



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2017-0280; FRL-9982-60-Region 5]

Air Plan Approval; Wisconsin; 2017 Revisions to NR 400 and 406

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving certain changes to the Wisconsin State Implementation Plan (SIP). This action relates to changes in Wisconsin's construction permit rules as well as the change in the definition for "emergency electric generators" in NR 400. This request for the revision of the SIP was submitted by the Wisconsin Department of Natural Resources (WDNR) on May 16, 2017.

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-2017-0280. 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 through www.regulations.gov or 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 Rachel Rineheart, Environmental Engineer, at (312) 886-7017 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart, Environmental Engineer, Air Permits Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-7017, rineheart.rachel@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: is used, we mean EPA. This supplementary information section is arranged as follows:

- I. Review of State Submittal
- II. What is Our Response to Comments Received on the Proposed Rulemaking
- III. What Action is EPA Taking?
- IV. Incorporation by Reference

V. Statutory and Executive Order Reviews

I. Review of State Submittal

This final rulemaking addresses the May 16, 2017 WDNR submittal for a SIP revision, revising the rules in the Wisconsin SIP to align them with Federal requirements. WDNR's submittal includes changes to the term "electric generator," replacing it with "restricted internal combustion engine" as well as other minor language and administrative changes. Specifically, NR 400.02(136m) replaces the existing definition of emergency "electric generator" with a definition of "restricted use internal combustion engine," and NR 406.04(1)(w) amends the exemption language for "emergency electric generators," replacing it with an exemption for "restricted use reciprocating internal combustion engines." NR 406.08(1) and NR 406.10 involve minor changes to language, and NR 406.11(1) amends procedures for revoking construction permits. These changes serve the purpose of aligning Wisconsin's definitions with the Federal definitions.

WDNR is also requesting the removal of NR 406.16(2)(d) and NR 406.17(3)(e) from the SIP. These provisions address the eligibility of coverage under general and registration construction permits based on whether the project constituted a Type 2 action under the previous chapter NR 150. However, the current chapter NR 150 was amended and no longer defines or sets

requirements for Type 2 actions. Removing these provisions from Wisconsin's SIP ensures consistency with the Wisconsin Environmental Protection Act (WEPA), and does not affect consistency with the Clean Air Act (CAA). It is also consistent with Section 110(1) of the CAA. Sources covered under registration and general permits are still subject to all emission caps and applicable requirements contained in those permits.

II. What is Our Response to Comments Received on the Proposed Rulemaking?

EPA published a direct final rule on November 7, 2017 (82 FR 51575), approving Wisconsin's requested revisions to the SIP, along with a proposed rule (82 FR 51594) that provided a 30-day public comment period. EPA received two comment letters during the public comment process. There were comments on the proposed approval from Sierra Club and the Center for Biological Diversity combined and one comment from an anonymous commenter. The letter from the anonymous commenter was dated December 2, 2017 and the letter from Sierra Club and the Center for Biological Diversity was dated December 7, 2017. Consequently, the direct final rule on this approval was withdrawn on December 21, 2017 (82 FR 60545). A summary of the comments received and EPA's response follows.

A. *Section 110(1) determination*

Comment 1: The revisions to the prior exemption for emergency generators are a relaxation of the SIP and EPA cannot approve the SIP relaxation without an analysis that the relaxation will not interfere with attainment or maintenance of the National Ambient Air Quality Standards (NAAQS) or any other CAA requirement pursuant to Section 110(1) of the CAA.

EPA Response: Section 110(1) states "each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171 of this title), or any other applicable requirement of this Act." Wisconsin has adequately demonstrated that the change in exemption will not interfere with attainment or maintenance of the NAAQS. EPA does not interpret section 110(1) to require a full attainment or maintenance demonstration before any changes to a SIP may be approved. Generally, a SIP revision may be approved under section 110(1) if EPA finds it will at least preserve status quo air quality. *See Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 986 (6th Cir. 2006); *GHASP v. EPA*, No. 06-61030 (5th Cir. Aug. 13, 2008); *see also, e.g.*, 70 FR 53, 57 (Jan. 3, 2005), 70

FR 28429, 28430 (May 18, 2005) (proposed and final rules, upheld in *Kentucky Resources*, which discuss EPA's interpretation of section 110(1)).¹

As mentioned in Subsection A, above, Wisconsin has included two categories of engines within its definition of Restricted Use Reciprocating Internal Combustion Engines (RICE):

- (a) One that is operated no more than 200 hours per year and that meets the definition of emergency stationary RICE or black start engine in 40 CFR 63.6675.
- (b) One that is operated in accordance with the definition of limited use RICE in 40 CFR 63.6675.

