Form 1100-001
(R 2/04)

NATURAL RESOURCES BOARD AGENDA ITEM

Item No. 3.A.4

SUBJECT:
Hearing authorization for Order AM-37-07on proposed rules affecting ch. NR 462 pertaining to the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters in ch. NR 462, Wis. Adm. Code

FOR: SEPTEMBER 2007 BOARD MEETING

TO BE PRESENTED BY: Al Shea, Administrator, Division of Air and Waste Management

SUMMARY:
The federal National Emission Standard for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters (Boiler MACT) was promulgated by the USEPA on September 13, 2004, with a compliance date set for September 13, 2007. Shortly after promulgation, four environmental organizations filed a lawsuit that challenged the methodology USEPA used to set the emission standards and the standards themselves. In June of 2007, the D.C. Circuit Court of Appeals ruled in favor of the environmental organizations and announced its intent to vacate the Boiler MACT. On July 30, 2007, the Court issued its mandate vacating the Boiler MACT. The compliance date for existing sources under the now vacated federal rule is no longer valid at the federal level. However, since DNR promulgated a similar standard in ch. NR 462 as required by s. 285.27(2)(a), Stats., the Boiler MACT requirements remain in Wisconsin's rules.

On September 10, 2007, the Board adopted an emergency order which stayed implementation of ch. NR 462 for 150 days. The Department is proposing an identical permanent amendment here. As described in the background memorandum, the issues here are complex. There is no specific national guidance yet from USEPA on the expected next steps following the federal court vacatur.

The Board last acted on ch. NR 462 on September 10, 2007, in a special session adopting an emergency order which stays implementation of the rule. Chapter NR 462 was originally adopted in May 2006, as required under s. 285.27(2)(a), Wis. Stats.

RECOMMENDATION: That the Board authorize one hearing in Madison on Order AM-37-07.

LIST OF ATTACHED MATERIALS:

No ☐	Fiscal Estimate Required	Yes ☒	Attached
No ☒	Environmental Assessment or Impact Statement Required	Yes ☐	Attached
No ☐	Background Memo	Yes ☒	Attached

APPROVED:

Bureau Director, Kevin Kessler — Date 9/13/07

Administrator, Al Shea — Date 9-19-07

Secretary, Matthew J. Frank — Date 9/20/07

cc: Laurie Ross - AD/5
Carol Turner - LS/5
K. Kessler - AM/7
R. Eckdale - AM/7 (6)
Roger Fritz - AM/7
Mike Scott - LS/5
Bill Baumann - AM/7
Jeff Hanson - AM/7

CORRESPONDENCE/MEMORANDUM — State of Wisconsin

DATE: September 12, 2007

FILE REF: 4503-12

TO: Natural Resources Board Members

FROM: Matthew J. Frank, Secretary

SUBJECT: Background Memo for Order AM-37-07 pertaining to the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters in ch. NR 462, Wis. Adm. Code.

Why is this rule being proposed?

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.

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Summary of the rule

The proposed rule amendment 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.

How this proposal affects existing policy

This rule amendment is consistent with state policy. The proposed action to stay implementation of ch. NR 462 is consistent with s. 285.27(4), Stats., which requires the Department to alter state rules if the corresponding federal rule is relaxed. Affected sources would continue to be subject to the state hazardous air pollutant standards, ch. NR 445, Wis. Adm. Code, although combustion of virgin fossil fuels such as coal are exempt from ch. NR 445 emission limitations. In accordance with sec. 112(j) of the CAA, the Department would make case-by case MACT determinations in Title V Air Operation permits for each affected facility in lieu of using ch. NR 462 requirements for all affected facilities.

The Court also vacated the definitions rule for Commercial, Industrial Solid Waste Incinerators (CISWI). As a result of the court action it is currently unclear if wood fired boilers and process heaters are regulated under the Boiler MACT and s. 112(j) or under CISWI. Staying the implementation of ch. NR 462 would avoid any conflict between the requirements of ch. NR 462 and CISWI, if it is determined that CISWI applies to wood fired boilers and process heaters.

Has the Board dealt with these issues before? If so, when and why?

The Board last acted on ch. NR 462 as an emergency rule at a special meeting on September 10, 2007. The Board adopted the original rule in May 2006.

Who will be affected by the proposed rule? How will they be affected?

The proposed stay in the implementation of ch. NR 462 Boiler MACT would relieve up to 59 facilities with solid fuel fired boilers or process heaters from the requirement to meet the Boiler MACT. These sources are subject to s. 112(j) MACT Hammer requirements of the CAA which requires sources to submit a permit application and requires permit authorities to issue a case-by-case MACT determination within 18 months of receipt of a complete application. Upon promulgation of a replacement Boiler MACT standard by USEPA, sources would have up to 8 years to comply with the new USEPA Boiler MACT standard if it is significantly more stringent than the case-by-case MACT.

Based upon the federal rule vacatur and the proposed corresponding stay in the implementation of ch. NR 462, particulate emissions from older boilers could continue without additional emission controls.

Information on environmental analysis

As provided under s. NR 150.03(6)(b)3.b., Wis. Adm. Code, an environmental analysis is not required either when implementation of changes in existing rules will not have material impacts on the human environment or when the Department has limited discretion in formulating important provisions of the rule. Since the proposed stay of implementation of the rule would allow continued operation of existing

sources in accordance with emission limits that were in effect prior to the federal vacatur, there is no material impact from the current condition. Also, under s. 285.27(4), Stats., the Department has little discretion with respect to staying implementation of the rule.

