

through 50.19, and the cap disclosure requirement of § 50.15, for each underlying insured loss that is included in the amount of the insurer's aggregate insured losses; and

\* \* \* \* \*

David G. Nason,

Assistant Secretary (Financial Institutions).

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R05-OAR-2007-1043; FRL-8714-1]

### Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations

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

**ACTION:** Final rule.

**SUMMARY:** EPA is conditionally approving into Michigan's State Implementation Plan (SIP) specified revisions to add the prevention of significant deterioration (PSD) construction permit program for the purpose of meeting the requirements of the Clean Air Act (CAA) with regard to new source review in areas attaining the National Ambient Air Quality Standards. The Michigan Department of Environmental Quality (MDEQ) submitted these rules to EPA for approval and inclusion into the Michigan SIP on December 21, 2006. In addition, in a separate action in today's **Federal Register**, EPA is proposing to partially disapprove the portion of Michigan's SIP revision submission consisting of Michigan Rule R 336.2816. The PSD SIP revision affects major stationary sources in Michigan that are subject to, or potentially subject to, the PSD construction permit program.

**DATES:** This final rule is effective on October 16, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2007-1043. 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 (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](http://www.regulations.gov) or in hard copy at the U.S. 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 Laura Cossa, Environmental Engineer, at (312) 886-0661 before visiting the Region 5 office.

#### FOR FURTHER INFORMATION CONTACT:

Laura Cossa, Environmental Engineer, Air Permits Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-0661, [cossa.laura@epa.gov](mailto:cossa.laura@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. What Is Being Addressed in This Document?
- II. What Proposed Revisions Are Included in the Conditional Approval?
- III. What Proposed Revisions Are Not Included in Today's Conditional Approval?
- IV. What Were the Comments Received and EPA's Response to Comments?
- V. What Action Is EPA Taking?
- VI. Statutory and Executive Order Reviews

#### I. What Is Being Addressed in This Document?

MDEQ submitted Michigan Air Pollution Control Rules, Part 18, Rules R 336.2801 to R 336.2819 and R 336.2823(1) to (14) ("Part 18") to EPA on December 21, 2006, for EPA approval and inclusion into the Michigan SIP. Part 18 relates to Michigan's PSD permit program. Michigan adopted revisions to Part 18 on December 4, 2006. Prior to approval of Michigan's submitted PSD program, EPA delegated to Michigan the authority to issue PSD permits through the Federal PSD rules at 40 CFR 52.21 (via delegation letter dated September 26, 1988).

On January 9, 2008, EPA proposed to conditionally approve Michigan's PSD SIP rules under section 110 of the CAA. (73 FR 1570, January 9, 2008). EPA received a number of comments on our proposal (see discussion in Section IV below). After considering the comments received, EPA is finalizing most of our proposed conditional approval of Michigan Air Pollution Control Rules, Part 18, Rules R 336.2801 to R 336.2819 and R 336.2823(1) to (14) (with one exception discussed in more detail below). Under section 110(k)(4) of the CAA, EPA may conditionally approve a

SIP revision based on a commitment from the State to adopt specific enforceable measures by a date certain that is no more than twelve months from the date of the conditional approval.

In addition, in a separate action also published today, EPA is proposing to disapprove Michigan Rule R 336.2816, which is also included in the State's December 21, 2006, PSD program submission. This rule sets out the mechanisms which facilitate the participation of the Federal Land Manager (FLM) in the State's permitting process for purposes of protecting either the increment or the Air Quality Related Values (AQRVs) associated with a Class I area from potential impacts from a proposed major source or major modification. Michigan will retain its Federal delegation of authority under 40 CFR 52.21(p) until such time as the State submits promulgated rules equivalent to 40 CFR 51.166(p) and those rules are approved into its SIP. Under section 110(k)(3), EPA may disapprove a part of a SIP revision if the partial disapproval meets certain conditions discussed in Section III, below.

Further, EPA is proposing to approve in the alternative a revised Michigan Rule R 336.2816 once the State submits and EPA approves promulgated rules equivalent to 40 CFR 51.166(p), which the State has committed to do.

Michigan is not authorized to carry out its Federally approved air program in "Indian Country," as defined in 18 U.S.C. 1151. Indian Country includes: 1. All lands within the exterior boundaries of Indian reservations within the State of Michigan; 2. Any land held in trust by the U.S. for an Indian tribe; and 3. Any other land, whether on or off an Indian reservation that qualifies as Indian Country. Therefore, EPA retains the authority to implement and administer the CAA program in Indian Country.

