

Summary of Comments and DNR Responses Natural Resources Board Order AM-05-22

June 25, 2024

This document presents a summary of public comments received on proposed rules affecting chapters NR 400, 419, 439, 462, and 484, related to simplifying, reducing, and making more efficient reporting, recordkeeping, testing, inspection and determination of compliance requirements for sources of air contaminants.

OVERVIEW

Rule Objective

Chapter NR 439, Wis. Adm. Code, contains the requirements for reporting, recordkeeping, testing, inspection, and determination of compliance for all sources of air contaminants in the state. The primary objective of the proposed rule is to simplify, reduce, and make more efficient these requirements for the following sources:

- Sources required to have operation permits under s. 285.60, Stats., but not required to have permits under s. 285.17(4), Stats and the federal Clean Air Act (CAA). These sources are sometimes referred to as “non-part 70 sources.”
- Sources required to have permits under the CAA.

The proposed changes to ch. NR 439, Wis. Adm. Code, will maintain consistency with the CAA and protect air quality.

Public Outreach/Input Opportunities

Informational Meetings – Following Natural Resources Board approval of the scope statement, the department held a stakeholder information session on October 24, 2022, to explain the objectives of the chapter NR 439 rulemaking and to review the rulemaking process. The program also held eight small group input sessions between November and December 2022 to gather additional stakeholder input. The public was also invited to provide written feedback via an online portal through Nov. 19, 2022.

Stakeholder Advisory Committee - Pursuant to s. 227.13, Stats., the department convened the Chapter NR 439 Stakeholder Advisory Committee (Committee) to gather stakeholder feedback on draft proposed revisions to ch. NR 439 rule language. The Committee was comprised of representatives from the DNR, industry stakeholders, and the U.S. Environmental Protection Agency (EPA) Region 5. The Committee meetings were open to the public, and were held virtually on April 13, April 20, April 25, May 1, May 9, May 22, June 8, and June 15, 2023. During the meetings, the Committee discussed stakeholder suggestions regarding draft proposed rule language that had been shared with the Committee in advance of each meeting.

Economic Impact Analysis – A public comment period on the draft economic impact analysis (EIA) was held from December 13, 2023, through January 12, 2024. The department notified the following entities of the opportunity to comment at the beginning of the solicitation period: businesses which emit or cause emissions of air contaminants, American Council of Engineering Companies of Wisconsin, Clean Wisconsin, League of Wisconsin Municipalities, NR 439 Stakeholder Advisory Committee, Small Business Environmental Council, tribal governments, Wisconsin Cast Metals Association, Wisconsin Counties Association, Wisconsin Manufacturers and Commerce, Wisconsin Paper Council, Wisconsin Transportation Builders Association, Wisconsin Utilities Association. The Air Management Advisory Group, which includes stakeholders representing academia, utilities, and large and small businesses, was also notified of the opportunity to comment. The department received comments on the draft EIA from Ahlstrom, the Wisconsin Department of Corrections, and the Milwaukee Metropolitan Sewerage District,

as well as a joint comment from Wisconsin Manufacturers & Commerce and the Wisconsin Paper Council.

Public Hearing and Comment – A public comment period on the draft rule occurred from March 18, 2024, to April 25, 2024, and a virtual public hearing was held on April 18, 2024. The department notified the group of stakeholders identified under the EIA section of the opportunity to comment on the proposed rule. The hearing on the draft rule was attended by 22 members of the public; none of the attendees registered a position on the proposed rule. Representatives of Wisconsin Manufacturers & Commerce and the Wisconsin Paper Council provided brief verbal comments which reiterated some points of the organizations’ more extensive written comments. The department received written comments from RadTech, Molson Coors, the Wisconsin Utilities Association, Printing United Alliance, as well as a joint comment from Wisconsin Manufacturers & Commerce and the Wisconsin Paper Council.

ECONOMIC IMPACT ANALYSIS

The following is a summary of comments received on the economic impacts of the proposed rule and the department’s responses. Other comments received during the EIA comment period that were repeated during the public comment period on the rule are summarized and addressed in the PUBLIC COMMENTS ON DRAFT RULE section below.

EIA Comment, Ahlstrom - Ahlstrom provided the following comment on the EIA of the proposed changes to s. NR 439.055 via email on December 19, 2023:

We believe it is not correct to say that the proposed changes add flexibility to the rule. Both the existing rule and the proposed rule allow no more than 12 months (yearly) between calibrations. In addition, if a manufacturer’s recommendation is to calibrate at frequencies of less than one year but currently a facility is using operational history to calibrate on a yearly basis or longer, under the proposed rule they would calibrate more often. If calibration is required more often that may mean shutting down the emission source more frequently, which is likely to result in higher costs. Therefore, a \$0 implementation cost cannot be estimated from these proposed changes.

Similar comments were submitted by WMC/WPC.

Response:

In the proposed rule that accompanied the draft EIA the requirement that calibrations be performed yearly, at a minimum were removed. Unlike the existing rule, the proposed rule allows calibrations to be performed according to the frequency specified by the equipment manufacturer, even if that frequency exceeds one year, unless a frequency is specified in an applicable standard. When estimating the economic impact of the proposed rule change, the department assumed that sources currently maintain monitoring equipment at least yearly and more frequently according to manufacturer recommendations, which is the requirement in the existing rule. If a source’s operational history shows that less frequent calibrations than those recommended by the manufacturer are adequate, the source can contact the manufacturer to obtain site-specific recommendations for the equipment. The department will consider written, site-specific recommendations from an equipment manufacturer to meet the requirement to follow manufacturer’s recommendations.

EIA Comment, Milwaukee Metropolitan Sewerage District - Milwaukee Metropolitan Sewerage District provided the following comment on the potential economic impact of proposed ch. NR 439 via email on January 8, 2024:

At this time, we cannot ascertain whether we will be affected in a material economic way by the implementation of the rule without spending significant resources to make the determination. If our current instrumentation is not able to meet the revised accuracy requirements, we will have to replace a significant number of instruments. If our existing instruments are grandfathered out of the revised accuracy requirements until they need to be replaced, then there will not be a material economic impact to us.

Response:

The proposed changes to the monitoring instrumentation accuracy requirements are intended to clarify that accuracy requirements are specific to individual measurement devices and to accommodate instrumentation that is currently commercially available. To address this comment and WMC/WPC Comment H, the department has added a definition of “accuracy” and “accurate” under s. NR 439.055 (1g) and has re-evaluated the accuracy requirements for temperature monitoring instruments. For more information on monitoring equipment accuracy requirements see the response to WMC/WPC Comment H.

