



**Wisconsin
Manufacturers
& Commerce**

Wisconsin Manufacturers'
Association • 1911

Wisconsin Council
of Safety • 1923

Wisconsin State Chamber
of Commerce • 1929

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June 11, 2007

Robert Eckdale
Bureau of Air Management
P.O. Box 7921
Madison, WI 53707
Robert.eckdale@wisconsin.gov

Re: AM-32-05: Revisions to Chapter NR 446 relating to the Federal Clean Air Mercury Rule (CAMR) and Additional Wisconsin Provisions.

Dear Mr. Eckdale:

Wisconsin Manufacturers & Commerce (WMC) submits these comments on the Department of Natural Resources (DNR) proposed mercury rule. We appreciate this opportunity to provide input on this draft rule.

Wisconsin Manufacturers & Commerce is a business trade organization with more than 4,300 members statewide in the manufacturing, energy, commercial, health care, insurance and service sectors. Roughly one-quarter of the private sector employees in Wisconsin are employed by WMC members. WMC members have a substantial interest in this mercury rule as we have utility members directly affected by the proposal. All other WMC members will be impacted indirectly through substantially higher electric rates resulting from this proposal.

Generally, WMC supports adoption of the US EPA's Clean Air Mercury Rule (CAMR), including the federal allocation structure and participation in the national trading market. CAMR will lower mercury emissions from existing coal-fueled power plants by 70 percent, and it imposes even stricter limits on new power plants. The proven "cap and trade" method employed by CAMR is the most cost-effective way to reduce mercury. We oppose those proposed provisions that deviate from CAMR and that will significantly increase electric rates for Wisconsin businesses and homeowners. Specifically, we oppose provisions in the draft rule that disallow emission trading to obtain required reductions and that would mandate utilities reduce emissions by 90 percent. These changes to CAMR, while adding significant costs, have not been shown to produce any benefits for Wisconsin.

**I. DNR'S PROPOSED NINETY-PERCENT REDUCTION AND BAN ON
EMISSION TRADING MORE THAN DOUBLES THE RULE'S COMPLIANCE
COST.**

A. DNR's Proposed Rule Substantially Deviates from EPA's CAMR.

The DNR proposed rule requires coal-fired units to meet specific targets and timetables over three distinct phases beginning in 2010. The first phase

(Phase I) begins in 2010 and extends through 2017, and requires all affected units in WI to achieve a state-wide mercury budget of 1,780 pounds, which is the same as the CAMR Phase I budget. In Phase II, which begins in 2018 and extends through 2019, all affected units must achieve a state budget of 702 pounds, or a 69 percent overall reduction, which is the same state budget as CAMR Phase II. The final phase (Phase III) goes from 2020 and beyond, however, coal-fired units operating in Wisconsin are required to achieve a 90 percent reduction from its annual mercury in coal. This additional 21 percent reduction beyond Phase II is not required by CAMR.

In addition, the proposed rule allows for system-wide compliance in Phases I & II for each Wisconsin generating system; however, no other trading (inter- or intra-state) is allowed and the banking of unused allowances is not permitted during these two phases. The regulatory regime in Phase III requires unit-by-unit controls for all affected units, which translates into a command-and-control regulatory regime.

DNR also requested comments on those components set forth in a January 22, 2007, petition from various environmental and fishing groups. Petitioners asked DNR to adopt rules that require a 90 percent or greater reduction in mercury emissions by January 1, 2012. Because such provisions are more stringent than DNR's proposal, we do not specifically address them here, except that WMC opposes for the same general reasons we oppose those deviations to CAMR proposed by DNR.

B. Wisconsin Deviations from CAMR will Increase Costs by \$450 Million.

The incremental costs associated with DNR's provisions that exceed CAMR requirements were recently calculated and presented in *Evaluation of the Compliance Implications to Wisconsin Electric Generators of Meeting the Wisconsin Proposed Mercury*.¹ This June 2007 report was developed in coordination with WMC and the Wisconsin Utility Association on behalf of the Center for Energy and Economic Development (CEED).

The CEED Study analyzed and presented the cumulative annualized compliance costs to Wisconsin utilities in meeting EPA's Clean Air Interstate Rule (CAIR) and CAMR and the incremental costs with the Wisconsin mercury rule. The table below shows that cumulative annualized compliance costs to Wisconsin generators between 2009 and 2020 to meet CAIR/CAMR are projected to be almost \$4.3 billion. Under DNR's proposed mercury rule, these compliance costs are projected to be almost \$4.8 billion for the same 2009 to 2020 time period. *Thus, the proposed DNR rule would increase the cost of*

¹ Evaluation of the Compliance Implications to Wisconsin Electric Generators of Meeting The Wisconsin Proposed Mercury; Prepared for Center for Energy and Economic Development; Prepared by James Marchetti, J. Edward Cichanowicz, Michael Hein (June 2007).

