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 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 (Pub. L. 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, this rule 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.

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 February 17, 2009. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 8, 2008.

Lynn Buhl,

Regional Administrator, Region 5.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart YY—Wisconsin

■ 2. Section 52.2570 is amended by adding paragraph (c)(120) to read as follows:

§ 52.2570 Identification of plan.

* * * * *

(c)* * *

(120) On May 25, 2006, Wisconsin submitted for EPA approval into the Wisconsin SIP a revision to renumber and amend NR 410.03(1)(b); to amend 410.03(intro.) and to create NR 406.035, 406.04(1f) and (1k), 406.07(3), 406.11(1m), 410.03(1)(a)8. to 10. and (b)(intro.) and 2. to 4. relating to changes to chs. NR 406 and 410, the state air permitting programs, with Federal changes to air permitting program and affecting small business. The rule revision being approved in this action has been created to update Wisconsin's minor NSR construction permit program to include changes to implement some of the new elements of the Federal NSR Reform rules for sources that meet certain requirements within the new major NSR permitting requirements. EPA has determined that this revision is approvable under the Act.

(i) Incorporation by reference. The following sections of the Wisconsin Administrative Code are incorporated by reference:

(A) NR 406.035 Establishment or distribution of plant-wide applicability limitations, as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(B) NR 406.04 Direct sources exempt from construction permit requirements. NR 406.04(1f) and NR 406.04(1k), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(C) NR 406.07 Scope of permit exemption. NR 406.07(3), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(D) NR 406.11 Construction permit revision, suspension and revocation. NR 406.11(1m), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(E) NR 410.03 Application fee. NR 410.03(intro.), NR 410.03(1)(a) 8 to 10, NR 410.03(1)(b), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

* * * * *

[FR Doc. E8–29817 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2006–0609; FRL–8748–9]

Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; NSR Reform Regulations, Rule AM–06–04

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving certain revisions to Wisconsin's prevention of significant deterioration (PSD) and non-attainment new source review (NANSR) construction permit programs, which Wisconsin submitted on May 25, 2006. The Wisconsin Department of Natural Resources (WDNR) is seeking approval of rule AM–06–04 to implement the

NSR Reform provisions that were not vacated by the United States Court of Appeals for the District of Columbia (D.C. Circuit) in *New York* v. *EPA.* EPA proposed approval of these rules on April 20, 2007 and received adverse comments. In this action, EPA responds to these comments and announces EPA's final rulemaking action. This action affects major stationary sources in Wisconsin that are subject to or potentially subject to the PSD and NANSR construction permit programs.

DATES: This final rule is effective on January 16, 2009.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2006–0609. 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 electronically through *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 Danny Marcus, Environmental Engineer, at (312) 353–8781 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Danny Marcus, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8781, *marcus.danny@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What is being addressed by this document?

We are approving rule AM–06–04 as a revision to the PSD and NANSR construction permit programs for the State of Wisconsin. EPA granted final approval to Wisconsin's NANSR program on January 18, 1995 (60 FR 3538) and the approval became effective on February 17, 1995. EPA granted final approval to Wisconsin's PSD program on May 27, 1999 (64 FR 28745), which became effective on June 28, 1999.

On December 31, 2002, EPA published revisions to the Federal PSD and NANSR regulations in 40 CFR Parts 51 and 52 (67 FR 80186). These revisions are commonly referred to as the New Source Review (NSR) Reform Rule and became effective on March 3, 2003. These regulatory revisions included provisions for establishing Plant-wide Applicability Limits (PALs), Clean Units and Pollution Control Projects (PCPs), for determining baseline actual emissions, and for promulgating the actual-to-future-actual methodology. As stated in the December 31, 2002, EPA rulemaking, state and local permitting agencies were required to adopt and submit revisions to their part 51 permitting programs implementing the minimum program elements of that rulemaking no later than January 2, 2006 (67 FR 80240). With this action, we are approving WDNR's program revisions that satisfy this requirement.

WDNR originally prepared rule changes to adopt a version of the Federal rule revisions, which were subsequently authorized by the Wisconsin Natural Resources Board for public hearing in December 2003. On June 24, 2005, the DC Circuit issued its ruling on challenges to the December 2002 NSR Reform Rule. *New York* v. *EP*A, 413 F.3d 3 (DC. Cir 2005). Although the court upheld most of EPA's rules, it vacated both the Clean Unit and the PCP provisions. In addition, the court remanded to EPA the ''reasonable possibility'' provision for reporting and recordkeeping. In response, on December 21, 2007, EPA published a rule that clarifies the recordkeeping and reporting standards of the 2002 rule.

