

Document No. 4070
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CHAPTER 61

Statutory Authority: 1976 Code Sections 48-1-10 et seq.

61-62. Air Pollution Control Regulations and Standards

Preamble:

On May 18, 2005, the United States Environmental Protection Agency (EPA) published a final rule in the *Federal Register* titled, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* (70 FR 28606), also referred to as the “Clean Air Mercury Rule” (CAMR). This final rule established standards of performance for mercury for new and existing coal-fired electric utility steam generating units (EGUs), as defined in the Clean Air Act (CAA) section 111. This final rule became effective July 18, 2005. The South Carolina CAMR became state-effective upon the publication of a Notice of Final Regulation in the South Carolina *State Register* (*State Register*) on June 22, 2007 (Vol. 31, Issue 6, Doc. No. 3083). The final package for the State CAMR was submitted to the EPA on August 16, 2007, for approval.

On February 8, 2008, the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) vacated the CAMR (Case No. 05-1097). The EPA filed a petition for a rehearing by the full Court of Appeals, but the petition was denied. The EPA has received two extensions to appeal the vacatur. On October 17, 2008, the U.S. Department of Justice filed an appeal with the U.S. Supreme Court requesting that the court overturn the Court of Appeals vacatur of the CAMR. On February 6, 2009, the EPA motioned to dismiss its case and remove the petition currently pending before the Supreme Court. The Supreme Court denied the remaining industry request to review the Court of Appeals mandate on February 23, 2009.

On May 16, 2003, the EPA published a final rule in the *Federal Register* titled, *National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing; Final Rule* (68 FR 26690), establishing National Emission Standards for Hazardous Air Pollutants (NESHAP) that required major sources of those types to apply maximum achievable control technology (MACT). These new subparts (40 CFR 63,

subparts JJJJ and KKKK) are also known as the “Brick MACT” and “Clay MACT” respectively. This final rule became effective May 16, 2003, and was incorporated by reference in Regulation 61-62.63, *National Emission Standards for Hazardous Air Pollutants (NESHAP) for Source Categories*, by a Notice of Final Regulation published in the *State Register* (Vol. 28, Issue 9, Doc. No. 2913) on September 24, 2004. On March 13, 2007, the Court of Appeals vacated this rule (Case No. 03-1202). The final mandate for this case was issued on June 18, 2007.

On September 13, 2004, the EPA published a final rule in the *Federal Register* titled, *National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule* (69 FR 55218), establishing NESHAP that required major sources of those types to apply MACT. This new subpart (40 CFR 63, subpart DDDDD) is also known as the “Boiler MACT.” This final rule became effective November 12, 2004, and was incorporated by reference in R. 61-62.63, by a Notice of Final Regulation published in the *State Register* (Vol. 29, Issue 8, Doc. No. 2980) on August 26, 2005. On June 8, 2007, the Court of Appeals vacated this rule (Case No. 04-1385). The final mandate for this case was issued on July 30, 2007.

The South Carolina Department of Health and Environmental Control (Department or DHEC) proposes to amend R. 61-62, Air Pollution Control Regulations and Standards by removing the aforementioned provisions of the State CAMR in R. 61-62.60, South Carolina Designated Facility Plan and New Source Performance Standards, and R. 61-62.72, Acid Rain. The Department also proposes to amend R. 61-62.63, by removing all the provisions of the aforementioned rules published in the *Federal Register* May 16, 2003, and September 13, 2004.

Pursuant to S.C. Code Section, 1-23-120(H)(1), the proposed amendments will require legislative review.

Two Notices of Drafting for the proposed changes were published in the *State Register* on September 26, 2008 and November 28, 2008. Notice of the Department’s intent to draft these regulations was also published on the DHEC Regulatory Internet site in its *DHEC Regulation Development Update*. The drafting comment periods for the Notices ended on October 27, 2008, and December 29, 2008, respectively. Comments were received and addressed by the Department.

Discussion of Proposed Revisions:

SECTION CITATION/EXPLANATION OF CHANGE:

R. 61-62.60:

Subpart A has been revised to remove previous amendments that incorporated by reference Federal amendments published in 70 FR 28606.

R. 61-62.60:

Subpart B has been revised to remove previous amendments that incorporated by reference Federal amendments published in 70 FR 28606 and 71 FR 33388.

R. 61-62.60:

Subpart Da has been revised to remove previous amendments that incorporated by reference Federal amendments published in 70 FR 28606, 70 FR 51266, and 71 FR 33388.

R. 61-62.60:

Subpart Db has been revised to remove previous amendments that incorporated by reference Federal amendments published in 71 FR 33388.

R. 61-62.60:

Remove and reserve Subpart HHHH.

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R. 61-62.63:

Remove and reserve Subpart DDDDD.

R. 61-62.63:

Remove and reserve Subpart JJJJ.

R. 61-62.63:

Remove and reserve Subpart KKKKK.

R. 61-62.72:

Subpart A has been amended to remove previous amendments that incorporated by reference Federal amendments published in 70 FR 28606.

Notice of Staff Informational Forum and Public Comment Period:

Staff of the Department invite interested members of the public to attend a staff-conducted informational forum to be held on April 27, 2009, at 10:00 a.m. in room 3141 (Wallace Room) at the South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC. The purpose of the forum is to answer questions, clarify any issues, and receive comments from interested persons on the proposed amendments to R. 61-62. Please use the Bull Street entrance.

Interested persons are also provided an opportunity to submit written comments to Christopher L. Vaigneur at the South Carolina Department of Health and Environmental Control, Bureau of Air Quality, 2600 Bull Street, Columbia, SC 29201. To be considered, comments must be received no later than 5:00 p.m. on April 27, 2009, the close of the public comment period.

