



INSTITUTE FOR
REFORMING GOVERNMENT

FEDERALISM IN PRACTICE:

STRENGTHENING STATE OVERSIGHT OF CLEAN AIR ACT IMPLEMENTATION PLANS



A REPORT BY



INSTITUTE FOR
REFORMING GOVERNMENT

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ABOUT THE INSTITUTE FOR REFORMING GOVERNMENT

The Institute for Reforming Government, along with its partner organization IRG Action Fund, is focused on developing free-market and limited-government reforms, taking action on them, and getting results for Wisconsin. Founded in 2018, IRG has quickly grown into one of the state's largest think tanks, boasting an elite policy team with decades of experience in state and federal government, trade associations, and statewide campaigns. Most importantly, IRG gets results for the conservative movement in Wisconsin.

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Executive Summary

Every state is required to submit a State Implementation Plan (“SIP”) to the Federal Environmental Protection Agency (“EPA”) with regulations that implement the standards of the Clean Air Act. Revisions to Wisconsin SIPs are proposed by the Wisconsin Department of Natural Resources (the “Department” or “DNR”) and go through a review process conducted by the Legislature. It is crucial that revisions, which affect Wisconsin businesses and families, go through strong oversight from the Legislature to ensure that they avoid evolving into unduly burdensome regulations and unjust policies.

As detailed below, IRG has identified eleven recent SIP revisions to determine the strength of the oversight exercised by the Wisconsin Legislature. Each clearinghouse rule has been given an “Oversight Strength” grade. This grade was determined by three common sense benchmarks: (1) Whether a public hearing was held and attended by any members of the committee or council staff; (2) Whether the committee or council took an executive action; and (3) Whether any modifications were made to the revision during the legislative oversight process. Scores were based on oversight strength - Zero Benchmarks achieved: Weak; One Benchmark achieved: Mediocre; Two Benchmarks achieved: Fair; All Benchmarks achieved: Strong.

The overall health of oversight gleaned from these eleven revisions is **concerning**. Eight out of eleven, roughly 73%, of the analyzed revisions did not achieve any of the three legislative oversight benchmarks. The Legislature did not take executive action on these eight, did not modify any of them, and did not hold a public hearing, or if a hearing was held, none of the committee members attended the hearing.

The report concludes with legislative recommendations to increase oversight of the SIP process.

In addition to reforms at the state level, with the incoming Trump Administration and likely full control of Congress by Republicans, opportunities may present themselves to reform the Clean Air Act, providing states with more flexibility to implement requirements under the Act that better fit state capabilities. The threat of federal implementation plans should not be used as leverage to force the adoption of state implementation plans that exceed state capabilities and/or result in significant economic impacts and implementation costs.

Background

According to the Congressional Research Service:

The Clean Air Act was first enacted in 1955, with major revisions in 1970, 1977, and 1990. The act requires EPA to set health-based standards for ambient air quality; sets deadlines for the achievement of those standards by state and local governments; requires EPA to set national emission standards for large or ubiquitous sources of air pollution, including motor vehicles, power plants, and other industrial sources; mandates emission controls for sources of 187 hazardous air pollutants; establishes a cap-and-trade program to limit acid rain; requires the prevention of significant deterioration of air quality in areas with clean air; requires a program to restore visibility impaired by regional haze in national parks and wilderness areas; and implements the Montreal Protocol to phase out most ozone-depleting chemicals.¹

The Clean Air Act was a first-of-its-kind act in which the federal government laid down air quality standards for all 50 states. The Act requires states to submit a SIP which the EPA can either approve or deny. If denied, a Federal Implementation Plan (“FIP”) may be implemented in its place². Therefore, it is the responsibility of states to create a satisfactory SIP in order to achieve the federal standard or else face the consequence of being subject to an externally imposed FIP.