After the DC Circuit ruled on the challenges to the Federal NSR Reform Rule, WDNR adopted those portions of the Reform Rule that the court upheld, and modified the portion that the court remanded to EPA in accordance with the court's instructions. WDNR submitted the revisions to EPA on May 25, 2006. These revisions are consistent with the current provisions of the NSR Reform Rule following the ruling of the DC Circuit.

II. What sections of Wisconsin's rules are we approving in this action?

We are approving amendments to provisions of the PSD and NANSR construction permit programs in the Wisconsin State Implementation Plan (SIP). Please refer to the proposed rule of this action which includes a detailed explanation of the provisions that are being approved. This final action amends the following provisions within NR 405, NR 408, and NR 484: NR 405.01(1) and (2), NR 405.02(1), NR 405.02(1)(d), NR 405.02(2m), NR 405.02(8) and (11), NR 405.02(11c), (11e) and (11j), NR 405.02(12), NR 405.02(20m), NR 405.02(21) and (24), NR 405.02(24j), NR 405.02(24m), NR 405.02(25b), (25d), (25e), (25f) and (25i), NR 405.02(27)(a)8., 17., and 18., NR 405.02(27m), NR 405.025, NR 405.16(3) and (4), NR 405.18(1) to (15), NR 408.02(1), NR 408.02(2m), NR 408.02(4), (5), and (11), NR 408.02(11e), (11m) and (11s), NR 408.02(13), NR 408.02(13m), NR 408.02(20), NR 408.02(21)(a)1.(intro), NR 408.02(23), NR 408.02(24m) and (25s), NR 408.02(27), NR 408.02(28e), (28j), (28m), (28s), (29m), and (32m), NR 408.025, NR 408.06(10), NR 408.10(5) and (6), NR 408.11(1) to (15), NR 484.04(21), and NR 484.04(27m).

III. How has this rulemaking been affected by the December 21, 2007 rulemaking which clarifies the ''reasonable possibility'' provision?

As part of its ruling on challenges to the December 2002 NSR Reform Rule, the DC Circuit remanded to EPA the ''reasonable possibility'' provision regarding reporting and recordkeeping. *New York* v. *EPA*, 413 F.3d at 35–36. In response, on December 21, 2007, EPA published a rule (72 FR 72607) that clarifies the recordkeeping and reporting standards of the 2002 rule. The rule adds further clarification to the criteria determining whether a source experiencing a physical change or change in the method of operation that does not trigger major NSR permitting requirements must keep records. The standard also specifies the recordkeeping requirements for such sources.

WDNR requires any facility that chooses to use the ''past-actual-to-future-actual'' provision to satisfy the recordkeeping and reporting standards. NR 405.16(3) and NR 408.10(5) are more stringent than the criteria established by EPA to determine whether a facility is subject to the recordkeeping and reporting requirements. *See* 40 CFR 51.165(a)(6) and 40 CFR 51.166(r)(6).

The preamble to the December 21, 2007, rule states that state and local authorities have the option of making their regulations more stringent than these rules. The preamble also states that state and local authorities that have regulations within their SIP, which they

believe fulfills the minimum criteria of the December 21, 2007, rulemaking, must submit notice acknowledging that their rules are at least as stringent as the Federal rules within three years of December 21, 2007. We have concluded that the revisions that we are approving today into Wisconsin's SIP are consistent with the December 21, 2007 rulemaking.

IV. What are EPA's responses to adverse comments?

EPA received comments both in support of and in opposition to Wisconsin's rules. The Sierra Club provided adverse comments on EPA's April 20, 2007, proposed rule approval. EPA responded to these adverse comments in a document that can be found in the official docket for this action. The document is titled, ''Response to Comments by the Sierra Club on NSR Reform Regulations.'' Below are EPA's responses to each of the Sierra Club's comments, which are set forth in full in the aforementioned document:

Comment I: The Proposed Modifications to Wisconsin's SIP are an Impermissible Backslide.

Response: The Federal NSR Reform Rule was upheld by the DC Circuit in *New York* v. *EPA*, 413 F.3d 3 (DC Cir. 2005), with the exception of the Pollution Control Project, Clean Unit, and ''reasonable possibility'' provisions. Therefore, with the exceptions noted, the revisions to Wisconsin's NSR rules, which are based on the Federal NSR Reform Rule, have already withstood judicial scrutiny and are lawful. EPA addresses the commenter's specific points as follows:

a. As addressed in the national Rulemaking, the proposed NSR Reform Rule of 1996, 61 FR 38250 (July 23, 1996) addressed the provision for the actual-to-future-actual method of determining whether or not a source is subject to major NSR. Thus, the appropriate time to have commented on this provision was prior to October 21, 1996, the close of the public comment period. EPA has found that while the actual-to-projected-actual test would reduce the number of sources that would need to take permit limits, the environmental benefit of these permit limits is preserved, because any source projecting no significant net emissions increase must stay within that projection or comply with NSR. Furthermore, in Wisconsin, a minor increase in emissions, even if small enough not to trigger major NSR, is still required to meet the criteria of NR 406.04(1k) of WDNR's SIP. Facilities that are able to net out of permit review under the actual-to-actual provision are still required to ensure that the modifications do not cause or exacerbate an air quality increment or air quality standard.

