

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R03-OAR-2005-WV-0002; FR-7986-7]

#### Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Emission Reductions to meet Phase II of the Nitrogen Oxides (NO<sub>x</sub>) SIP Call

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to grant conditional approval of a State Implementation Plan (SIP) revision submitted by the State of West Virginia pertaining to nitrogen oxides (NO<sub>x</sub>) emission reductions required under the NO<sub>x</sub> SIP Call. The SIP revision, required under Phase II of the NO<sub>x</sub> SIP Call (Phase II), consists of West Virginia's rule to meet its remaining NO<sub>x</sub> emission reduction obligations. In order to meet the April 2005 SIP revision submission due date specified under Phase II, the West Virginia Department of the Environment (WVDEP) adopted this rule using West Virginia's emergency rule procedures. In West Virginia, such emergency rules have a sunset date. In order for West Virginia to have a fully approvable SIP revision to satisfy Phase II, the WVDEP must adopt a permanent rule with an effective date prior to the sunset date of the emergency rule, and must submit the permanent rule as a SIP revision to EPA by July 1, 2006. The WVDEP is currently in the process of adopting its permanent version of the rule to satisfy the Phase II requirements. The WVDEP has submitted a written commitment to EPA stating it will adopt the permanent rule with an effective date prior to the sunset date of the emergency rule, and will submit the permanent rule as a SIP revision to EPA by July 1, 2006. EPA is proposing to grant conditional approval of this SIP revision based upon West Virginia's commitments. This action is being taken under the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before November 21, 2005.

**ADDRESSES:** Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03-OAR-2005-WV-0002 by one of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

*Agency Web site:* <http://www.docket.epa.gov/rmepub/> RME,

EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

*E-mail:* [campbell.dave@epa.gov](mailto:campbell.dave@epa.gov).

*Mail:* R03-OAR-2005-WV-0002, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

*Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operations, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to RME ID No. R03-OAR-2005-WV-0002. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at <http://www.docket.epa.gov/rmepub/>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, [regulations.gov](http://www.regulations.gov) or e-mail. The EPA RME and the Federal [regulations.gov](http://www.regulations.gov) Web sites are "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail comment directly to EPA without going through RME or [regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the RME index at <http://www.docket.epa.gov/rmepub/>. Although listed in the index, some information is not publicly available, i.e., 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 in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 7012 MacCorkle Avenue, SE., Charleston, West Virginia 25304-2943.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Powers, (215) 814-2308, or by e-mail at [powers.marilyn@epa.gov](mailto:powers.marilyn@epa.gov).

**SUPPLEMENTARY INFORMATION:** West Virginia's Phase I NO<sub>x</sub> SIP Call trading program was approved as part of the West Virginia SIP on May 10, 2002 (67 FR 31733). On April 21, 2004 (69 FR 21604), EPA promulgated Phase II of the NO<sub>x</sub> SIP Call which, among other changes, adjusted state budgets downward to reflect emission reductions based upon the application of cost effective controls on stationary internal combustion (IC) engines that emitted more than one ton of NO<sub>x</sub> per average ozone season day in 1995. On March 30, 2005, the State submitted a revision to its SIP to satisfy the additional emission reductions required under Phase II. The March 30, 2005 submittal is comprised of an emergency rule that sunsets after 15 months, on June 2, 2006. However, in its March 30, 2005 SIP submittal, the WVDEP indicated that it is in the process of adopting an identical permanent rule. On August 15, 2005, the WVDEP submitted a letter committing to adopt a permanent rule having an effective date prior to the sunset date of its emergency rule, and committing to submit the permanent rule as a SIP revision to EPA by July 1, 2006.

#### I. Background

EPA issued the NO<sub>x</sub> SIP Call (63 FR 57356, October 27, 1998) to require 22 Eastern states and the District of Columbia to reduce specified amounts of one of the main precursors of ground-level ozone, NO<sub>x</sub>, in order to reduce interstate ozone transport. EPA found that the sources in these states emit NO<sub>x</sub> in amounts that contribute significantly to nonattainment of the 1-hour ozone national ambient air quality standard (NAAQS) in downwind states. In the NO<sub>x</sub> SIP Call, the amount of reductions required by states were calculated based on application of available, highly cost-effective controls on source categories of NO<sub>x</sub>.

