

## Clearinghouse Rule 13-070

### ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD REPEALING, AMENDING, AND CREATING RULES

The statement of scope for this rule, SS 066-12, (which revised SS 056-12) was approved by the Governor on August 30, 2012, published in Register No. 681, on September 15, 2012, and approved by the Natural Resources Board on October 24, 2012.

The Wisconsin Natural Resources Board proposes an order **to repeal** NR 400.02 (101) and (106), and 410.03 (3); **to amend** NR 400.02 (123m) and (124), 405.02 (21) (b) 5. a. and b. and 6., and (25i) (a), 408.02 (20) (e) 5. a. and b. and 6., 408.02 (29m) (c), and 408.06 (1) (a); and **to create** NR 405.02 (25i) (ag) and (ar), and 408.02 (29m) (d), relating to revisions to chs. NR 405 and 408, necessary to maintain consistency with federal requirements, as well as the repeal of sections of chs. NR 400 and 410, related to the repeal of ch. NR 411, and affecting small business.

#### AM-21-12

#### Analysis Prepared by the Department of Natural Resources

- 1. Statute interpreted:** Section 285.11 (1) and (6), Stats. The State Implementation Plan developed under s. 285.11 (6), Stats., is revised.
- 2. Statutory authority:** Sections 227.11 (2) (a), 285.11 (1), (16) and (17), and 285.60 (11) (b)
- 3. Explanation of agency authority:** Section 227.11 (2) (a), Stats., gives state agencies general rule-making authority. Section 285.11 (1), Stats., gives the Wisconsin Department of Natural Resources (WDNR) the authority to promulgate rules implementing and consistent with, ch. 285, Stats. Section 285.11 (6), Stats., requires WDNR to develop a plan for the prevention, abatement, and control of air pollution. The plan must conform with the Clean Air Act and is necessary for new source review implementation. Section 285.11 (16) requires WDNR to promulgate rules that may limit the classification of a major source to specified air contaminants. Section 285.11 (17) requires WDNR to promulgate rules, consistent with the federal Clean Air Act, that modify the term ‘modification’ as it relates to specific categories of stationary sources. Section 285.60 (11) (b), Stats., establishes that the WDNR may not require a permit for an indirect source under ch. 285, Stats
- 4. Related statute or rule:** There are no related statutes that are not identified above.
- 5. Plain language analysis:** The objective of this rule package is to revise language in chs. NR 400, 405 and 408 to maintain consistency with federal requirements and definitions. Additionally, sections of chs. NR 400 and 410 need to be repealed due to the repeal of ch. NR 411.

In May 2006, WDNR requested approval by the U.S. Environmental Protection Agency (USEPA) of rules promulgated by Wisconsin to incorporate federal New Source Review Reform requirements as a revision to the State Implementation Plan (SIP). The USEPA approved the SIP revisions, but subsequently requested changes to language in chs. NR 405 and 408. The changes pertain to the fuel use prohibition that is part of the definition of “major modification”.

Section NR 405.02 (25i) defines “Regulated NSR air contaminant” and specifically identifies volatile organic compounds as a precursor for ozone. USEPA has requested inclusion of nitrogen oxides (NO<sub>x</sub>) in the definition for clarification purposes. Similarly USEPA requires, through its 2008 New Source Review Rule, explicit identification of NO<sub>x</sub> and sulfur dioxide (SO<sub>2</sub>) as precursors to particulate matter with a diameter of 2.5 micrometers or less

(PM<sub>2.5</sub>) within the definition of “Regulated NSR air contaminant”. WDNR has also amended the definition of “Regulated NSR air contaminant” in s. NR 408.02 (29m) to specifically address precursor pollutants in nonattainment areas. Additionally, WDNR will amend the definitions of PM<sub>2.5</sub> and particulate matter with a diameter of 10 micrometers or less (PM<sub>10</sub>) to address a USEPA-identified SIP deficiency. The definitions as currently written do not specifically mention condensables as required in the federal 2008 New Source Review Rule.