b. The test developed in *Wisconsin Electric Power Company* v. *Reilly,* 893 F.2d 901, 904 (7th Cir. 1990), as a result of the NSR Reform Rule, applies to all facilities and not just power plants. EPA found that the ten-year look back period promotes economic growth and administrative efficiency by affording sources the flexibility to respond rapidly to market changes, focusing limited regulatory resources on changes most likely to harm the environment. The DC Circuit upheld the ten-year look back period, stating, ''* * * we conclude that petitioner's challenges to the ten-year look back period fail to overcome the presumption of validity afforded to EPA regulations under the [Clean Air Act (CAA or Act)].'' *New York* v. *EPA,* 413 F.3d at 22. The court found that EPA's decision regarding this provision was supported with ''detailed and reasoned'' analysis based on EPA's own experience and expertise. *New York* v. *EPA,* 413 F.3d at 24.

c. Other than the change that applies the ten-year look back period to all sources, EPA's policy of determining ''actual'' emissions from two years of operating data has not changed. EPA's policy is to have all of the appropriate operating data that can prove what a facility's emissions were during that particular time period to identify the ''actual'' emissions.

d. A source's ability to use the full ten-year look back period will depend upon the availability of relevant data for the consecutive 24-month period that a source chooses. The data must adequately describe the operation and associated pollution levels for the emissions units being changed. In the event that a source does not have the data necessary to determine the unit's actual emission factors, utilization rate, and other relevant information needed to accurately calculate its average annual emissions rate during that period of time, the source must chose another consecutive 24-month period within the ten-year look back period for which it has adequate data. ''Non-compliant emissions'' are not allowed to be considered as part of the baseline actual emissions. This is to be determined by the permitting authority after reviewing adequate files and working with the source to determine the true baseline actual emissions based on the available data and considering all applicable regulations and emission limitations.

e. EPA received comments both in favor of and in opposition to making the demand growth exclusion available to all source categories. EPA decided to extend the demand growth exclusion because it captures periods of time where increased operations respond to independent factors, such as system-wide demand growth, which would have occurred and affected the unit's operations even in the absence of a physical or operational change. The ten-year look back period allows a facility to identify a consecutive 24-month time frame when the facility was operating at its true capacity, and calculate the emissions that resulted during that period. Instead of duplication, the provisions serve distinct purposes. In cases where the source experiences full capacity utilization, the source will not have a basis for attributing part of its post-change emissions increase to market demand. However, if the source still has the ability to increase production to meet projected market demand without making a physical or operational change, the source may consider product demand growth.

f. EPA has taken the position that replacement units may be considered to be modified units, since the replacement unit is replacing a similar emissions unit with a record of historical operational data. Since the replacement unit is very similar to the unit that is being replaced, a source replacing a unit should be able to adequately project and track emissions for the replacement unit based on the operating history of the replaced unit. Therefore, the projection of future actual emissions can be sufficiently reliable and an up-front emissions cap based on Potential to Emit (PTE) is unnecessary. *See* revised definition of ''emissions unit,'' 68 FR 63021 (November 7, 2003), clarifying that a replacement unit is considered an existing emissions unit and, therefore, is eligible for the actual-to-projected-actual test for major NSR applicability determinations.

g. *In New York* v. *EPA*, 413 F.3d at 36–38, the DC Circuit held that the environmental petitioners had failed to demonstrate that PALs are based on an impermissible statutory interpretation or are otherwise arbitrary and capricious. As part of an Environmental Impact Analysis, EPA examined six pilot projects that implemented flexible permits similar to PALs. The participants in these pilot projects reduced their emissions by 27% to 83% below their PAL levels, and, based on these results, EPA concluded that PALs encourage sources to reduce their emissions voluntarily in order to ''create enough headroom for future expansions'' during the PAL term. *See New York* v. *EPA,* 413 F.3d at 37.

h. In *New York* v. *EPA,* the DC Circuit addressed the environmental petitioners' comment that a ten-year look back period allows facilities to set their PALs high enough to accommodate future increases without any initial decreases. It examined EPA's conclusion that the ten-year look back period affects only a small percentage of sources, and that most sources would set their PALs equal to recent baseline actual emissions, thereby reducing emissions by 10% to 33% below their PAL levels. The court found that state intervenors' experience confirmed EPA's conclusions. *See New York* v. *EPA,* 413 F.3d at 38.