EIA Comment, Wisconsin Department of Corrections –Wisconsin Secure Program Facility provided the following comment on behalf of the 36 Department of Correction (DOC) Facilities:

We are all operating with inadequate maintenance budgets in the DOC so if there will be costs associated with these rule changes please note (or Legislate) in these administrative changes that the legislators (when approving the changes) will have to include funding for each of our facilities to meet the change requirements with the equipment at our facilities and funding to keep up with the annual fees or compliance requirements. I know I find it difficult to meet all of the required annual test, certifications and inspections required by all of the regulatory departments both state and federal. It's just like building a house, "Change Orders cost money"

Response:

The proposed rule changes do not add new requirements and will not require sources to modify current operations or replace or install new monitoring equipment. The proposed changes create flexibility and additional compliance options for reporting, monitoring and recordkeeping. The proposed rule language should not result in additional overall costs compared to the current requirements. Some changes were made to the proposed rule to clarify this. See the responses to WMC/WPC Comments H and J.

EIA Comments, Wisconsin Manufacturers & Commerce (WMC) and Wisconsin Paper Council (WPC) –WMC and WPC provided a number of comments and proposed alternatives on the EIA relating to modification of ch. NR 439, in a letter sent via email on January 12, 2024. The comments are enumerated below as presented in WMC/WPC’s January 12, 2024, letter. Comments C, D, F, G, and I were reiterated during the public comment phase and are addressed in the PUBLIC COMMENTS ON DRAFT RULE section below:

WMC/WPC Comment A – Email Submittals

As a general matter, we continue to encourage DNR to allow for submittal of reports via email. Allowing email submittals would simplify the process and reduce administrative costs for sources. In addition, e-mail submittals would presumably be easier for DNR to process than hard copy reports, which the rule allows.

Response:

To provide flexibility and accommodate alternative submittal methods that may become available in the future, the proposed language requiring electronic or hard copy submittal of reports was removed from ss. NR 439.03(1)(am), 439.06(intro), 439.07(1m), 439.075(1)(d), 439.09(10)(ag), 439.095(1), and 439.11(2), Wis. Adm. Code. The effect of removing this language is that email will again be an allowable submittal method.

WMC/WPC Comment B – Applicability [NR 439.01]

This provision provides in part that for sources subject to certain federal emission standards, the requirements of 40 CFR parts 60 to 62 apply in addition to the requirements of NR 439. Requiring different reporting requirements under both federal and state law unnecessarily increases complexity and costs. State requirements should align with federal reporting requirements. That alignment policy is reflected in Wis. Stat. § 285.27(1)(a) and (2)(a) which require that DNR adopt by rule standards, “including administrative requirements,” consistent with any federal NSPS or NESHAP unless DNR makes certain findings of necessity that are not at issue here.

Response:

When preparing the proposed updates to ch. NR 439, the department reviewed federal requirements in 40 CFR parts 51, 52, 60, 61, 63, 64, 68, 70, and 75 to ensure the proposed changes align with corresponding federal requirements. This comparison with federal statutes and regulations is summarized in section 6 of Board Order AM-05-22.

The federal standards in 40 CFR part 60 to part 63 apply to some, but not all air contaminants emitted from the emissions units covered under the standard. Other requirements, including those in chapters NR 400 to NR 499, Wis. Adm. Code may also apply to the same emissions units subject to a federal standard in 40 CFR part 60 to part 63 for a different air contaminant that is not regulated by the standard. For this reason, some requirements in ch. NR 439 will apply to a source in addition to the requirements in a federal standard.

The proposed language in s. NR 439.01(1), Wis. Adm. Code, updates code citations but does not substantively change the existing rule. The existing rule also states that federal rules apply in addition to ch. NR 439. Both existing and proposed language also specifically state that in the case of a conflict between applicable provisions under 40 CFR part 60 to part 63 and the provisions of ch. NR 439, the provisions of the federal standards apply. Therefore, it is anticipated there will not be an economic impact from the proposed changes to this section.

WMC/WPC Comment E – Deviation Reporting [NR 439.03(4)(am)]

DNR’s proposed use of “emission limitation” as defined in s. 285.01(16), Stats., and s. NR 400.02(58), would result in more reporting by permitted sources than necessary to meet EPA requirements. As DNR is required under s. 285.27(1) to ensure standards are not more restrictive than federal standards, DNR should limit deviation reporting to an exceedance of “their quantity, rate or concentration of emissions or air contaminants” specified in the applicable permit.

Response:

Requiring reporting of “emission limitation” exceedances as that term is defined, in full, in s. 285.01(16), Wis. Stats., and s. NR 400.02(58), Wis. Adm. Code, ensures that actual releases that may impact public health and the environment are reported promptly under s. NR 439.03(4)(am), Wis. Adm. Code, as required under 40 CFR 70.6(a)(3)(iii). The proposed rule, as currently written, should reduce costs associated with reporting requirements because it no longer requires

two business day notification of all operation or maintenance requirements of a source, but only those operation or maintenance requirements that “assure continuous emission reductions”.

WMC/WPC Comment H – Methods of Determining Compliance and Equipment Accuracy [NR 439.055(3)]

DNR is proposing significant changes to NR 439.055(3). The proposed accuracy changes contained within this section would result in added costs for a facility because new monitoring equipment would be required.

Using pressure monitoring as an example, the current rule requires the monitoring device to have an accuracy within 5% of the pressure drop being measured or within +/- 1 inch of the water column, whichever is greater. The revisions remove the +/- 1 inch of water column option. Thus, sources will now be required to meet the 5% threshold under the draft NR 439.

However, typically a differential pressure (DP) range across a baghouse or fabric filter is small, such as 1.0 to 8.0 inches of water column. Under the current rule the DP gauge would only need to be accurate within 1.0 inch of water column. Under the draft rule with the 5% threshold, such a gauge would need to be accurate within 0.1 inches. This is a more accurate reading than many standard non-digital gauges can meet. Thus, sources would likely need to install new gauges to meet the proposed 5% mandatory threshold and incur the related costs.

Similar changes are proposed for temperature monitoring devices under the draft rule. DNR proposes to eliminate the +/- 5 degrees allowance provided under the existing rule. To the extent new equipment is required, this would also impose additional costs on sources.

In addition to purchasing new monitoring equipment, a source would incur other costs as well. A source may need to take its equipment offline in order to replace the non-compliant devices. Moreover, having only one accuracy standard – as provided under the draft rule – would force sources to incur additional O&M costs to maintain the equipment.

Finally, it should be noted that this proposed 5% threshold appears to be more stringent than relevant federal requirements, as EPA allows multiple equipment accuracy standards. For example, for CEMS QA tests, EPA allows alternate thresholds of 15% or +/- 5 PPM.

In order to avoid imposing additional costs associated with monitoring equipment upgrades, equipment shutdowns to replace non-compliant equipment, and new O&M costs to maintain new equipment, we urge DNR to remove the proposed accuracy requirements in the draft NR 439.055(3). Instead, DNR is encouraged to retain the alternate standards and flexibility afforded by the existing rule.

