Wisconsin
Department of Natural Resources

Air Management Study Group
Quarterly Meeting

Madison
December 10, 2015

Ozone NAAQS Update

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2008 Ozone NAAQS - Update

- Neither Sheboygan nor Kenosha (Chicago) attained the NAAQS by July 2015.
- Sheboygan was eligible for a one-year extension to July 2016 (however, will not attain based on 2013-15 data). Eventual “bump-up” to Moderate classification likely.
- EPA has proposed that Kenosha/Chicago be bumped up to Moderate classification (ineligible for extension). However, preliminary 2013-15 data indicates area could instead be eligible for attainment.
- WDNR working with IN, IL, and R5 on potential attainment redesignation activities.

2008 Ozone NAAQS - Update

- EPA released the "transport rule" for 2008 NAAQS on November 17. This is intended to address "good neighbor" SIP provisions and interstate transport issues for this NAAQS. DNR is currently reviewing the proposed rule. Rule will have a 45-day comment period once published (comments likely due mid- to late-January)

- EPA proposed a new exceptional events rule on November 10, with comments due January 19. This is intended to clarify criteria/procedures to determine if monitoring data has been influenced by an event (i.e. wildfire), such that the data may not be appropriate for EPA use in comparison to the NAAQS.

EPA's 2015 Ozone NAAQS Final Rule

- EPA released a new NAAQS for ozone on October 1. This is EPA's first update to the standard since 2008, which resulted from a Clean Air Act-required review.
  - Must review standards every 5 years under the Act

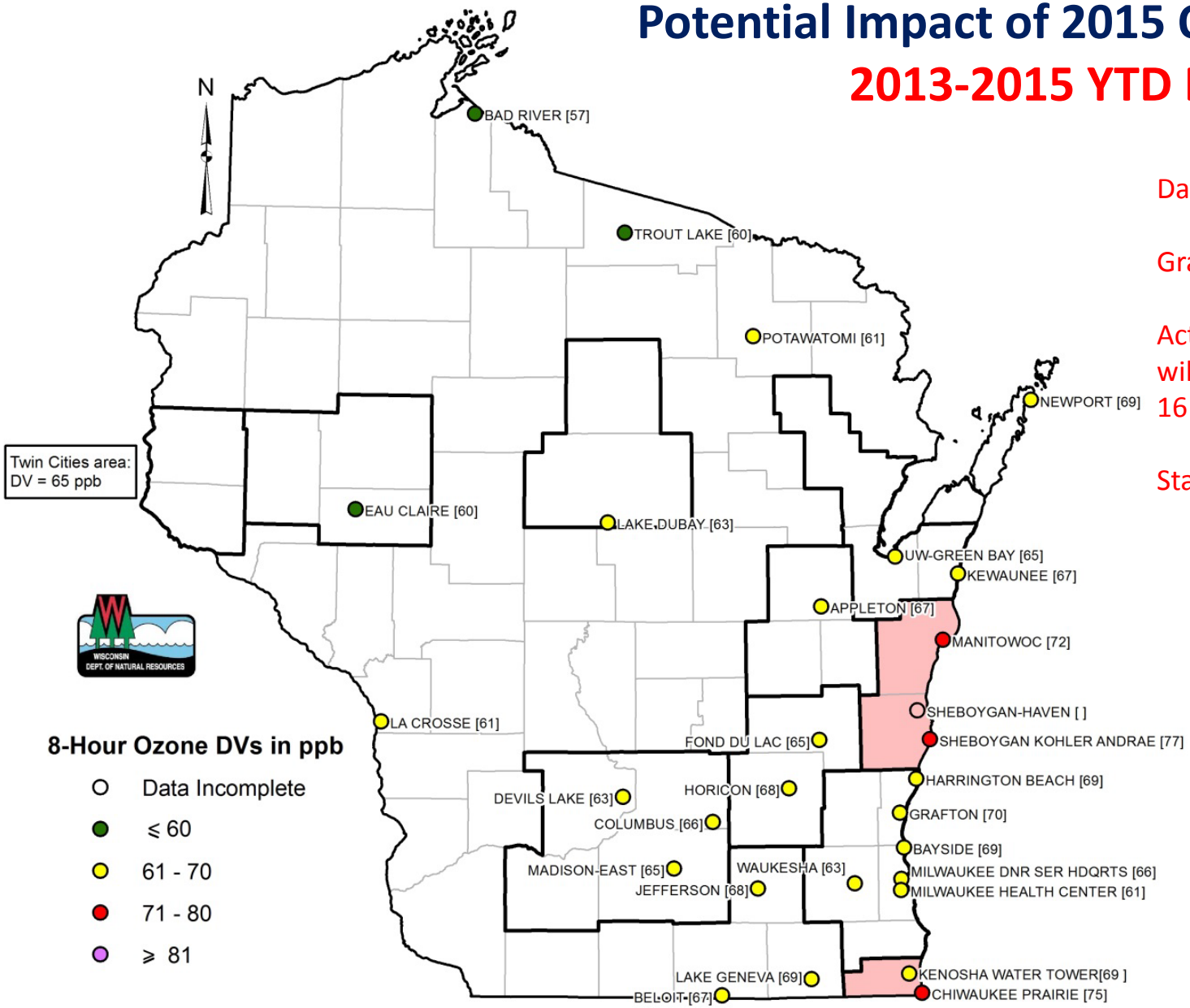
- EPA is finalizing a revised primary standard of 70 ppb (0.070 ppm). This is at the high end of the range they proposed (65-70 ppb) and is 5 ppb lower than the 2008 standard of 75 ppb.