#### II. What Proposed Revisions Are Included in the Conditional Approval?

EPA is conditionally approving the following sections of "Part 18, Prevention of Significant Deterioration of Air Quality" of Michigan's Air Pollution Control Rules, (a detailed discussion of the reasons for the conditional approval is available in 73 FR 1043, January 9, 2008):

- R 336.2801 Definitions (a) through (tt) [except for R 336.2801 (j) and (ff), reserved in original rule];
- R 336.2802 Applicability;
- R 336.2803 Ambient Air Increments;
- R 336.2804 Ambient Air Ceilings;

R 336.2805 Restrictions on Area Classifications;  
 R 336.2806 Exclusions from Increment Consumption;  
 R 336.2807 Redesignation;  
 R 336.2808 Stack Heights;  
 R 336.2809 Exemptions;  
 R 336.2810 Control Technology Review;  
 R 336.2811 Source Impact Analysis;  
 R 336.2812 Air Quality Models;  
 R 336.2813 Air Quality Analysis;  
 R 336.2814 Source Information;  
 R 336.2815 Additional Impact Analyses;  
 R 336.2817 Public Participation;  
 R 336.2818 Source Obligation;  
 R 336.2819 Innovative Control Technology; and,  
 R 336.2823 Actuals Plantwide Applicability Limits (PALs) (1) through (14).

### III. What Proposed Revisions Are Not Included in Today's Conditional Approval?

Today's action does not extend conditional approval to Michigan Rule R 336.2816, "Sources Impacting Federal Class I Areas—Additional Requirements." EPA determined that Michigan Rule R 336.2816 is not consistent with 40 CFR 51.166(p), which sets out the mechanisms which facilitate the participation of the FLM in the State's permitting process for purposes of protecting either the increment or the AQRVs associated with a Class I area from potential impacts from a proposed major source or major modification.

As further discussed below, commenters raised concerns that, insofar as Michigan Rule R 336.2816 does not fully provide this mechanism, EPA should act to ensure that the SIP contains these requirements. On November 30, 2007, in a letter from Steven Chester, Director, MDEQ, to Mary Gade, Regional Administrator, Michigan committed, among other things, to making changes to Michigan Rule R 336.2816 consistent with the requirements at 40 CFR 51.166(p).

Because Michigan currently implements the Federal PSD program under EPA's delegation of 40 CFR 52.21, EPA's conditional approval of Michigan Rule R 336.2816 would have made the Michigan SIP less stringent than the currently applicable, Federally delegated program. Therefore, in a separate action published today, EPA is proposing to disapprove Michigan's submittal as it relates to Michigan Rule R 336.2816. Michigan will retain its Federal delegation of authority under 40 CFR 52.21(p) to administer Michigan Rule R 336.2816 until such time as the State submits promulgated rules equivalent to 40 CFR 51.166(p) for approval, and these rules are approved into its SIP.

### IV. What Were the Comments Received and EPA's Response to Comments?

The public comment period for our proposed conditional approval began on January 9, 2008 (73 FR 1570, January 9, 2008). During the public comment period, EPA received both supportive and adverse comments in response to our proposed rulemaking. EPA received comments in support of our proposed action from the Alliance of Automobile Manufacturers and Marathon Petroleum Company on February 7, 2008, and from Consumers Energy Company on March 11, 2008 (Comment 1, discussed below). EPA received adverse consolidated comments, dated March 11, 2008, from Clean Water Action, Environmental Law and Policy Center, Michigan Energy Alternatives, Michigan Land Use Institute, Midland Cares, Natural Resources Defense Council and Sierra Club ("Consolidated Commenters") Comment 2, discussed below). EPA also received three requests, from Sidley and Austin LLP, Alliance of Automobile Manufacturers and Marathon Petroleum Company, on January 8, February 7, and March 11, 2008, respectively, to terminate the PSD delegation agreement between MDEQ and EPA when the approval of PSD program is issued (Comment 3, discussed below). One commenter (Consumers Energy Company) requested that EPA explicitly state in this notice the appropriate appeal procedures once the SIP is conditionally approved (Comment 4, discussed below). One commenter (Alliance of Automobile Manufacturers) expressed concern that Michigan's definition of "net emission increase" was more stringent than the Federal definition. As described in 40 CFR 51.166(b), states can use definitions that are more stringent than the corresponding definitions listed in 40 CFR 51.166(b)(1) to (56). However, in a letter dated May 17, 2007, Michigan stated that it did not intend to implement a more stringent definition, and stated that the definition of "net emissions increase" is being rewritten under a State rulemaking, so that it will follow the same requirements as the Federal rule. Michigan indicates that the definition of "net emissions increase" as currently set forth in Michigan Rule R 336.2801(ee) will be applied until the state rules are revised. The same commenter (Alliance of Automobile Manufacturers) expressed concern that the requirements of Michigan Rule R 336.2818 (Source Obligation) are more stringent than the Federal requirements (Comment 5, discussed below).

On January 25, 2008, EPA received a request from the Consolidated

Commenters to extend the public comment period an additional 30 days from the original closing date of February 8, 2008. Despite one comment to the contrary, EPA reopened the public comment period for an additional 30 days until March 10, 2008 (73 FR 8250, February 13, 2008).