On April 27, 2011, the Joint Committee for Review of Administrative Rules (JCRAR) adopted a motion under s. 227.26 (2) (d), Wis. Stats., suspending ch. NR 411. Subsequent passage of legislation introduced by JCRAR in support of the suspension (see [2011 Wisconsin Act 121](#)), resulted in the repeal of ch. NR 411. The primary purpose of ch. NR 411 had been to control carbon monoxide emissions from indirect sources through conditions established in construction and operation permits. Therefore the WDNR proposes to repeal rules whose only purpose is in support of ch. NR 411. Rules proposed for repeal include ss. NR 400.02 (101) and (106), and 410.03 (3). Sections NR 400.02 (101) and (106) define ‘modified indirect source’ and ‘new indirect source’ respectively. Section NR 410.03 (3) establishes fees for the application and issuance of permits to construct or modify an indirect source.

**6. Summary of, and comparison with, existing or proposed federal statutes and regulations:** In a letter dated June 17, 2009, the USEPA notified the WDNR that the definition of the term “major modification” in s. NR 405.02 was inadequate because it failed to identify permits issued under federal authority. Wisconsin’s Prevention of Significant Deterioration (PSD) program was approved into its SIP on June 28, 1999. Before that, PSD construction permits were issued under federal authority. When s. NR 405.02 (21) (b) (5) was written, the references to federal authority were inadvertently omitted. Because the federal citations were omitted from the rule, USEPA identified that in a very limited situation, the current state definition would allow a source to make a change to use a different fuel or raw material without undergoing major new source permit review for the change, even though the change could be prohibited under a federal permit. The WDNR will amend this definition to ensure that it is consistent with USEPA rule and policy and recognizes all federally-issued permits. WDNR is likewise amending the definition of “major modification” at s. NR 408.02(20) for nonattainment area new source review.

The alternative to this rule action is to keep the rules as they are, which USEPA has already identified as an inconsistency with federal rules. However, in a Federal Register filed June 15, 2012, USEPA disapproved narrow portions of the SIP pertaining to permit requirements in NR 405 and 408 that would be addressed with this rulemaking. In the Federal Register, USEPA stated that they are under obligation to promulgate a Federal Implementation Plan (FIP) addressing the disapproved portions of the SIP within 2 years. The Federal Register states that the FIP will not be promulgated if WDNR rectifies the deficiencies within the 2 year timeframe.

The clarifications of NO<sub>x</sub> as a precursor to ozone and NO<sub>x</sub> and SO<sub>2</sub> as precursors to PM<sub>2.5</sub>, as well as the clarification of accounting for PM<sub>2.5</sub> and PM<sub>10</sub> condensables as a portion of PM<sub>2.5</sub> and PM<sub>10</sub> emissions are not policy changes nor do they change how WDNR currently implements ch. 405 and 408 requirements. On June 15, 2012, USEPA disapproved a narrow portion of Wisconsin’s SIP for the 1997 ozone National Ambient Air Quality Standard pertaining to air construction permitting. This was done because NO<sub>x</sub> was not explicitly identified as a precursor to ozone as part of PSD permit program requirements. The final disapproval triggered a requirement that USEPA promulgate a FIP addressing the deficiency no later than 2 years from the date of disapproval. USEPA published a proposed disapproval of Wisconsin’s submittal on December 18, 2012, because the submittal did not meet the 2008 PM<sub>2.5</sub> SIP requirements. Specifically, the revisions submitted did not explicitly define the precursors of PM<sub>2.5</sub>, nor did they contain the prescribed language to ensure that gases that condense to form particulate matter (PM), known as condensables are regulated as part of PM<sub>2.5</sub> and PM of less than 10 micrometer (PM<sub>10</sub>) emissions. Final disapproval to portions of the SIP relating to identifying precursors of PM<sub>2.5</sub> will also result in the promulgation of a FIP unless the deficiencies are addressed.

Not repealing sections of chs. NR 400 and 410 in response to the repeal of NR 411 by the legislature would potentially create confusion and perpetuate an inconsistency with WDNR rules.

