

ENVIRONMENTAL PROTECTION COMMISSION[567]

Adopted and Filed

Pursuant to the authority of Iowa Code section 455B.133, the Environmental Protection Commission hereby amends Chapter 23, "Emission Standards for Contaminants," Iowa Administrative Code.

The purpose of the rule making is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are addressed in this rule making are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for industrial, commercial and institutional boilers and process heaters and the NESHAP for brick and structural clay products manufacturing.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 3, 2008, as **ARC 7395B**. A public hearing was held on January 5, 2009. The Department did not receive any oral or written comments at the public hearing. The Department received two sets of written comments before the public comment period closed on January 6, 2009.

The public comments submitted are described below for the respective items. Additionally, the submitted comments and the Department's response to those comments are summarized in more detail in a responsiveness summary available from the Department. In response to comments, the Department made minor changes to the adopted amendments from those published under Notice.

Over the last year and a half, the D.C. Court has issued rulings on several significant federal regulations promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. Although the D.C. Court vacated the federal regulations, the regulations were adopted by reference and therefore are still in effect and enforceable by the Department. The vacatur of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air quality agencies. In response to these vacaturs, the Department is removing the now-vacated federal regulations that were adopted by reference.

Section 112 of the CAA as amended in 1990 requires EPA to develop a list of source categories or subcategories that emit or have the potential to emit hazardous air pollutants (HAP) and further requires EPA to issue regulations for these source categories or subcategories. Section 112 also requires certain subject sources to meet maximum achievable control technology (MACT) for controlling HAP.

EPA issues the MACT standards for listed source categories and subcategories under the NESHAP program. EPA promulgated the NESHAP with MACT standards for brick and structural clay products manufacturing (Brick MACT) on May 16, 2003. EPA promulgated the NESHAP with MACT standards for institutional, commercial and industrial boilers and process heaters (Boiler MACT) on September 13, 2004. The Brick MACT and the Boiler MACT were adopted by reference into the existing state air quality rules.

Section 112 includes provisions to require MACT for major sources of HAP emissions in the event that EPA does not issue MACT standards. Under Section 112(g), if EPA has not set applicable emission limits for a category of listed HAP sources, construction of a new major source or modification of an existing major source in the source category may not occur unless the Administrator (or delegated state or local agency) determines on a case-by-case basis that the unit will meet standards equivalent to MACT. Under Section 112(j), if EPA fails to promulgate a standard for a listed category or subcategory by the dates established in the CAA, states must conduct a case-by-case MACT determination for each subject source category or subcategory and include the MACT requirements in each facility's Title V Permit. EPA has delegated authority to the Department to implement and enforce both Sections 112(g) and 112(j) in Iowa.

The D.C. Court issued its decision to vacate the Brick MACT on March 13, 2007, and issued the mandate making the decision final and effective on June 18, 2007. EPA did not

appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available online at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/03-1202a.pdf>.

The D.C. Court issued its decision to vacate the Boiler MACT on June 8, 2007, and issued the mandate making the decision final and effective on July 30, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available online at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/04-1385a.pdf>.

Because of the D.C. Court vacatur, it now appears that Sections 112(g) and 112(j) apply to sources affected by the vacated Boiler and Brick MACTs. Additionally, EPA entered into a D.C. Court-ordered agreement that includes several options, including a schedule requiring EPA to repropose a Boiler MACT by July 31, 2009, and to repromulgate a final Boiler MACT standard by July 31, 2010. EPA has not provided a schedule for repromulgating the Brick MACT.

At the Department's Air Quality Client Contact meetings on August 14, 2008, and November 13, 2008, the Department discussed the implications of the Boiler MACT vacatur with stakeholders. At the meetings, the Department outlined a tentative Section 112(j) time line for owners and operators of facilities with boilers and process heaters. The Department sent follow-up letters to affected facilities on September 16, 2008, and on December 31, 2008.

Since only three brick and structural clay products manufacturing facilities exist in the state, the Department will be working with these facilities individually to develop the Section 112(j) requirements as needed.

Item 1 amends paragraph 23.1(4)“dd,” which adopts by reference the federal provisions for the Boiler MACT. The amendment removes most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Boiler MACT. The amendment also includes a paragraph explaining the vacatur and indicating that the adoption by reference of federal regulations under 40 CFR Part 63, Subpart DDDDD, is rescinded. The Department received comments from EPA Region VII on this item, suggesting that the Department clarify the amendment to state that the adoption by reference of the federal regulations is rescinded rather than stating that the federal regulations are no longer adopted by reference. The Department is making the suggested changes to the adopted amendments. The paragraph is being preserved as a placeholder because EPA is required to repromulgate the Boiler MACT and may do so under the same federal subpart.

Item 2 amends paragraph 23.1(4)“dj,” which adopts by reference the federal provisions for the Brick MACT. The amendment removes most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Brick MACT. The amendment also includes a paragraph explaining the vacatur and indicating that the adoption by reference of federal regulations under 40 CFR Part 63, Subpart JJJJJ, is rescinded. The Department received comments from EPA Region VII on this item, suggesting that the Department clarify the amendment to state that the adoption by reference of the federal regulations is rescinded rather than stating that the federal regulations are no longer adopted by reference. The Department is making the suggested changes to the adopted amendments. The paragraph is being preserved as a placeholder because EPA is required to repromulgate the Brick MACT and may do so under the same federal subpart.

These amendments are intended to implement Iowa Code section 455B.133.

These amendments will become effective on April 15, 2009.

The following amendments are adopted.

ITEM 1. Amend paragraph **23.1(4)“dd”** as follows:

dd. Emission standards for industrial, commercial and institutional boilers and process heaters. These standards apply to new and existing major sources with industrial, commercial or institutional boilers and process heaters. ~~For purposes of these standards, a boiler is defined as an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Waste heat boilers, as defined in the federal rule, are excluded from these standards. For purposes of these standards, a process heater is defined as an enclosed device using controlled flame, that is not a boiler, and the unit's primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to a heat transfer material for use in a~~

~~process unit, instead of generating steam. Process heaters are devices in which the combustion gases do not directly come into contact with process materials. Process heaters do not include units used for comfort or space heat, food preparation for on-site consumption, or autoclaves. (Part 63, Subpart DDDDD)*~~

*As of April 15, 2009, the adoption by reference of Part 63, Subpart DDDDD, is rescinded. On July 30, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart DDDDD, in its entirety, and requiring EPA to repromulgate final standards for industrial, commercial or institutional boilers and process heaters at new and existing major sources.

ITEM 2. Amend paragraph **23.1(4)“dj”** as follows:

dj. Emission standards for hazardous air pollutants for brick and structural clay products manufacturing. These standards apply to new and existing brick and structural clay products manufacturing facilities that are, are located at, or are part of a major source of hazardous air pollutant emissions. ~~The brick and structural clay products manufacturing source category includes those facilities that manufacture brick including, but not limited to, face brick, structural brick, and brick pavers; clay pipe; roof tile; extruded floor and wall tile; or other extruded, dimensional clay products. Additional applicability criteria and exemptions from these standards are contained in the applicable subpart. (Part 63, Subpart JJJJ)*~~

*As of April 15, 2009, the adoption by reference of Part 63, Subpart JJJJ, is rescinded. On June 18, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart JJJJ, in its entirety, and requiring EPA to repromulgate final standards for brick and structural clay products manufacturing at new and existing major sources.

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