For purposes of the development and submission of infrastructure SIPs for National Ambient Air Quality Standards (“NAAQS”), EPA has provided guidance to states, in particular as they relate to Clean Air Act sections 110(a)(1) and 110(a)(2) (the “Guidance”).³ It first notes “[i]nfrastructure SIPs outline the requisite building blocks of state air quality management programs such as air quality monitoring and enforcement programs.” The Guidance is intended to “provide air agencies [such as the Wisconsin DNR] guidelines to develop and submit infrastructure SIPs that provide the basis to ensure public health through air quality management.”

The Guidance emphasizes “[u]nder Clean Air Act sections 110(a)(1) and 110(a)(2), each state is required to submit a SIP that provides for the implementation, maintenance and enforcement of a revised primary or secondary NAAQS.”⁴ These sections require each state to make a new SIP submission within three years after EPA promulgates a new or revised NAAQS. Section 110(a)(2) requires that each state submit an infrastructure SIP to EPA “after reasonable notice and public hearing.”

¹ [Congressional Research Service](#)

² See [example cases in Michigan and Minnesota](#).

³ see [Microsoft Word - Guidance to Implement Section 110 FACT SHEETV4.docx \(epa.gov\)](#).

⁴ The Guidance notes its non-binding nature but at the same time provides recommendations for agencies to develop infrastructure SIPs for “the ²⁰⁰⁸ ozone primary and secondary National Ambient Air Quality Standards (NAAQS), the ²⁰¹⁰ primary nitrogen dioxide (NO₂), NAAQS, the 2010 primary sulfur dioxide (SO₂), NAAQS, and the 2012 primary fine particulate matter (PM_{2.5}) NAAQS, as well as infrastructure SIPs for new or revised NAAQS promulgated in the future.”

Importantly, section 110(a)(2) specifies the substantive elements that state SIP submissions need to address for EPA approval, and includes requirements for: “emissions limits and control measures, ambient air quality monitoring, enforcement of Clean Air Act permitting programs, adequate personnel and funding, adequate authorities, stationary source monitoring, consultations with government officials, public notifications, PSD and visibility protections, modeling/data, permitting fees, and participation by affected local entities.”

