

## **Report From Agency**

### **REPORT TO LEGISLATURE**

NR 428, Wis. Adm. Code

Modification of existing rules for control of nitrogen oxide emitted by stationary sources in the ozone non-attainment area in southeastern Wisconsin.

Board Order Number: AM-20-08  
Clearinghouse Rule Number: 08-103

#### **BASIS AND PURPOSE OF THE PROPOSED RULE**

In 2000, the Natural Resources Board adopted ch. NR 428, "Control of Nitrogen Compound Emissions" to meet rate of progress requirements for reducing emissions in ozone non-attainment areas. These initial requirements consisted of new and existing stationary source NO<sub>x</sub> emission limitations. In April and May 2007, the Natural Resources Board adopted revisions to ch. NR 428, establishing NO<sub>x</sub> Reasonably Available Control Technology (RACT) emission limits for major sources in ozone non-attainment areas.

The RACT rules were submitted to the US Environmental Protection Agency (EPA) for approval as part of Wisconsin's State Implementation Plan (SIP) for ozone control. EPA subsequently raised concerns about the use of the term "potential to emit" (PTE) for purposes of identifying major sources subject to NO<sub>x</sub> RACT. The term PTE is not consistent with EPA's criteria for approving RACT rules, is not consistent with the state's VOC RACT rules, nor is it consistent with the NO<sub>x</sub> RACT rule's original intent. For these reasons, the Department is proposing to define the term "maximum theoretical emissions" (MTE) for use in determining major sources subject to NO<sub>x</sub> RACT requirements.

In addition, a number of non-substantive revisions are being proposed to address issues identified by the Department and affected sources during implementation of the existing rules in ch. NR 428.

#### **SUMMARY OF PUBLIC COMMENTS**

On December 5, 2008, the Department conducted a public hearing at the DNR Southeast Region Headquarters located at 2300 N Dr. Martin King Jr. Drive in Milwaukee. Three people attended the hearing. An oral statement was made by Bob Fassbender representing Wisconsin Manufacturers & Commerce.

Written comments were received from Wisconsin Manufacturers & Commerce, Wisconsin Power and Light, and WE Energies. In addition, at various times throughout the rule development process, the Department participated in discussions with Saint Gobain, a glass manufacturer affected by the proposed rules, relating to compliance demonstration procedures. The substantive comments and issues and the associated Department responses are as follows:

##### Identification of Major Sources

Responses to specific issues raised by WMC are as follows:

*Comment-WMC:* The Wisconsin Manufacturers and Commerce (WMC) association provided comment related to incorporating the term "Maximum Theoretical Emissions" (MTE) in place of "Potential to Emit" (PTE) currently used in the NO<sub>x</sub> RACT (reasonably available control technology) applicability statement under s. NR 428.20. WMC states that the DNR is exceeding the requirements of the Clean Air Act in taking this action.

*Response:* No changes are being made to the initially proposed rule. These revisions are required to meet the Clean Air Act and EPA's criteria for identifying major sources subject to RACT in an ozone non-attainment area.

*Comment-WMC:* The Clean Air Act allows for consideration of pollutant controls when determining a source's potential to emit.

*Response:* The term potential to emit is not defined under the Clean Air Act, but rather it is the responsibility of the EPA to define the term in implementing each provision of the Clean Air Act. For purposes of establishing applicability of RACT, the EPA specifically requires that a source's potential emissions be determined on an uncontrolled basis; i.e. theoretical potential emissions must discount the operation of control devices.

WMC cites 40 CFR 52.21(b)(4) in identifying the case where the Clean Air Act and EPA allows for the consideration of controls in determining a major source subject to a RACT program. However, this reference is to EPA's definition of potential to emit as it applies to the Prevention of Significant Deterioration air permitting program and does not apply for purposes of determining applicability of RACT.

*WMC Comment:* DNR has offered no instances where EPA has articulated the position subscribed to them in this rulemaking.

