

NR 408.06(3), and a modification significance level of 40 tpy in NR 408.02(32)(a)3.

#### 7. Lead Nonattainment NSR Requirements

The statutory permit requirements for lead nonattainment areas are generally contained in section 173, and in Subpart 5 of part D. These are the minimum requirements that States must include in an approvable implementation plan. For lead nonattainment areas, States must adopt the appropriate major source threshold, offset ratio, and significance level for modifications.

Wisconsin has established a major source threshold of 100 tpy NR in 408.02(21)(a), an offset ratio of 1 to 1 in NR 408.06(3), and a modification significance level of 0.6 tpy in NR 408.02(32)(a)6.

After consideration of the material submitted by the State of Wisconsin, USEPA has determined that the Wisconsin New Source Review rules revision satisfy the requirements for nonattainment new source review SIPs and permitting.

### III. The Wisconsin Operating Permit Program

For many years, Wisconsin has been issuing permits for major new sources and for major modifications of existing sources. Throughout this time, Wisconsin has also been issuing permits establishing limitations on the potential to emit from new sources so as to avoid major source permitting requirements. This latter type of permitting has been the subject of various guidance from the USEPA, including the memoranda entitled "Guidance on Limiting Potential to Emit in New Source Permitting" dated June 13, 1989, "Limitation of Potential to Emit with Respect to Title V Applicability Thresholds" dated September 18, 1992, and "Approaches to Creating Federally-Enforceable Emissions Limits" dated November 3, 1993.

The advent of operating permits pursuant to Title V of the ACT Amendments of 1990 has created interest in mechanisms for limiting sources' potential to emit, thereby allowing the sources to avoid being defined as "major" with respect to the Federal operating permits programs. A key mechanism for such limitations is the use of FESOPs. USEPA has issued guidance on FESOPs in the **Federal Register** of June 28, 1989 (54 FR 27274). Since operating permits are issued pursuant to a program approved by USEPA, these permits will also be enforceable by citizens pursuant to section 304 of the ACT.

On January 14, 1994, WDNR submitted the regulations, statutory changes, and administrative framework for the Operation Permits rule, NR 407, as a revision to its permit SIP. This SIP revision submittal is needed in order to make conditions in construction and operating permits federally enforceable and to create synthetic minor sources. USEPA is approving this program as meeting the five criteria articulated in the June 28, 1989 **Federal Register** notice for State operating permit programs to establish federally enforceable limits on potential to emit.

#### First Criterion

"The state operating permit program (i.e., the regulations or other administrative framework describing how such permits are issued) is submitted and approved by USEPA into the SIP."

On January 14, 1994, WDNR submitted the regulations and administrative framework for the Operation Permits rule, NR 407, as a revision to its permit SIP. USEPA's approval of this section provides legal support for the operating permit program and satisfies the first criterion.

#### Second Criterion

"The SIP imposes a legal obligation that operating permit holders adhere to the terms and limitations of such permits (or subsequent revisions of the permit made in accordance with the approved operating permit program) and provides that permits which do not conform to the operating permit program requirements and the requirements of USEPA's underlying regulations may be deemed not 'federally enforceable' by USEPA."

NR 407.09(1)(f)1 states that, "Any noncompliance with the operation permit constitutes a violation of the statutes and is grounds for enforcement action; for permit suspension, revocation or revision; or, if applicable under § 144.3925(6) Wisconsin Statutes, for denial of a permit renewal application." This satisfies the initial part of the second approval criterion in that the operating permit holder is considered in violation of the code if the holder does not abide by the permit conditions.

The latter part of the second approval criterion requires that the SIP have provisions which allow USEPA to deem a permit not "federally enforceable" under certain conditions. NR 400.02(39m) defines "federally enforceable" as "all limitations and conditions which are enforceable by the Administrator of the U.S. Environmental Protection Agency,

\* \* \* and requirements in operating permits issued pursuant to NR 407 and title V of the Federal clean air act which are designated as federally enforceable." Under NR 407.09(3), all terms and conditions in an operation permit, including any provisions designed to limit a stationary sources potential to emit, are enforceable by the Administrator under section 113(a) of the ACT. In approving the State operating permit, USEPA is determining that Wisconsin's program allows USEPA to deem an operating permit not "federally enforceable" for purposes of limiting potential to emit and to offset creditability. Such a determination will (1) be done according to appropriate procedures, and (2) be based upon the permit, permit approval procedures or permit requirements which do not conform with the operating permit program requirements and the requirements of USEPA's underlying regulations. Based on this interpretation of Wisconsin's program, USEPA finds that the second criterion for approving an operating permit program has been met by the State.

#### Third Criterion

"The State operating permit program requires that all emissions, limitations, controls and other requirements imposed by such permits, will be at least as stringent as any other applicable limitation or requirement contained in the SIP or enforceable under the SIP, and that the program may not issue permits that waive, or make less stringent, any limitation or requirement contained in or issued pursuant to the SIP, or that are otherwise 'federally enforceable' (e.g., standards established under sections 111 and 112 of the Act)."

Under NR 407.09(3)(b), the department shall specifically designate as not federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act, under the Act's applicable requirements or under the SIP. This provision requires that State permits comply with the provisions of the ACT and Federal regulations adopted pursuant to the ACT. Based on these provisions, USEPA has determined that the State authority to grant permits is properly restrained by the terms of the SIP, as required by the third criterion.

#### Fourth Criterion

"The limitations, controls, and requirements in the operating permits are permanent, quantifiable and otherwise enforceable as a practical matter."

USEPA has reviewed the Wisconsin operating permit program and is