The NO<sub>x</sub> SIP Call, including the Technical Amendments which addressed the 2007 electric generating units (EGU) budgets (64 FR 26298, May 14, 1999 and 65 FR 11222, March 2, 2000), was challenged by a number of state, industry, and labor groups. A summary of the NO<sub>x</sub> SIP Call requirements, including details of the court decisions that were made in response to challenges to the rule and impacts of the court decisions on certain aspects of the rule may be found in EPA's rulemaking dated April 21, 2004 (69 FR 21604) entitled, "Interstate Ozone Transport: Response to Court Decisions on the NO<sub>x</sub> SIP Call, NO<sub>x</sub> SIP Call Technical Amendments, and Section 126 Rules." The relevant portions of the April 21, 2004 rulemaking that affect West Virginia's obligations under the NO<sub>x</sub> SIP Call, and that pertain to the State's requirements for Phase II, are discussed in this document to provide background on the March 30, 2005 SIP revision submitted by the WVDEP.

On March 3, 2000, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) issued its decision on the NO<sub>x</sub> SIP Call, *Michigan v. EPA*, 213 F.3d 663 (DC Cir. 2000). While the DC Circuit ruled largely in favor of EPA in support of its requirements under the 1-hour ozone NAAQS, it also ruled, in part, against EPA on certain issues. The rulings against EPA included two areas of the NO<sub>x</sub> SIP Call that were remanded and vacated and two areas in which EPA was found to have failed to provide adequate notice of changes in the rule.

In the latter case, the rulings included a failure to provide adequate notice of the change in the definition of EGU as applied to cogeneration (cogen) units that supply electricity to a utility power distribution system for sale in certain specified amounts, and a failure to provide adequate notice of the change in the control level EPA assumed for large stationary internal combustion (IC) engines. The portions of the NO<sub>x</sub> SIP Call that were upheld by the Court were termed "Phase I" of the rule. With the exception of the remand of the EGU growth factors used in the NO<sub>x</sub> SIP Call and the requirements for the 8-hour ozone NAAQS (which EPA stayed due to uncertainty created by the court rulings), those portions of the NO<sub>x</sub> SIP Call that had been remanded back to EPA were finalized in the April 21, 2004 rulemaking (69 FR 21604) and termed "Phase II" of the rule.

The April 21, 2004 rule finalized specific changes to the definition of EGUs as applied to cogen units, finalized the control levels assumed for

large stationary IC engines in the NO<sub>x</sub> SIP Call, adjusted states' total budgets (as necessary) to reflect these changes, established a SIP submittal date of April 1, 2005 for states to address the Phase II portion of the budget, and set a compliance date of May 1, 2007 for all affected sources to meet Phase II. As a result of these changes, states that were not already meeting their total NO<sub>x</sub> SIP Call emission reduction obligations were required to submit a SIP revision by April 1, 2005 to reduce ozone season NO<sub>x</sub> emissions by an incremental amount equivalent to the reductions achieved by controlling IC engines to prescribed levels. The IC engines that comprise the subject states' Phase II inventory were compiled by EPA and termed the EPA's NO<sub>x</sub> SIP Call Engine Inventory (65 FR 1222, March 2, 2000). As finalized in the April 21, 2005 rulemaking, the amount of the incremental reductions required was based upon the level of reductions that would occur if large natural gas-fired stationary IC engines were controlled to a level of 82 percent, and large diesel and dual fuel stationary IC engines were controlled to a level of 90 percent.

The change to the definition of cogen units did not have an impact on the Phase I budget previously established for West Virginia. Therefore, in order to meet its NO<sub>x</sub> SIP Call obligations, the State was required only to achieve the incremental reductions that EPA calculated based on controlling stationary IC engines to prescribed levels. As in Phase I of the NO<sub>x</sub> SIP Call, states have flexibility in how they achieve the incremental reductions required under Phase II. West Virginia chose to require the reductions from large IC engines, allowing creditable reductions on a facility-wide basis, and developed a rule largely based on EPA's model language for Phase II requirements.

## II. Summary of SIP Revision

On March 30, 2005, the State of West Virginia submitted a revision to its SIP pertaining to emission reductions to satisfy Phase II of the NO<sub>x</sub> SIP Call. The SIP revision consists of Emergency Rule 45CSR1 entitled, "Control and Reduction of Nitrogen Oxides from Non-electric Generating Units as a Means to Mitigate Transport of Ozone Precursors," which amends West Virginia's existing rule 45CSR1 to include the Phase II requirements. The revision applies to owners or operators of large stationary IC engines in the State of West Virginia. A large IC engine is defined as an engine that emitted more than one ton of NO<sub>x</sub> per average ozone season day in 1995.