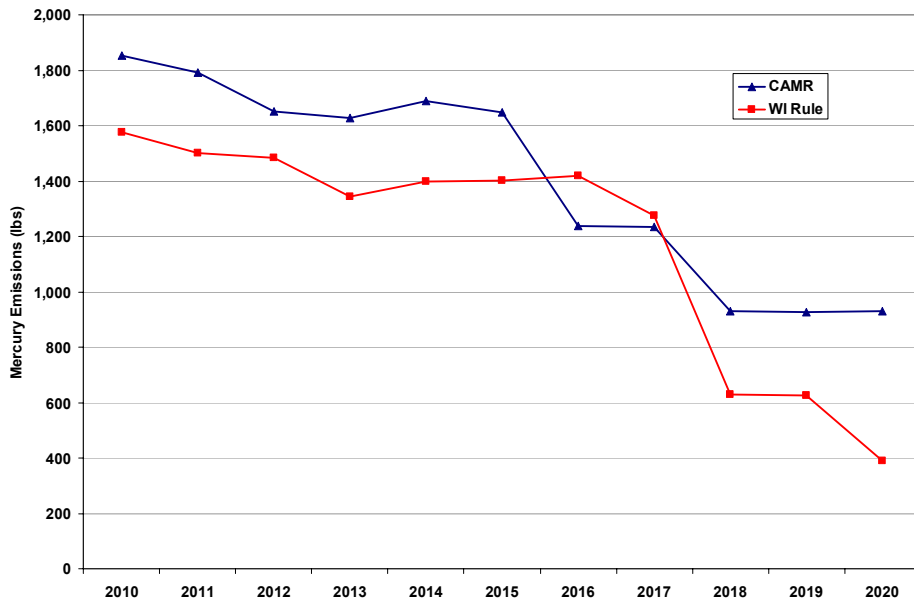
operating coal-fired generation facilities in Wisconsin by \$450 million between 2010 and 2020, or more than two times more expensive than CAMR.

CUMULATIVE ANNUALIZED COMPLIANCE COSTS - 2009-2020 (2006 \$)				
Rules	SO2	NOx	Mercury	Total Costs
CAIR/CAMR	3,017,000,000	988,000,000	319,000,000	4,334,000,000
CAIR/WI Hg Rule	3,017,000,000	988,000,000	769,000,000	4,784,000,000
Differential Costs	0	0	450,000,000	450,000,000

Beyond the additional reductions, the more restrictive trading regime has a particularly acute impact on costs. The study found that under CAMR, because it allows for inter- and intra-state trading and flexibility, Wisconsin utilities could install less expensive technology on 70 percent of its current coal-fired capacity by 2020, with removal costs ranging between \$12,000 and \$57,000 per pound. However, under the proposed DNR rule, all of the state’s 31 current coal-fired generating units would have to install some type of mercury control technology. This would drive removal costs to over \$250,000 per pound for some smaller and older units.

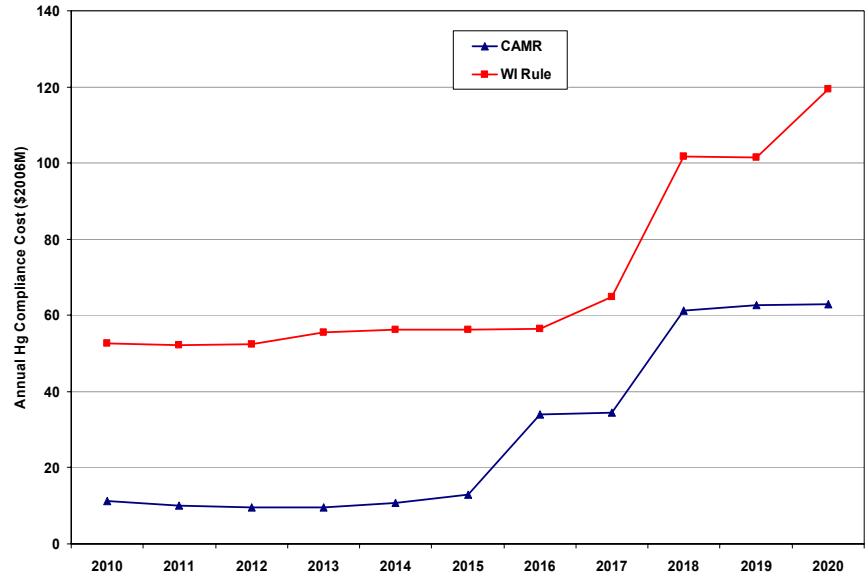
An additional consequence of the structure of the DNR rule’s restrictive trading regime is to require utilities to install technology earlier than would otherwise be required under the federal program. For example, certain technologies that would be expected for 2013 must be installed in 2010. This over-control is illustrated in the below figure that shows substantial reductions beyond CAMR through 2015.

MERCURY EMISSIONS: CAMR AND PROPOSED WISCONSIN HG RULE



The significance of requiring early over-controls is that costs starting in 2010 through 2015 are several orders of magnitude higher than would be seen under the CAMR, despite the fact DNR’s rule purports to have similar mercury reductions targets over the first two phases (2010-19). The figure below illustrates those substantial costs throughout Phase I and Phase II and before the 90 percent Phase III requirements apply.

