cir. 2002) and by the United States Court of Appeals for the D.C. Circuit (*Sierra Club v. EPA*, 294 F. 3d 155, 162-163, D.C. Cir. 2002). See also the final rulemakings for Pittsburgh-Beaver Valley, Pennsylvania, 66 FR 53096 (October 19, 2001) and St. Louis, Missouri-Illinois, 68 FR 25418 (May 12, 2003).

CAA section 172(c)(2) provides that SIP provisions in nonattainment areas must require "reasonable further progress." The term "reasonable further progress" is defined in section 171(1) as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable NAAQS by the applicable date." Thus, by definition, the "reasonable further progress" provision under subpart 1 requires only such reductions in emissions as are necessary to attain the NAAQS. If an area has attained the NAAQS, the purpose of the RFP requirement has been fulfilled, and since the area has already attained, showing that the state will make RFP towards attainment "[has] no meaning at

that point." General Preamble, 57 FR 13498, 13564 (April 16, 1992).

CAA section 172(c)(9) provides that SIPs in nonattainment areas "shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the [NAAQS] by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or [EPA]." This contingency measure requirement is inextricably tied to the RFP and attainment demonstration requirements. Contingency measures are implemented if RFP targets are not achieved, or if attainment is not realized by the attainment date. Where an area has already achieved attainment, it has no need to rely on contingency measures to come into attainment or to make further progress to attainment. As EPA stated in the General Preamble: "The section 172(c)(9) requirements for contingency measures are directed at ensuring RFP and attainment by the applicable date." See 57 FR 13564. Thus these requirements no longer apply when an area has attained the standard.

It is important to note that should an area attain the 2006 PM_{2.5} standard based on three years of data, its obligation to submit an attainment demonstration and related planning

submissions is suspended only for so long as the area continues to attain the standard. If EPA subsequently determines, after notice and comment rulemaking, that the area has violated the NAAQS, the requirements for Wisconsin to submit a SIP to meet the previously suspended requirements would be reinstated. It is likewise important to note that the area remains designated nonattainment pending a further redesignation action.

IV. Statutory and Executive Order Reviews.

This action proposes to make a determination of attainment based on air quality, and would, if finalized, result in the suspension of certain Federal requirements, and it would not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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 (Public Law 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 CAA; 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 proposed 2006 PM_{2.5} clean NAAQS data determination for the Milwaukee-Racine, Wisconsin area 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.

List of Subjects in 40 CFR Part 52

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

Dated: December 17, 2012.

Susan Hedman,
Regional Administrator, Region 5.

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