

deliberately “game” the system by projecting excessive activity by a unit with a reduced emissions rate. In the situation where non-compliance occurs because a unit has a lower-than-projected activity level, emissions will be lower than projected. This situation is of less concern if the activity levels projected are reasonable and similar to those of previous years, than if intentionally-erroneous significant growth in activity levels were projected. In the latter situation, emissions could increase even if activity levels are lower than the inflated projections of the averaging plan. It is important to note that it is a violation of the NO<sub>x</sub> averaging rules to exceed the allowable aggregate emissions rate, regardless of whether total emissions are greater or less than projected.

*Comment:* “Wisconsin’s air management program is already understaffed and under-funded,” is late in issuing permits, and is having difficulty ensuring compliance with the Title V program. “Even if DNR staff review of averaging plans could adequately address the concerns in EPA guidance, air management staff are not in a position to adequately complete this task.”

*Response:* The staff time required to verify that a small number of averaging plans contain reasonable projections of activity levels is minimal. EPA is confident that Wisconsin staff can perform this function, regardless of staffing and funding problems that may affect the Title V program.

*Comment:* A company operating a high-emissions unit cannot ensure that sufficient reductions exist unless it controls the low emission unit creating those credits. The fact that eligible facilities operate close to capacity is irrelevant, since activity levels can change.

*Response:* The commenter is correct that in averaging plans involving multiple owners, the ability to comply of all participants in the averaging plan can be compromised if the owner of the unit with a reduced emission rate does not maintain sufficient activity level. Averaging plan participants must take the risk of failing to comply with the averaging plan as a result of unexpected reductions in activity level by sources with reduced emissions rates. EPA could bring enforcement actions for such non-compliance, even though non-compliance with the emissions rate would be accompanied by lower actual emissions than projected.

*Comment:* The proposed SIP fails to indicate that all units participating in an averaging plan are in violation each and every day within the plan’s averaging

period if the aggregate NO<sub>x</sub> emissions exceed the averaging plan’s emission limits, multiplied by the number of participating units, as required under the EIP guidance.

*Response:* NR 428(j) states that “all emissions units participating in an ozone season NO<sub>x</sub> emissions averaging program may be considered out of compliance” if the averaging plan aggregate emissions rate or emissions cap is exceeded. Furthermore, “each emissions unit is considered out of compliance for each day of non-compliance until corrective action is taken to reduce emissions and achieve compliance.” In the case of a violation of the averaging plan’s aggregate emission rate or emissions cap, these provisions would give Wisconsin the ability to bring enforcement actions for violations for each participating unit, for each day during the ozone season up to the point when corrective action was taken. These provisions provide significant deterrence, are consistent with the requirements of the Clean Air Act and Title V regulations, and are substantially consistent with the EIP guidance. While the EIP guidance might be interpreted to indicate that a source may be in violations for each day of the ozone season even after corrective action is taken, EPA is willing to be flexible on this point.

*Comment:* The proposed rules do not indicate that source shutdowns and production activity curtailments are not eligible as emission reductions, nor that a source’s emissions reductions must be “permanent,” as required under the EIP.

*Response:* Given the structure of Wisconsin’s averaging program, such provisions against counting source shutdowns and curtailments are unnecessary, and not required under the EIP. In Wisconsin’s averaging program, compliance depends on emissions rates, not total emissions. Therefore, shutdowns and curtailments intrinsically do not generate reductions that can be used in averaging programs. Regarding the permanence of emissions reductions, the EIP states that “permanent” means that a source “commits to actions or achieves reductions for a future period of time as defined in the EIP” (EIP Guidance, Section 4.2(a)). In Wisconsin’s program, sources must commit to making reductions during the period defined by the NO<sub>x</sub> reduction rules—the ozone season. Thus, averaging plans in Wisconsin must use reductions that meet the EIP’s general definition of permanent. The EIP also provides an additional definition of permanent specifically for averaging. In addition to the general definition, in an averaging

program “the source’s emission reduction must last throughout the life of the program defined in the SIP” (EIP Guidance, Table 4.3(b)). If “the life of the program” is defined as the period of time during which the program will be in operation, then Wisconsin’s program, which has an indefinite life, would not seem to meet this requirement.

However, EPA believes that a more reasonable interpretation is that the reduction must last through a time period defined by the program—the ozone season. In this case, Wisconsin’s program does require permanent reductions.

*Comment:* The proposed SIP revision would allow geographic shifting of emissions without protecting communities of concern from emissions increases, as required under the EIP. In addition, EPA should determine whether the proposed SIP revision satisfies the environmental justice requirements in Executive Order 12898.

*Response:* The EIP does not require special protections for communities of concern in trading or averaging programs that involve emissions of NO<sub>x</sub>, because NO<sub>x</sub>, unlike volatile organic compounds, is not a pollutant that raises significant concerns about localized impacts. NO<sub>x</sub> emissions impact regional concentrations of ozone, but do not cause elevated ozone concentrations on a local level. NO<sub>x</sub> emissions are also associated with emissions of nitrogen oxides (NO<sub>2</sub>), a criteria pollutant for which the Clean Air Act provides a variety of protections for local communities. Wisconsin has no NO<sub>2</sub> nonattainment areas, and any significant increases in NO<sub>2</sub> emissions at sources subject to the averaging plan would be subject to New Source Review. Since the averaging program creates no adverse local impacts, there is no potential to create “disproportionately high and adverse human health or environmental effects \* \* \* on minority populations and low-income populations,” as addressed in Executive Order 12898.

*Comment:* Wisconsin’s NO<sub>x</sub> averaging rule “may frustrate the state’s new 8-hour attainment needs”. EPA should disapprove this SIP revision until Wisconsin submits an 8-hour attainment demonstration plan.

*Response:* The NO<sub>x</sub> averaging rule is a necessary component of Wisconsin’s NO<sub>x</sub> control rules, which will reduce NO<sub>x</sub> emissions and contribute to reductions in ambient ozone concentrations. The rule contributes to Wisconsin’s efforts to meet the 8-hour attainment standard; it does not frustrate them.