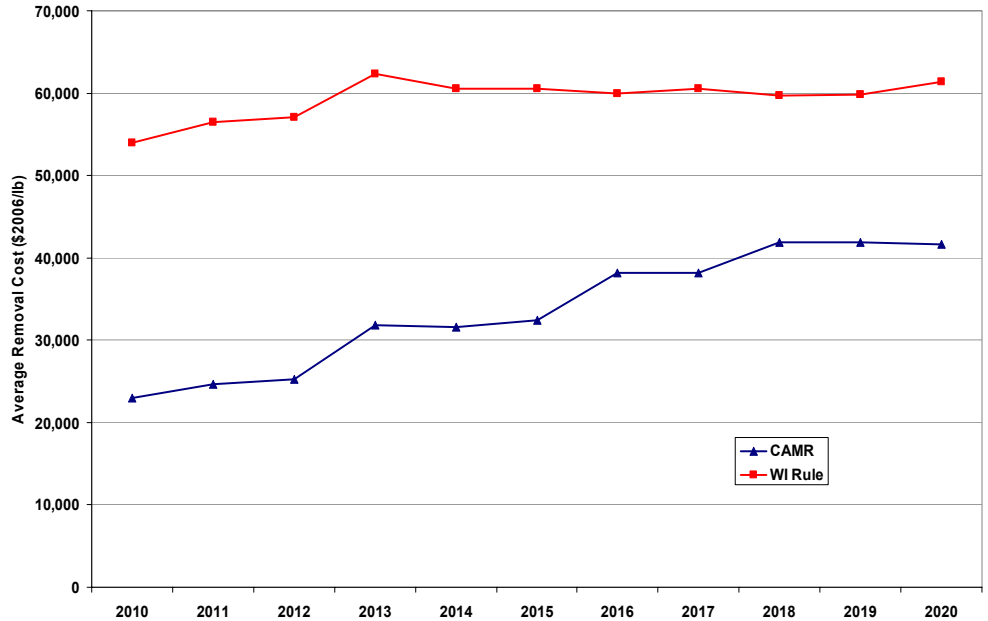
ANNUALIZED COMPLIANCE COSTS: CAMR AND PROPOSED WISCONSIN HG RULE



This over-control results in an average incremental annualized compliance cost beyond CAMR of about \$41 million. In 2020, when the command and control regulatory regime calling for unit specific 90 percent reduction in mercury emissions, the incremental compliance costs increase to \$57 million per year.

A key corollary is that while DNR’s rule requires an incremental additional reduction of 20 percent starting in 2020, that 20 percent comes at a much higher cost. The figure below shows the weighted average cost of removal under the proposed DNR rule compared to CAMR. The result is those Wisconsin ratepayers immediately start paying the DNR-penalty amounting to \$450 million for this 20 percent additional reduction (compared to the \$319 million for CAMR’s 70 percent reduction).

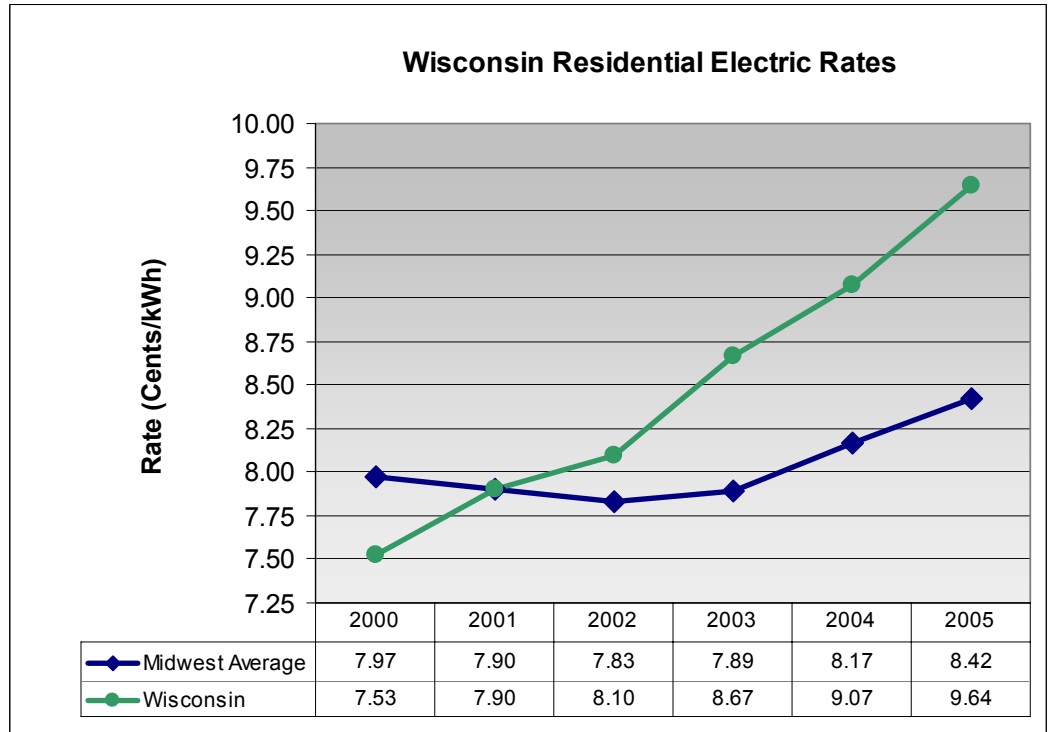
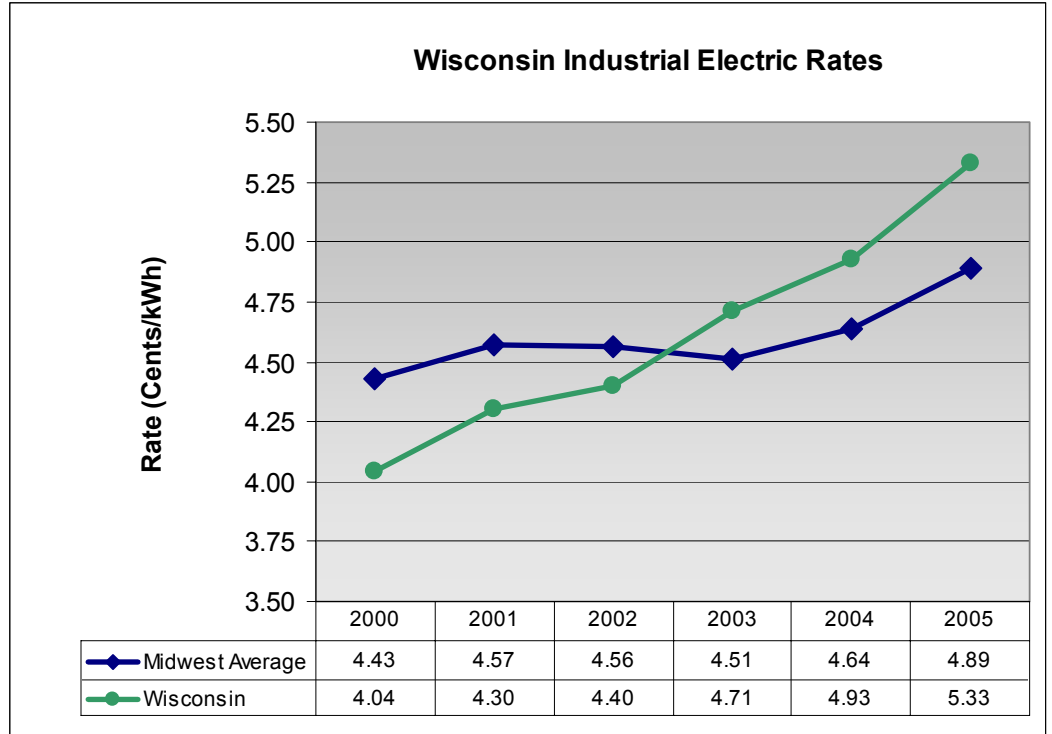
WEIGHTED AVERAGE REMOVAL COST: CAMR AND PROPOSED WISCONSIN HG RULE (2006 \$)