EPA has considered the comments received and, with the exception of the proposed disapproval of Michigan Rule R 336.2816, has finalized our action as proposed. Presented below is a summary of the comments and our responses.

*Comment 1:* Three commenters supported the approval of Michigan's PSD Rules into the Michigan SIP and requested that EPA make the rule effective immediately upon publication.

*Response:* EPA acknowledges receipt of the comments and for reasons set forth in this Notice is proceeding with a conditional approval of the specified PSD rules (along with the proposed disapproval of Michigan Rule R 336.2816). Pursuant to section 110(k)(4) of the CAA, EPA may conditionally approve a portion of a SIP revision based on a commitment from the State to adopt specific, enforceable measures, no later than twelve months from the date of final conditional approval. The State must provide the corrected promulgated rules, not a new SIP submittal, to EPA for approval. If the State fails to actually make the changes within the twelve month period, EPA would subsequently publish a notice in the **Federal Register** providing notice and details of such disapproval. EPA is not required to propose the finding of disapproval. If Michigan submits final and effective rule revisions correcting the deficiencies, as discussed above, within one year from this conditional approval becoming final and effective, EPA will publish a subsequent notice in the **Federal Register** to acknowledge that Michigan has met the criteria of a conditional approval and to inform the public about the conversion from a conditional approval to a full approval.

Federal regulations at 40 CFR 51.166 set forth the criteria for a PSD program approval that EPA applies. With the exception of several deficiencies that need to be corrected, EPA has determined that Michigan's PSD rules meet these criteria. These deficiencies are explained below, in Part IV of this document, entitled "What Action Is EPA Taking." Therefore, EPA is conditionally approving a revision to the SIP that includes specified sections of Michigan's PSD construction permit program, with the exception of the proposed disapproval of Michigan Rule R 336.2816.

The requirement to provide at least 30 days notice before a rule becomes effective comes from the Administrative Procedures Act (APA), which governs all Federal rulemaking, not just EPA rulemaking. Section 553(d) of the APA provides that set

[T]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) A substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) Interpretative rules and statements of policy; or
- (3) As otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. 553(d)(1)–(3).

In rulemaking, exemptions from APA requirements are to be interpreted narrowly, not broadly. The commenters have not shown “good cause,” which, in this case, would be a demonstration of what actual hardship they would face as a result of a 30-day effective date. In the context of adoption of a State program, such as this, which essentially mirrors a Federal program, it is difficult to conceive of situations that would actually present such good cause.

Arguments for rushing the new program into place imply that the new program is less stringent than the existing Federal rules, and undercut the rationale for approving it.

Considerations supporting the 30 day notice period include: Providing advance notice to the regulated community and the public of the legal and practical requirements under the regulations, giving MDEQ time to get ready to implement the program, giving EPA time to work out the protocol of reviewing the State permits, and giving Michigan sources advance notice of which rules will apply and where their applications should be submitted. We find that the reasons listed by the commenters do not constitute a “good cause” to deviate from the general rule of section 553 of the APA. Therefore, the effective date of this rule is 30 days after the publication. Additionally, the commenter urges EPA to adopt an effective date concurrent with signature because this approach was followed by EPA in its conditional approval of the Ohio PSD SIP (66 FR 51570, October 10, 2001). The commenter is mistaken. In the case of the Ohio PSD SIP, the approval was not effective until the conditions were actually determined to be fulfilled, which would have taken more than 30 days.

*Comment 2:* One group of commenters requested that EPA deny approval of Michigan’s current PSD SIP revision, require the State to resubmit a

revision with materials addressing the comments made, and impose appropriate conditions on any subsequent approval.

*Response:* EPA acknowledges receipt of the comments and has addressed them specifically below (Comments A through F). As explained in EPA’s response to Comment D.2, in a separate action EPA is proposing disapproval of Michigan Rule R 336.2816 (Sources Impacting Federal Class I Areas—additional requirements).

*Comment A:* The commenters requested that EPA should make explicit in its approval that provisions in the Michigan SIP concerning best available control technology (“BACT”) analysis and air quality analysis, 40 CFR 51.166(j) and (m), apply to construction of any new major stationary source or major modification that would result in any emissions of particulate matter of less than or equal to 2.5 micrometers in diameter (PM<sub>2.5</sub>), carbon dioxide, and/or other greenhouse gases (GHG), based on the definitions of “significant” and “regulated New Source Review (NSR) pollutant” contained in the Federal regulations.

*Response:* The minimum program requirements at 40 CFR 51.166 do not require States to designate individual pollutants as being covered by their PSD programs. As long as States adopt regulations that meet the requirements of 40 CFR 51.166 and their regulations include the pollutants covered by our definition of “regulated NSR pollutant” at 40 CFR 51.166(b)(49), then the State has satisfied the requirements for SIP approval. The definition of “regulated NSR pollutant” in Michigan Rule R 336.2801(nn) follows the Federal definition.