In its March 30, 2005 submittal, West Virginia included an incremental budget demonstration that listed seven large natural gas-fired IC engines that are subject to Phase II, consistent with EPA's NO<sub>x</sub> SIP Call Engine Inventory. Application of 82 percent control to these units for the projected 2007 base case resulted in an incremental reduction of 903 tons of NO<sub>x</sub> emissions. EPA has determined that an additional reduction of 903 tons of NO<sub>x</sub> satisfies all of West Virginia's remaining requirements under the NO<sub>x</sub> SIP Call, and that this amount appropriately adjusts the incremental reduction specified in the April 21, 2004 rulemaking.

Emergency Rule 45 CSR1 contains revisions to West Virginia's existing NO<sub>x</sub> Budget Trading Program that enables the State to implement the additional requirements under Phase II of the NO<sub>x</sub> SIP Call. Sources in West Virginia that are subject to the new requirements must submit a compliance plan to WVDEP by May 1, 2006, and reduce ozone season NO<sub>x</sub> emissions in the state by an additional 903 tons beginning May 1, 2007. The revised rule also includes the pertinent definitions associated with stationary IC engines, and also adds a new Section 90 which sets forth general provisions, applicability provisions, the required ozone season NO<sub>x</sub> emission reductions, requirements for compliance plans, and the monitoring, recordkeeping, and reporting requirements necessary to determine compliance with the required emission reductions from stationary IC engines. The rule also incorporates the monitoring and reporting revisions set forth in 40 CFR Part 97 to align it with modifications that had been made to 45 CFR Part 75.

## III. Proposed Action

EPA is proposing to grant conditional approval of West Virginia's March 30, 2005 SIP revision which consists of West Virginia's Emergency Rule 45CSR1 to meet Phase II of the NO<sub>x</sub> SIP Call. For West Virginia's Rule 45CSR1 to become fully approvable, the State of West Virginia must, in accordance with its August 15, 2005 commitment, fulfill the following conditions:

(1) Adopt a permanent Rule 45CSR1 with an effective date prior to the sunset date of the emergency rule, and

(2) Submit permanent rule 45CSR1 as a SIP revision to EPA by July 1, 2006. Once West Virginia fulfills these conditions, EPA will conduct rulemaking to convert its conditional approval to a full approval. If the conditions are not fulfilled within the specified time frame, any final

conditional approval granted by EPA will convert to a disapproval. EPA is soliciting public comments on proposed action and issues discussed in this document. These comments will be considered before taking final action.

#### IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 Fed. Reg. 28355 (May 22, 2001)). This action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve 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). This proposed rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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), because it merely proposes to approve a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air 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 SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air 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. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This proposed rule to grant conditional approval of West Virginia Emergency Rule 45CSR1 to meet Phase II of the NO<sub>x</sub> SIP Call does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

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

Dated: October 13, 2005.

**Donald S. Welsh,**

*Regional Administrator, Region III.*

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**BILLING CODE 6560-50-M**

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 62

[R01-OAR-2005-MA-0003; FRL-7986-5]

#### Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Massachusetts; Negative Declaration

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve the Sections 111(d) and 129 negative

declaration submitted by the Massachusetts Department of Environmental Protection (MADEP) on August 23, 2005. This negative declaration adequately certifies that there are no existing commercial and industrial solid waste incineration units (CISWIs) located within the boundaries of the Commonwealth of Massachusetts.

**DATES:** EPA must receive comments in writing by November 21, 2005.

**ADDRESSES:** Submit your comments, identified by Regional Material in EDocket (RME) ID Number R01-OAR-2005-MA-0003 by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

2. Agency Web site: <http://docket.epa.gov/rmepub/> Regional Material in EDocket (RME), EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select "quick search," then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

3. E-mail: [brown.dan@epa.gov](mailto:brown.dan@epa.gov)

4. Fax: (617) 918-0048

5. Mail: "RME ID Number R01-OAR-2005-MA-0003", Daniel Brown, Chief, Air Permits, Toxics & Indoor Programs Unit, Office of Ecosystem Protection, U.S. EPA, One Congress Street, Suite 1100 (CAP), Boston, Massachusetts 02114-2023.

6. Hand Delivery or Courier. Deliver your comments to: Daniel Brown, Chief, Air Permits, Toxics & Indoor Programs Unit, Office of Ecosystem Protection, U.S. EPA, One Congress Street, Suite 1100 (CAP), Boston, Massachusetts 02114-2023. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding federal holidays. Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

Copies of documents relating to this proposed rule are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the day of the visit.

Environmental Protection Agency, Air Permits, Toxics & Indoor Programs Unit,