C. Increasing Energy Costs is Making Wisconsin Less Competitive.

WMC is very concerned about the \$4.3 billion dollars that the CEED Study projects for the federal CAIR and CAMR programs. This study understates the costs associated with CAIR in that DNR’s rule exceeds the federal CAIR program in important ways that increase costs for Wisconsin’s investor-owned utilities. These utilities serve key Wisconsin manufacturing corridors where higher costs are not borne by businesses in other states. Layering another \$450 million on top of these costs exacerbates our competitive disadvantage by making it even more expensive to do business in Wisconsin.

The Wisconsin Public Service Commission (PSC) conducted an analysis of industrial and residential electric rates in Wisconsin as part of its Strategic Energy Assessment in June 2006. The following charts summarize the data presented by the PSC in their report, which show that Wisconsin has lost its electric rate advantage over other Midwest states for both industrial and residential electricity users. This rate disparity relative to nearby states raises affordability issues for homeowners, and diminishes the competitiveness of our businesses.



II. THERE ARE NO ENVIRONMENTAL OR HEALTH BENEFITS ASSOCIATED WITH THE 90 PERCENT MANDATE AND AN EMISSION TRADING BAN.

The fundamental technical question presented is whether the additional costs associated with DNR's rule produces any meaningful benefits. Here the benefits sought are reductions of mercury deposition into Wisconsin's lakes and rivers. To be meaningful, those reductions would have to measurably reduce mercury in fish to levels that create health benefits for Wisconsin citizens. DNR has provided no evidence to support such a finding that would support imposing \$450 million in additional costs to be borne by Wisconsin businesses and homeowners through higher electric rates.

A. Mercury Air Deposition is a Global Problem; Yet Limited Mercury Deposition comes from Wisconsin Utilities.

United States mercury emissions make up about 6 percent of the world total. Relevant here is that U.S. utility mercury emissions make up less than 2 percent of the world total. Asia is responsible for roughly half of mercury emitted globally per year, with much of this being deposited across the United States due to prevailing west-to-east winds.² It is expected that Asia's economic growth will cause an increasing percentage of mercury in the U.S.

Wisconsin utilities prepared a response to the January 22, 2007, petition from various environmental and fishing groups asking for deeper mercury reduction mandates.³ In that response, the following points were made relating to the efficacy of DNR's 90 percent requirement and its ban on emission trading:

- The distance mercury travels from utility sources is related to the form emitted. There are two primary forms of mercury emitted from power plants: elemental mercury and oxidized mercury. Elemental mercury tends to enter the global mercury pool. About 20 percent of oxidized mercury can be deposited within 30 kilometers of its origin, with the remainder being converted into elemental mercury.
- EPA conducted a mercury modeling study in the mid-1990s as part of its comprehensive Mercury Study Report to Congress⁴. This study estimated that less than seven percent of mercury emissions from large coal-fired units is deposited within 50 km of the facility.
- As part of the development of CAMR, EPA conducted additional utility mercury modeling.⁵ This modeling showed that all coal-fired power plants in the U.S. contributed less than 10 percent to mercury deposition occurring in Wisconsin.

² EPRI, *Integrated Approaches to Managing Mercury* at 1 (September 2006).

³ Wisconsin Utilities' Response to Citizens' Mercury Petition (June 2007).

⁴ EPA, 1997. *Mercury Study Report to Congress, Volume III: Fate and Transport of Mercury in the Environment*, EPA-452/R-97-005, U.S. Environmental Protection Agency, Washington, D.C.

⁵ US EPA, 2005. Chapter 8, *Regulatory Impact Analysis of the Clean Air Mercury Report*. Report # EPA-452/R-05-003.