The BACT requirement set forth in 40 CFR 51.166(j) applies to each regulated NSR pollutant covered by the definition at 40 CFR 51.166(b)(49), and Michigan’s submission is consistent with the requirement. In addition, EPA construes the air quality analysis requirement set forth in 40 CFR 51.166(m) to apply only to regulated NSR pollutants. The regulation at 40 CFR 51.166(m)(1)(a)–(b) indicates that the air quality analysis needs to cover the pollutants that a new major source would have the potential to emit in significant amounts and each pollutant for which a major modification would result in a net significant emissions increase. EPA’s definition of “major stationary source,” “major modification,” “net emissions increase” and “significant,” each refer to emissions of regulated NSR pollutants. 40 CFR 51.166(b)(1), (2), (3), and (23). Since the applicability of 40 CFR 51.166(m) cannot be determined

without reference to these other definitions, we construe 40 CFR 51.166(m) to apply to regulated NSR pollutants as well. Michigan’s program satisfies the requirements of 40 CFR 51.166(m), as interpreted by the Agency.

On May 16, 2008, EPA finalized a specific regulation addressing implementation of the NSR program for PM<sub>2.5</sub>, which became effective on July 15, 2008. (73 FR 28321, May 16, 2008). Section V.H. of the preamble to the regulation discusses the process for transitioning State PSD programs to address PM<sub>2.5</sub>. (73 FR 28340, May 16, 2008). Michigan submitted its PSD program for approval to EPA prior to the publication of the implementation rule on May 16, 2008. The SIP revision that we are conditionally approving today does not specifically address the EPA PM<sub>2.5</sub> rulemaking that became effective on July 15, 2008. Michigan has assured us that it has the authority under its SIP provisions to implement the PSD program for PM<sub>2.5</sub>, and that it intends to do so. Michigan is currently drafting revised regulations to address the PM<sub>2.5</sub> rulemaking. EPA will act on those revisions when the State formally submits them as SIP revisions.

*Comment B:* The commenters requested that EPA should not approve the SIP revision until it undertakes the Section 7 consultation under the Endangered Species Act (“ESA”) to determine whether the proposed approval of major changes to the State’s PSD permit program may affect any listed species. In addition, these commenters request that EPA retain its ESA oversight obligations under the Act.

*Response:* EPA disagrees with the commenters. Recent Supreme Court precedent has confirmed that the ESA requirements cited in the comments do not apply to EPA’s decision to approve the PSD rules into a State’s Federally authorized CAA program.

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 *National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) (*Defenders of Wildlife*), 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. 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 are 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). 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, and Title I, Part C of the CAA does not explicitly state that consideration of the impacts on listed species is a required factor in SIP approval decisions. EPA's action on State SIP submittals is governed by section 110 of the Act, which unequivocally directs EPA to approve State plans meeting applicable CAA requirements.

EPA recognizes that it exercises some judgment when evaluating whether a SIP submittal meets specific statutory criteria. However, as the Supreme Court held in *Defenders of Wildlife*, the use of

such judgment does not allow the Agency "the discretion to add another entirely separate prerequisite"—such as the ESA Section 7(a)(2) consultation requirements—to the list of required criteria EPA considers when determining whether it "shall approve" a SIP revision request. 127 S. Ct. at 2537. 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 MDEQ has submitted a SIP revision request to incorporate the PSD rules 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 condition the State's SIP revision request based on concerns for listed species, and the ESA requirements cited by the commenters are thus inapplicable to this approval action.

*Comment C:* Some commenters requested assurance that EPA's approval of the PSD revisions would not diminish Federal authority pursuant to Title V of the CAA to review, object to, or deny issuing an operating permit where the state has issued a permit under its federally approved SIP.

*Response:* Following approval of the Michigan's PSD revisions, EPA retains its authorities and obligations under Title V.

*Comment D:* Some commenters expressed concern over MDEQ's commitments made in its November 30, 2007, letter to EPA. Specifically, the concerns are related to the definitions of "replacement unit" and "potential to emit," and the mechanism by which the FLM may present to a State a demonstration of impacts of air quality-related values from proposed sources or modifications. The responses to these two comments follow (*Response D:1* and *Response D:2*).

*Response D.1:* Regarding the missing definition of "replacement unit," Michigan committed in a letter to EPA, dated May 17, 2007, to follow the Federal definition of "replacement unit" (40 CFR 51.166(b)) in its implementation of these rules, and to add the definition to the state rules in a future rulemaking.

Regarding the definition of the terms "potential to emit" and "legally enforceable" in the Michigan SIP rules, commenters requested that MDEQ provide to EPA a clear definition of these terms. EPA agrees with the commenters.