**7. Comparison with similar rules in adjacent states (Illinois, Iowa, Michigan and Minnesota):**

Illinois and Minnesota are delegated states, so they are directly implementing the federal program and not implementing their programs through a State Implementation Plan (SIP), as Wisconsin does. Iowa and Michigan, similar to Wisconsin, are SIP approved states, so they are also implementing a federal program, but through their own state rules and regulations. It is the goal of SIP-approved states to implement federal programs in accordance with the regulations set out in federal code. The majority of this rule package addresses changes necessary to comply with federal regulations. Those changes not dictated by federal regulations are associated with the repeal of fees related to the indirect source program which is no longer existing in Wisconsin, thereby addressing a current internal inconsistency.

**8. Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen:**

The WDNR did not use any factual data or analytical methodologies in developing the proposed rules. The changes proposed in this rule package are based on deficiencies in the rules identified by the USEPA and a comparison of the current state rules to the federal rules.

**9. Analysis and supporting documents used to determine the effect on small business or in preparation of an economic impact analysis:** The proposed changes to the new source permit review programs only affect major sources which typically do not include small businesses. The proposed changes related to the former indirect source permit program will not have any effect on small businesses since the indirect permit program has been repealed and the proposed changes are of a clean-up nature only.

The WDNR has not yet prepared an economic impact analysis under s. 227.137, Stats.

**10. Effect on small business (initial regulatory flexibility analysis):** WDNR does not believe that the proposed rule revisions will have an economic impact on small businesses.

**11. Agency contact person:** Gail Good; P.O. Box 7921, Madison, WI 53707-7921; Telephone number (608) 266-1058; email address: gail.good13@wisconsin.gov

**12. Place where comments are to be submitted and deadline for submission:**

Written comments may be submitted at the public hearings, by regular mail, fax or email to:

Gail Good  
Department of Natural Resources  
Bureau of Air Management  
PO Box 7921  
Madison WI 53707  
Fax: (608) 267-0560

Written comments may also be submitted to the Department using the Wisconsin Administrative Rules Internet Web site at <http://adminrules.wisconsin.gov>.

Hearing dates and the comment submission deadline are to be determined.

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**SECTION 1.** NR 400.02 (101) and (106) are repealed.

**SECTION 2.** NR 400.02 (123m) and (124) are amended to read:

NR 400.02 (123m) “PM<sub>2.5</sub> emissions” means PM<sub>2.5</sub> emitted to the ambient air as measured by an applicable reference method or an equivalent or alternative method specified by the department. PM<sub>2.5</sub> emissions include filterable emissions and gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures.

(124) “PM<sub>10</sub> emissions” means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers, emitted to the ambient air as measured by an applicable reference method or an equivalent or alternative method specified by the department. PM<sub>10</sub> emissions include filterable emissions and gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures.

**SECTION 3.** NR 405.02 (21) (b) 5. a. and b. and 6. are amended to read:

NR 405.02 (21) (b) 5. a. The source was capable of accommodating the alternative fuel or raw material before January 6, 1975, unless the change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to this chapter or ch. NR 406 or 408 or under an operation permit issued pursuant to ch. NR 407; or pursuant to a permit issued under 40 CFR 52.21, 40 CFR Part 51, Appendix S, or regulations approved pursuant to 40 CFR Part 51 subpart I.

b. The source is approved to use the alternative fuel or raw material under any permit issued under this chapter or chs. NR 406, 407, or 408; or pursuant to a permit issued under 40 CFR 52.21, 40 CFR Part 51, Appendix S, or regulations approved pursuant to 40 CFR Part 51 subpart I.

6. An increase in the hours of operation or in the production rate, unless the change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to this chapter, ch. NR 406 or 408 or 40 CFR 52.21 or under an operation permit issued pursuant to ch. NR 407; or pursuant to a permit issued under 40 CFR Part 51, Appendix S, or regulations approved pursuant to 40 CFR Part 51 subpart I.