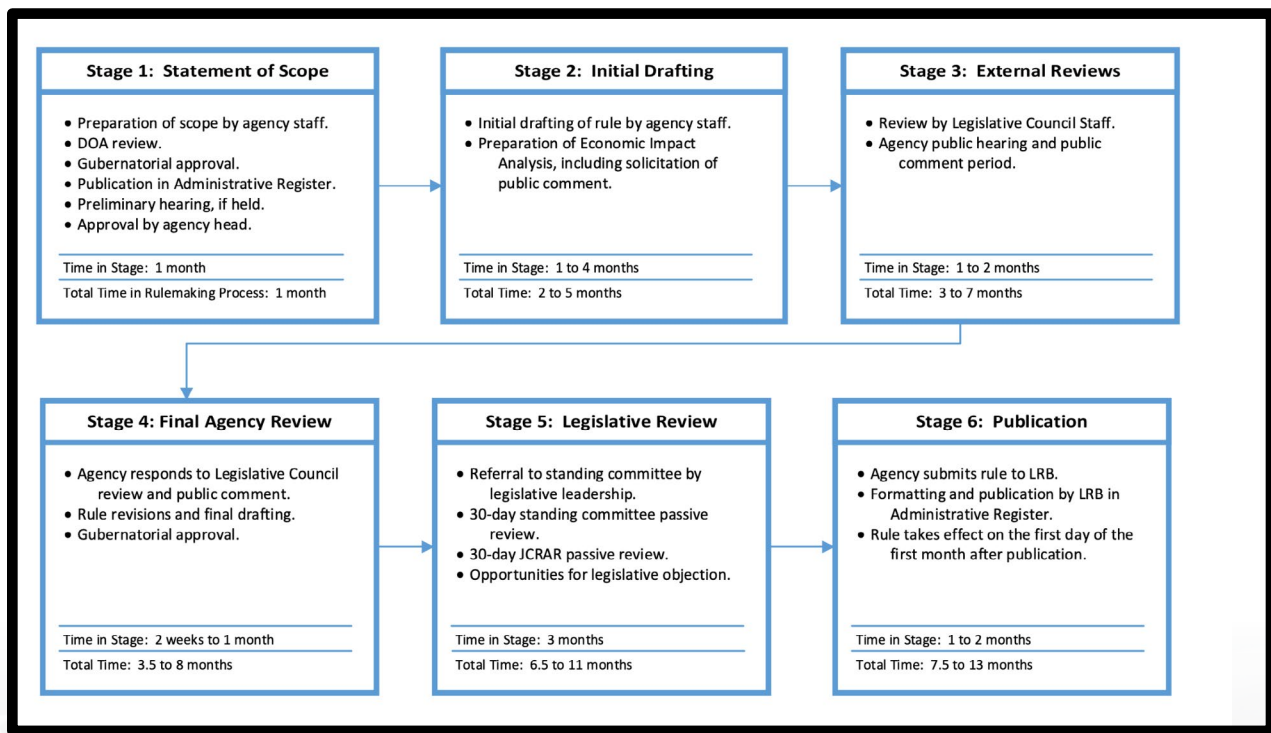
In June 2023 the Wisconsin DNR published the Wisconsin Department of Natural Resources 2024 Air Monitoring Network Plan. The Plan notes the criteria monitor types include those that are “largely determined by monitoring requirements for NAAQS comparisons and the needs of monitoring organizations to meet ... state implementation plan (SIP) requirements” and provides for “special studies needed by the monitoring organizations to support TIPs/SIPs and other air program activities.” The Plan specifically makes reference to standards that may be lowered by EPA. For example, with respect to particulate matter, the Plan explains “DNR monitors three different particle fractions,” including $PM_{2.5}$, $PM_{10-2.5}$, and PM_{10} . The Plan explains on January 27, 2023, “EPA proposed to lower the annual NAAQS for annual $PM_{2.5}$ from 12 $\mu\text{g}/\text{m}^3$ to within the range of 9-10 $\mu\text{g}/\text{m}^3$. There are currently 18 $PM_{2.5}$ sites in Wisconsin. According to the Plan, based on the $PM_{2.5}$ monitors, “Wisconsin averages ranged from 5.3 $\mu\text{g}/\text{m}^3$ at Trout Lake to 9.4 $\mu\text{g}/\text{m}^3$ at Milwaukee 16th Street” and therefore “all sites were below the annual standard.” The same held true for the 24-hours standards.

Wisconsin law specifically provides for the provision of SIPs to the EPA relating to “air pollution.” The Wisconsin DNR “may not submit a control measure or strategy that imposes or may result in regulatory requirements to the federal environmental protection agency for inclusion in a state implementation plan under 42 USC 7410 unless the department has promulgated the control measure or strategy as a rule.” Wis. Stat. § 285.14(1). Specific time limits are triggered in such a scenario. “At least 60 days before the department is required to submit a state implementation plan to the federal environmental protection agency, the department shall prepare, and provide to the standing committees of the legislature with jurisdiction over environmental matters, under s. 13.172 (3) a report that describes the proposed plan and contains all of the supporting documents that the department intends to submit with the plan.” Wis. Stat. § 285.14(1). If within 30 days after being provided a report the chairman of the committee provides written comments, the DNR secretary then has 15 days to respond in writing. It is important to note the section does not apply to a modification to a state implementation plan relating to an individual source.