The MDEQ's definition of "potential to emit" (Michigan Rule R 336.2801(hh)) follows the Federal definition, except instead of "federally enforceable" the Michigan rules use the more general term "legally enforceable." Michigan has committed, in its letter to EPA, dated September 11, 2007, to define the term "legally enforceable" to mean "legally and practically enforceable by the Administrator, a state or local air pollution agency," consistent with the Interim Policy dated January 22, 1996, and to revise the rule to make it consistent with this definition. In a subsequent letter to EPA, dated November 30, 2007, MDEQ committed to add this definition to its rules no later than one year after EPA's conditional approval of the State's PSD SIP. A final approval relies on MDEQ's commitment to submit a clear definition of "legally enforceable."

*Comment D.2:* The Consolidated Commenters requested that EPA deny approval of Michigan's current PSD SIP revision until the State promulgates rule corrections to ensure that its regulations implementing the special requirements for sources impacting Class I areas are consistent with Federal requirements found at 40 CFR 51.166(p). The commenters assert that Michigan's current regulation to implement this provision (found at Michigan Rule R 336.2816) diminishes the role of the FLM in the State's permitting process. The commenters urge EPA to ensure that the State program provides, at a minimum, that: The FLM will receive timely written notice of proposed PSD permits that may affect the FLM's Class I area; the FLM will be provided with all relevant information to assess anticipated impacts to the Class I area; and the State will consult with the FLM regarding potential adverse impacts, and providing public notice and opportunity to comment on any FLM adverse impact findings and the State's response.

*Response D.2:* EPA agrees that a federally approved SIP must meet the minimum requirements set forth in 40 CFR 51.166(p) which: Requires that a PSD permitting authority transmits to EPA copies of permit applications and related documents for major sources and major modifications; provides for a process by which a FLM may present his or her comments, findings, and certifications relating to such draft permit applications to the State; and provides for a process by which the State consults with such FLM. The State has committed to incorporating the requirements of 40 CFR 51.166(p) into its PSD SIP rules via letter to EPA, dated November 30, 2007. In order to keep the Federally delegated requirements under

40 CFR 51.166(p) in place until Michigan has revised its rules to add these requirements and EPA has approved them into the SIP, EPA is proposing, in a separate notice, disapproval of Michigan Rule R 336.2816. In that same proposed disapproval notice, EPA is also proposing in the alternative to approve such rules once they are properly promulgated and submitted.

40 CFR 51.166(p) sets out those requirements that apply to major sources or major modifications that will affect Class I areas. This section contains both requirements for State plans and optional provisions. Pursuant to 40 CFR 51.166(p)(3), the State plan must provide a mechanism whereby the FLM may

present to the State \* \* \* a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any Federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the State concurs with such demonstration, the reviewing authority shall not issue the permit. 40 CFR 51.166(p)(3).

As submitted, Michigan's Rule R 336.2816 did not contain an equivalent to this required provision. Additionally, EPA sought clarification from the State as to how it planned to implement certain State rules corresponding to the variance provisions contained in 40 CFR 51.166(p)(4), (5), and (6).

On November 30, 2007, Michigan provided suggested rule clarification language to address both the lack of an equivalent to 40 CFR 51.166(p)(3) and how the State intends to implement the variance provisions in 40 CFR 51.166(p)(4), (5), and (6). Michigan also provided its commitment to promulgate these changes into its PSD regulations within one year of EPA's action on Michigan's PSD SIP submittal.

Because the State program currently lacks a functional equivalent to 40 CFR 51.166(p)(3), EPA cannot conditionally approve Michigan's Rule R 336.2816 without creating a regulatory gap. Therefore, by separate notice today, EPA is disapproving Michigan's Rule R 336.2816, and Michigan will retain federal delegation of this provision until such time as the State promulgates and EPA has approved the corrective rules it has proposed in its November 30, 2007 letter. Retention of the delegated program until such time as Michigan promulgates a corrective rule will ensure that the provisions of 40 CFR

51.166(p) will continue to apply, thereby avoiding any regulatory gap, and ensuring full participation of the FLM, as appropriate, in State permitting decisions.

The commenters also request that EPA provide public notice and opportunity for comment on any adverse finding made by an FLM, in addition to making public the State's decision on such finding. EPA's responsibilities regarding State permit actions that may impact Class I areas are set forth in Section 165(d) of the CAA, 42 U.S.C. 7475(d). EPA's functions include providing notice to FLMs of permit applications, consulting with FLMs regarding the potential impact of a proposed source on AQRVs, and coordinating with the State regarding issuance (or non-issuance) of permits. Information developed during this process is part of the public docket for permit issuance, and as such would be available to the public. Additionally, the regulations require public notice and comment, and the opportunity for a public hearing, on State proposed permits. Together these provisions enable fully informed public participation in State permit issuance. These provisions apply nationwide, and commenters have not shown why more should be required from Michigan here.