*Response:* In 1992-1993, the EPA required the Department to identify major sources subject to the state's VOC RACT rules based on uncontrolled potential emissions. This position was directly communicated by the EPA in identifying deficiencies preventing approval of Wisconsin's VOC RACT rules to the state implementation plan. The Department addressed this issue by incorporating an appropriate definition and use of the term "maximum theoretical emissions" (MTE). This requirement also applies to NO<sub>x</sub> RACT and therefore the same corrective action is proposed by this rule revision.

*WMC Comment:* There is no Clean Air Act requirement to incorporate the term or concept of "maximum theoretical emissions".

*Response:* The Clean Air Act requires major sources in ozone non-attainment areas to be subject to NO<sub>x</sub> RACT. There is no direct Clean Air Act requirement to use either "potential to emit" (PTE) or "maximum theoretical emissions" (MTE) in identifying a major source. Rather, as with the state's VOC RACT rules, the Department is appropriately defining and using the term "maximum theoretical emissions" consistent with EPA's criteria for identifying major sources subject to RACT. This approach is taken to eliminate confusion with the PTE term as defined and applicable to other air regulatory programs, e.g. air pollution control permits.

#### Clarification and Implementation Issues

*Electric Utilities Comment:* Wisconsin Power and Light and WE Energies provided comment supporting the proposed modifications which clarify the electric utility units subject to a phased emission limitation, which allow additional time to request an alternative requirement, and which streamline compliance demonstration requirements.

*Response:* No changes are being made to the initially proposed rule.

*Glass furnaces:* Saint Gobain is a container glass manufacturer in the ozone non-attainment area. The current emission limitation for glass furnaces, expressed in pounds of NO<sub>x</sub> emitted per ton of produced glass, is not appropriate for periods of maintenance and hot idling of oxygen-fired furnaces. During these periods the flow of glass from the furnace is minimized to levels necessary to maintain the equipment and process. Since emissions do not decrease in direct relationship to lower furnace production levels, the source may have to keep glass production higher than necessary solely to generate a compliant emission rate.

*Response:* The Department agrees that the form of the emission limitation is not appropriate for the periods when glass production is below 25% of furnace glass production capacity. The Department revised the rule as follows: Below the 25% production threshold, owners of glass furnaces are required to monitor and minimize NO<sub>x</sub> emissions through combustion optimization techniques described in s. NR 439.096. This approach reduces NO<sub>x</sub> emissions to the lowest levels practical during periods of maintenance or furnace idling. The 25% threshold for describing glass furnace production is also used in California rules that are applicable in ozone non-attainment areas.

### **MODIFICATIONS MADE**

Modifications made by the Department are detailed in the previous Summary of Public Comments section.

### **APPEARANCES AT THE PUBLIC HEARING**

The following appeared as indicated below:

In support: None

In opposition: None

As interest may appear: Representing Wisconsin Manufacturers & Commerce: Bob Fassbender, 10 E. Doty St., Suite 500, Madison, WI 53707

Representing WE Energies: Brian Borofka, 333 W. Everett St., Milwaukee, WI 53201

Representing Meverden Environmental, Inc.: James Meverden, 5159 N. Bay Ridge Ave, Whitefish Bay, WI 53217

### **CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE**

Minor modifications were made to the rule analysis to reflect the rule changes made in response to public comments received. References to Ohio and Indiana were removed since they are not adjacent states and therefore are not included in those states for which a similar rule comparison needs to be made.

The fiscal estimate was updated to clarify the assumptions. These clarifications did not change the original conclusion that there is no anticipated fiscal impact from the proposed rules.

### **RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

All Clearinghouse comments have been accepted and the rule revised accordingly, except for Clearinghouse comment 2.a.(a). Comment 2.a.(a) stated that, in the plain language analysis section of the rule, "US EPA" should have been replaced with "U.S. Environmental Protection Agency (EPA)". The failure to accept this comment was an oversight. However, since US EPA is a commonly understood acronym, the Department does not believe any confusion resulted from this error.

### **FINAL REGULATORY FLEXIBILITY ANALYSIS**

The existing rule requirements apply to large industrial or electric generation sources. Based on the limited nature of the proposed changes to the existing rule, there is no impact anticipated to small businesses.