- The atmospheric models mentioned above used to generate these estimates of source attribution for mercury tend to overestimate contributions from point sources, such as coal-fired power plants. Therefore, all model predictions of "local" impacts on deposition are likely to be conservative.⁶
- In January 2002, LADCO released the results of its Midwest mercury study and found that utility sources in Wisconsin contribute one to five percent of the simulated wet deposition as measured at the four Wisconsin Mercury Deposition Network (MDN) monitors.⁷
- In May 2002, a study developed in cooperation with EPRI and conducted by Atmospheric and Environmental Research, Inc. found that mercury deposition declines by one to four percent over most of the state when Wisconsin utility emissions are completely eliminated.⁸

In summary, credible research conducted by federal, state and private entities has found that less than 10% of mercury deposition in Wisconsin waterways is attributable to Wisconsin electric utilities. Therefore, the benefit of overly-stringent mercury emission reductions applied to Wisconsin electric utilities is limited to the point of being insignificant.

B. DNR's Record contains no Evidence that its Proposed Provision that Exceed CAMR will provide any Environmental or Health Benefit.

The Jobs Creation Act (2003 Act 118) requires all agencies to more thoroughly document their justification for rules by expanded analysis and related record requirements. Wis. Stat. Chapter 227 sets forth the procedural requirements all agencies must follow when promulgating rules. The Jobs Act substantially strengthens the draft rule analysis requirements, including a directive that an agency include a summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen. Wis. Stat. §227.14(2)(a)5.

To address this requirement for the subject rule, DNR included the following as part of its initial proposed rulemaking order:

⁶ Seigneur, C., K. Lohman, K. Vijayaraghavan, J. Jansen and L. Levin, 2006. Modeling atmospheric mercury deposition in the vicinity of power plants, *J. Air Waste Manage. Assoc.*, **56**, 743-751.

⁷ ICF Consulting, 2002. Application of the REMSAD Modeling System to the Midwest, Memorandum to LADCO, San Rafael, California.

⁸ Vijayaraghavan, K., K. Lohman, P. Karamchandani and C. Seigneur, 2002. Modeling Deposition of Atmospheric Mercury in Wisconsin, Report CP136-02-1 to the Electric Power Research Institute (EPRI), Palo Alto, CA.

Summary of factual data and analytical methodologies: EPA's Clean Air Mercury Rule Web page, <http://www.epa.gov/air/mercuryrule/index.htm>, includes proposed and final rules, fact sheets, and other rulemaking documents as well as technical support information used in the preparation of these rule revisions.⁹

That is it; DNR uses EPA's data and analytical methodologies to support its proposal to exceed EPA's mercury rule. Given DNR's support for the rule is merely a reference to EPA's findings, those findings on the key issues such as those noted below are certainly relevant:

- We believe that after implementation of CAIR, remaining utility emissions will not pose hazards to public health.¹⁰
- Although EPA is optimistic that such controls (90-95 percent) may be available for use on some scale prior to 2018, it does not believe that such controls can be installed and operated on a national scale before that date."¹¹ [emphasis added] pp. 28614-15.

In addition, EPA published the following regulatory findings¹² in March 2005 in conjunction with promulgation of CAMR. The following EPA regulatory findings are germane to the policy analysis of whether there is a justification for DNR to exceed federal requirements and impose more stringent emission limitations:

- ...we conclude today that the level of Hg emissions remaining after imposition of the requirements of the [Clean Air] Act will not cause hazards to public health. p.16002.
- Our analysis concludes that Utility Unit Hg emissions do not cause hazards to the health of the general public or higher fish consuming recreational anglers. p.16022.
- EPA concludes that the level of Hg emissions remaining after implementation of CAIR, and independently, CAMR, which implement sections 110(a)(2)(D) and 111, respectively, do not result in hazards to public health. p.16022.
- In assessing whether remaining utility HAP emissions pose hazards to public health...we looked at the public's, including sensitive populations' (*i.e.* fish consumers), exposure to methylmercury through fish consumption attributable to utilities alone. Based on

⁹ Initial Proposed Rulemaking Order (March 15, 2007).

¹⁰ 70 FR 28609 (May 18, 2005)

¹¹ *Id.* at 28614-15.

¹² *EPA's Revised Mercury Regulatory Finding* 70 Fed. Reg. 15994; March 29, 2005

this assessment...EPA concludes that remaining utility HAP emissions do not pose hazards to public health. p.16023.

- CAIR and CAMR reduce the public's methylmercury exposure due to fish consumption to below the methylmercury RfD. p.16023.
- "Risks remaining after implementation of CAIR, and even more so after CAMR, are acceptable. Applying the risk factors...to utility Hg emissions in the 112(n)(1)(A) context, EPA concludes that utility Hg emissions remaining after implementation of CAIR, and even more so after CAMR, do not pose unacceptable hazards to public health. The overwhelming majority of the general public and high-end fish consumers (at least through the 99th percentile of recreational anglers) are not expected to be exposed above the methylmercury RfD. pp.16024-25.
- EPA in its expert judgment, concludes that utility Hg emissions do not pose hazards to public health, and therefore that it is not appropriate to regulate such emissions under section 112. p.16025.
- ...the Agency has concluded that power plant Hg emissions remaining after CAIR, and even more so after CAMR, do not pose hazards to public health. p. 16025.
- ...we demonstrate that the CAMR rule, once implemented, will result in levels of Hg emissions from coal-fired Utility Units that pose no hazards to public health.... p.16029.
- Based on what we know about the uncertainties and nature of the potential adverse effects associated with Hg exposure, the extent to which the public, including sensitive subpopulations, is exposed to Hg, and the extent to which such exposure could be reduced by further reducing Hg emissions from U.S. power plants, *we have concluded that the cost of requiring further reductions in Hg emissions from power plants would significantly outweigh any benefits.* p. 16025 (Emphasis added.)
- The final CAMR will not lead to localized "utility hot spots". p. 16025.
- EPA does not believe that there will be any hot spots after implementation of CAIR and CAMR. p. 16026.
- Therefore, based on the information available to us at this time, our analyses indicate utility Hg emissions, after implementation of either CAIR or CAMR, will not result in 'hot spots'. p. 16026.