*Comment E:* The commenters asked EPA not to approve the PSD SIP until MDEQ demonstrates that the current fiscal situation of the State government and its agencies will not hinder the implementation of the PSD program. These commenters provide examples of current State funding problems, including the small portion of the State's overall budget that is devoted to environmental protection, the sunset of State environmental fee programs, and projected shortfalls in the State's ability to fund environmental programs.

*Response:* EPA agrees that the CAA requires the States to provide the "necessary assurances" that they are able to carry out the implementation of SIP requirements through adequate staffing and funding. 42 U.S.C. 7410(a)(2)(E), CAA section 110(a)(2)(E). MDEQ already implements the federal PSD program within the State. EPA finds that a demonstration of current fiscal capabilities is not necessary. There is no evidence that MDEQ has encountered financial difficulties in carrying out the PSD program. Moreover, because MDEQ is already implementing the program based on the Federal delegation of authority, these rules are not expected to result in additional costs for MDEQ.

The Consolidated Commenters enclosed a copy of a September 2007

Report by the Southeast Michigan Council of Governments titled "Funding Environmental Protection in Michigan: The Need for Change," which, among other things, describes how funding sources for environmental protection programs in Michigan have shifted their priorities. Nevertheless, the overall funds available to MDEQ, as portrayed in this report, appear to have increased slightly. While EPA is aware that environmental regulators at the State level must make many difficult decisions between competing priorities in the allocation of available resources, EPA cannot conclude on the basis of this comment that Michigan is unable to fund its PSD program.

*Comment F:* The commenters request a shorter deadline for State adoption of SIP Rules meeting the terms of conditional approval (namely, 6 months instead of 1 year).

*Response:* EPA disagrees with the comment. Under section 110(k)(4) of the CAA, EPA may conditionally approve a SIP revision based on a commitment from the State to adopt specific enforceable measures by a date certain that is no more than one year from the date of conditional approval. According to Michigan's rulemaking process, the rules have to go through several State agencies, such as the Michigan Legislature's Joint Committee on Administrative Rules and the State Office of Administrative Hearings and Rules, and be open for public comments for at least 30 days; then after the public comment period closes, the state must respond to comments. This procedure reasonably would take more than 6 months. In a letter dated November 30, 2007, MDEQ committed to adopt the revised rules, subject to the conditional approval, no later than one year after EPA's conditional approval of the State's PSD SIP. This one year commitment is reasonable here and the final approval relies on this commitment.

*Comment 3:* Some commenters requested that the PSD delegation agreement between MDEQ and EPA be terminated when EPA issues the final approval of PSD program.

*Response:* EPA agrees with the commenters, with one exception (relating to Michigan Rule R 336.2816). 40 CFR 52.02 and 40 CFR 52.21(a)(1) provide that EPA's delegation will not apply at such time as when the State's SIP is approved. In a similar situation to Michigan's, EPA's recent approval of South Dakota's PSD SIP (72 FR 72617, December 21, 2007) also includes a clear statement rescinding the prior delegation agreement. The one exception to the termination of EPA's

delegation of the PSD program in Michigan is, as discussed elsewhere in this notice, the Federal delegation for the requirements at 40 CFR 51.166(p), which is to remain in place until an equivalent State provision is approved into the Michigan SIP.

*Comment 4:* One commenter requested that EPA explicitly state in this notice that parties seeking to appeal PSD permits issued by the State under a Federally approved program must go through procedures contained in Michigan's laws and rules, and not appeal through Environmental Appeal Board (EAB).

*Response:* EPA agrees with the commenter, with the exception of those provisions Michigan will continue to retain as a Federally delegated program (See proposed partial disapproval of Michigan Rule R 336.2816 pursuant to a separate notice published today). For permits issued by the State under the rules covered by this conditional approval, appeals will not be made to the EAB; rather, such appeals will be subject to the opportunity for review and appeal procedures provided under the State law. Michigan's Rule R 336.2830 is intended to provide a parallel appeal procedure to the procedure that is currently in place for the Federal PSD program in Michigan under the regulation at 40 CFR part 124. The rule creates a right to an administrative hearing before a state administrative law judge that is similar to the current appeal rights under the Federal PSD permitting program. This rule was not submitted as part of Michigan's PSD SIP. Therefore, EPA is not taking action on Michigan Rule R 336.2830. However, EPA finds the State appeal process sufficient to conditionally approve the specified parts of the PSD program as submitted. An appeal of any permit requirement(s) under 40 CFR 51.166(p) would still need to be brought before the EAB until a replacement State regulation is approved into the SIP. Depending on other permit issues on appeal, the EAB can decide how to best structure such appeal.