The risk associated with a FIP was detailed in an administrative rule revision to Wisconsin NR 438 relating to clarifying and updating air contaminant emissions inventory reporting requirements. There, the DNR explained:

Inaction by the department to adopt the proposed rule into Wisconsin Administrative Code could lead to EPA becoming involved to resolve the deficiency, in place of the state, by issuing a federal implementation plan (FIP) and/or sanctions under the CAA. Without a permanent and enforceable primary PM_{2.5} reporting requirement consistent with the federal AERR rule, the state's SIP will not be approvable. Specifically, EPA has not approved all elements of Wisconsin's infrastructure SIPs for the 2012 PM_{2.5} NAAQS or the 2015 O₃ NAAQS because Wisconsin currently does not have a codified PM_{2.5} emissions reporting requirement (81 FR 95043, 85 FR 61673). **Disapproval of a SIP would prompt a 2-year clock for the FIP requirement under Section 110(c) of the CAA. Under a FIP, EPA would step in and directly implement PM_{2.5} emissions reporting requirements in the state.** The department has a history of working with sources in the state to implement programs through SIP revisions that are consistent with the federal CAA and minimize impacts on sources. If EPA implemented a FIP following disapproval of a Wisconsin SIP revision, under the CAA, the department would not play a role in FIP development. In addition, disapproval of a SIP could trigger sanctions under Section 179 of the CAA and 40 CFR 52.31. **Sanctions under the CAA include the loss of federal highway grants.** (Bold added for Emphasis)⁵

Wisconsin's clean air SIP has been revised many times since its first inception.⁶ The image below details the administrative rule process in Wisconsin, which includes an initial statement of scope, drafting of the rule (including an economic impact analysis), external reviews by Legislative Council staff, final agency review, review by standing committee and the Legislature's Joint Committee for the Review of Administrative Rules, and final publication.



Source: Wisconsin Legislature Government Website

⁵ The full fiscal estimate and economic impact analysis can be found here: [FINAL - DOA-2049 FE/EIA Form AM-31-19 \(wisconsin.gov\)](#).

⁶ [EPA: WI SIP Revisions](#)

Review of Wisconsin SIPs

IRG has identified eleven recent SIP revisions to determine the strength of the oversight exercised by the Legislature. These revisions are given a Clearinghouse Rule (“CR”) number in the process toward it becoming effective. It’s critical to closely review the CRs⁷ in order to determine whether proper legislative oversight is being conducted. This report provides the legislative oversight background for eleven Wisconsin SIP revisions relating to the Clean Air Act. This report is not an exhaustive list and is not a complete review of the oversight workings of Wisconsin SIP revisions. This report rather provides a glimpse into the process of overseeing the revisions of a SIP in order to establish a basic pulse of legislative oversight strength.

Each CR has been given an “Oversight Strength” grade. This grade was determined by three common sense benchmarks followed by an oversight “grade”:

Three Legislative Oversight Benchmarks

1. Whether a public hearing was held and attended by any members of the committee or council staff.
2. Whether the committee or council took an executive action.
3. Whether any modifications were made to the revision during the legislative oversight process.

Oversight Strength Grades

1. Zero Benchmarks achieved: Weak
2. One Benchmark achieved: Mediocre
3. Two Benchmarks achieved: Fair
4. All Benchmarks achieved: Strong

Analysis of SIPs

Overall, the level of oversight exercised by the Legislature over the eleven SIPs analyzed was **weak**. Eight out of eleven revisions, or roughly 73%, did not achieve any of the three legislative oversight benchmarks. The Legislature did not take any executive action on these eight, did not modify any of them, and did not hold a public hearing, or if a hearing was held, none of the committee members attended the hearing (see CR 21-072 and CR 21-022). One revision was scored as mediocre (see CR 13-057), one scored as fair (see CR 20-088) and one scored as strong (see CR 19-015).

⁷ [The Wisconsin Legislative Council defines a clearinghouse rule as follows:](#)

“Upon receipt of a proposed administrative rule, the rule is given a Clearinghouse Rule number and is assigned to a Legislative Council attorney or analyst for review and preparation of a Clearinghouse Report containing comments about the rule. The Legislative Council staff reviews the rule for form, style, and technical adequacy. The Legislative Council staff review may indicate whether an agency is attempting to regulate matters beyond its legal authority or whether a lack of clarity and precision in the rule language could inappropriately affect persons regulated by the rule.”

