

Report From Agency

REPORT TO LEGISLATURE

NR 462.015, Wis. Adm. Code
National emission standards for hazardous air pollutants
for industrial, commercial and institutional boilers and process heaters
and affecting small business

Board Order No. AM-37-07
Clearinghouse Rule No. 07-088

Basis and Purpose of the Proposed Rule

On July 30, 2007, the United States Court of Appeals for the District of Columbia Circuit vacated a federal air quality regulation, 40 CFR Part 63, Subpart DDDDD, the National Emission Standard for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters, also known as the "Boiler MACT." The result of this vacatur is that the standard is no longer in effect at the federal level. The compliance date for existing sources under the now vacated federal rule was September 13, 2007.

As required under s. 285.27(2), Stats., the Department had promulgated a state version of the federal Boiler MACT, in ch. NR 462, Wis. Adm. Code. Our state version of the Boiler MACT was not vacated by the court action. As a result, affected sources in Wisconsin would still be required to comply with the ch. NR 462 version of the Boiler MACT. Under emergency order AM-28-07(E) which the Board adopted on September 10, 2007, the implementation of ch. NR 462 was stayed for 150 days. A permanent rule revision is needed to continue the stay of NR 462 implementation until EPA replaces the vacated federal standard.

The Boiler MACT was promulgated by USEPA on September 13, 2004 and was significantly based on the New Source Performance Standards required for boiler and heaters installed after 1984. The Boiler MACT required significant emission reductions primarily from older boilers and process heaters. The regulated pollutants are metals (particulate matter as a surrogate) and hydrogen chloride. The concern over ch. NR 462 is primarily over equity with industry in other states.

Section 285.27(4), Stats., requires the Department to alter state rules if the corresponding federal rule is relaxed. The proposed action will stay the implementation of ch. NR 462 to comply with that requirement. There is also no schedule yet for USEPA to promulgate a replacement standard for the vacated Boiler MACT. It is expected that USEPA will not propose a new Boiler MACT standard for several years.

Upon vacatur of the Boiler MACT, the USEPA advised permit authorities that another federal Clean Air Act (CAA) requirement known as the Section 112(j) "MACT hammer," codified in 42 U.S.C. 7412(j)(2), became effective. This CAA provision requires permitting authorities to issue case-by-case MACT determinations when the USEPA has failed to promulgate a MACT for an identified source category such as boilers. There is no specific guidance yet from the USEPA on initiating implementation of Section 112(j) under this vacatur.

The proposed rule stays implementation of ch. NR 462 Boiler MACT. There are up to 59 affected facilities in Wisconsin. Sources would not be required to operate any emission controls that were installed to comply with ch. NR 462 by September 13, 2007, until a case-by-case determination under the MACT hammer provisions has been established in their operating permit, or until USEPA promulgates and requires compliance with a replacement standard for the Boiler MACT.

Summary of Public Comments

One hearing was held in Madison on October 26, 2007. Mike Scott of Legal Services conducted the hearing, and Roger Fritz represented the Bureau of Air Management. Scott Manley, representing Wisconsin Manufacturers & Commerce, spoke and registered support for the proposed rule change. A student also attended the hearing as part of a class assignment.

Written comments were received from the Legislative Council Rules Clearinghouse and from the Wisconsin Paper Council and Wisconsin Manufacturers & Commerce. The Rules Clearinghouse submitted one non-substantive comment to correct a spelling error, which was made.

The Wisconsin Paper Council and Wisconsin Manufacturers & Commerce both registered support for the proposed rule change. Wisconsin Manufacturers & Commerce also requested that "DNR adopt subsequent rules intended to track federal programs by reference to those federal rules." The Wisconsin Manufacturers & Commerce letter explained that incorporation of federal rules by reference would avoid the need for DNR to adopt an emergency rule, hold a special Board meeting, involve the Joint Committee on the Review of Administrative Rules and promulgate rules as was needed in this case. The Wisconsin Paper Council provided a similar comment on a previous rule proposal (AM-08-07).

The Department's understanding is that the Attorney General's office has issued several opinions (e.g. 1979 WL 41994, Wis. A.G.) that incorporation by reference, as suggested, is prohibited under the Wisconsin Constitution.

Modifications Made

No modifications were made.

Appearances at the Public Hearing

In support:

Scott Manley, Wisconsin Manufacturers & Commerce, 501 E. Washington Ave., Madison, WI 53703

In opposition – none

As interest may appear:

Ashley Spencer, 515 University Avenue, Madison, WI 53703

Changes to Rule Analysis and Fiscal Estimate

No changes were required.

Response to Legislative Council Rules Clearinghouse Report

The recommendation was accepted.

Final Regulatory Flexibility Analysis

The Department believes that few if any small businesses are affected. Staying implementation of ch. NR 462 would initially reduce the impact on any affected small business. However, if section 112(j) of the CAA (MACT hammer) applies, any affected small businesses would be required to prepare and submit permit applications and may be subject to more stringent requirements under a case-by-case Boiler MACT determination.

A. Identify and discuss why the rule includes or fails to include any of the following methods for reducing the impact on small business.

1. *Less stringent compliance or reporting requirements.* There is no provision in federal law to provide less stringent requirements for small businesses. In addition, the proposed amendment stays implementation of all provisions of the chapter.

2. *Less stringent schedules or deadlines for compliance or reporting requirements.* There is no specific guidance yet from the USEPA on initiating implementation of Section 112(j). However, once initiated, both large and small businesses would need to submit a Part 1 application within 30 days and a Part 2 application within another 60 days. The Department has 18 months to complete its case-by-case MACT determination.

3. *Consolidation or simplification of compliance or reporting requirements.* Not applicable. See above.

4. *The establishment of performance standards in lieu of design or operational standards.* Not applicable to the proposed action.

5. *The exemption from any or all requirements of the rule.* Only sources that have the potential to emit more the 10 tons per year of a single federal hazardous air pollutant or 25 tons per year of combined federal hazardous air pollutants (i.e. a major source of HAP emissions) are subject to the Boiler MACT or to s. 112(j) requirements. Sources can take emission limits in an operation permit to avoid the Boiler MACT or s. 112(j) requirements.

B. Summarize the issues raised by small business during the rule hearings, any changes made in the proposed rule as a result of alternatives suggested by small business and the reasons for rejecting any alternatives suggested by small business.

No issues were raised by small businesses during the public comment period.

C. Identify and describe any reports required by the rule that must be submitted by small business and estimate the cost of their preparation.

Not applicable to the proposed stay in the implementation of the rule.

D. Identify and describe any measures or investments that small business must take to comply with the rule and provide an estimate of the associated cost.

Not applicable to the proposed stay in the implementation of the rule.

E. Identify the additional cost, if any, to the state in administering or enforcing a rule which includes any of the methods listed in A.

Not applicable to the proposed stay in the implementation of the rule.

F. Describe the impact on public health, safety and welfare, if any, caused by including in the rule any of the methods listed in A.

Not applicable to the proposed stay in the implementation of the rule.