*Comment 5:* One commenter expressed concern that the requirements of Michigan Rule R 336.2818 (Source Obligation) are more stringent than the Federal requirements, and requested that EPA allow MDEQ to review its rules and adopt the new rule in its next submittal. The commenter also suggested EPA issue a direct final rule to approve this aspect of the regulation.

*Response:* Michigan Rule R 336.2818 places specified requirements upon the PSD permit applicant, including recordkeeping requirements for

applicants using certain methods for determining if a project results in a significant emissions increase.

On December 31, 2002, EPA published revisions to the Federal PSD and non-attainment NSR regulations. These revisions are commonly referred to as "NSR Reform" regulations and became effective on March 3, 2003. These regulatory revisions include provisions which require a source to follow the recordkeeping and reporting requirements in this section if there is a "reasonable possibility" that a source may exceed the projected actual emissions (40 CFR 51.166(r)(6)). The "reasonable possibility" clause of this provision of the Federal rule was remanded to EPA in the June 24, 2005, D.C. Circuit Court ruling in *State of New York et al. v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). At the time of Michigan's PSD SIP submittal, EPA had responded to the remand order. However, the MDEQ's minor source permitting program—Michigan Rule R 336.201—requires this information to be submitted for all sources as part of a complete Permit To Install application before beginning actual construction on the proposed project (not just where there is a "reasonable possibility" that the source may exceed the projected actual emissions). Because this is more stringent than the Federal requirement, we approve this approach. All other requirements of Michigan Rule R 336.2818 are consistent with 40 CFR 51.166(r). At this time Michigan has made no request to adopt different language than what the state already requires for this rule.

#### V. What Action Is EPA Taking?

EPA is conditionally approving specified revisions to Michigan's SIP to include the State's PSD construction permit program.

#### *What Is the Effect of Conditional Approval?*

Pursuant to section 110(k)(4) of the CAA, EPA may conditionally approve a portion of a SIP revision based on a commitment from the State to adopt specific, enforceable measures no later than twelve months from the date of final conditional approval. The State must only provide the rule changes, not a new SIP submittal to EPA for approval. If the State fails to commit to undertake the necessary changes, or fails to actually make the changes within the twelve month period, EPA would subsequently publish a notice in the **Federal Register** providing notice and details of such disapproval. EPA is not required to separately propose a finding of disapproval. If Michigan

submits final and effective rule revisions correcting the deficiencies, as discussed above, within one year from this conditional approval becoming final and effective, EPA will publish a subsequent notice in the **Federal Register** to acknowledge conversion of the conditional approval to a full approval.

#### *What Is Our Basis for Conditional Approval of Michigan's Rules?*

EPA has identified several deficiencies that need to be corrected in Michigan's rules so that the rules are approvable. The deficiencies referenced above are summarized below.

*Issues regarding definitions:* In its May 17, 2007, letter to EPA, Michigan committed to follow the Federal definition of "replacement unit" (40 CFR 51.166(b)(7)) in its implementation of these rules, and to add the definition to the state rules in a future rulemaking. For the definition of "potential to emit" (Michigan Rule R 336.2801(hh)), Michigan follows the Federal definition, except instead of "federally enforceable," the Michigan rules use the more general term "legally enforceable." Michigan has committed, in its September 11, 2007 letter to EPA, to define the term "legally enforceable" to mean "legally and practically enforceable by the Administrator, a State or local air pollution agency," consistent with the Interim Policy dated January 22, 1996.

*Issues regarding FLM authority:* The State's current Michigan Rule R 336.2816 does not include an equivalent State provision to 40 CFR 51.166(p), which sets out the mechanisms which facilitate the participation of the FLM in the State's permitting process for purposes of protecting either the increment or the AQRVs associated with a Class I area from potential impacts from a proposed major source or major modification. Therefore, this provision of the State rule is subject to the proposed partial disapproval set forth in a separate rulemaking notice. A partial disapproval of this section would keep the Federal delegation to Michigan in place to implement 40 CFR 51.166(p) until an equivalent State provision is approved into the SIP. The deficiencies being addressed in this rulemaking are described in more detail in Part III of 73 FR 1570, January 9, 2008.

#### 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 Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a).



Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the 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) 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. Nevertheless, EPA notified Michigan tribal environmental staff for the respective Michigan tribes of the proposed conditional approval via email message of November 29, 2007, and invited them to seek more information and to submit comments during the public notice and comment period for the proposed conditional approval.

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 November 17, 2008. 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, nor will it 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.

Date: August 25, 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 X—Michigan

■ 2. A new § 52.1188 is added to read as follows:

##### § 52.1188 Conditional approval.

The plan commitments listed below were submitted on the dates specified.