i. PALs are designed to cap a facility's emissions for a criteria pollutant, and thus allow facilities to operate within a cap without triggering NSR. Additional necessary recordkeeping, monitoring, and reporting are required for facilities to obtain a PAL, and compliance must be demonstrated through the additional monitoring activities required. The commenter asserts that PALs replace operational limitations that are never restored after a PAL limit expires. We disagree. Once a PAL expires, the facility loses the ability to operate particular emission units unrestricted within the facility-wide cap. Sources that have existing permits with limitations that are subject to state or Federal requirements such as Best Available Control Technology (BACT), Reasonably Available Control Technology (RACT), and New Source Performance Standards (NSPS), and they must still comply with those particular requirements throughout the use of the PAL, as well as after the expiration of a PAL. The reviewing authority maintains the discretion to determine how to distribute any remaining allowable emissions after a PAL's expiration. This may require a source to take emission limits even more stringent than the original emission/operating limits that originally applied to an emission unit, or require that unit to undergo a PSD/NANSR analysis.

The commenter points to a 2003 WDNR prepared analysis, which they describe as concluding that specific emissions increases would result if the elements of NSR Reform were approved into Wisconsin's SIP. Unfortunately, the commenter did not include the 2003 analysis with the comments. The analysis that the commenter attached to the comments is a presentation file that does not contain an explanation describing how WDNR arrived at the increases that the commenter references in the comments.

EPA has made several attempts to obtain any existing supporting documentation for the analysis the commenter describes. WDNR has not been able to provide us with any documentation in support of the 2003 conclusions to which the commenter refers. However, as a result of our efforts to obtain this documentation, we did obtain from WDNR a document entitled ''Report to Legislature,'' (hand-dated March 10, 2006, and received by EPA on October 7, 2008). This 2006 report contains, among other things, a description of WDNR's 2003 position regarding the analysis. In the report, WDNR states that its 2003 conclusion was that the NSR reform rules would lead to emissions increases because fewer projects would be required to undergo major source NSR, but that this conclusion was flawed because WDNR did not examine other changes at a facility that would reduce allowable emissions. Further, the 2006 report acknowledges that the State of Michigan has been implementing the elements of the Federal NSR Reform Rule since March 3, 2003, and that Michigan has not seen a decrease in PSD permit applications. According to the 2006 report, Michigan and Wisconsin have issued a similar number of PSD permits annually and have a comparable number of sources subject to the major source NSR program. Because WDNR has, itself, disavowed its own former predictions, and EPA never received supporting documentation for the predictions, EPA does not find the comments based on WDNR's 2003 analysis to be persuasive.

Finally, any analysis done in 2003 would have been done prior to *New York* v. *EPA,* the 2005 DC Circuit decision that vacated the Clean Unit and Pollution Control Projects provisions of the rule. Such analysis would be based on the NSR Reform Rule prior to the changes made as a result of the decision, and so the analysis could not have considered the rules that are in effect today.

The commenter also points to a report entitled, ''Reform or Rollback? How EPA's Changes to New Source Review Affect Air Pollution in 12 States.'' The report was prepared by the Environmental Integrity Project (EIP) and the Council of State Governments/Eastern Regional Conference. The draft report claims that the change to a ''two-in-ten'' baseline could allow emissions from 1,273 major sources to increase emissions in 12 states. However, EPA disagrees that the EIP report supports this conclusion. EPA has found the analysis to be overly simplistic and erroneous in its interpretation of NSR. These failures undermine the plausibility of the report's conclusions, including its emissions estimates. EPA notes, in particular, the following problems with the report:

- The approach EIP used looks at plant-wide emissions inventories at facilities where emissions have been lower in the recent two years than in the past. The plant-wide inventory approach completely avoids consideration of why these emissions went down.
- The report incorrectly used plant-wide emissions inventory changes as a crude estimate of emissions increases allowed under the rule.
- The EIP analysis did not consider the fact that major source NSR is only triggered when a physical change or change in the method of operation of a source results in a significant net emissions increase.
- The EIP analysis ignored netting. Even if a project results in a significant increase, it does not trigger major source NSR if there are decreases during the contemporaneous period that offset the increases during that period (including the project increase).
- The EIP analysis purported to measure the ''potential'' for increases under the rule revisions. Notwithstanding all the other flaws of the analysis, EIP made no assessment of whether this ''potential'' will actually be realized.

