



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

#### [EPA-R01-OAR-2017-0138; A-1-FRL-9967-27-Region 1]

#### **Air Plan Approval; New Hampshire; Rules for Open Burning and Incinerators**

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

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of New Hampshire on August 9, 2011, and July 23, 2013. These SIP revisions establish rules for open burning and establish emission standards and operating practices for incinerators and wood waste burners that are not regulated pursuant to federal incinerator standards. We are also approving revisions to the definitions of “Incinerator” and “Wood Waste Burner,” submitted by the State on July 23, 2013 and October 26, 2016, respectively. This action is being taken in accordance with the Clean Air Act.

**DATES:** This direct final rule will be effective **[Insert date 60 days after date of publication in the Federal Register]**, unless EPA receives adverse comments by **[Insert date 30 days after date of publication in the Federal Register]**. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R01-OAR-2017-0138 at <http://www.regulations.gov>, or via email to [Arnold.Anne@epa.gov](mailto:Arnold.Anne@epa.gov). For comments submitted at [Regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.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 <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Alison C. Simcox, Air Quality Planning Unit, Air Programs Branch (Mail Code OEP05-02), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts, 02109-3912; (617) 918-1684; [simcox.alison@epa.gov](mailto:simcox.alison@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

## **Table of Contents**

- I. Background and Purpose
- II. EPA’s Evaluation of New Hampshire’s SIP Revisions
- III. Final Action
- IV. Incorporation by Reference

## V. Statutory and Executive Order Reviews

### I. Background and Purpose

On January 10, 2003, New Hampshire Department of Environmental Services (NH DES) submitted a SIP revision for Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution). On August 9, 2011, NH DES submitted an updated version of this regulation. Because the 2011 submittal superseded the previous submission, the State withdrew the 2003 submittal on May 5, 2014. The withdrawal letter is included in the docket for this action.

On July 23, 2013, NH DES submitted Env-A 1900 (Incinerators and Wood Waste Burners) and Env-A 101.104 (definition of “Incinerator”) to EPA for approval. Env-A 1900 is not currently part of the federally-approved New Hampshire SIP. The definition of the term “Incinerator” is currently part of the New Hampshire SIP, but is codified at Env-A 101.59<sup>1</sup> and does not include a reference to “wood-waste burners.” The submitted definition of “Incinerator” adds “wood-waste burners” to the definition and is codified at Env-A 101.104. The current SIP-approved version of the definition of “Incinerator” (Env-A 101.59) will be replaced by the new definition of that term (Env-A 101.104) as a result of this approval.

A definition of “Wood Waste Burner” is currently part of the New Hampshire SIP, but is codified as Env-A 101.95 and explicitly excludes incinerators. On October 26, 2016, NH DES submitted a revision of the definition of “Wood Waste Burner” (Env-A 101.219) to EPA for approval. This revised definition does not exclude incinerators. The current SIP-approved

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<sup>1</sup> This appears to be an error because there are two different terms numbered 101.59 in Env-A 101, and the term Incinerator is listed after term numbered 48 and before term numbered 50.

version of the definition of “Wood Waste Burner” (Env-A 101.95) will be replaced by the new definition of that term (Env-A 101.219) as a result of this approval.

The version of Env-A 1900 (Incinerators and Wood Waste Burners) submitted to EPA by the State included an affirmative defense provision for malfunction, which is defined as a sudden and unavoidable breakdown of process or control equipment. On April 13, 2016, NH DES sent a letter to EPA withdrawing the affirmative defense provision in Env-A 1900 (i.e., 1902.02). In addition, an earlier SIP submission of Env-A 1900 had included an exception to the 20-percent visible emissions limit that would have allowed these emissions to be exceeded for one period of 6 continuous minutes in any 60-minute period during startup, shutdown, or malfunction.

However, NH DES removed this exception from the July 23, 2013 submittal.