Comments received at the Forum and/or during the public comment period by the deadline requested above will be considered in formulating the final proposed regulation for public hearing before the Board of Health and Environmental Control (Board) as noticed below.

Public comments received during the comment period noticed above shall be submitted to the Board in a Summary of Public Comments and Department Responses for consideration at the public hearing as noticed below.

Copies of the proposed regulation for public notice and comment may be obtained by contacting Christopher L. Vaigneur at the South Carolina Department of Health and Environmental Control, Bureau of Air Quality, 2600 Bull Street, Columbia, SC 29201, or by calling (803) 898-3116. A copy may also be obtained on the Department's Regulatory Information Internet Site at <http://www.scdhec.gov/administration/regs/> in its *DHEC Regulation Development Update*. To access this document, click on the Air category, then scan down for this proposed amendment.

Notice of Public Hearing and Opportunity for Public Comment:

Interested members of the public and regulated community are invited to comment on the proposed amendments to R. 61-62, at a public hearing to be conducted by the Board at its regularly-scheduled meeting on June 11, 2009. The public hearing is to be held in room 3420 of the Commissioner's Suite, third floor, Aycock Building of the South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC. The Board meeting commences at 10:00 a.m. at which time the Board will consider items on its agenda in the order presented. The order of presentation for public hearings will be noted in the Board's agenda to be published by the Department twenty-four hours in advance of the meeting. Persons desiring to make oral comments at the hearing are asked to limit their statements to five minutes or less, and as a courtesy are asked to provide written copies of their presentation to the Clerk of the Board for inclusion into the record of the public hearing.

Preliminary Fiscal Impact Statement:

There will be no increased cost to the State or its political subdivisions.

Statement of Need and Reasonableness:

This statement of need and reasonableness was determined by staff analysis pursuant to S.C. Code Section 1-23-115(C)(1)-(3) and (9)-(11).

DESCRIPTION OF REGULATION: Proposed Amendments to Regulation 61-62, Air Pollution Control Regulations and Standards.

Purpose: The Federal requirements that necessitated the amendments to R. 61-62, described herein, have been effectively vacated by decisions of the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals). Therefore, the Department proposes to amend the aforementioned regulations by removing the vacated provisions to ensure enforceability of State regulations and clarify requirements for compliance.

Legal Authority: The legal authority for R. 61-62, Air Pollution Control Regulations and Standards is S.C. Code Section 48-1-10 et seq.

Plan for Implementation: The proposed amendments will take effect upon approval and adoption by the South Carolina Board of Health and Environmental Control, approval by the Legislature, and publication in the *South Carolina State Register (State Register)*.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATIONS BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

On May 18, 2005, the United States Environmental Protection Agency (EPA) published a final rule in the *Federal Register* titled, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* (70 FR 28606), also referred to as the “Clean Air Mercury Rule” (CAMR). This final rule became effective July 18, 2005. The South Carolina CAMR became state-effective upon the publication of a Notice of Final Regulation in the *State Register* on June 22, 2007 (Vol. 31, Issue 6, Doc. No. 3083). The final package for the State CAMR was submitted to the EPA on August 16, 2007, for approval. On February 8, 2008, the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) vacated the CAMR (Case No. 05-1097). The EPA filed a petition for a rehearing by the full Court of Appeals, but the petition was denied. The EPA has received two extensions to appeal the vacatur. On October 17, 2008, the U.S. Department of Justice filed an appeal with the U.S. Supreme Court requesting that the court overturn the Court of Appeals vacatur of the CAMR. On February 6, 2009, the EPA motioned to dismiss its case and remove the petition currently pending before the Supreme Court. The Supreme Court denied the remaining industry request to review the Court of Appeals mandate on February 23, 2009.

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The Court of Appeals vacatur of the abovementioned rules effectively nullifies the Federal requirements established at the time of promulgation. The proposed amendments to remove these provisions from R. 61-62, are reasonable in that they ensure enforceability of State regulations and clarify the requirements for compliance.

DETERMINATION OF COSTS AND BENEFITS:

There will not be a negative fiscal or economic impact as a result of this regulatory action. Amending R. 61-62, to remove the provisions of the CAMR will decrease the cost to the regulated community and result in a reduction of the use of existing State resources. For more information on the original cost estimates and additional information, please refer to the promulgation of the State CAMR (*State Register* Vol. 31, Issue 6, Doc. No. 3083).

Amending R. 61-62, to remove the provisions of the vacated requirements of 40 CFR 63, subparts DDDDD, JJJJJ, and KKKKK will decrease the cost to the regulated community and result in the reduction of the use of existing State resources. Please refer to the promulgation of the abovementioned subparts (*State Register* Vol. 28, Issue 9, Doc No. 2913, and *State Register* Vol. 29, Issue 8, Doc No. 2980) for the original cost estimates and additional information.

UNCERTAINTIES OF ESTIMATES:

There are no uncertainties of estimates relative to cost. These amendments will not create a burden for the public, the State or its political subdivisions. Refer to the above paragraph for cost estimates for the regulated community. Existing staff and resources will be utilized to implement these amendments.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

There will be no environmental or public health effect.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATIONS ARE NOT IMPLEMENTED:

There will be no specific detrimental effect on the environment and public health if the abovementioned amendments are not implemented.

Statement of Rationale:

Due to the Court of Appeals decisions in Cases No. 05-1097, 03-1202, and 04-1385 as described in the Statement of Need and Reasonableness above, the Department has determined it necessary to amend R. 61-62, to ensure enforceability of State regulations and to clarify requirements for compliance.

Text:

The full text of this regulation is available on the South Carolina General Assembly Home Page: <http://www.scstatehouse.net/regnsrch.htm>. Full text may also be obtained from the promulgating agency.