- ...For all these reasons, we do not anticipate that our final CAMR rule will result in local Hg hot spots; to the contrary, we anticipate that our cap-and-trade CAMR will actually eliminate hot spots that may have previously existed. p. 16027.

Nowhere in the proposed order or in its background memorandum to the Natural Resources Board does DNR even attempt to show the additional \$450 million cost would provide any measurable environmental or health benefit. Nor does the agency provide evidence that an incremental benefit to public health and/or fish consumption will occur by imposing a 90 percent reduction by 2020. As discussed below, DNR appears to take the position it will justify its proposal later, after it is adopted.

III. DNR PROPOSAL HAS FUNDAMENTAL PROCEDURAL, LEGAL AND POLICY DEFECTS.

A. DNR's Statement of Scope Precludes Provisions that Exceed CAMR.

Wis. Stat. §227.135 (Statements of scope of proposed rules) provides that:

(1) An agency shall prepare a statement of the scope of any rule that it plans to promulgate. The statement shall include all of the following:

(a) A description of the objective of the rule.

(b) A description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives.

(c) The statutory authority for the rule.

(d) Estimates of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule.

(e) A description of all of the entities that may be affected by the rule.

(f) A summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

(2) Until the individual or body with policy-making powers over the subject matter of a proposed rule approves a statement of the scope of the proposed rule, a state employee or official may not perform any activity in connection with drafting the proposed rule except for an activity necessary to prepare the statement. (Emphasis ours)

DNR's Statement of Scope for this rule (Published & Updated June 23, 2005) states the following:

Summary and Comparison with Existing or Proposed Federal Regulations

The state mercury rule in Chapter NR 446 has different mercury emission reductions and compliance determination requirements. The purpose of this action is to revise the state rule to mirror the federal CAMR requirements. (Emphasis ours.)

In general, the purpose of the Statement of Scope is to provide elected officials, the regulatory community and the public important notice before agency staff commits to any particular regulatory scheme. In addition, an accurate notice is necessary for interested parties to avail themselves of related legal rights. For example, Wis. Stat. §227.137 (2) (Economic impact reports of proposed rules), provides in part that:

(2) After an agency publishes a statement of the scope of a proposed rule under s. 227.135, and before the agency submits the proposed rule to the legislature for review under s. 227.19 (2), a municipality, an association that represents a farm, labor, business, or professional group, or 5 or more persons that would be directly and uniquely affected by the proposed rule may submit a petition to the department of administration asking that the secretary of administration direct the agency to prepare an economic impact report for the proposed rule. (Emphasis ours.)

Thus, DNR's Scope Statement for this rule included an inadequate and/or inaccurate: (a) description of existing policies relevant to the proposed rule; (b) description of new policies proposed to be included in the rule; (c) analysis of policy alternatives; and (d) summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule. Specifically, the Scope Statement indicated that the revised rule would "mirror" the federal Clean Air Mercury Rule ("CAMR"). However, the draft rule that was published in proposed order AM-32-05 on March 15, 2007, contains provisions that do not mirror CAMR. As a consequence, DNR has generally failed to meet its obligations and rulemaking responsibilities as set forth in Wis. Stat. ch. 227, including Wis. Stat. § 227.135.

The deficiencies described above further resulted in the Scope Statement failing to provide affected parties with the requisite knowledge and notice needed to effectively evaluate their right to request an economic impact report as permitted under Wis. Stat. § 227.137. An economic impact report would have provided critical information necessary for the public, regulators and the regulated community to better understand and comment upon the full impact of the potential options under consideration.

B. DNR must perform a Heath Risk Assessment Prior to promulgating any Provisions that Exceed CAMR.

Wis. Stat. §285.27 (2)(b) provides that:

(b) *Standard to protect public health or welfare.* If an emission standard for a hazardous air contaminant is not promulgated under section 112 of the federal clean air act, the department may promulgate an emission standard for the hazardous air contaminant if the department finds the standard is needed to provide adequate protection for public health or welfare. The department may not make this finding for a hazardous air contaminant unless the finding is supported with written documentation that includes all of the following:

1. A public health risk assessment that characterizes the types of stationary sources in this state that are known to emit the hazardous air contaminant and the population groups that are potentially at risk from the emissions.
2. An analysis showing that members of population groups are subjected to levels of the hazardous air contaminant that are above recognized environmental health standards or will be subjected to those levels if the department fails to promulgate the proposed emission standard for the hazardous air contaminant.
3. An evaluation of options for managing the risks caused by the hazardous air contaminant considering risks, costs, economic impacts, feasibility, energy, safety, and other relevant factors, and a finding that the chosen compliance alternative reduces risks in the most cost-effective manner practicable.
4. A comparison of the emission standards for hazardous air contaminants in this state to hazardous air contaminant standards in Illinois, Indiana, Michigan, Minnesota, and Ohio. (Emphasis ours.)