- WDNR will not know what areas may be designated nonattainment until after the 2016 ozone season concludes. EPA will issue implementation guidance separately.

- Nonattainment designations will likely be made based on 2014-2016 monitoring data. Final designations may consider 2017 data.

- EPA also finalized an extension of the ozone monitoring season to March 1-October 15, which is 1.5 months longer than now.

Potential Impact of 2015 Ozone NAAQS:
2013-2015 YTD Data



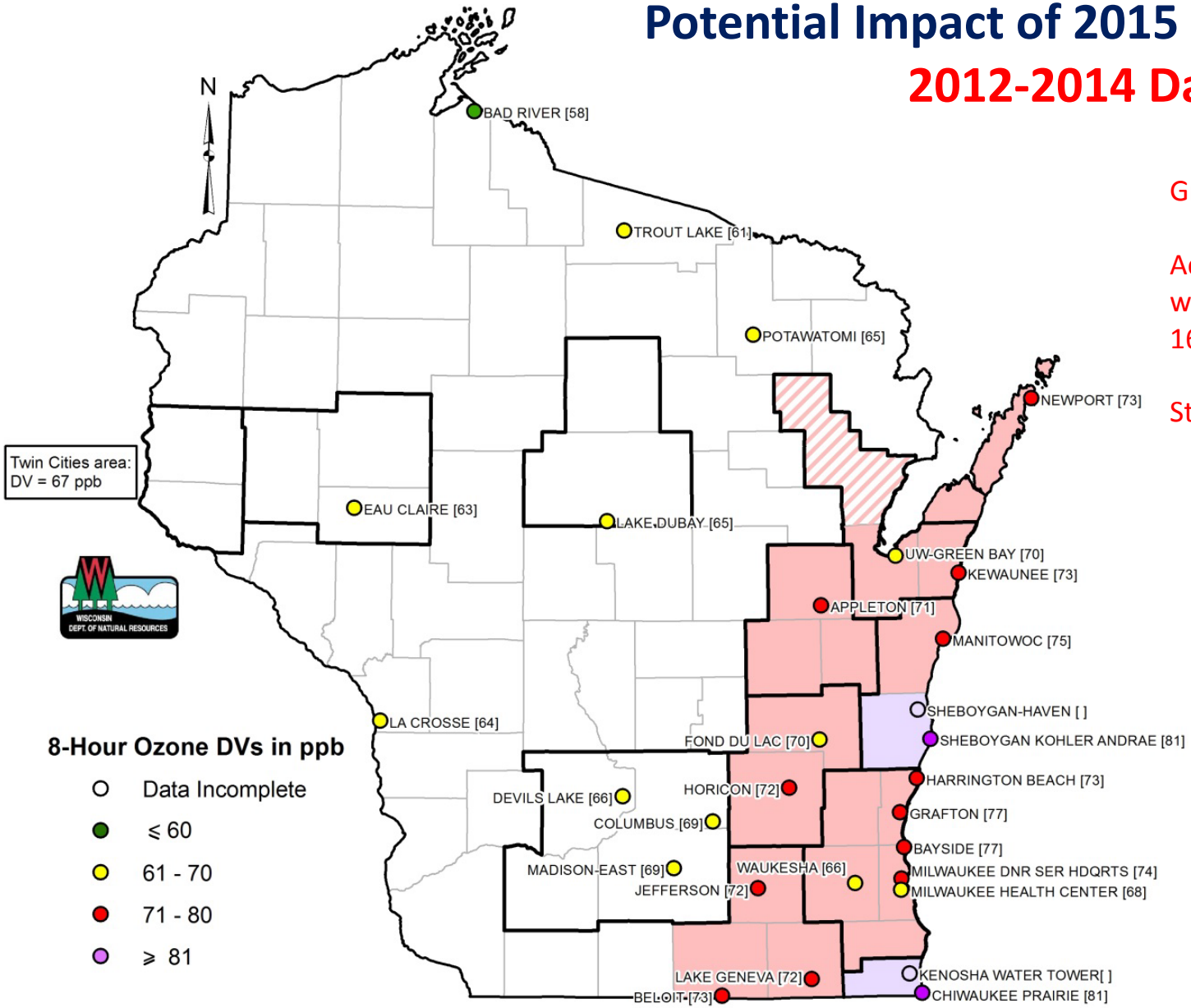
Data is prelim/not QA'd

Graphic is illustrative only.

Actual nonattainment areas will likely be based on 2014-16 data.

Statistical areas outlined
Red areas = marginal

Potential Impact of 2015 Ozone NAAQS: 2012-2014 Data



Graphic is illustrative only.