Response:

- *For Accuracy:*

To clarify that accuracy is specific to an individual measurement device, the following definition from [chapter 4 of U.S. EPA’s CAM Technical Guidance Document \(epa.gov\)](#)¹ was added under s. NR 439.055 (1g), Wis. Adm. Code:

“In this section “accuracy” or “accurate” means the closeness of an indicator or reading of a measurement device to the actual value of the quantity being measured; usually expressed as ± percent of the full-scale output or reading.”

¹ Chapter 4 of U.S. EPA - Technical Guidance Document: Compliance Assurance Monitoring, MRI Project No. 4701-05, August 1998.

The accuracy of a monitoring device is determined by the manufacturer of the equipment. The accuracy of a monitoring device is not a variance used to adjust data collected.

- *For pressure drop gauges:*

It is not intended that sources would be required to replace monitoring equipment based on the changes to the proposed rule. The proposed requirement that pressure drop monitoring devices be accurate within 5 percent reflects the accuracy of devices that are currently in operation and commercially available. (See tables 4.3-2 and 4.3-4 and section 4.3.3.3 of the U.S. EPA technical guidance document referenced above.) It is the department's experience that sources are currently using devices that would meet at least a 5% accuracy requirement for measuring pressure drop.

The +/- 1 inch of water column accuracy level for pressure drop was removed from the proposed rule because this level of accuracy would not be appropriate for pressure drop monitoring devices designed to read values under 1 inch of water column, as the level of accuracy would be outside the range of the device. Using the percentage accuracy standard accommodates any device regardless of the range of values being measured and will not require a source to incur additional operation and maintenance costs to maintain the equipment. The accuracy of a device is inherent to the device itself and not an ongoing maintenance issue.

The requirements in s. NR 439.055, Wis. Adm. Code, are specific to parametric monitoring devices, not continuous emission monitors. Requirements for continuous emissions monitors are covered in ss. NR 439.09 and 439.095, Wis. Adm. Code, and specific federal regulations. The 5% accuracy requirement for parametric monitoring instrument is not more stringent than federal requirements.

- *For temperature gauges:*

The accuracy range for temperature monitoring devices has been returned to the existing language under s. NR 439.055(3)(a), Wis. Adm. Code, which states that the "temperature monitoring device shall have an accuracy of 0.5 percent of the temperature being measured in degrees Fahrenheit or $\pm 5^{\circ}\text{F}$ of the temperature being measured, or the equivalent in degrees Celsius (centigrade), whichever is greater." Upon review of the EPA CAM Technical Guidance Document: [Technical Reference for Monitoring Equipment and Instruments](#),¹ it is noted that devices that are currently in operation and on the market for sale may not be able to meet a 0.5% accuracy requirement alone. It is not the department's intent to require facilities to install new monitoring devices. For this reason, the department has returned to the existing rule language as requested by the commenter.

WMC/WPC Comment J – Definition of Monitoring Device [NR 439.02(9)]

DNR has proposed revising the definition of "monitoring device" as follows:

(9) "Monitoring device" means ~~any instrument used~~ all equipment necessary to measure the operating parameters of a control device or process, obtain a reading, and transmit the reading to recordkeeping equipment and to the control room, if applicable.

The revised definition proposes to include devices that "obtain a reading" and "transmit a reading." For sources that do not currently have recordkeeping or transmittal equipment, this could impose added costs. In addition, the calibration of recording, indication, or transmittal devices would add a cost burden by possibly doubling or tripling the number of calibrations that a plant must complete. These costs must be considered in the final EIA.

Response:

In response to this comment, the department has modified the definition of “monitoring device” to read as follows:

“Monitoring device” means ~~all~~ **the collection of** equipment ~~necessary~~ **used** to measure the operating parameters of a control device or process, obtain a reading, and transmit the reading to recordkeeping equipment and to the control room, ~~if applicable.~~

Facilities will not be required to install new devices for recordkeeping or transmittal as a result of the proposed definition change. Rather, if a facility currently uses equipment that measures, obtains a reading or transmits a reading to recordkeeping equipment and to the control room, then those components are all part of a monitoring device. If a facility does not have all the components listed, they are not required to install them. With this clarifying language, the proposed rule will not result in additional costs relative to current requirements.

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

The Legislative Council Rules Clearinghouse submitted comments on form, style and placement in administrative code and clarity, grammar, punctuation and use of plain language. Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse, except for Comment 5.f. discussed below.

Comment 5.f. Suggested that “... the new language beginning with “Nothing in this chapter...””, in s. NR 439.06 (intro.), could be clarified. By whom would the evidence or information be used? In what circumstances “would” a source have been in compliance?”

Response:

The department is not incorporating the suggestion because the referenced language under s. NR 439.06 (intro.) is copied directly from federal rule language on credible evidence. It is being retained for consistency with U.S. EPA regulations.

PUBLIC COMMENTS ON DRAFT RULE

Written comments on the proposed rule were received from:

- RadTech Association for UV&EP Technology (RadTech)
- Molson Coors Beverage Company (Molson Coors)
- Printing United Alliance (PUA)
- Wisconsin Utilities Association, Inc. (WUA)
- Wisconsin Manufacturers & Commerce and Wisconsin Paper Council (WMC/WPC)

The following is a summary of comments received and the department’s responses.

Public Comments – General

WMC/WPC General Comment

Rule should allow report submittals by e-mail or paper hardcopy. In the remaining text of this comment, the commenters elaborate on their reasons for why DNR should allow email submittals.

Response:

In response to similar comments provided by WMC and WPC on the EIA, the department removed language from the proposed rule that limited the method for submitting information to the department to electronic reporting or hardcopy only. By removing this language, the rule now allows submittal by any method, including email, hardcopy, electronic reporting, and any other method that may be available to sources in the future. Nothing in the proposed rule precludes submittal by email or paper hard copy.

Public Comments – Section NR 439.01 – Applicability; purpose

RadTech Comment s. NR 439.01

While the commenter understands the need for the rule to include the requirements of 40 CFR part 60 to part 63, they do not see a need to add to those requirements by imposing unnecessary added burdens to impacted businesses. The commenter says that additional reporting requirements will not yield actual emission reductions and will, in fact, dissuade companies from investing in new processes like UV/EB/LED. The rule should not apply to companies that are reducing their emissions above and beyond DNR requirements. Thus, the commenter suggests adding language specifying that the rule is not applicable to UV/EB/LED processes.

Response:

Applicability of requirements in ch. NR 439, Wis. Adm. Code, to UV/EB/LED processes, if any, would be triggered by applicability to these processes of other regulations elsewhere in chs. NR 400-499, Wis. Adm. Code, or in federal standards. As long as UV/EB/LED processes are not subject to regulations elsewhere in chs. NR 400-499, Wis. Adm. Code, or in federal standards, the requirements of ch. NR 439, Wis. Adm. Code, will not apply. Addressing rule applicability to UV/EB/LED processes in other regulations is outside the scope of this rulemaking.