Industry has complained that it is often expected to surrender capacity under the current approach, because it is not being utilized in the two-year period immediately preceding the change. The purpose of the new baseline provision is to enable sources with an existing unit undergoing modification to select as a baseline a level of operation that more accurately represents that unit's actual operating history. EPA has determined that it is reasonable for a source to determine its baseline emissions in this manner, so long as it is done in compliance with the applicable regulations. First, a source must have adequate information to calculate an average annual emissions rate, in tons per year, for the specific 24-month period selected to represent the unit's representative operation. Second, a source will be required to make downward adjustments in the baseline emissions calculations to account for any enforceable emissions factors and operating restrictions that have been imposed since the representative baseline period and are more stringent than the original limits. This adjustment ensures that the source cannot take credit for an emissions level that is no longer allowed for the unit if it were

operating at its representative level today. Third, the new rule for determining baseline emissions does not affect new sources and new units at existing sources, nor does it affect electric utility steam generating units, for which the five-year look back period is still required. There will be no change in baseline for sources with recent high levels of emissions or consistent emissions levels over ten-year periods. Finally, under the existing regulations, states have always had the flexibility to define a different contemporaneous period under SIP-approved NSR programs. The new rules will help simplify the process of determining the appropriate baseline period, and eliminate the delays associated with the previous approach.

Section 110(l)

The commenter contends that the requested rule revisions would relax the existing safeguards in the current NSR rules, and thereby violate section 110(l) of the CAA. Section 110(l) states that ''[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * * or any other applicable requirement of this chapter.'' 42 U.S.C. 7410(l).

In ''Approval and Promulgation of Implementation Plans; New Source Review; State of Nevada, Clark County Department of Air Quality and Environmental Management,'' 69 FR 54006 (Sept. 7, 2004), the EPA stated that section 110(l) does not preclude SIP relaxations. The Agency stated that section 110(l) only requires that the ''relaxations not interfere with specified requirements of the Act including requirements for attainment and reasonable further progress,'' and that, therefore, a state can relax its SIP provisions if it is able to show that it can ''attain or maintain the [National Ambient Air Quality Standards (NAAQS)] and meet any applicable reasonable further progress goals or other specific requirements.'' 69 FR 54011–54012.

The Wisconsin-requested NSR revisions track the Federal NSR Reform Rule, and EPA has already determined that the implementation of the Federal NSR Reform Rule will be environmentally beneficial. See 68 FR 44620 (July 30, 2003) and 68 FR 63021. EPA's Supplemental Analysis for the Federal NSR Reform Rule estimated that there are likely to be reductions in emissions of volatile organic compounds (VOC) due to the use of PALs. A quantitative methodology was applied in the Supplemental Analysis to three industrial categories, concluding that 3,400 to 17,000 tons of VOC emission reduction per year was likely nationwide in just these categories. The three industrial categories selected were Automobile Manufacturing (SIC 3711), Pharmaceutical Manufacturing (SIC 2834), and Semiconductor Manufacturing (SIC 3674). These were chosen based on the Flexible Permit Pilot Evaluation Report.[1] The report concluded that facilities in these source categories were likely to adopt a PAL because of frequent operational, time-sensitive changes, and because of opportunities for economical air pollution control measures. The Supplemental Analysis determined that 50% to 75% of the facilities under these categories would seek a PAL and each facility would reduce its emissions by 10% to 33%.

We have found seven facilities that fall under these categories within Wisconsin. Six are automobile manufacturing facilities and one is a pharmaceutical manufacturing facility. These facilities may take advantage of the PAL option under the Federal NSR Reform Rule. The following tables evaluate the potential effects of PALs in Wisconsin from these sources.[2]

Facility name	VOC (tons per year (TPY))[2]
Oshkosh Truck Corp—West Plant	123.8
Oshkosh Truck Corp—Main Plant	78.97
FWD Corporation	16.28
Western Products	2.33
Scientific Protein Labs	75.74
GM—NAO Janesville—Truck Platform	1103.56
Oshkosh Truck Corp—South Plant	0.50

If 75% of the facilities above take a PAL	
10% VOC Reduction	105.1 TPY of VOC.
33% VOC Reduction	346.8 TPY of VOC.
If 50% of sources take a PAL	
10% VOC Reduction	70.1 TPY of VOC.
33% VOC Reduction	231.2 TPY of VOC.
10% VOC reduction at largest single source.	110.3 TPY of VOC.
33% VOC reduction at largest single source.	364.2 TPY of VOC.

Using the same methodology used in the Supplemental Analysis to assess the emissions benefits of Wisconsin's NSR reform revisions in Wisconsin as EPA used to assess the benefits nationally, we conclude that the PAL option would result in a net reduction of between 70.1 and 364.2 tons of VOC per year.

EPA's Supplemental Analysis for the Federal NSR Reform Rule mentions that, since PALs are voluntary, it is extremely difficult to model how many and which particular sources will take PALs. It is assumed that the source categories more likely to apply for a PAL are those sources that are making frequent operational changes.

