

REPORT TO LEGISLATURE

NR 404 and 484, Wis. Adm. Code,
Repeal of the state's secondary 24-hour ambient air quality standard
for particulate matter measured as total suspended particulate.

Board Order Number: AM-23-07B
Clearinghouse Rule Number: 07-082

This rule is not subject to s. 227.185, Wis. Stats. The statement of scope for this rule, published in Register 616 on April 30, 2007, was sent to the Legislative Reference Bureau prior to the effective date of 2011 Wisconsin Act 21.

BASIS AND PURPOSE OF THE PROPOSED RULE

The federal Clean Air Act (CAA) requires the U.S. Environmental Protection Agency (EPA) to promulgate national ambient air quality standards (NAAQS), which are designed to protect public health (primary standards) and public welfare (secondary standards) for criteria air pollutants, including particulate matter. The U.S. EPA is required to periodically review the current health science in order to evaluate if and how the existing NAAQS need to be adjusted to more accurately protect public health and welfare.

The U.S. EPA established NAAQS for particulate matter in 1971 measured as total suspended particulate (TSP), which is particulate up to 100 micrometers in diameter. In 1987, the U.S. EPA repealed the NAAQS for TSP and replaced it with standards for particulate matter with a diameter of less than 10 micrometers (PM₁₀), which was shown to be more readily inhaled into the respiratory system. In 1997, the U.S. EPA adopted standards for fine particulate matter (PM_{2.5}), which is particulate up to 2.5 micrometers in diameter. PM_{2.5} can remain suspended in the air longer and penetrate deeply into the lungs easier than PM₁₀. In 2006, the U.S. EPA took additional action by repealing the annual standard for PM₁₀ and by lowering (making more restrictive) the 24-hour PM_{2.5} standard.

In 2007, the Department of Natural Resources (Department) proposed rulemaking order AM-23-07 to address the U.S. EPA actions described above and thereby ensure Wisconsin's ambient air quality standards reflected the latest understanding of how particulate matter affects human health and to maintain consistency with the NAAQS. More specifically, the Department proposed to repeal the TSP and annual PM₁₀ standards, to create the PM_{2.5} standards, and to make related changes to definitions and monitoring requirements. Order AM-23-07 underwent Legislative Council Rules Clearinghouse review and was assigned Clearinghouse rule number 07-082. The Department subsequently held a hearing on the proposed rules on October 12, 2007. After the close of the public comment period, concerns were expressed by citizens and members of the Natural Resources Board (Board) regarding the proposed repeal of the TSP standard. At the Board's direction, the Department removed the proposed repeal of the TSP standard and related definitions and measurement methods from AM-23-07 in order to move the remaining elements related to PM₁₀ and PM_{2.5} forward. At that time the order number was amended to AM-23-07A and was adopted by the Board. The Department advised the Board that the TSP provisions that were removed might be brought back to the Board for reconsideration for adoption. The rules in AM-23-07A ultimately became effective on October 1, 2009.

On September 15, 2010, the Department and the Board received a petition for rulemaking from the Great Lakes Legal Foundation to repeal the state's secondary 24-hour ambient air quality standard for

particulate matter measured as TSP (s. NR 404.04 (3), Wis. Adm. Code). The petitioners' request for repeal of the TSP standard is primarily based on s. 285.21 (1) (a) and (4), Wis. Stats. These statutes state that the Department may not issue air quality standards more restrictive than federal air quality standards unless there is a finding and written documentation by the Department justifying the need in order to protect public health and welfare.

In response to the petition, the Department requested that the Board adopt rulemaking order AM-23-07B, which it did on June 22, 2011. Order AM-23-07B, which is the subject of this report, contains the same proposed rule changes which had been previously removed from order AM-23-07 at the direction of the Board. Since Order AM-23-07B only contains proposed rule changes already reviewed by the Legislative Council Rules Clearinghouse, and after discussions with the Director and Assistant Director of the Legislative Council, this order is being submitted under the same Clearinghouse number (CR 07-082) assigned to order AM-23-07.

On a related note, on April 27, 2011, the Wisconsin Joint Committee for Review of Administrative Rules (JCRAR) adopted a motion under s. 227.26 (2) (d), Stats., suspending s. NR 404.04 (3), Wis. Adm. Code (TSP standard). The committee subsequently adopted a motion to introduce Assembly bill 160. This proposed rule is consistent with the purpose of JCRAR's action and Assemble bill 160.

SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSE

The Department held one hearing on the proposed rules on October 12, 2007 in Madison. One person attended the hearing but did not provide oral comment.

Written public comments were received on the original Order AM-23-07 from two trade organizations that represent certain Wisconsin business sectors. These trade organizations are the Wisconsin Paper Council (WPC), which currently represents 20 separate entities in the pulp, paper, and allied industry, and Wisconsin Manufacturers and Commerce (WMC) which currently represents nearly 4,000 companies in the state. Both the WPC and WMC expressed full support of the proposed rule revisions in Order AM-23-07, including the proposed repeal of the TSP standard which is the subject of this report.

MODIFICATIONS MADE TO THE PROPOSED RULE AS A RESULT OF PUBLIC COMMENT OR TESTIMONY RECEIVED

No modifications were made in response to public comment received. (See explanation in previous section.)

PERSONS APPEARING OR REGISTERING AT PUBLIC HEARING

One person appeared at the public hearing and registered as indicated below.

In support:	Donald Pay, 26 Mesa Court, #4, Madison, WI 53719
In opposition:	None
As interest may appear:	None

CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE

Changes to the rule analysis were made to reflect the focus of this order on TSP only and that the PM₁₀ and PM_{2.5} related rules contained in order AM-23-07 have already become effective.

No changes were made to the fiscal estimate.

RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

The Legislative Council Rules Clearinghouse suggested that the Department reconsider the proposed repeal of two definitions as contained in order AM-23-07. Based in part on the decision to remove proposed rule changes related to TSP, the Department determined that both definitions should be retained, and neither was repealed under order AM-23-07A. The Department has now determined that the definition in s. NR 404.04 (11), for “total suspended particulates” should be repealed as part of the action here to repeal the TSP standard.

FINAL REGULATORY FLEXIBILITY ANALYSIS

The proposed rule does not have the potential to have a significant direct impact on a substantial number of small sources. The proposed rule repeals an existing Wisconsin ambient air quality standard with the purpose of ensuring Wisconsin’s ambient air quality standards are the same as the federal national ambient air quality standards for particulate matter. The proposed rules contain no new direct requirements for any sources, including those defined as a small business under s. 227.114 (1), Stats.