

**Wisconsin Department of Natural Resources  
Natural Resources Board Agenda Item**

**SUBJECT:**

Request that the Board approve the Statement of Scope for Emergency Rule Board Order AM-20-13(E) and Permanent Rule Board Order AM-19-13 related to control of mercury emissions under Subchapter III of NR 446, Wis. Adm. Code, and conditionally approve the Public Hearing Notice and the Notice of Submittal to the Legislative Council Rules Clearinghouse for the proposed permanent rule.

**FOR: June 2013 Board meeting**

**PRESENTER'S NAME AND TITLE:** Suzanne Bangert, Deputy Division Administrator

**SUMMARY:**

On May 21, 2013, the Board approved a recommendation by the Department to extend the initial compliance date for the second phase in mercury emission reductions applicable to electric generating units (EGUs) under the state mercury rule, NR 446 Subchapter III, Wis. Adm. Code, from January 1, 2015 to April 16, 2016. This proposed rule-making implements the approved recommendation. The Department may propose modifying this date further if the federal implementation dates change during the rule-making process. Authority for an emergency rule is also requested at this time in the event that the permanent rule cannot be completed prior to January 1, 2015, which is the current compliance date for the second phase of state rule mercury emission reductions.

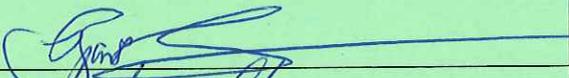
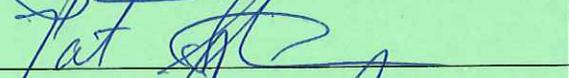
The U.S. Environmental Protection Agency (EPA) recently promulgated two rules which regulate mercury and other hazardous pollutants emitted by EGUs; the Mercury and Air Toxics Standards (MATS) rule, and the Industrial, Commercial, and Institutional (ICI) Boiler Maximum Achievable Technology (MACT) rule. Together, these two rules regulate the same EGUs that are subject to the state mercury rule. Pursuant to s. 285.27(2)(d), Wis. Stats., these EGUs are no longer subject to the state mercury rule once their emissions are regulated under the federal emission standards. Therefore, moving the second phase compliance date of the state mercury rule to April 16, 2016 will allow EGUs to focus on meeting the federal standards. This change will reduce complexity, cost, and compliance burden because it avoids EGUs becoming subject to the state mercury rule second phase requirements only to be exempt a short time later when compliance begins under the federal rules. The proposed later compliance date for the state mercury rule will ensure that mercury reductions still occur in the event that the federal rules are delayed due to litigation or unanticipated actions.

The proposed rule change does not impact small business or have an added cost economic impact. Instead, the proposed rule change is expected to reduce compliance cost. The Department anticipates holding one public hearing in November of 2013 in Madison, Wisconsin. The Department contact for this rule change is Joseph Hoch at 608-267-7543.

**RECOMMENDATION:** That the Board approve the Scope Statement and Notices of hearing and submittal to the Legislative Council Rules Clearinghouse.

**LIST OF ATTACHED MATERIALS (check all that are applicable):**

- |  |   |
|--|---|
| <input type="checkbox"/> (choose one)  | <input type="checkbox"/> Attachments to background memo                     |
| <input checked="" type="checkbox"/> Statement of scope                           | <input checked="" type="checkbox"/> Governor approval of statement of scope |
| <input type="checkbox"/> Fiscal estimate and economic impact analysis (EIA) form | <input type="checkbox"/> Environmental assessment or impact statement       |
| <input type="checkbox"/> Response summary  | <input type="checkbox"/> Board order/rule                                   |

Approved by	Signature	Date
Bart Sponseller, Bureau Director		5/31/13
Pat Stevens, Administrator		5/31/13
Cathy Stepp, Secretary		6/3/13

# STATEMENT OF SCOPE

## Department of Natural Resources

Rule No.: AM-19-13 & AM-20-13(E)

Relating to: NR 446 Subchapter III, Wis. Adm. Code, Control of Mercury Air Emissions from Coal-Fired Electric Generating Units (EGUs)