DNR acknowledges the applicability of this provision.¹³ Despite these requirements, DNR included language in proposed Order AM-32-05 focusing on a 90 percent mercury emission reduction and limited emission trading requirements without first making the statutorily required findings (supported by written documentation) that residual risks to public health exist after implementing CAMR and that requirements are the most cost-effective compliance alternative to reduce those risks.¹⁴ This is of particular concern

¹³ Initial Proposed Rulemaking Order (Published Mar. 15, 2007), noting that “Since the CAMR was promulgated under section 111 and not 112 of the CAA, the Department may adopt a supplementary emission standard for mercury pursuant to s. 285.27(2)(b).”

¹⁴ In the final rule, *EPA interprets the term “standard of performance,” as applied to existing sources, to include a cap-and-trade program.* This interpretation is supported by a

given EPA's determination that the federal model rules are the most cost-effective manner for controlling mercury emissions from utility units. See 70 Fed. Reg. 28606 (May 18, 2005).

DNR also failed to identify population groups at risk and that these groups are subjected to levels of the hazardous air contaminant that are above recognized environmental health standards or will be subjected to those levels if the department fails to promulgate the proposed emission standard for the hazardous air contaminant.

C. DNR's Proposed Rule Contains Additional Procedure and Legal Defects.

The department violated procedural rulemaking requirements, including Wis. Stat. § 27.16 (6), when it issued a hearing notice containing three alternative approaches (referred to as "Option 2," "Option 3," and "Option 4") for reducing mercury emissions from coal-fired electrical steam generating units as a part of the hearing notice for proposed revisions to Wis. Admin. Code § NR 446. These three options do not qualify as "general subject matter" related to anticipated rules but rather are specifically options related to the revisions proposed to NR 446.

The department improperly and incompletely analyzed the potential effect of the proposed revisions to NR 446 on small businesses. The department improperly relied upon the EPA's economic analysis which is associated with and premised upon states implementing the model federal rules. However, the proposed revisions to NR 446 do not "mirror" or otherwise incorporate the CAMR rule language. Accordingly, EPA's small entity economic analysis cannot be used to support any option other than full implementation of the EPA's recommended model rules to implement CAMR.

Wis. Stat. § 227.14(2m)(4) requires the department to prepare a fiscal estimate for each proposed rule before it is submitted to the legislative council staff for review. The statute requires the fiscal estimate to include "the major assumptions used in its preparation and a reliable estimate of the fiscal impact of the proposed rule, including...For rules that the agency determines may

careful reading of the section 111(a) definition of the term, quoted above: *A requirement for a cap-and-trade program* (i) *constitutes* a "standard for emissions of air pollutants" (i.e., a rule for air emissions), (ii) "which reflects the degree of *emission limitation* achievable" (i.e., which requires an amount of emissions reductions that can be achieved), (iii) "through application of (a) * * * system of emission reduction" (i.e., in this case, a cap-and-trade program that caps allowances at a level lower than current emissions). Id at 28616. Thus, according to EPA, Cap and Trade equates to a Standard of Performance, which equates to a standard for emissions of air pollutants, which reflects the degree of emission limitation achievable. In other words, EPA's cap and trade is an emission limitation/standard and DNR must adopt a similar cap and trade program that is no more restrictive in terms of emission limitations/reductions unless DNR provides the finding required under Wis. Stat. §285.27 (2)(b).

have a significant fiscal effect on the private sector, the anticipated costs that will be incurred by the private sector in complying with the rule.” Wis. Stat. § 227.14(2m)(4)(b). The department failed to include a “reliable estimate” of the costs of compliance with the revisions to NR 446 for the 48 existing electrical generating units that are operated by the eight utilities named in the estimate. In fact, the fiscal estimate provides no actual estimate of these costs. Here again, a fiscal estimate would have provided critical information necessary for the regulated community to better understand and comment upon the full impact of the potential options under consideration by the department.

The inclusion of the 90 percent mercury emission reduction requirement (as well as other provisions in proposed Order AM-32-05) violates the statutory requirement for state and federal consistency with regard to the promulgation of a mercury emission standard. As a consequence, proposed Order AM-32-05 exceeds the department’s statutory rulemaking authority and is inconsistent with the Scope Statement prepared by the department. A 90 percent emission reduction requirement is more stringent than the reduction percentage required by the federal CAMR. Likewise, the following provisions in the proposed rule are inconsistent with, or are otherwise more stringent than, the emission standards (including administrative requirements) that are associated with the federal CAMR rule:

- The failure to allow emission trading.
- The sunseting of emission allowances granted to retired units.

The inclusion of these more stringent emission standards is in direct violation of the statutory requirements contained in Wis. Stat. §§ 285.11(9) and 285.27. Further, the department failed to complete the statutorily required analysis to support a finding which justifies these more stringent emission standards as required by Wis. Stat. §§ 285.11(9) and 285.27(2)(b).

Likewise, the inclusion of these more stringent emission standards violates the statutory requirement that a scope statement provide a summary and preliminary comparison of a proposed rule to an existing federal regulation. This is because the Scope Statement developed here indicated that the state rule would “mirror” the CAMR. Clearly proposed Order AM-32-05 does not “mirror” the CAMR.

The statute authorizing the department to promulgate an emission standard for mercury does not require a specific percent emission reduction. See Wis. Stat. § 285.27(2)(b). Rather, this statute directs the department to make a finding that a more stringent “standard is needed to provide adequate protection for public health or welfare” and, further, to make “a finding that the chosen compliance alternative reduces risks in the most cost-effective manner.” Wis. Stat. § 285.27(2)(b)3.