WMC/WPC Comment s. NR 439.01

*NR 439.01(1) specifies that for sources that are subject to 40 CFR part 60 through part 63, the applicable requirements of those provisions apply, **in addition to the provisions in NR 439**. These federal requirements include New Source Performance Standards, Approval and Promulgation of State Plans for Designated Facilities and Pollutants, National Emission Standards for Hazardous Pollutants, and more. The commenter does not agree that ch. NR 439 requirements should apply in addition to federal requirements.*

Response:

Section NR 439.01 intro states, “In the case of a conflict between applicable provisions under 40 CFR part 60 to part 63 and provisions of this chapter, the provisions under 40 CFR part 60 to part 63 shall apply.” See response to EIA WMC/WPC comment B for additional explanation.

Public Comments – Section NR 439.02 -- Definitions

RadTech Comment s. NR 439.02

Commenter requests the inclusion of a definition for “energy curable materials”.

Response:

Because DNR is not proposing to use the term “energy curable materials” in ch. NR 439, Wis. Adm. Code, a definition for this term cannot be included in ch. NR 439. As noted in the response to RadTech’s comment on applicability of ch. NR 439, Wis. Adm. Code, concerns about regulations that may apply to its energy curable materials would need to be addressed in other NR chapters, which is outside the scope of this rulemaking.

WMC/WPC Comment s. NR 439.02(2m)

Calibration (NR 439.02(2m)): DNR should replace “report or eliminate those inaccuracies by adjustment” with “reduce those inaccuracies by adjustment if necessary.” This change would recognize that there may often be some level of variation that cannot be addressed through calibration. This change would recognize that some small variation may not be able to be addressed through calibration.

Response:

In response to the comment and to clarify the definition, the department has modified the definition of calibration as follows: “Calibration” means the comparison of a standard or instrument with a known accurate standard or instrument to detect and quantify inaccuracies, and either reduce or eliminate those inaccuracies by adjustment.

WMC/WPC Comment s. NR 439.02(5m)

Deviation (NR 439.02(5m)): The DNR should clarify that a “deviation” is not necessarily a violation of a permit requirement or applicable regulation. This change would make the proposed definition more consistent with the federal definition under 40 CFR 71.6(a)(3)(iii)(C), which explicitly states that “a deviation is not always a violation.”

Our members continue to have serious concerns with how deviation is defined with respect to enforceability, as well as excursions and exceedances.

Response:

The department requested clarification from EPA on this matter and received a letter from EPA, dated May 31, 2024, addressing this comment. For reference, this letter is attached to this response to comment document. “A deviation is not always a violation” was added to the definition of deviation.

WMC/WPC Comment s. NR 439.02(6e)

Exceedance (NR 439.02(6e)): DNR should modify this definition to reference a “numerical” limitation or standard. This change would provide clarity to the definition.

Response:

The proposed definition of exceedance is based on the federal CAM rule definition which is broader than “numerical limitation” and says an exceedance means a condition that is detected by monitoring that provides data in terms of an emission limitation or standard and that indicates that emissions (or opacity) are greater than the applicable emission limitation or standard (or less than the applicable standard in the case of a percent reduction requirement) consistent with any averaging period specified for averaging the results of the monitoring.

To address concerns about clarity and assure consistency with federal definitions, the word “emission” will be added before limitation where it appears in the definition as follows:

“Exceedance” means a condition that is detected by monitoring, testing, or other documentation that provides data in terms of an emission limitation or standard and that indicates that emissions or opacity are greater than the applicable emission limitation or standard, or less than the applicable standard in the case of a percent reduction requirement, consistent with any averaging period specified for averaging the results of the monitoring or testing, or specified in the applicable emission limitation or standard.

WMC/WPC Comment s. NR 439.02(6s)

Incinerator (NR 439.02(6s)): The proposed definition of incinerator is inconsistent with both NR 400 and federal rules (40 CFR 60 Subpart E). Moreover, it appears that under this definition, a “boiler” could be considered an “incinerator,” which it is not appropriate. Furthermore, it is unclear why this definition is needed in NR chapter 439. Consequently, DNR should modify this definition or remove it if it is not needed.

WMC/WPC Comment s. NR 439.02(9e)

Oxidizer (NR 439.02(9e)): Based upon the proposed definition, it is difficult to understand whether oxidizers are a subset of incinerators, or incinerators are a subset of oxidizers. DNR should clarify or remove this definition.

WMC/WPC Comment s. NR 439.075(2)(c)1.a.

Incinerators (NR 439.075(2)(c)1.a.): Note the definition of incinerator in NR 439.02(6s) is different than the definition contained in 40 CFR part 60 Subpart E. As noted previously, the definition of “incinerator” should mirror the federal definition, or it should be deleted.

Response:

There are two definitions of incinerator used within ch. NR 439, Wis. Adm. Code.

The term incinerator is used with few exceptions to mean an air pollution control device. The term oxidizer is also used in ch. NR 439, Wis. Adm. Code, to mean air pollution control device, yet neither of these terms were specifically defined as such. In response to these comments and to assure clarity, the department modified the rule to include definitions for oxidizer and incinerator as these terms are specifically used in ch. NR 439, Wis. Adm. Code.

The word incinerator is also defined in 40 CFR part 60 Subparts E and O to mean any furnace used in the process of burning solid waste for the purpose of reducing the volume of the waste by removing combustible matter. The word incinerator is defined in ch. NR 400, Wis. Adm. Code, as a device designed for high temperature operation in which solid, semisolid, liquid, or gaseous combustible wastes are ignited and burned to produce solid and gaseous residues containing little or no combustible material.

WUA Comment s. NR 439.02(9)

WUA believes the definition of monitoring device is overly prescriptive and will require unnecessary calibrations. WUA recommends the original definition be maintained.

Response:

Updates to the definition of “monitoring device” were necessary to address modern control device systems that may use non-mechanical means to transmit and store data.

WMC/WPC Comment s. NR 439.02(11)

Sampling Port (NR 439.02(11)): To accommodate open path analyzers, this definition should specify “...provide access for extraction of a sample or sample analysis.”

Response:

In response to this comment, the definition proposed by the commenter has been adopted. The revised language reads:

“Sampling port” means an opening through the wall of a stack or duct that is used to provide access for extraction of a sample or sample analysis.”

Public Comments – Section NR 439.03 -- Reporting

RadTech Comment s. NR 439.03

RadTech requested an exemption for UV/EB/LED technology from the reporting requirements of the rule including the requirement to submit monitoring reports.