In Wisconsin, facilities, like the paper mills, frequently apply for PSD permits in order to modify their mills, which result in relatively large increases in emissions. An analysis of the National Emissions Inventory found that Wisconsin has about 73 major sources that belong to SIC group 26, paper and allied products. These sources emit about 8,358 tons of VOC per year. Even if a conservative 10% of these sources were to take a PAL for a conservative decrease in emissions between 10% and 33%, that would result in a total decrease in emissions between about 83.5 tons to 275.8 tons of VOC per year.

It is more difficult to assess the environmental impacts of the actual-to-projected-actual test and the ''two-in-ten'' baseline provisions. The Supplemental Analysis determined that there is a slight national environmental benefit brought about by these NSR reform provisions. Additionally, in Wisconsin, sources undergoing construction, which are not subject to the best available control technology or

[1] The full reports, ''Evaluation of Implementation Experiences with Innovative Air Permits,'' is included in the Supplemental Analysis as Appendix A.

[2] Emissions based on 2002 National Emission Inventory Database.

lowest achievable emission reduction NSR requirements, will need to assure WDNR that any increases will not cause or exacerbate an air quality increment or air quality standard.

Overall, we expect changes in air quality as a result of implementing PALs, the actual-to-projected-actual test and the ''two-in-ten'' baseline provisions in Wisconsin to provide somewhere between a neutral and modest contribution to reasonable further progress. Accordingly, EPA determines that these changes will not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA.

Section 193

The commenter contends that WDNR's NSR Reform revision does not ''demonstrate[] that the NAAQS/PSD Increment/RFP [reasonable further progress] demonstration/visibility will be protected if the revision is approved and implemented,'' and that WDNR did not ''quantify the changes in SIP-allowable emissions and estimate or quantify the changes in actual emissions from affected sources.'' This failure to demonstrate protection of the NAAQS, the commenter argues, constitutes backsliding, in violation of section 193 of the CAA.

As the commenter points out, section 193 of the CAA provides in part that ''No control requirement in effect * * * before November 15, 1990, in any area which is a non-attainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.'' 42 U.S.C. 7515.

Assuming that section 193 applies to NSR, section 193 does not require additional emission reductions before this SIP revision is approved. Wisconsin did not have a major source NANSR program consistent with the requirements of the CAA. Although the program that was in effect as of November 15, 1990, included a preconstruction permitting program, that program did not require any offsets for any sources. In the proposed rules, major sources are subject to permitting requirements consistent with CAA requirements.

Thus, assuming that section 193 applies in some fashion to the permitting program in the SIP, as of November 15, 1990, as it applied to major sources, that program did not require any ''emission reductions'' from major sources because it did not require offsets for any sources. Absent offsets, a source subject to the permitting program would not be required to reduce emissions. It follows that if there were no emission reductions generated by the 1990 permitting program, then the section 193 requirement to provide ''equivalent or greater emission reductions'' of any air pollutant as part of this SIP revision would be satisfied with no additional reductions. Furthermore, for the reasons discussed above with respect to section 110(l), EPA has found that the net effect of these changes will be neutral to environmentally beneficial.

Comment II: The Proposed Modifications Violate the Anti-Backsliding Provisions of Section 172(e).

Response: As discussed above, EPA has concluded that the NSR Reform Rule is not a ''relaxation'' or weakening of the existing NSR rules. EPA has assessed the impact of NSR Reform on the State of Wisconsin and has concluded that approving these revisions into the Wisconsin SIP will result in somewhere between a neutral effect on the environment and a modest environmental benefit. Thus, approving the NSR Reform Rule into the Wisconsin SIP will not result in controls that are ''less stringent'' than the previous controls. In addition, the changes to the existing NSR rules are not being undertaken in the context of a NAAQS relaxation. Thus, section 172(e) does not apply on its face. Nor are these changes undertaken in the context of strengthening a NAAQS. Therefore, the decision of the DC Circuit in *South Coast Air Quality Management District* v. *Environmental Protection Agency,* 472 F.3d 882 (D.C. Cir. 2006), does not apply in this context.

Comment III: The Proposed Modifications Cannot Be Adopted Unless and Until EPA Consults with the Fish and Wildlife Service Pursuant to the Endangered Species Act (ESA).

Response: Under relevant CAA provisions, states are entitled to administer their own approved NSR programs, and EPA is required to approve a state's program or revisions to its program that satisfy applicable requirements of the CAA. The CAA SIP approval authority does not provide the Agency with the discretion to refrain from approving Wisconsin's SIP revisions if the revisions to its NSR program meet all applicable CAA requirements. Accordingly, and as confirmed by recent Supreme Court precedent, the ESA requirements cited in the comments do not apply to EPA's decision to approve revisions to Wisconsin's NSR program into the SIP. *See* 50 CFR 402.03; *National Ass'n of Home Builders* v. *Defenders of Wildlife,* 127 S. Ct. 2518 (2007) (*Defenders of Wildlife*).

