



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R05-OAR-2009-0805; FRL-9939-77-Region 5]**

**Wisconsin; Disapproval of Infrastructure SIP with Respect to  
Oxides of Nitrogen as a Precursor to Ozone Provisions for the  
2006 PM<sub>2.5</sub> NAAQS**

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is narrowly disapproving elements of a State Implementation Plan (SIP) submission from Wisconsin regarding the infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 2006 fine particulate matter (PM<sub>2.5</sub>) National Ambient Air Quality Standard (NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. This action pertains specifically to certain infrastructure requirements that may be satisfied if a state has a fully approved prevention of significant deterioration (PSD) permitting program that incorporates all required program requirements, including the requirement to correctly address oxides of nitrogen (NO<sub>x</sub>) as a

precursor to ozone.

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

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2009-0805. All documents in the docket are listed on the [www.regulations.gov](http://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 [www.regulations.gov](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 Sarah Arra, Environmental Scientist, at (312) 886-9401 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Sarah Arra, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency,

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**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 of this SIP submission?
- 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 of this SIP submission?**

This rulemaking addresses a January 24, 2011, submission, supplemented on June 29, 2012, from the Wisconsin Department of Natural Resources (WDNR) intended to address all applicable infrastructure requirements for the 2006 PM<sub>2.5</sub> NAAQS.

The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and

enforcement” of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA’s taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that “[e]ach such plan” submission must address.

This specific rulemaking is only taking action on a the specific infrastructure requirements of CAA sections 110(a)(2)(C), (D)(i)(II), and (J), which may be satisfied if the state demonstrates that it has a fully approved PSD permitting program that incorporates all federal requirements, including, as relevant here, the requirement to properly regulate NO<sub>x</sub> as a precursor to ozone. The majority of the other infrastructure elements were approved in a rulemaking dated October 29, 2012, (77 FR 65478), including approvals and a narrow disapproval of the remaining PSD requirements in sections 110(a)(2)(C), (D)(i)(II), and (J).

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

The proposed rulemaking associated with this final action was published on September 10, 2015 (80 FR 54468). During the comment period, which ended on October 13, 2015, EPA received a

comment from the WDNR. A synopsis of the comment and EPA's response to the comment are provided below.

**Comment:** WDNR disagrees with the proposed disapproval because the program discussed in the disapproval is currently being implemented by the state and the state is actively working to add the needed elements to its rules. WDNR also comments that EPA previously issued the state a finding of failure to submit for the missing PSD element and more recently issued a disapproval of this element on the same basis in a final action on a separate infrastructure SIP, and argues that a second disapproval is unnecessary.

**Response:** EPA understands that WDNR is currently implementing the requirement to regulate NOx as a precursor to ozone as part of the state's PSD program, and that WDNR is currently working on revisions to its SIP to incorporate this requirement. Because of this, EPA did not originally take action on this aspect of the PSD program during EPA's evaluation of and final action on WDNR's 2006 PM<sub>2.5</sub> infrastructure SIP, which was published on October 29, 2012 (77 FR 65478). However, the CAA requires EPA to take action on SIPs submitted by the state within 12 months of the submittal's completion date. EPA has been sued for missing this deadline, and under a consent

decree, must finalize action on the state's SIP submission by November 30, 2015. Each time a new or revised NAAQS is promulgated, the statute requires both the state and EPA to reevaluate the adequacy of the states' SIP to satisfy the applicable requirements of section 110(a)(2), including elements (C), (D)(i)(II), and (J). Therefore, disapproval of these elements with respect to EPA's evaluation of the state's 1997 ozone and PM<sub>2.5</sub> infrastructure SIPs did not remove the requirement for the EPA to evaluate these elements anew in future infrastructure SIPs, such as this one. Because the state's PSD program does not meet all program requirements, and therefore does not fully satisfy the infrastructure requirements of CAA section 110(a)(2)(C), (D)(i)(II), and (J) with respect to the 2006 PM<sub>2.5</sub> infrastructure SIP, EPA must narrowly disapprove the state's SIP submission as to that deficiency here.

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

EPA is disapproving narrow portions of the 2006 PM<sub>2.5</sub> infrastructure SIP submission from Wisconsin certifying that its current SIP is sufficient to meet required infrastructure elements. Specifically, EPA is narrowly disapproving the submission with respect to the infrastructure elements under CAA sections 110(a)(2)(C), (D)(i)(II), and (J) for the 2006 PM<sub>2.5</sub>

NAAQS because the state's PSD program fails to properly regulate NOx as a precursor to ozone. This action together with EPA's October 29, 2012, final action partially approving and narrowly disapproving these elements with respect to other PSD requirements, completes final action on Wisconsin's 2006 PM<sub>2.5</sub> infrastructure SIP with respect to CAA section 110(a)(2)(C), (D)(i)(II), and (J).

#### **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.

##### **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.*).

##### **Regulatory Flexibility Act**

This action merely disapproves state law as not 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 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, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

**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.

**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).

**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.

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

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address

environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely disapproves certain state requirements for inclusion into the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it 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.

#### **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 after 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,  
Particulate matter, Reporting and recordkeeping requirements.

Dated: November 23, 2015.

Susan Hedman,  
Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

2. Section 52.2591 is amended by revising paragraph (c) to read as follows:

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

\* \* \* \* \*

(c) *Approval and Disapproval* – In a January 24, 2011, submittal, supplemented on March 28, 2011, and June 29, 2012, Wisconsin certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (H), and (J) through (M) for the 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA is approving Wisconsin's submission addressing the infrastructure SIP requirements of section 110(a)(2)(A), (B), (C) with respect to enforcement and the GHG permitting threshold PSD requirement, (D)(i)(II) with respect to the GHG permitting threshold PSD requirement and visibility protection, (D)(ii), (E) except for state board requirements, (F) through (H), (J) except for narrow prevention of significant deterioration requirements, and (K) through (M). We are not finalizing action

on (D) (i) (I) and the state board requirements of (E) (ii). We will address these requirements in a separate action. We are disapproving narrow portions of Wisconsin's infrastructure SIP submission addressing the relevant prevention of significant deterioration requirements of the 2008 NSR Rule (identifying PM<sub>2.5</sub> precursors and the regulation of PM<sub>2.5</sub> and PM<sub>10</sub> condensables in permits) and the requirement of NO<sub>x</sub> as a precursor to ozone with respect to section 110 (a) (2) (C), (D) (i) (II), and (J).

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