On November 23, 2018 the submittal for MDAQMD Rule 1160 was deemed by operation of law to meet the completeness criteria in 40 CFR part 51

Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved an earlier version of Rule 1160 into the SIP on November 1, 1996 (61 FR 56470).
C. What is the purpose of the submitted rule revision?

Emissions of NOx contribute to the production of ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control NOx emissions. Rule 1160 regulates NOx emissions from stationary internal combustion engines. In the District’s reasonably available control technology (RACT) SIP for the 2008 National Ambient Air Quality Standards (NAAQS), the District concluded that Rule 1160 did not meet current RACT and acknowledged the need to revise the rule, primarily the limits for NOx, in order to implement RACT.1 The submitted rule revisions are intended to strengthen the rule by, among other things, strengthening the NOx limits in the rule, in order to implement current RACT. The EPA’s technical support document (TSD) has more information about this rule.

II. The EPA’s Evaluation and Action

A. How is the EPA evaluating the rule?

Rules in the SIP must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater emissions reductions (see CAA section 193).

Generally, SIP rules must require RACT for each major source of NOx in ozone nonattainment areas classified as moderate or above (see CAA sections 182(b)(2) and 182(l)). The MDAQMD regulates an ozone nonattainment area classified as Severe-15 for the 2008 8-hour ozone NAAQS and the 2015 8-hour ozone NAAQS (40 CFR 81.305). Rule 1160 regulates multiple major sources of NOx in the nonattainment area. Therefore, this rule must implement RACT.

Guidance and policy documents that we use to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:


B. Does the rule meet the evaluation criteria?

Rule 1160 improves the SIP by establishing more stringent NOx emission limits and by clarifying monitoring, recording and recordkeeping provisions. The revised rule also requires an additional ten percent reduction in allowed emissions for facilities opting to use emissions aggregation as part of an economic incentive program (EIP), consistent with the EPA’s guidance on such provisions. The rule is largely consistent with CAA requirements and relevant guidance regarding enforceability, and RACT, except for the provisions described below. The rule is also consistent with the EPA’s requirements on SIP revisions, except for the provisions described below. Rule provisions that do not meet the evaluation criteria are summarized below and discussed further in the TSD.

C. What are the rule deficiencies?

These provisions do not satisfy the requirements of section 110 and part D of title I of the Act and prevent full approval of the SIP revision.

1. MDAQMD Rule 1160 section (C)(2)(b) allows for engines to comply with an alternative emission reduction provision instead of the concentration-based emission limits for NOx. Specifically, this alternative provision allows for owners or operators of applicable equipment to submit a plan for alternative emissions reduction that would achieve an 80% or 90% reduction of emissions from a baseline emission rate. Because the rule does not clearly specify how to calculate the baseline emission rate, the rule is not sufficiently clear to constitute an enforceable emission limitation, control measure, means or technique, as required under § 110(a)(2) of the Act. The rule leaves the approval of the NOx emission reduction alternative to the District. Because the rule is not clear with respect to how to calculate the baseline emission rate, and the approval of an alternative limit is left to the District, this provision allows for overbroad discretion on the part of the Director to modify requirements of the SIP without the procedure required under § 110 of the Act. In addition, the ambiguous alternative emission reduction provision could allow many units to emit more than the concentration limit in the rule by, in some cases, more than two times. These alternative limits have not been justified as meeting the RACT requirement.

2. Under section (C)(2)(b)(iv), the alternative emission reduction option also allows for units operating at the same facility to aggregate their emissions in order to comply with the percentage reduction. This type of provision constitutes an EIP under the EPA’s 2001 policy referenced above. The rule provisions do not meet the criteria for EIP integrity because they fail to require that any excess emission reductions credited through the provision be surplus (i.e., not required by any other federally enforceable provision). This omission could allow reductions that are otherwise federally required to be aggregated and used to allow greater emissions at other units.

3. The compliance determination requirements described in section (B)(1)(c) do not require adequate source testing for emission units without emission control equipment. The requirements do not specify any frequency for testing beyond the initial compliance test, and do not specify what criteria must be met for certified manufacturer emission rates to be evidence of compliance.

D. Proposed Action and Public Comment

As authorized in sections 110(k)(3) and 301(a) of the Act, the EPA is proposing a limited approval and limited disapproval of the submitted MDAQMD Rule 1160. We will accept comments from the public on this proposal until July 1, 2021. If finalized, this action would incorporate the submitted rule into the SIP, including those provisions identified as deficient. The submitted rule would replace the existing SIP-approved version of MDAQMD Rule 1160, which would be removed from the SIP. This approval is limited because the EPA is simultaneously proposing a limited disapproval of the rule under section 110(k)(3).

If we finalize this disapproval, CAA section 110(e) would require the EPA to promulgate a general implementation plan within 24 months of the effective date of our final action unless we

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1 The EPA conditionally approved the District’s RACT SIPs for major NOx sources, based on the District’s commitment to remedy deficiencies in a set of different NOx rules, including Rule 1160. 83 FR 5921 (February 12, 2018). The District has also submitted revisions to the other NOx rules subject to the conditional approval. Because the EPA has not yet acted on these other rules, we intend to address our conditional approval of the major NOx RACT source category in a separate rulemaking once we have taken action on all of the applicable NOx rules.
approve subsequent SIP revisions that correct the deficiencies identified in section II.C of this notice.

In addition, final disapproval would trigger the offset sanction in CAA section 179(b)(2) 18 months after the effective date of a final disapproval, and the highway funding sanction in CAA section 179(b)(1) six months after the offset sanction is imposed. A sanction will not be imposed if the EPA determines that a subsequent SIP submission corrects the deficiencies identified in our final action before the applicable deadline.

Note that the submitted rule has been adopted by the MDAQMD and the EPA’s final limited disapproval would not prevent the local agency from enforcing it. The limited disapproval also would not prevent any portion of the rule from being incorporated by reference into the federally enforceable SIP as discussed in a July 9, 1992 EPA memo found at: https://www.epa.gov/sites/production/files/2015-07/documents/procsip.pdf.

III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the MDAQMD rule described in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available through www.regulations.gov and at the EPA Region IX Office (please contact the person identified in the FOR FURTHER INFORMATION CONTACT section of this preamble for more information).

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at http://www.epa.gov/laws-regulations/laws-and-executive-orders.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12666.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone. Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: May 19, 2021.

Deborah Jordan,
Acting Regional Administrator, Region IX.
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