Section 7(a)(2) of the ESA generally requires Federal agencies to consult with the relevant Federal wildlife agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of Federally-listed endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of such species. 16 U.S.C. 1536(a)(2). In accordance with relevant ESA implementing regulations, this requirement applies only to actions ''in which there is discretionary Federal involvement or control.'' 50 CFR 402.03. In the *Defenders of Wildlife* case, the Supreme Court examined these provisions in the context of EPA's decision to approve a state permitting program under the Clean Water Act (CWA). In that case, the Court held that when a Federal agency is required by statute to undertake a particular action once certain specified triggering events have occurred, there is no relevant agency discretion, and thus the requirements of ESA section 7(a)(2) do not apply. *Defenders of Wildlife,* 127 S.Ct. at 2536.

With regard to EPA's transfer of CWA permitting authority to a state, the Court found that the relevant CWA provision mandated that EPA ''shall approve'' a state permitting program if a list of CWA statutory criteria is met. Therefore, EPA lacked the discretion to deny a transfer application that satisfied those criteria. Id. at 2531–32. The Court also found that the relevant CWA program approval criteria did not include consideration of endangered or threatened species, and stated that ''[n]othing in the text of [the relevant CWA provision] authorizes EPA to consider the protection of threatened or endangered species as an end in itself when evaluating [an] application'' to transfer a permitting program to a state. Id. at 2537. Accordingly, the Court held that the CWA required EPA to approve the state's permitting program if the statutory criteria were met; those criteria did not include the consideration of ESA-protected species; and thus, consistent with 50 CFR 402.03, the non-discretionary action to transfer CWA permitting authority to the state did not trigger relevant ESA section 7 requirements.

Similar to the CWA program approval provision at issue in *Defenders of Wildlife,* section 110(k)(3) of the CAA mandates that EPA ''shall approve'' a SIP submittal that meets applicable CAA requirements. 42 U.S.C. 7410(k)(3).

The CAA provides a list of SIP submittal criteria in section 110. See 42 U.S.C. 7410(a)(2).

Section 110(l), governing SIP revisions, states that each revision ''shall be adopted'' after reasonable public notice and public hearing, as long as the revision does not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA.

As was the case with the CWA requirements in *Defenders of Wildlife,* the SIP requirements contained in section 110 of the CAA do not include protection of listed species. Further, Title I, Parts C and D, of the CAA do not explicitly state that consideration of the impacts on listed species is a required factor in SIP approval decisions. EPA has interpreted sections 169(3) and 165(e)(3)(B) of the CAA as providing EPA with the relevant discretion to carry out ESA section 7(a)(2) obligations during its review of individual applications for Federally issued PSD permits under section 165. *See In re Indeck-Elwood, LLC,* PSD appeal No. 03–04 (EAB Sept. 27, 2006), slip op. at 108 (holding EPA has discretion to consider impacts on listed species in BACT and soils and vegetation analyses). However, this discretion in PSD permitting decisions does not provide EPA similar discretion in its SIP approval decisions under section 110.

In issuing individual PSD permits, EPA is required to complete an environmental impacts analysis in the BACT determination of CAA section 169(3) and an additional impacts analysis, including impacts on soils and vegetation, under section 165(e)(3)(B) of the CAA. In carrying out these analyses, EPA has interpreted these provisions as affording the Agency discretion to determine whether listed species are impacted by individual Federal PSD permitting decisions. In contrast, EPA's action on state SIP submittals is governed by section 110 of the CAA, which unequivocally directs EPA to approve state plans meeting applicable CAA requirements.

Section 110 does not provide for similar impact analyses in reviewing SIP submittals. An ESA obligation triggered by one provision of the statute-consideration of ESA in individual Federal PSD permitting decisions cannot be bootstrapped to raise that obligation in another provision-approval of the revision to a SIP that does not provide EPA with similar discretion. *See,* generally, *Defenders of Wildlife* (finding that while EPA undertakes ESA consultation when issuing individual Federal National Pollutant Discharge Environmental System (NPDES) permits, it was not required to do so in approving state NPDES permitting programs).

Applying the reasoning of *Defenders of Wildlife,* the SIP approval criteria contained in the CAA do not provide EPA with the discretionary authority to consider whether approval of SIP revisions may affect any listed species. EPA has determined that WDNR has submitted a SIP revision to incorporate the NSR Reform Rule that satisfies all of the applicable SIP requirements contained in section 110 of the CAA. Thus, given the Supreme Court precedent and applicable regulations (*see* 50 CFR 402.03), EPA is without discretion to disapprove or conditionally approve Wisconsin's SIP revision request based on concerns for listed species, and the ESA requirements cited by the commenter are thus inapplicable to this approval action.