While the analysis establishes that the Legislature has generally exercised little oversight, when it did so, germane modifications could be made, presumably in response to comments submitted during the public hearing. For example, following receipt of the agency report relating to CR 20-088 and referral to the Assembly Committee on Environment, a public hearing was held (where 6/10 members were present) and a referral was made to the Joint Committee for the Review of Administrative Rules (“JCRAR”). Following the referral, the CR was recalled by the agency and resubmitted with germane modifications attached. Following another referral to the Committee on Environment, another public hearing was held (where 5/10 members were present). No additional action was taken and the revision became effective.

Clearinghouse Rule	Topic	Benchmarks	Score
23-017	Nitrogen compound emissions	No hearing, action, or modifications.	0/3
21-072	PM2.5 emissions reporting requirement, alignment of state and federal emissions reporting terminology, updates to reflect current emissions reporting procedure	Assembly committee hearing held but no members present. No action or modifications.	0/3
20-088	Reasonably available control technology for volatile organic compound emissions from miscellaneous metal and plastic parts coatings and miscellaneous industrial adhesives	Initial public hearing held with 6/10 members present, leading to recall of revision by agency and resubmission with germane modifications made, followed by second public hearing with 5/10 members present. No action taken.	2/3
21-022	Incorporation of the 2015 national ambient air quality standards for ozone	Assembly committee hearing held but no members present. No action or modifications.	0/3
19-015	Increasing the operational efficiency for, and simplifying the air permit process	Public hearing held with 14/14 members present, executive action taken and modifications requested and received.	3/3
18-067	Regulating volatile organic compound emissions from lithographic printing facilities	No hearing, action, or modifications.	0/3
16-041	The ambient air quality standards for fine particles (PM2.5)	No hearing, action, or modifications.	0/3
15-077	Consistency with U.S. Environmental Protection Agency air pollution control regulations and the repeal of obsolete rules, and affecting small business	No hearing, action, or modifications.	0/3

15-033	Ambient air quality standards for sulfur dioxide (SO ₂) and nitrogen dioxide (NO ₂)	No hearing, action, or modifications.	0/3
15-005	Increasing the operational efficiency of and simplifying the air permit process and affecting small business	No hearing, action, or modifications.	0/3
13-057	2013 Wisconsin Act 1, the Ferrous Mining Law	Public hearing held with 9/15 Assembly members present. No actions or modifications.	1/3

Full details regarding each CR analyzed are included here as Attachment 1.

Legislative Recommendation

Recognizing the highly technical nature of many of the revisions summarized above and the demands on committee, staff, and individual legislator time, the below legislative recommendation could serve to buttress the already strong administrative review process in place in Wisconsin. What follows is a model SIP Transparency Act.

Among other reforms, the proposed act would create a SIP advisory committee to review all draft SIP proposals provided to the committee by the Department and provide specific feedback on each section and require an affirmative vote whether to approve or disapprove of any final SIP proposal provided by the Department. With respect to the required department actions, the proposed act would require that the Department “meaningfully consult” with the advisory committee on each aspect of a SIP and annually prepare a report regarding a proposed SIP. Finally, the proposed act would prohibit the Department from submitting any SIP to the EPA until the Legislature adopts a resolution approving the plan.

Model Legislation

STATE IMPLEMENTATION PLAN TRANSPARENCY ACT

Section 1. Title.

This Act may be referred to as the State Implementation Plan Transparency Act.

Section 2. Definitions.

- (a) “State Implementation Plan” means
- (b) “Department” means [state agency authorized to implement the mandates of the Clean Air Act]
- (c) “Development of a state implementation plan” includes drafting a new state implementation plan or modifying an existing state implementation plan.
- (d) “Economic impact analysis” means a report prepared by the Department that includes:
 - 1. An estimate of the cost impact to businesses of the proposed state implementation plan broken down by business sector.
 - 2. An estimate of the cost impact to the general public of the proposed state implementation plan.