Actual nonattainment areas will likely be based on 2014-16 data.

Statistical areas outlined
- Red areas = marginal
- Purple areas = moderate

Startup, shutdown and malfunction SIP briefing

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Background

- June 30, 2011 – Sierra Club files petition for rulemaking with EPA
  - Regarding how state agency rules in EPA-approved SIPs treat excess emissions during periods of startup, shutdown, or malfunction (SSM) of industrial processes or emission control equipment
- February 23, 2013 – Proposed SIP inadequacy for other states related to startup and shutdown
  - EPA agrees with Sierra Club's 2011 petition (see e.g. *Luminant Generation v EPA* (5th Cir. 2013))
  - EPA made preliminary finding that provisions in 36 states' SIPs relating to excess emissions during SS events were inadequate
  - Wisconsin was not identified; Sierra Club pointed out that Wisconsin should have been included in comments on the proposal and MEDC filed a petition specifically for Wisconsin
- April 18, 2014 – *NRDC v. EPA* (D.C. Circuit)
  - **Affirmative defense** - set of facts, if shown by defendant, which defeats or mitigates legal consequences . EPA's affirmative deference was available to defendants in cases where an "unavoidable" malfunction had resulted in impermissible levels of emissions.

Background

- April 18, 2014 – *NRDC v. EPA* (D.C. Circuit), cont.
  - Holding: EPA does not have authority under the CAA to create an affirmative defense for "unavoidable" malfunctions leading to exceedances of emissions limits under the Portland Cement NESHAP
- August 6, 2014 – Sierra Club files 180 day notice of intent to sue EPA
  - Claims EPA failed to respond to a separate petition requesting correction of illegal SSM provisions in Wisconsin's SIP
- September 17, 2014 – Supplemental Notice of Rulemaking, includes malfunction events in addition to startup/shutdown per *NRDC v EPA*
- December 11, 2014 – Email from Susan Tennenbaum (EPA Region 5 counsel) to DNR
  - "Wisconsin was inadvertently omitted from the current SIP call"
- May 22, 2015– EPA finalizes SIP call for 36 other states (published in the federal register June 12, 2015)
- Current lawsuits related to EPA's SIP call
  - Lawsuit filed by Texas in 5th Circuit; D.C. Circuit denied Texas the ability to file a separate suit and consolidated all cases (Oct 2015)
  - *Southeastern Legal Foundations, Inc. et. al. v EPA* (D.C. Circuit)

Current Status of NR 436.03 Exceptions

- Still giving exceptions because it is in our code
  - NR 436.03, Wis. Adm. Code
- Additional language at end of approval letters

Please note that this is a Wisconsin Department of Natural Resources Air Management Program approval only. This approval in no way precludes or affects action that U.S. EPA or private citizens may decide to take in relation to this matter. **[*INSERT COMPANY NAME*]** should be aware that on June 12, 2015, the U.S. EPA issued a state implementation plan ("SIP") call to remove SIP provisions in other states that provide an affirmative defense for excess emissions during planned events, such as startup and shutdown. U.S. EPA believes that automatic or discretionary exemptions from emission limitations in SIPs are impermissible because they are not consistent with the Clean Air Act. While Wisconsin was not included in the June 12, 2015 SIP call, the excess emission exception in s. NR 436.03(2)(b), Wis. Adm. Code constitutes an affirmative defense similar to those identified as problematic by the U.S. EPA in other states, and similar to provisions that courts have ruled against in cases such as *Luminant Generation Co. LLC, Et. Al. v. U.S. Environmental Protection Agency* (5th Circuit, 2013) and *Natural Resources Defense Council v. Environmental Protection Agency* (D.C. Circuit, 2014). If you have any questions concerning this letter, please contact me at **[INSERT COMPLIANCE STAFF PHONE #].**

Looking Ahead - SIP Process Schedule

- Wisconsin will receive a proposed SIP call
  - No expected date of publication provided yet.
- SIP call process:
  - Proposed SIP call published
  - 30-day comment period
  - Final SIP call published
  - Likely will have 18 months to submit a SIP revision
- If fail to meet the deadline, risk of a FIP

How other States are Proceeding

- CO – remove all rule and SIP language on SSM and affirmative defense
- MI – remove affirmative defense from rule and SIP
  - keep a separate rule on enforcement discretion for emissions violations during SSM
- IN – published notice of rulemaking Sept 2015
  - Notice invited comments from the public on how to proceed.

Questions for AMSG

- What are AMSG members thoughts on how Wisconsin should approach this expected SIP Call?
- Do members have a reaction to how this will affect their constituents and/or industries?
- EPA has laid out its ideas for how states can approach start-up, shutdown and malfunction. http://www3.epa.gov/airquality/urbanair/sipstatus/docs/20150522fr.pdf

Next Steps

- WDNR would like to develop a workgroup to discuss and develop an approach for addressing the expected SIP call.
  - Form a subgroup
  - Set a timeline
  - Collect ideas
  - Make recommendations

Volunteers?

Contact Information

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