Comment IV: The Proposed Rules do not Reference 40 CFR 52.21 in Order to Encompass Permits Issued by EPA and/or WDNR Under a Delegated Program.

Response: EPA has considered the comment regarding the differences in citations used with respect to the fuel use prohibition that is part of the definition of a major modification. This provision was part of Wisconsin's SIP prior to the requested change and is unaffected by Wisconsin's requested revisions. It is, therefore, not before EPA for approval. Moreover, this issue was never brought to WDNR's attention during the public comment period during which WDNR sought approval by the Wisconsin Natural Resources Board. Nevertheless, EPA has considered this comment and agrees with the commenter that certain permits that have been issued to sources within Wisconsin, to the extent that they exist, may not be covered by the language in NR 405.02(21)(b)(5) and NR 408.02(20)(e)(5), which refers to permits that have established fuel prohibiting conditions. Wisconsin's PSD program was approved into its SIP on May 27, 1999. The rules cited above failed to incorporate language that would include sources with construction permits issued prior to that approval, either directly by EPA or by WDNR under a delegated agreement in accordance with 40 CFR 52.21.

We have been in contact with WDNR on this matter, and plan to work with WDNR to revise the language as appropriate. However, this amendment is not required for EPA's approval of Wisconsin's requested revisions, which did not include the omission of language referencing 40 CFR 52.21 and 40 CFR 51.166.

With respect to the commenter's contention that ''WDNR has sometimes taken the position that the Mandatory Operating Permits (MOPs) are not federally enforceable,'' it is EPA's understanding that WDNR does not consider its MOP program to be federally enforceable. Although WDNR submitted the MOP program to EPA as a SIP revision on April 22, 1985, by letter dated June 20, 1990, WDNR withdrew that request for approval, prior to EPA approving the program.

V. What action is EPA taking?

EPA is approving revisions to the PSD and NANSR construction permit programs for the State of Wisconsin which Wisconsin submitted to EPA on May 25, 2006. These revisions meet the minimum program requirements of the December 31, 2002, EPA NSR Reform rulemaking, consistent with subsequent changes to that rule, as set forth in *New York* v. *EPA,* and the resulting December 21, 2007 rule concerning recordkeeping and reporting standards.

VI. 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 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 (Pub. L. 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 rule 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.

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 February 17, 2009. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 8, 2008.

Lynn Buhl,

Regional Administrator, Region 5.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart YY—Wisconsin

■ 2. Section 52.2570 is amended by adding paragraph (c)(119) to read as follows:

§ 52.2570 Identification of plan.

* * * * *

(c) * * *

(119) On May 25, 2006, Wisconsin submitted for EPA approval into the Wisconsin SIP a revision relating to changes to chs. NR 405 and 408 for incorporation of Federal changes to the air permitting program. The rule revision being approved in this action has been created to approve rule AM–06–04, the NSR Reform provisions that were not vacated by the DC Circuit Court in *New York* v. *EPA*, 413 F.3d 3 (DC Cir. 2005). The rule revision also repeals NR 405.02(1)(d), (24m), (27)(a)8., 17 and 18 and 408.02(27). EPA has determined that this revision is approvable under the Clean Air Act.

(i) Incorporation by reference. The following sections of the Wisconsin Administrative Code are incorporated by reference:

(A) NR 405.01 Applicability; purpose. NR 405.01(1) and (2), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(B) NR 405.02 Definitions. NR 405.02(1), (2m), (8), (11), (11c), (11e), (11j), (12), (20m), (21), (24), (24j), (25b), (25d), (25e), (25f), (25i), and (27m) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(C) NR 405.025 Methods for calculation of increases in actual emissions, as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(D) NR 405.16 Source obligation. NR 405.16(3) and (4) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(E) NR 405.18 Plant-wide applicability limitations (PALs), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(F) NR 408.02 Definitions. NR 408.02(1), (2m), (4), (5), (11), (11e), (11m), (11s), (13), (13m), (20), (21)(a)1.(intro), (23), (24m), (25s), (28e), (28j), (28m), (28s), (29m), and (32m) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(G) NR 408.025 Methods for calculation of increases in actual emissions, as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(H) NR 408.06 Emissions offsets. NR 408.06(10), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(I) NR 408.10 Source obligation. NR 408.10(5) and (6), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(J) NR 408.11 Plant-wide applicability limitations (PALs), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(ii) Additional material.

(A) NR 484.04 Code of federal regulations appendices. NR 484.04(21), and (27m) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

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