Rule Type: Permanent and Emergency

### 1. Nature of Emergency:

The Department is requesting authority for both a permanent and an emergency rule-making process to extend the state mercury rule NR 446, subchapter III, Wis. Adm. Code, compliance date from January 1, 2015 to April 16, 2016. This date may be further modified if necessary to accommodate any potential change in federal implementation dates. This state rule regulates mercury emitted by coal-fired electric generating units (EGUs). Recently federal rules have been promulgated which also regulate mercury emitted by coal-fired EGUs. This proposed rule change facilitates transitioning the EGUs from regulation of mercury emissions under the state rule to the federal rules.

Authority for an emergency rule-making is requested to implement the proposed rule change by January 1, 2015 in the event the permanent rule cannot become effective by that date. A delay in the permanent rule beyond this date may simply result due to the current timeframes and logistics associated with permanent rule-making process. Initiating the rule change by January 1, 2015 is necessary to avoid additional compliance burden and cost to the electric utilities as a result of the current state and federal mercury compliance schedules. In this case, added cost for compliance will be passed onto the consumer in electricity rates and will harm the public welfare and economy. At the same time there is no definable environmental benefit resulting under the current compliance schedules as compared to the proposed rule change.

### 2. Detailed description of the objective of the proposed rule:

NR 446 Subchapters II and III, Wis. Adm. Code, collectively referred to as the "state mercury rule", regulate mercury emitted by coal-fired electric generating units (EGUs). Under Subchapter II, EGUs were required to comply with a 40% emission control requirement starting January 1, 2010. Subchapter III initiates a second phase of mercury emission control starting *January 1, 2015*. The requirements under the second phase are 90% control for large EGUs and use of Best Available Control Technology (BACT) for small EGUs. The second phase of control under the state rule is anticipated to affect 35 coal-fired EGUs operating at 14 Wisconsin power plants.

The U.S. EPA recently promulgated two federal mercury control rules that regulate the same coal-fired EGUs that are subject to the second phase of state mercury rule requirements starting January 1, 2015. The two federal rules are the Mercury and Air Toxics Standards (MATS) and the Industrial, Commercial, and Institutional (ICI) Boiler rule with initial compliance dates of April 16, 2015 and January 31, 2016, respectively.

According to Wisconsin Statute 285.27(2)(d), when the affected EGUs are regulated by their applicable federal mercury emission standard they will then become exempt from the state mercury rule requirements. This means that on January 1, 2015, the 35 affected coal-fired EGUs will be subject to state rule requirements and then exempt a short time later when they comply with either the MATS rule beginning April 16, 2015 or the ICI boiler rule beginning January 31, 2016. The result is that the federal

MATS and ICI boiler rules set the long-term mercury emissions control requirements for the affected EGUs.

The Department examined the interaction between the state and federal rules. The Department has found that the state and federal rule requirements will both implement deep mercury reductions. However, the differences between the state and federal rules are likely meaningful enough to require a different focus in planning, control strategies, and installation of equipment for some of the utilities. Potential differences include approaches to emissions averaging, annual versus 30-day emission limitations, and administrative requirements. One major difference is that the federal rules will focus compliance on an individual unit basis whereas the state rule allows compliance averaging over an operator's EGU fleet. The impact of the differences between the state and federal requirements is further compounded due to the short time between their initial compliance dates.

Under these circumstances, the Department believes that requiring affected EGUs to comply with the state mercury rule requirements beginning on January 1, 2015 and then transitioning to the federal rule requirements beginning on April 16, 2015 and January 31, 2016 will result in unnecessary regulatory burden and cost. Therefore, the Department proposes to extend the compliance date for the second phase of state rule requirements until April 16, 2016. The proposed April 16, 2016 compliance date for the state rule is significant because it coincides with and will accommodate approval of a one year compliance extension available under the federal rules. In this way, the EGUs will not become subject to the state rule second phase requirements, via exemption under the state statute, unless the federal rules are delayed.