Section 3. Advisory Committee.

- (a) There is created within the Department a “State Implementation Plan Development Advisory Committee.” The committee shall consist of:
 - 1. One member representing manufacturing appointed by the state’s largest manufacturing trade association.
 - 2. One member representing agriculture appointed by the state’s largest agricultural trade association.

3. One member representing small business appointed by the state's largest small business trade association.
 4. Two members of the public, one appointed by the majority leader of the State Senate and one appointed by the minority leader of the State Senate.
- (b) The State Implementation Plan Development Advisory Committee shall:
1. Hold regular public meetings in accordance with [the state's public meetings law requirements].
 2. Make all meetings available virtually.
 3. Receive public comment at all meetings.
 4. Review all draft state implementation plan proposals provided to the committee by the Department and provide specific feedback on each section thereto.
 5. Affirmatively vote whether to approve or disapprove of any final state implementation plan proposal provided by the Department.
- (c) The Department may not submit any state implementation plan to the legislature for approval under [section 5] until the State Implementation Plan Development Advisory Committee has affirmatively approved of the implementation plan under this section.

Section 4. Department Actions.

- (a) The Department shall:
1. Meaningfully consult with the State Implementation Plan Development Advisory Committee on each aspect of the State Implementation Plan.
 2. Publicly notice all internal meetings where Department staff discusses development of a state implementation plan in accordance with [the state's public meetings law requirements].
 3. Make all such meetings available virtually.
 4. Survey state implementation plans submitted by all other states and prepare a menu of options prior to development of a state implementation plan and make those options publicly available.
 5. Submit draft sections of a state implementation plan to the State Implementation Plan Development Advisory committee for review as soon as available.
 6. Thoughtfully consider all comments received from the State Implementation Plan Development Advisory Committee, and if the Department disagrees with any such comments, the Department shall explain why in writing.
 7. Prior to submitting a final proposed state implementation plan to the State Implementation Plan Development Advisory Committee, develop an economic impact analysis of the proposed plan.
 8. Annually prepare a report regarding the state implementation plan, which shall be

- submitted to the legislature, and which shall include:
- a. An accounting of costs accrued by businesses and the general public for implementing the state implementation plan.
 - b. A statement as to whether those costs are in line with cost estimates in the economic impact analysis, and if they are not, an explanation as to why.
9. Prior to submitting the final proposed state implementation plan to the legislature for approval under [section 5], the Department shall hold a public hearing on the plan in each part of the state which is, or will reasonably be expected to become, a non-attainment zone. The Department shall provide the public with an opportunity to testify on the proposed state implementation plan and shall accept written comments for up to fourteen days following any public hearing.

Section 5. Legislative approval.

- (a) The Department shall prepare a state implementation plan report which shall include the full text of the state implementation plan, a summary of all comments received regarding that plan, a response to all those comments, any statement from the State Implementation Plan advisory committee regarding the plan, and an economic impact analysis on the state implementation plan.
- (b) The Department shall submit the state implementation plan report to the legislature for approval.
- (c) The Department shall not submit any state implementation plan to the environmental protection agency until the legislature adopts a resolution approving of the plan.

Conclusion

Increased legislative oversight of SIPs is an excellent way for elected officials to hold agencies to a high standard when implementing revisions that have a significant impact on Wisconsin businesses and families. Revisions to Wisconsin SIPs should be passed with the trust and knowledge that they underwent careful scrutiny and have become effective only after clear and robust oversight from the people's elected officials in the Legislature.

This report should serve both as an invitation to the legislative branch to exercise oversight responsibility and as encouragement to the people of Wisconsin to hold legislators accountable for exercising oversight over regulations that can have a direct impact on economic development and growth.



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