Response:

As noted in the response to RadTech’s other comments, ch. NR 439 reporting and monitoring requirements apply based on the applicability of other state and federal regulations. Concerns about the applicability of other regulations to energy-curable materials would need to be addressed in other NR chapters, which is outside the scope of this rulemaking.

WMC/WPC Comment s. NR 439.03(1)(a)

General Reporting Requirements (NR 439.03(1)(a)): This provision provides in part that DNR can require a source to provide DNR information to locate and classify air contaminant sources according to the type, level...and other characteristics of emissions and “such other information as may be necessary.”

The commenter objects to these overly broad, catchall provisions granting DNR undefined authority. Regulatory requirements should be defined to provide the regulated community notice of applicable requirements.

Response:

The department removed the phrase “and such other information as may be necessary” from the proposed rule.

WUA Comment s. NR 439.03(1)(b)

WUA asks WDNR to remove the requirement to provide the results of all monitoring, or a summary of monitoring results, during all times during the monitoring period.

This provision still requires multiple and duplicative submittals considering WUA members submit compliance reports quarterly, semi-annually, and annually. WUA asks WDNR to further evaluate the opportunity to reduce and streamline reporting.

Response:

Section NR 439.03(1)(b) is included in ch. NR 439, Wis. Adm. Code, to meet the requirements of 40 CFR part 70.6(a)(3)(iii) which states that “with respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following: (A) Submittal of reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly

identified in such reports. All required reports must be certified by a responsible official consistent with [40 CFR § 70.5(d)] of this part. ”

The department is supportive of report consolidation; however, the department cannot modify the frequency or content of federally required reports without jeopardizing Title V Program approval by the EPA. If federal streamlining occurs in the future, this proposed rule will allow for further report consolidation.

WMC/WPC Comment s. NR 439.03(1)(c)

Compliance Certifications (NR 439.03(1)(c)): This provision sets forth the information that must be contained in a monitoring report, which must be certified by the responsible official. This provision should be modified to allow the source the option of submitting credible evidence demonstrating compliance.

Response:

The proposed language in NR 439.03(1)(c)4. is included to meet the federal requirements in 40 CFR s.70.6(c)(5)(iii)(B). The proposed language in s. NR 439.03(1)(c)4., Wis. Adm. Code, indicates the source shall identify “the methods or other means used for determining compliance status with each term and condition of the operation permit during the certification period.” This allows the source to identify any other methods or other means that are the basis of their certification, including any credible evidence.

40 CFR s. 70.6(c)(5)(iii)(B) and s. NR 439.03(1)(c)4., Wis. Adm. Code, both go on to state that “(i)f necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information.” This statement requires sources to identify any other material information, including credible evidence, when certifying compliance with each term and condition during the certification period.

Because the language in s. NR 439.03(1)(c)4., Wis. Adm. Code, has been included to meet federal requirements of 40 CFR s. 70.6(c)(5)(iii), the department cannot change the provisions without jeopardizing Title V program approval by the EPA.

WMC/WPC Comment s. NR 439.03(1)(c)(7)

“Any Information Requirement”: NR 439.03(1)(c)(7)): This provision requires compliance certifications to include certain information, including “any other information the department may require, as specified in the operation permit, to determine the compliance status of the source.”

As noted previously by the commenter, there are several opened ended provisions in NR 439, similar to the one referenced above. Such provisions allow DNR virtually unlimited ability to require additional information from a source. Again, WPC and WMC request such provisions be removed from NR 439. Such provisions provide no notice of what will be required of the source and allows DNR to pursue an unending amount of information. Instead, DNR should specify the information in the rule that will be required of sources.

Response:

The phrase “any other information the department may require, as specified in the operation permit, to determine the compliance status of the source” is limited to information specified by the operation permit. The DNR includes this phrase in NR 439 to meet the permit content requirement of 40 CFR s. 70.6(c)(5)(iii)(D) which includes “Such other facts as the permitting authority may require to determine

the compliance status of the source.” In order to maintain an approvable Title V operation permit program, the DNR must have authority to request information to determine compliance status of the source.

PUA Comment s. NR 439.03(3)(m)

NR 439.03 (3)(m) requires immediate notification of hazardous air spills. However, there is no definition of a hazardous substance or what constitutes an air spill. Is there a threshold for release that triggers reporting? NR 445.16 applies to "Persons possessing or controlling a hazardous substance" but does not define hazardous substance.

In addition, there is no definition for what constitutes immediate and that needs to be defined. What is a hazardous substance air spill?

Response:

The proposed language was updated to be consistent with ch. NR 445, Wis. Adm Code.

WUA Comment s. NR 439.03(4)(am)

WMC/WPC Comment s. NR 439.03(4)(am)

Regarding deviation reporting, commenters request that WDNR change the due date for the follow up report from 10 calendar days to 10 business days for consistency with the initial notification, which is based on business days. This change would avoid potential confusion about due dates and bring more cohesion to the notification requirements.

Further, commenters request that the notification be updated to include “initially notify the department (via email, telephone, or oral communication)” so it is clear how the department can be notified within 2 business days.

Additionally, commenters request clarity within the final rule on how it will determine “when the owner or operator ...should have known of the event.”

The commenters also state that reporting should be limited to when there is an exceedance of “the quantity, rate or concentration of emissions or air contaminants” specified in the applicable permit.

Response:

To address this comment, the department has revised s. NR 439.03(4)(am), Wis. Adm. Code, to state that “the owner or operator of a source shall report any event at the source that causes any emission limitation, including a visible emission limit, to be exceeded within 10 calendar days of its occurrence...”

This modification addresses the commenter’s concern about when an owner or operator should have known. The modification removes the language and clarifies that reporting is required within 10 calendar days of the event’s occurrence. Reporting within 10 days of the occurrence is consistent with federal reporting requirements for prompt deviation reporting in 40 CFR Part 71.

This modification also addresses the commenter’s concern regarding inconsistency with business days and calendar days. The department has already taken steps to change all other dates within the rule to calendar days for clarity, so this change of clarifying “calendar days” will add to that consistency.

This modification also addresses the commenter’s concern about having the option to notify in a non-prescribed way. The department has removed the requirement to provide initial notification.

See response to comment **WMC/WPC Comment s. NR 439.02(6e)** regarding the definition of exceedance.

WMC/WPC Comment s. NR 439.03(4)(cm)

*Deviations not Reported Under NR 439.03(4)(am): NR 439.03(4)(cm) provides that the owner or operator of a source must report all deviations not reported under NR439.03(4)(am). Note that under the proposed definition of “deviation,” it is defined to include any instance in which a source is not in conformance with a **permit requirement or applicable regulation** and includes both exceedances and excursions. Note that this provision requires the reporting of **permit terms or conditions** not reported under NR 439.03(4)(am). These provisions should be reconciled.*

In addition, deviations reported under this provision are due with the next monitoring report. We agree that reporting these deviations with the next monitoring report is generally an improvement, although we note that there could be situations in which there is very little time to report if the deviation occurs close to the due date of the monitoring report. An allowance for deviations that occur very close to the monitoring report’s due date (such as two business days), may be helpful.