After reviewing New Hampshire’s SIP submittals for Env-A 1000 and 1900, as well as the submitted definitions of “incinerator” (Env-A 101.104) and “waste wood burner” (101.219) and the letter withdrawing the affirmative defense provision in Env-A 1900, EPA is approving all of the SIP revisions with the exception of the withdrawn portion relating to affirmative defenses.

## **II. EPA’s Evaluation of New Hampshire’s SIP Revisions**

On August 9, 2011, NH DES submitted a revision of Env-A 1000 for approval into the New Hampshire SIP. This revision establishes requirements for open burning, fugitive dust and firefighter instruction and training activities. Specifically, Env-A 1000 sets general open-burning requirements, authorizes certain materials to be burned in the open, and identifies materials that are prohibited from being burned in the open. The version of Env-A 1000 that was originally approved into the SIP in 1994 (59 FR 42766) identifies the types of burning that are

generally allowed by the State, such as outdoor grills, burning for agricultural or forestry improvement or firefighter training, as well as a list of generally prohibited burning activities, such as burning of rubbish, brush, demolition debris or tires, or burning at any solid waste disposal area. The revised SIP-submitted regulation includes all these permissible and prohibited types of burning. In addition, the revision adds definitions of key terms used in the regulation, such as “demolition debris,” “salvaging operation,” and “untreated wood,” as well as references to applicable state statutes. The revised regulation also adds sections on (1) precautions to prevent and control fugitive dust, and (2) provisions to minimize air pollution from open burning for firefighter instruction and training purposes.

New Hampshire’s revision to Env-A 1000 removes two references to “nuisance” in the current SIP, which was approved in 1994. EPA believes that the State’s regulation is approvable under the Clean Air Act (CAA) because the term “nuisance” in Env-A 1000 is a broad concept that could be applied to prohibit activities that bear no reasonable connection to the National Ambient Air Quality Standards (NAAQS) and related air-quality goals of the CAA. The fact that something may cause a nuisance does not necessarily equate to a condition that would interfere with attainment or maintenance of the NAAQS. The concept of a nuisance is too vague for EPA to rely on as a NAAQS attainment or maintenance strategy. See, for example, analogous instances in which EPA has removed from SIPs certain regulations that prohibit odors (61 FR 47058), or that contain a general prohibition against air pollution (63 FR 65557).

New Hampshire’s revision to Env-A 1000 removes a reference to NAAQS nonattainment areas for particulates (i.e., Particulate Matter or PM) that appears in the current SIP-approved version of Env-A 1000. Specifically, SIP-approved Env-A 1001.02 allowed for certain types of open

burning if: 1) not prohibited by local ordinance or officials having jurisdiction, such as state forest fire wardens, and 2) where the particular area has not been designated nonattainment in relation to the NAAQS for PM. Under Env-A 1000, such burning was allowed in NAAQS nonattainment areas for PM (when not prohibited by local ordinance or officials having jurisdiction) if written authorization had been obtained by the NH DES. EPA believes that the version of Env-A 1000 we are approving today is approvable, notwithstanding the absence of references to nonattainment areas for NAAQS as a limiting condition on certain types of burning because there have not been any areas of New Hampshire designated as not attaining a PM NAAQS. Thus, the version of Env-A 1000 we are approving today is functionally equivalent to the existing SIP-approved version and the latter's references to PM nonattainment areas are unnecessary.

The submitted Env-A 1000 retains existing provisions currently in the New Hampshire SIP, except for the term "nuisance" and references to PM nonattainment areas as discussed above. EPA has determined that the SIP revision meets the requirements of section 110(l) of the CAA in that it will not interfere with any applicable requirement concerning attainment and reasonable further progress, or with any other applicable requirement of the CAA. Further, the additional requirements in the revised regulation will benefit public health and the environment by controlling PM emissions from open burning and fugitive dust. Consequently, EPA is approving Env-A 1000 into the New Hampshire SIP.

