

Clearinghouse Rule 07-088

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **create** NR 462.015, relating to national emission standards for hazardous air pollutants for industrial, commercial and institutional boilers and process heaters and potentially affecting small business.

AM-37-07

Summary Prepared by the Department of Natural Resources

1. **Statute interpreted:** s. 285.27(4), Stats.
2. **Statutory authority:** ss. 227.11(2)(a), 285.11(1) and 285.27(4), Stats.
3. **Explanation of agency authority:** Section 285.27(4), Stats, requires the Department to alter state standards when the corresponding federal requirements are relaxed. Sections 227.11(2)(a) and 285.11(1), Stats. provide the Department with the general authority to promulgate state rules.
4. **Related statute or rule:** Section 285.27(2)(a), Stats., requires the Department to promulgate National Emission Standards for Hazardous Air Pollutants (NESHAP) often referred to as MACT standards, by rule.
5. **Plain language analysis:** The USEPA National Emission Standard for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters (Boiler MACT) was promulgated September 13, 2004, with a compliance date set for September 13, 2007. The Natural Resources Board adopted the state version of the Boiler MACT as ch. NR 462 in May 2006 and the rule was published in November 2006.

Shortly after promulgation, four environmental organizations filed a lawsuit challenging, among other things, emission standards for the Boiler MACT rule, and EPA's methodology for setting them. In June of 2007, the D.C. Circuit Court of Appeals ruled in favor of the environmentalists and announced its intent to vacate the Boiler MACT Rule. On July 30, 2007, the Court issued its mandate vacating the Boiler MACT. The Department proposes to amend ch. NR 462, Wisconsin Administrative Code, the counterpart state regulation.
6. **Summary of, and comparison with, existing or proposed federal regulation:** The proposed amendment to stay implementation of ch. NR 462 would be consistent with the vacatur by the D.C. Circuit Court of Appeals of the federal rule. Section 112(j) of the federal Clean Air Act (42 U.S.C.

7412(j)(2)) 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. Without ch. NR 462, the Department would implement s. 112(j) through the procedures under 40 CFR 63.50 to 63.56. There is no guidance yet from the USEPA on the implementation of Section 112(j) for sources previously affected by the federal Boiler MACT.

7. Comparison with similar rules in adjacent states: Very few if any other states have a similar state version of the federal standard. Some states have rules that incorporate the federal standard by reference so that these rules become mute when the federal rule was vacated.

8. Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen: The D.C. Circuit Court of Appeals' vacatur can be found at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/04-1385a.pdf>. The Department is merely staying the implementation of a rule which is based on a vacated federal rule.

9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: none

10. Effect on small business: Staying implementation of ch. NR 462 would relieve any affected businesses from complying with the requirements of the Boiler MACT by September 13, 2007. Because the Court vacatur occurred shortly before the compliance date and some sources needed to install control equipment to comply with the emission limitations, affected sources may have already installed controls that they would not now be required to operate.

11. Agency contact person: Kevin Kessler, Air Management Bureau Director (608/266-5207), Kevin.Kessler@Wisconsin.gov

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

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

Roger Fritz
Department of Natural Resources
Bureau of Air Management
PO Box 7921
Madison WI 53707
Fax: (608) 267-0560
Roger.Fritz@Wisconsin.gov

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

The deadline for written comments is November 2, 2007.

SECTION 1. NR 462.015 is created to read:

NR 462.015 **Implementation and enforcement; compliance.** (1) The department may not implement or enforce the provisions of this chapter unless the department revises this chapter in response to EPA's final rule-making on revisions to the provisions of 40 CFR part 63, Subpart DDDDD, on which this chapter is based, in response to the U.S. Court of Appeals' decision of June 6, 2007 which became effective on July 30, 2007 vacating 40 CFR part 63, Subpart DDDDD.

(2) Notwithstanding s. NR 462.01(5), no owner or operator, otherwise subject to this chapter under s. NR 462.01, is required to comply with any of the provisions of this chapter until the department revises this chapter in accordance with sub. (1).

SECTION 2. 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 3. 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 _____
Matthew J. Frank, Secretary

(SEAL)