Response:

A monitoring reporting period covers a specific timeframe identified within an air pollution control permit. Air permits typically allow 30 to 60 days after a monitoring period to submit the report. Facilities experiencing deviations within a monitoring report period would report those deviations within the monitoring report due for that period. Because of the time frame allowed for report submittal, deviations that occur very close to the report due date would be considered to have occurred during the subsequent reporting periods and would be included in that subsequent report.

In addition, to reconcile that “deviation” is defined to include instances when a source is not in conformance with a permit requirement or applicable regulation, the proposed language in s. NR 439.03(4)(cm), Wis. Adm. Code, is changed as follows:

“(cm) The owner or operator of a source shall report to the department any deviation from permit terms or conditions **or applicable regulations** not reported under par. (am) no later than the due date **for** the monitoring report required under sub. (1)(b) **for the reporting period during which the deviation occurred**. The owner or operator of a source shall report to the department all of the following:”

PUA Comment s. NR 439.03(7)

NR 439.03 (7) requires a printing or coating operation that uses an “in-line” averaging approach for compliance to notify the DNR that they are using the provision as identified in NR 422.04. The requirement to notify the DNR should be deleted as it poses an administrative burden that is not necessary. If a source is using NR 422.04 for compliance, it is incumbent upon the source to be able to demonstrate how it is achieving compliance when they are inspected. The notification provision is not related to compliance certification which is required under NR 439.03 (4)(m).

Response:

The department has not revised the reporting requirements in s. NR 439.03(7), Wis. Adm. Code, in response to this comment. These ch. NR 439 provisions are in place to meet ch. NR 422 requirements. Chapter NR 422, Wis. Adm. Code, contains rules necessary to meet ozone SIP planning requirements and any changes would need an analysis that this rulemaking is not scoped to undertake. As the commenter notes, ch. NR 439 may not be the most desirable location for ch. NR 422 reporting requirements and this request can be considered the next time ch. NR 422 is revised.

WMC/WPC Comment s. NR 439.03(11)

Requirement for Truthful Report:(NR 439.03(11)): This provision requires that all certifications made under section must be truthful. This requirement seems redundant with the provision in NR 439.03(10). DNR should consider consolidating these provisions.

Response:

Section NR 439.03(10) and (11), Wis. Adm. Code, is in place to meet the compliance certification requirements of 40 CFR part 70.5(d). To address the comment, the department has modified s. NR 439.03(11), Wis. Adm. Code, to be consistent with s. NR 439.03(10), Wis. Adm. Code, and 40 CFR part 70 by including that “all certifications made under this section and all material statements and representations made in any report or notice required by an operation permit shall be truthful, **accurate and complete.**”

Public Comments – Section NR 439.04 -- Recordkeeping

RadTech Comment s. NR 439.04

The rule should recognize the excess emission reductions associated with the implementation of UV/EB/LED materials by providing relief from recordkeeping. We suggest that an exemption be provided for UV/EB/LED materials.

Response:

Chapter NR 439, Wis. Adm. Code, does not contain source-category specific exemptions or determinations. If a facility is not subject to other state or federal regulations, ch. NR 439, Wis. Adm. Code, does not apply. Revision of other state regulations to exempt UV/EB/LED materials is outside the scope of this rulemaking.

WUA Comment s. NR 439.04(1)(b)

WMC/WPC Comment s. NR 439.04(1)(b)

*WDNR proposes to change NR 439.04(1)(b) to require sources to maintain records detailing all malfunctions that cause or **may cause** an applicable emission limitation to be exceeded, including logs to document the implementation of the plan required under s. NR 439.11.*

Commenters request that the “or may cause” language not be added in the final rule. Commentors believe this is overly broad, likely will create confusion regarding implementation and result in inconsistent recordkeeping throughout the state. Further, the removal of “or may cause” from NR 439.04(1)(b) would be consistent with the changes WDNR is proposing to NR 439.03(4)(am), where similar phrasing was removed.

Response:

The phrase “may cause” has been removed from the proposed rule.

WMC/WPC Comment s. NR 439.04(1)(d)

Requirement to Retain “Any Records” relating to Emissions of Air Contaminants (NR 439.04(1)(d))

As referenced above, the commenters say DNR should eliminate generic requirements such as the provision in NR 439.04(1)(d). These “catchall” provisions do not provide notice of what will be required

by the rule, nor do they provide any guidance regarding DNR expectations. Rather, NR 439.04(1)(d) should be deleted.

Response:

Section NR 439.04(1)(d), Wis. Adm. Code, is included in part to meet recordkeeping requirements in 40 CFR part 70.6(a)(3)(i)(B) which prescribes allowable methods for demonstrating compliance with permit conditions. In order to address the commenters' concerns, the department has changed the provision to specify the owner or operator of an air contaminant source shall maintain any other records relating to the emission of air contaminants which may be required to demonstrate compliance with permit conditions.

WMC/WPC Comment s. NR 439.04(1)(f)

Requirement to maintain records for NSPS and NESHAP (NR 439.04(1)(f)): This should be expanded to include specific references to the Code of Federal Regulations (NESHAP, NSPS, MACT and BACT) to be more specific and relevant for the permittee, as well as to the permit writer and compliance inspectors. Specific cites to applicable requirements will inform permittees and others of expectations. Use of broad, non-specific references is not a state or federal requirement.

Response:

Affected sources are required to comply with applicable requirements of federal standards promulgated under sections 111 and 112 of the Clean Air Act (the Act). These standards are codified in 40 CFR parts 60-63. The department has delegated authority to implement the requirements of federal standards promulgated under sections 111 and 112 of the Clean Air Act. To meet its implementation obligations and determine whether affected sources are complying with applicable federal standards, the department must have access to records that sources are required to keep under applicable federal standards. The standards under section 111 and 112 of the Act are specific to various affected source types and detail the specific records that are required. The specific records that are required for each affected source are dependent on the records required by each standard and will be specifically identified in any permit issued to the source. Sources have an obligation to know which federal standards apply to them and to comply with all the requirements including recordkeeping requirements.

WMC/WPC Comment s. NR 439.04(3) to (6)

DNR should consider relocating these provisions to chapters NR 419 to NR 424. This would streamline NR 439. It is confusing and unnecessary to list them both here and in chapters NR 419 to NR 424.

PUA Comment s. NR 439.04(4)(a)-(d), (5)(a) and (5)(e)

NR 439.04 (4)(a-d) requires sources that are excluded due to their emissions being less than the applicability threshold to compile extensive records and maintain them. This provision needs to be revised to make it easier for small sources to demonstrate they are excluded from regulation as this poses a significant administrative and technical burden that is difficult for small sources to meet.