Small business 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 s. 112(j) applies, any affected small businesses would be required to prepare and submit applications and may be subject to more stringent requirements under a case-by-case Boiler MACT determination.

A.1. Describe the compliance and/or reporting requirements imposed on small business.

If implementation of ch. NR 462 is stayed, any affected small businesses would need to prepare and submit applications and may be subject to more stringent requirements under a case-by-case Boiler MACT determination. There is no specific guidance yet from the USEPA on initiating implementation of Section 112(j).

2. Can these compliance and/or reporting requirements be made less stringent for small business? Explain.

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.

B.1. Describe the schedules or deadlines for compliance or reporting imposed on small business.

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.

2. Can these schedules or deadlines be made less stringent for small business? Explain.

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

C. Can the compliance or reporting requirements for small business be consolidated or simplified? Explain.

Not applicable. See above.

D. Can performance standards be established for small businesses in lieu of design or operational standards? Explain.

Not applicable to the proposed action.

E. Can small business be exempted from any or all requirements of the rule? Explain.

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.

F. Initial Regulatory Flexibility Analysis

1. Describe the type of small business that will be affected by rule.

   Any small business which is a major source of HAP emissions and has a solid fuel fired boiler or process heater would be affected by the proposed stay in the implementation of ch. NR 462.

2. Briefly explain the reporting, bookkeeping and other procedures required for compliance with the rule.

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

3. Describe the type of professional skills necessary for compliance with the rule.

   An environmental scientist or environmental engineer with knowledge of organic HAP emissions, halogenated solvent cleaning operations, performance testing, air pollution control technologies, compliance strategies and environmental regulations would have the professional skills necessary to ensure compliance with the proposed rule.

Division of Executive Budget and Finance
DOA-2048 (R10/2000)

Fiscal Estimate — 2007 Session

☒ Original	☐ Updated	LRB Number	Amendment Number if Applicable
☐ Corrected	☐ Supplemental	Bill Number	Administrative Rule Number NR 462

Subject

Staying implementation of the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters in ch. NR 462

Fiscal Effect

State: ☒ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

☐ Increase Existing Appropriation
☐ Decrease Existing Appropriation
☐ Create New Appropriation
☐ Increase Existing Revenues
☐ Decrease Existing Revenues

☐ Increase Costs — May be possible to absorb within agency's budget. ☐ Yes ☐ No
☐ Decrease Costs

Local: ☒ No Local Government Costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected: ☐ Towns ☐ Villages ☐ Cities ☐ Counties ☐ Others ☐ School Districts ☐ WTCS Districts

Fund Sources Affected

☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

Summary: The Department is proposing an emergency rule amendment to stay implementation of Chapter NR 462 regarding hazardous air pollutant emission standards for institutional boilers and process heaters.

Fiscal Effect Assumptions:

1. This proposal requires no action by local units of government, and the Department assumes there will be no fiscal impact on local government.

2. The Department also assumes that staying the implementation of Ch. NR 462 will have no state fiscal effect. However, section 112(j) of the federal Clean Air Act (42 U.S.C. 7412(j)(2)) may apply to the Boiler Maximum Achievable Control Technology (MACT) vacatur. Section 112(j)(2) requires requires permitting authorities to issue case-by-case MACT determinations when the US EPA has failed to promulgate a MACT for an identified source category such as boilers. However, there is no available guidance from US EPA on the implementation of s. 112(j) for sources previously affected by the federal boiler MACT, and as a result it is currently unclear whether the Department will perform these reviews. If the Department were required to perform the case-by-case reviews, it might do so for up to 59 facilities. The Department assumes that each s. 112(j) determination would take approximately 40 hours for the permit review. If the Department were in fact required to perform the case-by-case review, the additional workload would be absorbed in the agency's budget by redirecting existing staff.

3. Staying implementation of ch. NR 462 would have no direct adverse fiscal impact on the private sector. Without ch. NR 462 as the DNR determination under s. 112(j), affected facilities would need to prepare and submit a permit application. Because s. 112(j) is an existing federal requirement, the Department's proposed action does not impose additional costs on the private sector.

Long-Range Fiscal Implications

None

Prepared By:	Telephone No.	Agency
Joseph Polasek	266-2794	Department of Natural Resources
Authorized Signature	**Telephone No.**	**Date (mm/dd/ccyy)**
Joe Polasek by EE	266-2794	09/07/2007

Wisconsin Department of Administration
Division of Executive Budget and Finance
DOA-2047 (R10/2000)

Fiscal Estimate Worksheet — 2007 Session

Detailed Estimate of Annual Fiscal Effect

		LRB Number	Amendment Number if Applicable
☒ Original	☐ Updated		
☐ Corrected	☐ Supplemental	Bill Number	Administrative Rule Number NR 462

Subject

Staying implementation of the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters in ch. NR 462

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

Annualized Costs:	Annualized Fiscal Impact on State Funds from:	
	Increased Costs	Decreased Costs
A. State Costs by Category State Operations — Salaries and Fringes	$ 0	$ - 0
(FTE Position Changes)	(FTE)	(- FTE)
State Operations — Other Costs		-
Local Assistance		-
Aids to Individuals or Organizations		-
Total State Costs by Category	$	$ -
	Increased Costs	Decreased Costs
B. State Costs by Source of Funds GPR	$	$ -
FED		-
PRO/PRS		-
SEG/SEG-S		-
	Increased Revenue	Decreased Revenue
State Revenues — Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.) GPR Taxes	$	$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
Total State Revenues	$ 0	$ - 0

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	$ 0	$ 0
Net Change in Revenues	$ 0	$ 0

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
Joe Polasek by EE	266-2794	09/07/2007

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.

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

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)