In summary, revising the state mercury rule second phase compliance date to April 16, 2016 achieves the following objectives:

- Avoids compliance with two different mercury control rules in a staggered fashion, thus simplifying administrative requirements, planning, equipment installations and avoids undue cost in achieving the deep mercury control levels.
- Maintains the existing state mercury rule requirement under NR 446 Subchapter II, Wis. Adm. Code, for 40% mercury control until EGUs comply with the federal standards and become exempt from all state mercury requirements.
- Maintains NR 446 Subchapter III, Wis. Adm. Code, requirements in the event that federal rules are delayed. Maintaining the state mercury rule in a backup position ensures that health-based emission requirements targeted by both the federal and state rules will be achieved in a reasonable time-frame in order to fulfill the state finding for mercury control; and
- Allows granting of the one-year extension to federal MATS requirements until April 16, 2016, on a case-by-case basis, in order to maintain reliability without being in conflict with the state mercury rule requirements.

### **3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

#### **Existing Policy and Rules**

Mercury has been determined to be a hazardous pollutant that bio-accumulates in the environment and impacts human and wildlife health. This impact has resulted in the need to issue a state-wide advisory for the consumption of fish for all Wisconsin waters.

**State Mercury Rule:** In 2008, the state made a "health-based finding" in accordance with Wisconsin Statute 285.27(2)(b) that requires reduction of mercury emitted by coal-fired EGUs. To fulfill this finding, the state enacted the state mercury rule as described in item 2 discussion of the rule objective. The state mercury rule 40% control requirement that began in 2010 is the first step in fulfilling the state health finding. The January 1, 2015 requirement is the second step of deep reductions necessary in fulfilling the finding.

**Federal Mercury Rules:** In accordance with the Clean Air Act (CAA), Section 112, the U.S. EPA has recently promulgated two rules that regulate mercury for the same coal-fired EGUs subject to the state

rule. Of the EGUs subject to the state rule, 32 EGUs will be regulated under the MATS rule beginning April 16, 2015. The remaining 3 EGUs will be regulated under the ICI boiler rule. Refer to description of federal rule in item 2 discussion of the rule objective for more details.

**Wisconsin Statute for Exemption:** According to Wisconsin Statute 285.27(2)(d), EGUs will be exempt from state mercury rule requirements of the state mercury rule, NR 446 Subchapters II and III, Wis. Adm. Code, when the EGUs begin regulating mercury emissions under the MATS and ICI boiler rules. Wisconsin Statute 285.27(2)(d) reads:

*"Emissions limitations promulgated under par. (b) and related control requirements do not apply to hazardous air contaminants emitted by emissions units, operations, or activities that are regulated by an emission standard promulgated under section 112 of the federal clean air act"*

### **New Policy**

The Department does not view this proposed rule change as new policy regarding the control of mercury emitted by coal-fired EGUs. Rather, the Department believes the proposed rule change implements existing policy by facilitating transition to the federal rules as the intended long-term mercury regulatory requirement. Specifically, the proposed rule supports existing policy for the following reasons:

- 1) The proposed rule change maintains ensures the state health finding is fulfilled in two ways. First, the 40% control requirement is maintained until federal requirements apply. Second, deeper control requirements under the state rule will occur by April 16, 2016 in the event federal rules are delayed.
- 2) Existing policy, as set under Wisconsin Statute 285.27(2)(d), directs that the federal rules, when in place, will be the long-term compliance requirement for controlling mercury emissions. This rule change facilitates transition to the federal requirements.
- 3) This proposed rule change does not result in a definable difference in the amount of mercury emitted to the environment versus what the state rule would have achieved without promulgation of the federal standards. The Department has estimated that in 2015, the federal rule alone can result in emissions ranging from 34 pounds more of mercury emitted to the environment or up to 80 pounds less of mercury emitted when compared to implementing the state rule alone.

### **Analysis of Alternatives**

One alternative to the proposed rule is to take no action to address the transition from the state to the federal rules. The "No Action" option may result in undue compliance burden and cost. Further, the comparison of mass mercury reduction in 2015 resulting under the state and federal rules does not indicate a clear environmental benefit to maintaining the January 1, 2015 requirement under the state mercury rule.