Despite these requirements, the department included language in proposed Order AM-32-05 focusing on a 90% mercury emission reduction requirement without first making the statutorily required findings (supported by written documentation) that residual risks to public health exist after implementing CAMR and that a 90% reduction requirement is the most cost-effective compliance alternative to reduce those risks. This is of particular concern given EPA's determination that the federal model rules are the most cost-effective manner for controlling mercury emissions from utility units. See 70 Fed. Reg. 28606 (May 18, 2005).

The department lacks authority to simply adopt the proposed mercury emission standards for existing sources. See, Wis. Stat. §§ 285.11(9) and 285.27(1). Rather, the department must first undertake an analysis and make the findings required under Wis. Stat. § 285.27(2)(b) before adopting the proposed mercury standards for existing sources. *Id.*

D. DNR's Proposed Rule is Inconsistent with Existing NR 446 Requirements.

The policy decision of whether Wisconsin should promulgate a mercury emission standard that is more stringent than federal requirements has already been made, and is reflected in existing Chapter NR 446 of the Wisconsin Administrative Code. Specifically, industry stakeholders reached an agreement with lawmakers and the Governor that Wisconsin's state mercury rule shall be no more restrictive than the federal standard. This agreement is codified in NR 446 as it appears below:

Adoption of federal mercury standard. If a federal emission standard limiting mercury emissions from a major utility is promulgated under section 111 or 112 of the federal clean air act, the department shall adopt a similar standard, including administrative requirements that are consistent with the federal administrative requirements. The standard adopted by the department may not be more restrictive in terms of emission limitations than the federal standard. *The administrative requirements of the standard adopted by the department relating to baseline calculations, monitoring, recordkeeping and reporting shall be the same as the federal standard.* No later than 18 months after the promulgation of a federal emission standard limiting mercury emissions from a major utility, the department shall revise this subchapter under the provisions of s. 227.10 [regular rulemaking] or 227.24 [emergency rulemaking], Stats., as appropriate, to comply with the provisions of this section and s. NR 446.06(4). NR 446.029. (Emphasis ours.)

Pursuant to s. 285.27 (1)(a) and (2)(a), Wis. Stats., if an emission standard regulating mercury emissions from a major utility is promulgated under section 111 or 112 of the federal clean air act, the department shall promulgate a similar standard, including

administrative requirements that are consistent with the federal administrative requirements. *The department's standard shall have the same mercury emission reductions as the federal standard.*

NR 446.06(4). (Emphasis ours.)

These statutory constraints on the Department's rulemaking authority are largely ignored in the context of the proposed mercury rule. Stakeholders who sought to minimize the electric rate impact of implementing CAMR are very disappointed that the Department is proposing to unilaterally unravel this agreement, ignore the law, and add unwarranted cost the rule without achieving a meaningful incremental public health benefit. As a result, Wisconsin will be an even more expensive place to do business, which negatively impacts our ability to compete against other states in the global marketplace.

IV. CONCLUSION

The availability of affordable electricity is absolutely critical to the economic health and competitiveness of Wisconsin businesses. This is particularly true for manufacturers, as many manufacturing processes consume large quantities of electricity. Although cost considerations have driven many companies to find efficiencies in energy use and ways to reduce consumption, large industrial energy use has been, and will continue to be a fact of life.

An important policy consideration is the fact that many sectors of Wisconsin's manufacturing economy have seen a level of intensified competition from Asian and other international markets causing the margin between success and failure to become increasingly slim. As such, Wisconsin manufacturers cannot afford to remain competitive if they are saddled with a significant electric rate hike. Likewise, Wisconsin manufacturers simply cannot afford to pass a rate hike along to their customers in the form of higher prices for their products. For many manufacturers, adding cost will literally price them out of the national marketplace.

Manufacturing jobs are some of the highest-paying jobs in the state of Wisconsin. Hundreds of thousands of workers in this state rely on manufacturing employment to support their families. We can ill afford to jeopardize these jobs and dramatically reduce the competitiveness of Wisconsin's manufacturing companies by dealing a crippling blow to our economy through a large electric rate hike - a cost that will not be borne by our foreign competition.

WMC believes there are profound policy, legal and economic issues at stake with this rule. Although the Department has presented a menu of policy options with respect to this rule, we believe it is clear that the policy decisions have already been made by lawmakers, and those decisions are reflected in our statutes and administrative code as described above. As a

result, we believe the Department must promulgate a rule that mirror's EPA's model CAMR rule with an identical allocation structure, with the allowance of emission trading as a compliance enhancement option, and without proposing a more stringent standard. Any other approach is inconsistent with statutory policies embodied in Chapter 285 of the Wisconsin Statutes, and Chapter NR 446 of the Wisconsin Administrative code.

Higher electric rates resulting from adoption of CAIR and CAMR are a fact of life. As noted in the CEED study, Wisconsin utilities will spend more than \$4 billion to comply with those rules alone. Unfortunately, the DNR's proposed mercury rule is guaranteed to push that multi-billion dollar rate hike on residential and industrial ratepayers significantly higher. The result will be a devastating blow to our economy in general, and to our manufacturing competitiveness in particular, with no corresponding environmental benefit.

Inflicting this magnitude of economic disruption is unwarranted and avoidable. In fact, the statutory constraints in Chapter 285 were put in place for the expressed purpose of avoiding this outcome. However, the safeguards adopted by the Legislature and Governor offer no protection to Wisconsin citizens if they are ignored. For the aforementioned reasons, WMC strongly urges the DNR to revise the draft rule to mirror the federal CAMR, with an identical allocation structure, the full allowance of emission trading and banking, and a level of control that is no more stringent than the federal requirement.

Sincerely,

SCOTT MANLEY
Director of Environmental Policy

Attachments

WMC Mercury Comments

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