



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 70**

**[EPA-R05-OAR-2018-0285; FRL-10002-80-Region 5]**

**Air Plan Approval; Wisconsin; Title V Operation Permit Program**

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving updates and revisions to the Wisconsin title V Operation Permit Program, submitted by Wisconsin pursuant to subchapter V of the Clean Air Act (Act). The revisions were submitted to update the title V program since the final approval of the program in 2001 and to change the permit fee schedule for subject facilities. The revisions consist of amendments to Department of Natural Resources NR Chapter 407 Wisconsin Administrative Code, operation permits, Chapter NR 410 Wisconsin Administrative Code, permit fees, and Wisconsin statute 285.69, fee structure. This approval action will help ensure that Wisconsin properly implements the requirements of title V of the Act.

**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-2018-0285. 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 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](http://www.regulations.gov) or at the EPA, 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 Susan Kraj, Environmental Engineer, at (312) 353-2654 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Susan Kraj, Environmental Engineer, Air Permits Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-2654, [kraj.susan@epa.gov](mailto:kraj.susan@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. Review of Wisconsin's submittal
- 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. Review of Wisconsin's submittal**

This final rulemaking addresses the request EPA received on March 8, 2017, from the Wisconsin Department of Natural Resources (WDNR) for approval of revisions and updates to Wisconsin's title V operating permit program. Pursuant to subchapter V of the Act, generally known as title V, and the implementing regulations, at 40 Code of Federal Regulations (CFR) part 70, states developed and submitted to EPA for approval, programs for issuing operation permits to all major stationary sources. EPA promulgated interim approval of Wisconsin's title V operating permit program on March 6, 1995 (60 FR 12128). In 2001, WDNR submitted corrections to the interim approval issues identified in the 1995 interim approval action as well as additional program revisions and updates. EPA took action to approve the corrections to the interim approval issues and promulgated final approval of the Wisconsin title V program on December 4, 2001 (66 FR 62951).

Wisconsin is seeking approval of changes and updates made to its title V program since the 1995 and 2001 approvals. EPA received WDNR's submittal updating its title V operating permit program on March 8, 2017, and supplemental information on January 26, 2018 (submittal). WDNR's submittal contains two sections, Part 1 and Part 2.

Part 1 contains previously approved program elements which are included for informational purposes, as well as minor clarifications and corrections, which were included in WDNR's 2001 submittal, but which EPA did not act on or approve in the 2001 approval.

Part 2 contains title V program revisions and updates since Wisconsin's program was approved in 2001. Part 2 of the submittal contains section I - Additional State Rule Changes and Updates to the Regulations, and section II - Permit Fee Demonstration.

EPA is addressing the changes and updates in WDNR's submittal that have not been previously approved by EPA. This includes the changes in Part 1, Section IX (Other Changes - Minor Clarifications and Corrections), as well as the changes in Part 2, both sections I and II, of WDNR's submittal that relate to the Federal title V program at 40 CFR Part 70. EPA finds that the program revisions and updates in WDNR's submittal have satisfactorily addressed the requirements of part 70, and EPA is therefore approving this submittal.

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

EPA published a direct final rule approving Wisconsin's submittal on July 31, 2019 (84 FR 37104) along with a proposed rule that was also published on July 31, 2019 (84 FR 37194). In

this proposed rule we stated that if we receive adverse comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the direct final action. In the proposal, we also stated that all public comments received will then be addressed in a subsequent final rule and that EPA will not institute a second comment period.

EPA received a comment from one commenter during the public comment process. The comment from the anonymous commenter was received on August 30, 2019. Consequently, the direct final rule for this approval was withdrawn and this withdrawal of the direct final rule was published on September 25, 2019 (84 FR 50307). The comment received and EPA's response follows:

Comment 1: "Did EPA even do a financial analysis of Wisconsin's Permit Fee Demonstration? Fixed fee programs are gradually becoming insolvent across the country as emissions decrease over time. Slowly states are beginning to understand that billable hours model permit programs are the only way to sustain adequate permit reviews and writing permits for these sources with extensive requirements. EPA must perform a financial analysis of the Department's fee demonstration and audit the department's finances to determine what level of fees is adequate to sustain the permit review and issuance process."

EPA Response: WDNR submitted a fee demonstration as part of its submittal because 40 CFR 70.9(c) requires a demonstration. 40 CFR 70.9(a) provides that a state program must require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs. 40 CFR 70.9(b) provides that a state shall collect fees that cover the actual permit program costs and 40 CFR 70.9(b)(2) establishes a presumptive fee level such that a state fee schedule that collects at or above that presumptive level will be presumed valid.

Permitting authorities have the option of submitting a fee demonstration based on the presumptive fee test or submitting a detailed fee demonstration if they collect less than the presumptive fee. EPA considers the total program revenue to be presumptively adequate if fees are collected at or above the presumptive minimum level, and if presumptively adequate, EPA does not require a detailed fee analysis. Because Wisconsin has shown that the actual revenues collected under its fee structure exceed what would be collected using the presumptive minimum fee schedule, WDNR has demonstrated that the level of fees collected is sufficient.