Another option is to repeal the state mercury rules effective when EGU mercury emissions are regulated under the federal rules. However, this is not a simple approach to implement since the two federal rules have different compliance dates. In addition, pending litigation introduces uncertainty as to the final disposition and implementation of the federal rules and, consequently, the fulfillment of the state health-based finding. Essentially, this option is already implemented by the default exemption when EGUs are regulated under the federal rules. The proposed rule option facilitates the intended exemption from the state rule.

For these reasons, the Department believes extending the initial compliance date of the state mercury rule second phase requirements to April 16, 2016 is the preferred and least controversial option at this time.

**4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

Wisconsin Statute s. 227.11(2)(a). Each agency may promulgate rules interpreting the provisions of any statute enforce or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.

Wisconsin Statute s. 285.11(9). Prepare and adopt minimum standards for the emissions of mercury compounds or metallic mercury into the air, consistent with s. 285.27(2)(b).

**5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:**

*Permanent Rule:* The Department anticipates the rule-making process to range from 18 to 20 months and require approximately 700 hours of Department staff time. This includes one primary staff employee at 20 hours per month, one supervisor at 5 hours per month, and additional technical, administrative, and legal staff at 2 hours per month.

*Emergency Rule:* In the event that an emergency rule is initiated, the rule language and supporting materials developed during the permanent rule making process will provide the necessary base information for the emergency rule. The Department only anticipates additional work for preparing documents specific to the emergency rule process. Therefore, the Department is allotting 120 hours of staff and supervisory time specifically for administering the emergency rule process.

**5. List with description of all entities that may be affected by the proposed rule:**

The Department anticipates 35 EGUs will be subject to the state mercury rule requirements that must be complied with on January 1, 2015. Of these EGUs, 32 will be subject to the federal MATS rule and 3 will be subject to the ICI Boiler rule. The affected EGUs are owned or operated by the following utility entities: Alliant Energy, Dairyland Power Cooperative, Manitowoc Public Utilities, Wisconsin Public Service Corporation, We Energies, and Xcel Energy.

**6. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:**

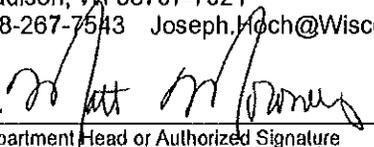
Refer to previous discussions of the federal MATS and ICI boiler rules under item 2, the description of the rule objective; and 3, the description of existing rules and policy.

**7. Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses):**

The economic impact of the proposed rule is expected to be minimal. The rule modification will not result in additional cost versus existing requirements under NR 446 Subchapter II and III, Wis. Adm. Code. One goal of the rule change is to minimize any cost impact caused by transitioning from state to federal rule requirements over a short period of time. The proposed rule will not affect small businesses.

**Contact Person:**

Joseph Hoch  
Bureau of Air Management, Regional Pollutant and Mobil Section, Section Chief  
Wisconsin Department of Natural Resources  
101 South Webster Street  
Madison, WI 53707-7921  
608-267-7543 Joseph.Hoch@Wisconsin.gov

  
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Department Head or Authorized Signature

4/22/13  
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Date Submitted



**SCOTT WALKER**  
**OFFICE OF THE GOVERNOR**  
**STATE OF WISCONSIN**

P.O. Box 7863  
MADISON, WI 53707

May 1, 2013

Cathy Stepp  
Secretary  
Wisconsin Department of Natural Resources  
101 South Webster St.  
P.O. Box 7921  
Madison, WI 53707-7921

**RE: Scope Statement for AM-19-13 modifying NR 446 relating to the control of mercury air emissions from coal-fired electric generating units**

Dear Secretary Stepp,

I hereby approve the statement of scope submitted on April 22, 2013, pursuant to Wisconsin Statutes § 227.135, in regards to a proposed rule modifying Chapter NR 446 of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.135(3).

Sincerely,

Scott Walker  
Governor