In order to evaluate whether the air quality will be maintained despite the change in definition, we have addressed the two categories of engines separately. The first category of engines within the definition of emergency stationary RICE or black start engines, as defined in 40 CFR 63.6675, operates no more than 200 hours per year (NR 400.02(136m)(a)). NR 406.04(1)(w) exempts restricted use reciprocating internal combustion engines fueled by gaseous fuels, gasoline or a clean fuel and which have a combined electrical output of less than 3000 kilowatts. This is consistent with the definition and

¹ Discussed in Utah Approval, Disapproval, and Promulgation of Air Quality Implementation Plans; Utah; Revisions to New Source Review Rules, 76 FR 41712 at 41713 (Aug 15, 2011).

exemption for emergency electric generators prior to the revision, which referred to an electric generator whose purpose is to provide electricity to a facility if normal electrical service is interrupted and which is operated no more than 200 hours per year. The prior exemption excluded "emergency electric generators powered by internal combustion engines which are fueled by gaseous fuels, gasoline or distillate fuel oil with an electrical output of less than 3000 kilowatts." Since the size as well as the number of operating hours per year of engines used for emergency purposes remains the same before and after the revision, there will be no additional impact to air quality as a result of this revision.

The second category of engine within Wisconsin's definition of restricted use RICE are limited use engines as defined in 40 CFR 63.6675 that operate less than 100 hours per year (NR 400.02(136m)(b)). We reviewed information on how the State permitted limited use RICE prior to the proposed exemption. Limited use RICE, as opposed to restricted use RICE, was not a defined category and these engines were permitted as stationary RICE with permit restrictions. However, this provision in the Wisconsin code exempting limited use RICE from obtaining a permit will not result in an increase in emissions beyond what would result from construction or modification of these types of engines through an individual minor new source review (NSR)

construction permit. Wisconsin has shown that this permit exemption is consistent with conditions that would have been part of a construction permit under the prior version of the state regulations.

For example, prior to the exemption, limited use RICE were included in permits with a permit limitation or an operational restriction. The permit may or may not have included a restriction in the number of hours. Under the proposed exemption, however, sources will need to operate for less than 100 hours per year in order to be eligible for this exemption, in accordance with 40 CFR 63.6675. Therefore, in some cases, this provision in the rule may be more protective of air quality than an individual permit. An increase in the hours of operation to over 100 hours per year will make the source ineligible for this exemption, as per the definition of limited use engines. Further, an increase to 100 hours per year or greater will make the source subject to the requirements under the Federal National Emission Standards for Hazardous Air Pollutants (NESHAP). An exemption from obtaining a permit does not relieve the source from having to comply with the NESHAP. Therefore, the NESHAP acts as a backstop to ensure emissions from these engines are controlled. As mentioned above, EPA may approve a SIP revision under section 110(1) if EPA finds it will

at least preserve status quo air quality. *Kentucky Resources, supra.*

B. Aligning with Federal requirements

Comment 1: "It is unclear what Federal requirements or Federal program EPA is referencing throughout this notice".

EPA response: In this action, EPA is referring to the Federal definition of RICE under 40 CFR 63.6675. The Federal regulations do not specifically define emergency generators. 40 CFR 63.6675 defines internal combustion engines that are used for emergency purposes. WDNR's revised definition conforms to the Federal definition of internal combustion engines used for emergency purposes.

EPA does not find the need to re-propose this action, since commenters had adequate notice of these Federal requirements. The Federal citation is clearly mentioned in Wisconsin's revised definition of RICE under NR 400.02(136m).

Comment 2: The Federal NESHAPs are not the same program as the NSR program and are not designed to meet the same goals. Thus EPA's statement that these changes "serve the purpose of aligning the state and Federal regulations" is not grounded in the CAA.

EPA response: EPA understands that NESHAPs and the NSR program are different programs, but that does not eliminate the value in aligning state and Federal regulations. Consistency

among state and Federal regulatory requirements, whether from the same or different programs, is valuable to achieve goals such as simplifying applicability and regulatory requirements and promoting compliance. Such alignment need not be mandated by the CAA to add such value, and EPA and states need only assure that an alignment of state and Federal requirements across programs is not inconsistent with the CAA requirements for either program. The revisions approved in this action pass this test.

Further, this action is only aligning Wisconsin's definitions with the Federal definitions, thereby aligning permitting exemptions with certain NESHAP exemptions. The revision does not attempt to align the regulatory requirements or the pollutants addressed by these programs in a manner that is inconsistent with the CAA requirements for either program.

C. Exclusions from modifications, NR 406.04(4) (e)

The Wisconsin Code NR 406.04(4) has provisions that exclude certain types of changes from constituting a modification. The purpose of these exclusions is to minimize the administrative and economic burdens on both the agency and low emitting sources without sacrificing environmental protection. NR 406.04(4) (e) excludes from the definition of modification sources that increase their hours of operation if: (1) the increase is not prohibited by any permit, plan approval or special order

applicable to the source; and (2) the increase will not cause or exacerbate the violation of an ambient air quality standard or ambient air increment or violate an emission limit.

Comment 1: The exemption in NR 406.04(1)(w), when considered in conjunction with the existing exemptions under NR 406.04(4)(e), could allow the construction of a stationary reciprocating internal combustion engine without a permit that could ultimately be allowed to operate 8760 hours per year with no construction permit being issued prior to review.