On July 23, 2013, NH DES submitted Env-A 1900 (Incinerators and Wood Waste Burners) and a revision of Env-A 101.104 (definition of "Incinerator") for approval into the New Hampshire SIP.

Env-A 101.104 defines “Incinerator” as “a device engineered to burn or oxidize solid, semi-solid, liquid, or gaseous waste for the primary purpose of volume reduction, disposal, or chemical destruction, leaving little or no combustible material. Such devices include, but are not limited to, heat recovery systems and wood waste burners.” This definition is the same as that which is currently in the New Hampshire SIP (approved on August 14, 1992; 57 FR 36603), except that the definition has been amended to include “wood waste burners.”

Also, on October 26, 2016, NH DES submitted Env-A 101.219, a revised definition of “Wood Waste Burner” to EPA. This revised definition no longer excludes incinerators.

Thus, more sources are now included in the revised definition of “Incinerator” and are subject to regulation. The definition meets the anti-back sliding requirements of section 110(l) of the CAA in that it will not interfere with any applicable requirement concerning attainment and reasonable further progress, or with any other applicable requirement of the CAA. Therefore, EPA is approving the revised definition into the New Hampshire SIP. We also note that the current SIP-approved definition of the term “Incinerator” is codified as Env-A 101.59. The new codification, Env-A 101.104, and revised definition we are approving in this action will replace the old definition and old codification at Env-A 101.59.

Env-A 101.219 establishes the definition of “Wood Waste Burner” as “any device such as burners used to dispose of wood waste by burning, and which are commonly known as teepees, wigwams, truncated cones or silos.” NH DES considers the term “wood waste” to be consistent with EPA’s definition of “clean cellulosic biomass” as defined at 40 CFR 241.2, and, therefore,

does not consider wood waste to be a solid waste. As a consequence, wood waste burners are not specifically regulated by NH DES pursuant to federal incinerator or waste combustor standards in New Hampshire's Env-A 3300 and Env-A 4300. Thus, wood waste burners are regulated under Env-A 1900.<sup>2</sup>

Env-A 1900 establishes emission standards and operating practices for incinerators and wood waste burners that are not regulated pursuant to federal incinerator standards. Particulate emissions standards in Env-A 1900 for incinerators would not allow the incinerator to emit more than 0.675 grams per dry standard cubic meter (g/dscm), equivalent to 0.3 grains per dry standard cubic foot (grains/dscf), corrected to 7 percent oxygen (O<sub>2</sub>). The standard for allowable visible emissions for incinerators is 20 percent opacity for any continuous 6-minute period. In addition, Env-A 1900 includes requirements for posting instructions for incinerator operation and for training of incinerator operators. This rule will benefit public health and the environment by controlling PM emissions and visible emissions from incinerators that are not regulated under federal incinerator rules. Therefore, EPA is approving Env-A 1900 into the New Hampshire SIP.

### **III. Final Action**

EPA is approving and incorporating two regulations into the New Hampshire SIP. The two regulations include revised Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution) submitted by the State of New Hampshire on August 9, 2011, effective on May 1, 2011; and Env-A 1900 (Incinerators and Wood Waste Burners) submitted by the State on July

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<sup>2</sup> EPA email from Felice Janelle (NH DES) to Alison Simcox (EPA, Region 1), June 23, 2016, "RE: SIP revisions for Env-A 101.104 and 1900." This correspondence is included in the docket for today's action.

23, 2013, effective April 23, 2013, except for the withdrawn affirmative defense provision. The revised version of Env-A 1000 that we are approving into the SIP will replace the existing SIP-approved version of Env-A 1000.

In addition, EPA is approving a revised definition of “Incinerator” (Env-A 101.104), submitted by the State on July 23, 2013, effective April 23, 2013, which replaces the definition of “Incinerator” currently in the New Hampshire SIP (numbered Env-A 101.59). We are also approving a revised definition of “Wood Waste Burner” (Env-A 101.219), submitted by the State on October 26, 2016, effective January 14, 2005, which replaces the definition of “Wood Waste Burner” currently in the New Hampshire SIP (numbered Env-A 101.95). Thus, the SIP at Env-A 101.59 and at Env-A 101.95 will read “[reserved].”