(a) On December 21, 2006, the State of Michigan submitted to EPA Michigan Air Pollution Control Rules, Part 18, Rules R 336.2801 [(a) through (tt)

[except for (j) and (ff)] to R 336.2819 and R 336.2823(1) to (14) ("Part 18"), for inclusion in the SIP. Part 18 relates to the PSD permit program of the state of Michigan. Revisions to Part 18 were adopted by MDEQ on December 4, 2006. On January 9, 2008, EPA proposed to conditionally approve the PSD SIP rules under section 110 of the CAA. On September 16, 2008 EPA conditionally approved the revisions to Part 18.

(b) The conditional approval is based on the commitment from the State to adopt specific enforceable measures by a date certain that is no more than twelve months from the date of the conditional approval. The deficiencies that need to be corrected in Michigan's rule so that the rule is approvable include two missing definitions. In a separate action also published September 16, 2008, EPA is proposing to disapprove Michigan Rule R 336.2816, which is also included in the State's December 21, 2006, PSD program submission. This rule sets out the mechanisms which facilitate the participation of the FLM in the State's permitting process for purposes of protecting either the increment or the AQRVs associated with a Class I area from potential impacts from a proposed major source or major modification. Michigan will retain its Federal delegation of authority under 40 CFR 52.21(p) until such time as the State submits promulgated rules equivalent to 40 CFR 51.166(p) and those rules are approved into its SIP.

(c) In its May 17, 2007, letter to EPA, Michigan committed to follow the Federal definition of "replacement unit" (40 CFR 51.166(b)(7)) in its implementation of these rules, and to add the definition to the state rules in a future rulemaking. For the definition of "potential to emit" (Michigan Rule R 336.2801(hh)), Michigan follows the Federal definition, except instead of "federally enforceable," the Michigan rules use the more general term "legally enforceable." Michigan has committed in its September 11, 2007, letter to EPA, to define the term "legally enforceable" to mean "legally and practically enforceable by the Administrator, a state or local air pollution agency," consistent with the Interim Policy dated January 22, 1996.

(d) The State must only provide the rule changes, not a new SIP submittal to EPA for approval. If the State fails to actually make the changes within the twelve month period, EPA would subsequently publish a notice in the **Federal Register** providing notice and details of such disapproval. If Michigan submits final and effective rule revisions correcting the deficiencies, as

discussed above, within one year from this conditional approval becoming final and effective, EPA will publish a subsequent notice in the **Federal Register** to acknowledge that Michigan has met the criteria of the conditional approval and to inform the public about the conversion of the conditional approval to a full approval.

[FR Doc. E8-21209 Filed 9-15-08; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2007-0603; FRL-8713-6]

#### Approval and Promulgation of Air Quality Implementation Plans; Louisiana; Approval of Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for the New Orleans Ozone Maintenance Area

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is approving this revision to the Louisiana State Implementation Plan (SIP) concerning the maintenance plan addressing the 1997 8-hour ozone standard for the New Orleans Ozone Maintenance Area. On June 29, 2007, the State of Louisiana submitted a maintenance plan for the New Orleans Ozone Maintenance Area, which includes the parishes of Jefferson, Orleans, St. Bernard and St. Charles, which ensures continued attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) through the year 2014. This maintenance plan meets the statutory and regulatory requirements, and is consistent with EPA's guidance. EPA is approving the revision pursuant to section 110 of the Federal Clean Air Act (CAA). On March 12, 2008, EPA issued a revised ozone standard. Today's action, however, is being taken to address requirements under the 1997 ozone standard. Requirements for the New Orleans area under the 2008 standard will be addressed in future actions.

**DATES:** This rule is effective on November 17, 2008 without further notice, unless EPA receives relevant adverse comment by October 16, 2008. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-

OAR-2007-0603, by one of the following methods:

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

- *EPA Region 6 "Contact Us" Web site:* <http://epa.gov/region6/r6coment.htm>. Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

- *E-mail:* Mr. Guy Donaldson at [donaldson.guy@epa.gov](mailto:donaldson.guy@epa.gov). Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), at fax number 214-665-7263.

- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

Such deliveries are accepted only between the hours of 8 am and 4 pm weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-R06-OAR-2007-0603. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at

[www.regulations.gov](http://www.regulations.gov), 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 [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) Web site is an "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 an e-mail comment directly to EPA without going through [www.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 docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 am and 4:30 pm weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214-665-7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Louisiana Department of Environmental Quality, Public Records Center, Room 127, 602 N. Fifth Street, Baton Rouge, Louisiana 70821.

**FOR FURTHER INFORMATION CONTACT:** Ellen Belk, Air Planning Section (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-2164, fax number 214-665-7263; e-mail address [belk.ellen@epa.gov](mailto:belk.ellen@epa.gov).

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

#### Outline

- I. Background
- II. Analysis of the State's Submittal
- III. Final Action
- IV. Statutory and Executive Order Reviews

#### I. Background

Under section 107 of the 1977 CAA, Louisiana's New Orleans Ozone Maintenance Area, which includes the