EPA response: 40 CFR 51.160 requires that a SIP set forth legally enforceable procedures that enable the permitting authority to determine whether the source is in violation of applicable portions of the control strategy or would result in an interference with the attainment or maintenance of a NAAQS. The exemption in NR 406.04(1)(w) exempts restricted use RICE that (1) operated no more than 200 hours per year and meet the definition of emergency stationary RICE in 40 CFR 63.6675; or (2) are operated in accordance with the definition of limited use RICE in 40 CFR 63.6675, *i.e.* RICE that is operated no more than 100 hours per year. An increase in hours of operation above these thresholds, as applicable, will cause the source to no longer qualify for the permit exemption and will thereby result in a SIP violation. Further, the exemption in NR 406.04(1)(w)2. requires that records be kept of total hours the

engines operate each year to verify that the units continue to meet the criteria for an exemption.

D. Air quality analysis

Comment 1: Wisconsin's exemption could apply to generators used for peak shaving. Peaking units typically go through frequent startups and shutdowns and thus could have disproportionately high emissions on a short-term basis despite the limited operating hours per year. EPA must require a worst case evaluation of impacts on the NAAQS - particularly the 1-hour SO₂ and 1-hour NO₂ NAAQS.

EPA response: WDNR's definition of restricted use RICE mirrors the Federal definition of emergency stationary RICE in 40 CFR 63.6675. This definition, while allowing an engine to operate for up to 50 hours per year for non-emergency purposes, clearly precludes the source from using the engines for "...peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity." Prior to adopting the proposed definition, Wisconsin did not have a category called "limited-use" engines. An engine could either be operated as a "limited-use" engine by restricting the number of operating hours through a permit, or have permit limits based on its usage. Engines that had restrictions on the number of operating hours were required to maintain records of the number

of hours they operate, with no further requirements. Under the revised regulation, operating hours equal to or greater than the applicable thresholds under the definition will trigger a permit requirement and the requirements of Wisconsin's minor source permit program. These permitting requirements include an analysis of the impact on ambient air quality. Moreover, an increase in the number of hours will trigger requirements under the NESHAP. As discussed above in the context of section 110(1), EPA has conducted an evaluation sufficient to support the conclusion that the approved changes will preserve the status quo air quality.

III. What Action is EPA Taking?

EPA is approving the requested revisions to WDNR's SIP. Specifically EPA is approving revisions to Wisconsin rules NR 400.02(136m), NR 406.04(1)(w), NR 406.08(1), NR 406.10 and NR 406.11(1). EPA is also approving the removal of NR 406.16(2)(d) and NR 406.17(3)(e) from the SIP.

IV. Incorporation by Reference.

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Wisconsin Regulations described in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these documents generally available

through www.regulations.gov and at the EPA Region 5 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 CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 CAA. 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);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;

- 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, 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 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 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. 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, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 8, 2018.

Cathy Stepp,
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 52.2570 is amended by revising paragraph (c) (113) (i) (D), and by adding paragraph (c) (137) to read as follows:

§ 52.2570 Identification of plan.

* * * * *

(c) * * *

(113) * * *

(i) * * *

(D) NR 400.02 (73m) and (131m), 406.02 (1) and (2), 406.04 (2m), NR 406.11 (1) (g) (1), 406.11 (3), 406.16, 406.17, 406.18, 407.02 (3m), 407.105, 407.107, 407.14 Note, 407.14 (4) (c), 407.15 (8) (a) and 410.03 (1) (a) (6) and (7) as created and published in the (Wisconsin) Register, August 2005, No. 596, effective September 1, 2005. Sections NR 406.16 (2) (d) and NR 406.17 (3) (e) were repealed in 2015 and are removed without replacement; see paragraph (c) (137) of this section.

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(137) On May 16, 2017, the Wisconsin Department of Natural Resources submitted a request to revise Wisconsin's air

permitting rules NR 400.02(136m), NR 406.04(1)(w), NR 406.08(1), NR 406.10 and NR 406.11(1). These revisions replace the existing definition of "emergency electric generator" with the Federal definition of "restricted internal combustion engine", amends procedures for revoking construction permits and include minor language changes and other administrative updates.

Wisconsin has also requested to remove from the SIP NR 406.16(2)(d) and NR 406.17(3)(e), provisions affecting eligibility of coverage under general and registration construction permits, previously approved in paragraph (c)(113) of this section. This action ensures consistency with Wisconsin Environmental Protection Act (WEPA) laws.

(i) Incorporation by reference.

(A) Wisconsin Administrative Code, NR 400.02(136m) as published in the Wisconsin Administrative Register November 2015 No. 719, effective December 1, 2015.

(B) Wisconsin Administrative Code, NR 406.04(1)(w), NR 406.08(1), NR 406.10 and NR 406.11(1) as published in the Wisconsin Administrative Register November 2015 No. 719, effective December 1, 2015.

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