NR 439.04 (5)(a) requires detailed per line recordkeeping for certain printing and coating sources. Please delete the reference to 422.145 as there are no per line or individual unit VOC emission limits contained in it. There are limits for VOC content for ink systems and this requirement imposes a recordkeeping requirement that is not necessary and is very burdensome.

NR 439.04 (5)(e) requires detailed per line recordkeeping for certain printing and coating sources. Please delete the reference to 422.145 as there are no per line or individual unit VOC emission limits contained in it. There are limits for VOC content for ink systems and this requirement imposes a recordkeeping requirement that is not necessary and is very burdensome. In addition, this requirement is redundant with NR 439.04 (5)(a).

Response:

The coating content limitations for inks used in screen printing operations subject to s. NR 422.145, Wis. Adm. Code, are considered emission limitations so the provisions in ch. NR 439, Wis. Adm. Code, would apply. These ch. NR 439 provisions are in place to meet ch. NR 422 requirements. Chapter NR 422 contains rules necessary to meet ozone SIP planning requirements and any changes would need an analysis that this rulemaking is not scoped to undertake.

Chapter NR 439, Wis. Adm. Code, may not be the most desirable location for the ch. NR 422, Wis. Adm. Code, recordkeeping requirements, and this request will be considered when ch. NR 422 is revised.

WMC/WPC Comment s. NR 439.05(1)

The commenter is concerned that use of the term “information” in the authority under NR 439.05(1) is overly broad.

Response:

The statutory authority for access to records and other information comes from s. 285.11(7), Wis. Stats., which lists air pollution control department duties, “the department shall conduct or direct studies, investigations and research relating to air contamination and air pollution and their causes, effects, prevention, abatement and control and, by means of field studies and sampling, determine the degree of air contamination and air pollution throughout the state”.

In order to conduct the investigations required by the statute, access to information in addition to records may be necessary.

Public Comments – Section NR 439.055 -- Methods and procedures for determining compliance using instrumentation of air pollution control equipment and source processes

WMC/WPC Comment on Enforceability of Compliance Demonstrations

Enforceability of Compliance Demonstrations:

In previous comments, WPC and WMC have explained our belief that compliance demonstrations should not be independently enforceable in the absence of a violation of an emission limit. Such an approach would allow industry and DNR to focus resources to circumstances in which there is an actual potential impact to the environment.

Language in the proposed rule, such as contained in NR 439.055(2m), suggests such provisions are enforceable. Thus, DNR should consider clarifying that compliance demonstrations are not enforceable in the absence of a violation of an emission limit.

DNR is well aware that unintended and unavoidable excursions from compliance demonstrations occur, which have no impact to the environment. As noted above, credible evidence may be provided by a source to demonstrate compliance with an emission limit. DNR, however, maintains it is a permit violation if there is an excursion for a compliance demonstration provision, even in the absence of emission limitation exceedance.

As DNR noted in its response to comments on the draft EIA, DNR continues to claim that these compliance demonstrations are enforceable even if DNR is provided with an “after-the-fact” demonstration of compliance consistent with EPA’s credible evidence rule.

In its response to comments, DNR further points to 40 CFR 70.6(a)(6)(i), which states in part that “any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action,” and

asserts that this provision makes compliance demonstrations independently enforceable. DNR seems to equate a “deviation,” which may be reportable, with “noncompliance” or a “violation” of a permit condition. This is a problematic interpretation.

First, as WMC and WPC have strenuously noted previously, the issue of compliance is addressed by the EPA’s credible evidence rule, which reads in part that “...nothing...shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in **compliance [emphasis added]** with applicable requirements...” Moreover, 40 CFR 70.6(a)(3)(iii), as cited by DNR, references “deviations” in the context of “reporting requirements,” not “noncompliance.”

Second, EPA itself has previously taken the position that a “deviation” is not necessarily a permit violation. As noted above, EPA explicitly notes in its definition of deviation in 40 CFR 71.6(a)(3)(iii) that “A deviation is not always a violation.”

With respect to the treatment of deviations in Part 71, please see EPA’s response to comments on deviations in its rulemaking for 40 CFR Parts 64, 70, and 71:

*The Agency has deleted the definition of deviation from the final rule and references to excursions or exceedances as deviations. The final rule does not refer to “deviations” and thus does not include a definition of “deviation.” The 1996 part 64 Draft did contain a revised definition of “deviation” to be included in the part 71 provisions covering the federal operating permits program. **This definition would have clarified that a deviation is not always a violation (Emphasis added)** and that types of events that were to be considered deviations included “exceedances” and “excursions” as defined under part 64.”*

*...The Agency has also made clear...that excursions are not necessarily indications of excess emissions or violations of applicable emission limits but are reported as **possible** exceptions to compliance.(footnote 2)*

In other words, it is inappropriate for DNR to equate the reporting of a deviation, as required by a permit, with a “violation” of a permit. This is inconsistent with EPA’s definition of deviation. This is especially true when considering “after the fact” compliance demonstrations are explicitly allowed by the EPA’s credible evidence rule.

(footnote 2): See Compliance Assurance Monitoring Rulemaking (40 CFR Parts 64,70 and 71) Response to Public Comments (Part III): <https://www3.epa.gov/airtoxics/cam/rtpart3.pdf>

Response:

The department requested clarification from EPA on this matter and received a letter from EPA, dated May 31, 2024, addressing this comment. For reference, this letter is attached to this response to comment document.

The department has modified the proposed definition of “deviation” to state: ““Deviation” means any instance in which a source is not in conformance with a permit requirement or applicable regulation, including exceedances and excursions. **A deviation is not always a violation.**”

WMC/WPC Comment s. NR 439.055(3)(a)

Temperature Monitoring Device – Technical Fix (NR 439.055(3)(a)): DNR should change the reference from “0.5%” to “0.5 percent” for consistency with other similar proposed changes in this chapter.

Response:

The department has updated the proposed language as the commenter suggests.

Molson Coors Comment s. NR 439.055(3)(b)

WUA Comment s. NR 439.055(3)(b)

WMC/WPC Comment s. NR 439.055(3)(b)

Comments concerning the removal of an alternate accuracy demonstration for pressure drop monitoring, specifically “or within ± 1 inch of water column”.

- *Molson Coors suggested language modification to include 0.01 inch of water column.*
- *WUA requests that the ± 1 inch be retained*
- *WMC/WPC believe the threshold could be lowered from “plus or minus 1 inch” to “plus or minus 0.5 inches.”*

Response:

The accuracy of a monitoring device is determined by the manufacturer of the equipment. The accuracy of a monitoring device is not a variance used to adjust data collected. See response to similar EIA comment WMC/WPC Comment H. Commercially available pressure drop monitoring equipment is advertised as having an accuracy of 2.5% or better. The requirement of the rule is to use monitoring devices certified by the manufacturer to have an accuracy of not less than 5%. The proposed rule remains “the pressure drop monitoring device shall be accurate to within 5 percent of the pressure drop being measured”.

