

Report to
Legislative Council Rules Clearinghouse
NR 404, 407, 408, 428 and 484, Wis. Adm. Code
Natural Resources Board Order No. AM-10-19

Wisconsin Statutory Authority

Section 285.21 (1) (a), Wis. Stats., establishes that if an ambient air quality standard is promulgated under section 109 of the federal Clean Air Act (CAA), the Department shall promulgate a similar standard by rule which may not be more restrictive than the federal standard except as otherwise provided by statute. The action taken by the EPA in promulgating the revised primary annual standard for ozone was done under section 109 of the federal Clean Air Act (42 U.S.C. 7409). In addition, s. 285.11 (16), Wis. Stats., requires the Department to promulgate rules consistent with the CAA that specify the amounts of emissions that result in a source of air contaminants being classified as a major source.

Federal Authority

Section 109 of the federal CAA directs EPA to conduct reviews of the national ambient air quality standards (NAAQS) for criteria air pollutants every five years, and potentially revise the level of the NAAQS as may be appropriate to protect public health and welfare. The 2015 ozone NAAQS are codified in 40 CFR 50.19. After promulgation of a NAAQS, Section 110 of the federal CAA requires states to submit a plan which provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region within the state (a state implementation plan, or SIP). Wisconsin is satisfying SIP requirements related to the 2015 NAAQS through this rulemaking.

Comparison of Adjacent States

Illinois and Indiana have incorporated the 2015 ozone NAAQS in their administrative code. Portions of Wisconsin, Illinois, and Indiana comprise a tri-state nonattainment area for the 2015 ozone NAAQS. Minnesota has state-specific standards in its administrative code and incorporates by reference the federal standard for ozone. Michigan incorporates by reference the federal ozone standard. Iowa does not currently have the 2015 ozone NAAQS incorporated into its administrative code, but has incorporated ozone NAAQS promulgated in earlier years.

Court Decisions Directly Relevant

The D.C. Circuit upheld the 2015 ozone NAAQS in Murray Energy Corp. v. Env'tl. Prot. Agency, 936 F.3d 597 (D.C. Cir. 2019).

In South Coast Air Quality Management District v. EPA, 882 F.3d 1138 (D.C. Cir. 2018), the Court determined that EPA erred in waiving nonattainment requirements for the 1997 ozone standard during the implementation of the more restrictive 2008 standard. Because there are several areas in Wisconsin that are now subject to nonattainment requirements under both the 2008 and 2015 ozone standards, language was added in this rule to clarify that the most stringent applicable conditions would apply.

Analysis of the Rule - Rule Effect - Reason for the Rule

Under the federal CAA, EPA is responsible for promulgating NAAQS, which are designed to protect public health and welfare. The department is proposing to revise chs. NR 404 and 484, Wis. Adm. Code, to adopt the 2015 ozone NAAQS and incorporate by reference the federal air pollution monitoring requirements related to the NAAQS. State-enforced ambient air standards enable the department to implement the full range of emission control programs necessary to comply with the health-based standards and meet associated CAA requirements.

Additionally, the department is proposing to clarify or update sections of chs. NR 407, 408 and 428, Wis. Adm. Code, to ensure implementation of the ozone NAAQS, consistent with federal law. Proposed changes to sections of chs. NR 407 and 408, Wis. Adm. Code, clarify which major source or major modification thresholds apply in areas subject to more than one ozone nonattainment classification due to the implementation of multiple ozone NAAQS. Proposed changes to sections of ch. NR 428, Wis. Adm. Code, update requirements related to Reasonably Available Control Technologies (RACT) for emissions of nitrogen oxides (NOx). The proposed rule language would revise the applicability emissions thresholds for NOx RACT so that they include all the major source thresholds associated with current (and former) ozone nonattainment classifications of the area (i.e., 100 tpy in areas classified as “moderate,” 50 tpy in areas classified as “serious,” 25 tpy in areas classified as “severe,” and 10 tpy in areas classified as “extreme” nonattainment). This change is required to meet federal CAA requirements for NOx RACT programs. This proposed change ensures that the correct NOx RACT major source threshold is being implemented regardless of future changes to an area’s nonattainment classification(s) and removes the need for the department to potentially undertake a rulemaking project every time an area’s nonattainment classification changes.

Agency Procedures for Promulgation

The department will hold a virtual hearing on April 8, 2021 at 1:30 PM. The hearing will be followed by board adoption, expected in June 2021, followed by a request for the governor’s approval and legislative review.

Description of any Forms (attach copies if available)

None

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