**SECTION 4.** NR 405.02 (25i) (a) is amended to read:

NR 405.02 (25i) (a) Any air contaminant for which a national ambient air quality standard has been promulgated ~~and any constituents or precursors for the air contaminants identified by the administrator, e.g., volatile organic compounds are precursors for ozone.~~

~~(Note) Nitrogen oxides have been identified by the administrator as precursors for ozone.~~

**SECTION 5.** NR 405.02 (25i) (ag) and (ar) are created to read:

NR 405.02 (25i) (ag) PM<sub>2.5</sub> emissions and PM<sub>10</sub> emissions. As defined in s. NR 400.02 (123m) and (124), respectively, these terms include filterable emissions and gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures.

(ar) Any air contaminant that is identified under this paragraph as a constituent or precursor to an air contaminant for which a national ambient air quality standard has been promulgated by the EPA. The precursors identified by the administrator for purposes of this chapter are as follows:

a. Volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas.

b. Sulfur dioxide is a precursor to PM<sub>2.5</sub> in all attainment and unclassifiable areas.

c. Nitrogen oxides are precursors to PM<sub>2.5</sub> in all attainment and unclassifiable areas, unless the department demonstrates to the administrator's satisfaction or the EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to the area's ambient PM<sub>2.5</sub> concentrations.

**SECTION 6.** NR 408.02 (20) (e) 5. a. and b. and 6. are amended to read:

NR 408.02 (20) (e) 5. a. The source was capable of accommodating before December 21, 1976, unless the change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to this chapter or ch. NR 405 or 406 or under an operation permit issued pursuant to ch. NR 407; or pursuant to a permit issued under 40 CFR 52.21, 40 CFR Part 51, Appendix S, or regulations approved pursuant to 40 CFR Part 51 subpart I.

b. The source is approved to use an alternative fuel or raw material under any permit issued under this chapter or ch. NR 405, 406, or 407; or pursuant to a permit issued under 40 CFR 52.21, 40 CFR Part 51, Appendix S, or regulations approved pursuant to 40 CFR Part 51 subpart I.

6. An increase in the hours of operation or in the production rate, unless the change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to ch. NR 405 or 406 or this chapter, or under operation permits issued pursuant to ch. NR 407; or pursuant to a permit issued under 40 CFR 52.21, 40 CFR Part 51, Appendix S, or regulations approved pursuant to 40 CFR Part 51 subpart I.

**SECTION 7.** NR 408.02 (29m) (c) is amended to read:

NR 408.02 (29m) (c) Any air contaminant that is identified under this paragraph as a constituent or precursor of a general air contaminant listed under par. (a) or (b), provided that a constituent or precursor pollutant

may only be regulated under this chapter or ch. NR 405 as part of regulation of the general air contaminant. The precursors identified by the administrator for purposes of this chapter are as follows:

1. Volatile organic compounds and nitrogen oxides are precursors to ozone in all ozone nonattainment areas.

2. Sulfur dioxide is a precursor to PM<sub>2.5</sub> in all PM<sub>2.5</sub> nonattainment areas.

3. Nitrogen oxides are presumed to be precursors to PM<sub>2.5</sub> in all PM<sub>2.5</sub> nonattainment areas, unless the department demonstrates to the administrator's satisfaction or the EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to the area's ambient PM<sub>2.5</sub> concentrations.

**SECTION 8.** NR 408.02 (29m) (d) is created to read:

NR 408.02 (29m) (d) PM<sub>2.5</sub> emissions and PM<sub>10</sub> emissions. As defined in s. NR 400.02 (123m) and (124), respectively, these terms include filterable emissions and gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures.

**SECTION 9.** NR 408.06 (1) (a) is amended to read:

NR 408.06 (1) (a) ~~Offsets~~ Except as provided in par. (cm), offsets shall be of the same air contaminant class, that is, volatile organic compounds, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide or lead.

**SECTION 10.** NR 410.03 (3) is repealed.

**SECTION 11.** EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

**SECTION 12. BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on \_\_\_\_\_.

Dated at Madison, Wisconsin \_\_\_\_\_.

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Cathy Stepp, Secretary

(SEAL)