New Hampshire organizes Env-A 101 (Definitions) alphabetically, and also assigns a codification number, in sequential order, to each defined term. Because the State’s SIP submissions did not include the entirety of Env-A 100, and the State has added other definitions to Env-A 100 over time (not all of which are SIP-approved), our approval of the two definitions in this action will result in the numbered codification assigned to the defined terms being out of numerical sequence in the SIP. However, the two defined terms will still be in alphabetical order. As noted earlier, the affirmative defense provision, which NH DES withdrew from its July 23, 2013 SIP submittal, is not included in this approval action and is contained in state law only, codified at Env-A 1902.02.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed

rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed.

This rule will be effective **[Insert date 60 days after date of publication in the Federal Register]** without further notice unless the Agency receives relevant adverse comments by **[Insert date 30 days after date of publication in the Federal Register]**.

If the EPA receives such comments, then EPA will publish an action withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on **[Insert date 60 days after date of publication in the Federal Register]** and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

#### **IV. Incorporation by Reference**

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference the New Hampshire Code of Administrative Rules stated in section III. The EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov), and/or at the EPA Region 1 Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

## V. 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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 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, 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).

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 **[insert date 60 days after 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 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 9, 2017.

Deborah A. Szaro,  
Acting Regional Administrator,  
EPA New England.

For the reasons set forth in the preamble, 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.*

**Subpart EE – New Hampshire**

2. In § 52.1520(c), the table is amended by adding four entries for “Env-A 100” after the entry “Env-A 100; Organizational Rules: Definitions”; revising the entry for “Env-A 1000”; and by adding an entry for “Env-A 1900” in numerical order to read as follows:

**§ 52.1520 Identification of plan.**

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(c) \* \* \*

**EPA-Approved New Hampshire Regulations**

State citation	Title/subject	State effective date	EPA approval date <sup>1</sup>	Explanations
**	*	*	*	**
Env-A 100	Definition of “Incinerator”	04/29/2003	[Insert <b>Federal Register</b> date of publication]  [Insert <b>Federal Register</b> citation]	Remove Part Env–A 101.59, definition of “Incinerator” and replace with “[reserved].”
Env-A 100	Definition of “Wood Waste Burner”	04/29/2003	[Insert <b>Federal Register</b> date of publication]  [Insert <b>Federal Register</b> citation]	Remove Part Env–A 101.95, definition of “Wood Waste Burner” and replace with “[reserved].”

Env-A 100	Definition of “Incinerator”	04/23/2013	[Insert <b>Federal Register</b> date of publication]  [Insert <b>Federal Register</b> citation]	Approve Part Env–A 101.104, definition of “Incinerator.”
Env-A 100	Definition of “Wood Waste Burner”	01/14/2005	[Insert <b>Federal Register</b> date of publication]  [Insert <b>Federal Register</b> citation]	Approve Part Env–A 101.219, definition of “Wood Waste Burner.”
**	*	*	*	**
Env-A 1000	Control of Open Burning	05/01/2011	[Insert <b>Federal Register</b> date of publication]  [Insert <b>Federal Register</b> citation]	Approve Part Env–A 1000 “Prevention, Abatement and Control of Open Source Air Pollution.”
**	*	*	*	**
Env-A 1900	Emission Standards and Operating Practices for Incinerators	04/23/2013	[Insert <b>Federal Register</b> date of publication]  [Insert <b>Federal Register</b> citation]	Approve Part Env–A 1900 “Incinerators and Wood Waste Burners.”
**	*	*	*	**

<sup>1</sup> In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

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[FR Doc. 2017-18774 Filed: 9/5/2017 8:45 am; Publication Date: 9/6/2017]