WDNR describes in its submittal the rule changes related to fees that have occurred since 2001, including changes that

revised the operation permit fee structure. WDNR's current title V fee structure requires sources that must obtain a Federal operation permit to pay an annual air emissions tonnage fee, but sources also pay an additional annual flat fee, based on the tons of actual billable emissions. In addition, sources also pay an additional annual flat fee if the source is subject to other requirements, such as if maximum achievable control technology standards apply to the source, if one or more Federal New Source Performance Standards apply to the source, if Federal Prevention of Significant Deterioration permitting requirements apply to the source, or if the source is a privately-owned coal-fired electric utility with an electric generating unit, among other flat fees.

The submittal provides tables showing the fee rate per ton of billable pollutants, the billable tons, and the total fees assessed for various years. The submittal also provides details on WDNR's revenue, work planning, and expenditures. In addition, WDNR has several mechanisms in place to ensure that fees collected from title V sources are used solely for funding title V permit activities as required by 40 CFR 70.9(a). See also 40 CFR 70.9(d). In the submittal, WDNR compares the actual revenues collected under its fee structure to an estimate of what would be collected using the presumptive minimum fee schedule, and WDNR's actual revenues collected exceed the

presumptive minimum projections. WDNR's submittal demonstrates that the level of fees it collects from federally-regulated sources is sufficient for the WDNR to adequately administer and enforce the required minimum elements of the title V permit program required in Section 502(b) of the Act.

EPA evaluated the fee information in WDNR's submittal and has found that WDNR has demonstrated that it has adequate funding levels to support its title V program. Accordingly, Wisconsin has adequately demonstrated that the revised fee schedule has resulted in the collection of fees in an amount sufficient to cover its actual program costs, as required by 40 CFR 70.9 and the Act.

Note that this is not the first time that EPA has conducted an analysis of WDNR's title V fees. On March 4, 2004, EPA published a Notice of Deficiency (NOD) for the title V Operating Permit Program in Wisconsin. See 69 FR 10167. The NOD was based upon EPA's findings that the State's title V program did not comply with the requirements of the Act or with the implementing regulations at 40 CFR part 70 in part because (1) Wisconsin had failed to demonstrate that its title V program required owners or operators of part 70 sources to pay fees sufficient to cover the costs of the State's title V program in contravention of the requirements of 40 CFR part 70 and the Act; and (2) Wisconsin was not adequately ensuring that its title V

program funds were used solely for title V permit program costs and, thus, was not conducting its title V program in accordance with the requirements of 40 CFR 70.9 and the Act.

On August 18, 2005, WDNR submitted to EPA its response to the March 4, 2004 NOD " (NOD Response). The NOD Response is available to view in the docket, Docket ID No. WI-118-2. In the NOD Response, and its accompanying attachments, WDNR explained and documented how each of the deficiencies identified in the NOD had been, or were being, addressed. The NOD Response contains documented internal operational changes within WDNR, a copy of the fee structure included in Wisconsin's 2005-07 biennial budget bill enacted into law as 2005 Wisconsin Act 25 (published July 26, 2005), and numerous attachments describing WDNR's permit program, program costs, fee structure, and workload.

In an action dated February 27, 2006, EPA determined that Wisconsin had demonstrated that it has resolved each of the issues listed in the March 4, 2004, NOD. See 71 FR 9720 for the analysis of WDNR's submittal and EPA's approval.

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

EPA is approving the requested revisions and updates to WDNR's title V operation permit program.

#### **IV. Statutory and Executive Order Reviews.**

##### **Executive Orders 12866 and 13563: Regulatory Planning and Review**

Under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), this action is not a "significant regulatory action" and, therefore, is not subject to review by the Office of Management and Budget.

##### **Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs**

This action is an Executive Order 13771 (82 FR 9339, January 30, 2017) regulatory action because this action is not significant under Executive Order 12866.

##### **Paperwork Reduction Act**

This action 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 approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this state operating permit program 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 action approves 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 approves a state operating permit program, and does not alter the relationship or the distribution of power and responsibilities established in the Act.

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

In addition, the state operating permit program 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 state operating permit program 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 action 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 proposes to approve a state operating permit program.

**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 Act. 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 Act. 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 state operating permit program submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Act. Accordingly, this action merely approves certain state requirements 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.

**List of Subjects in 40 CFR Part 70**

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operation permits, Reporting and recordkeeping requirements.

Dated: November 19, 2019.

Cathy Stepp,  
Regional Administrator, Region 5.

40 CFR part 70 is amended as follows:

**PART 70—STATE OPERATING PERMIT PROGRAMS**

1. The authority citation for part 70 continues to read as follows:

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

2. Amend appendix A to part 70 by adding paragraph (d) under Wisconsin to read as follows:

**Appendix A to Part 70—Approval Status of State and Local  
Operating Permits Programs**

\* \* \* \* \*

***Wisconsin***

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(d) Department of Natural Resources: Title V operating permit

program revisions and updates received on March 8, 2017.

Wisconsin's Title V program is hereby updated to include these requested changes.

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[FR Doc. 2019-26296 Filed: 12/6/2019 8:45 am; Publication Date: 12/9/2019]