WUA Comment s. NR 439.055(4)

Under NR 439.055(4) WDNR proposes to allow instruments used for measuring source or air pollution control equipment operational variables to be calibrated, replaced, or validated at a frequency based on written manufacturer recommendations or as required by an applicable standard. WUA appreciates and supports this proposed change. Certain WUA members have instruments that have timelines longer than one year, as recommended by the manufacturer. However, WUA asks WDNR to specify in the final rule that the calibration due date is determined based on the initial operating date of the equipment, rather than the delivery date, assuming the equipment comes initially calibrated.

Response:

As written, this proposed rule language would not preclude calibration due dates from being based on the initial operating date if appropriate and thus allows for this flexibility. Adding additional specificity could be counter to specific manufacturer recommendations which may specify a different date.

WMC/WPC Comment s. NR 439.055(4)

WPC and WMC request the language be modified to read:

All instruments used for measuring source or air pollution control equipment operational variables shall be calibrated, replaced, or validated at a frequency based on written manufacturer recommendations, as required by an applicable standard, or at a frequency based on good engineering practices. Alternatively, the time between calibrations, replacements, or validations may not exceed one year from when the equipment was placed into service.

Response:

Language like “good engineering practices as established by operational history” was removed from the rule in response to comments from stakeholders. The proposed rule language is consistent with EPA CAM Technical Guidance Document: [Technical Reference for Monitoring Equipment and Instruments](#), which states that “in general, calibration frequency should be within manufacturer’s recommendations”

and that the “manufacturer can best recommend at what interval these inspection and calibrations should occur with regard to specific operating conditions....”

The language proposed in the rule expands what is allowed for a calibration to include replacements or validations. This language also makes it possible to extend calibration frequency beyond the current minimum of 1 year when recommended by the manufacturer for a specific instrument.

Public Comments – Section NR 439.06 -- Methods and procedures for determining compliance with emission limitations (by air contaminant)

RadTech Comment s. NR 439.06

RadTech urges the DNR to include ASTM D7767-11 as suitable test method for UV/EB/LED products.

Response:

Specifically addressing UV/EB/LED projects in ch. NR 439, Wis. Adm. Code, is outside the scope of this rulemaking. However, alternate methods may be approved by the department under s. NR 439.06, Wis. Adm. Code, so if it becomes necessary for a source to test UV/EB/LED products, use of ASTM D7767-11 could be accommodated.

WUA Comment s. NR 439.06

WDNR proposes to add the following language in NR 439.06:

Nothing in this chapter shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements.

WUA suggests WDNR further align this language with that contained in Part II of Title V operating permits to avoid confusion regarding the use of credible evidence.

WMC/WPC Comment s. NR 439.06

Credible Evidence (NR 439.06):

DNR has proposed the following language regarding the use of credible evidence: “Nothing in this chapter shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements.” This language is an improvement upon DNR’s previous proposals.

As WPC and WMC have previously noted, however, Wisconsin air permits contain language in “PART II: General Permit Conditions for Direct Stationary Sources” relating to the use of credible evidence. This provision provides: “Notwithstanding the compliance determination methods which the owner or operator of a source is authorized to use under this permit, any relevant information or appropriate method may be used to determine a source’s compliance with applicable emission limitations.” It is our belief that this language has been approved by the federal Environmental Protection Agency (EPA).

This permit language should be mirrored in the rule to avoid confusion between the proposed rule credible evidence language and the permit credible evidence language.

WMC and WPC made a similar argument in comments on the draft EIA. In response, DNR asserts that the language in Part II “limits the use of credible evidence to only the owner or operator of a source,” and thus “would not conform to EPA’s position on the use of credible evidence and could risk disapproval of the rule by EPA” into Wisconsin’s SIP.

Despite this claim, DNR did not dispute that the current permit language is approved by EPA. At the least, it would seem odd and inconsistent that EPA would disapprove language in a rule that it already approved in permits.

Moreover, DNR states that in NR 439.01(1) that this chapter of administrative code “applies to all air contaminant sources and to their owners and operators.” If DNR’s intent is to use “broader language” that applies beyond the “owner or operator of a source,” it is unclear how such a provision within NR 439 would be consistent with the applicability requirements of the rule. It should further be noted that the rule’s scope statement explicitly refers to “requirements for sources of air contaminants,” and does not cite expanding the scope of entities impacted by the rule. Nor does DNR cite explicit statutory authority for expanding the scope of the rule to impact other entities.

Thus, for the aforementioned reasons, and consistent with the DNR’s explicit statutory authority, the rule’s scope statement, and the applicability of the rule, DNR should incorporate the “Part II” definition from permits into the rule.

Response:

The department requested a review from EPA on this matter and received a letter from EPA, dated May 31, 2024, addressing this comment. For reference, this letter is attached to this response to comment document. EPA did not approve of stakeholder proposed language, the department proposed credible evidence language was not modified.

WMC/WPC Comment s. NR 439.06(3)

Test Methods (NR 439.06(3)): This provision specifies in part that an owner or operator of a source shall use test methods listed in this section to determine compliance with an organic compound emission limitation. WPC and WMC request that this provision be modified to allow other methods specified in a permit.

Response:

The introduction in s. NR 439.06, Wis. Adm. Code, provides for use of alternative test methods approved or required in writing by the department. Therefore, if a permit requires a different test method it would be considered approved/required in writing by the department and available to be used by the source, therefore no modification is needed.

Public Comments – Section NR 439.07 -- Methods and procedures for periodic compliance emission testing

WUA Comment s. NR 439.07(1)

NR 439.07(1) states that WDNR expects sources to conduct compliance testing “under conditions that would result in maximum emissions with any control devices in operation.” In addition, WDNR notes that “all compliance emission tests shall be performed with the equipment operating at capacity or as close to capacity as practicable or under other conditions as specified in an applicable requirement or approved by the department.” For WUA members, periods of maximum emissions and maximum capacity may not occur at the same time. As such, WUA suggests WDNR only require testing at maximum capacity to resolve any potential confusion about creating artificial operating limits by not testing at maximum capacity.

WMC/WPC Comment s. NR 439.07(1)

Testing under Conditions for Maximum Conditions (NR 439.07(1)): This provision requires testing under conditions resulting in “maximum emissions” with a control device operating. This language should be

modified. Instead, testing should occur at levels reflective of operational levels. In addition, the requirement to operate at capacity or as close to capacity as possible, may conflict with the requirement to test under conditions resulting in “maximum emissions.”

Response:

As noted by the commenters, maximum emissions may not always occur under maximum capacity operating conditions.

The phrase “under conditions that would result in maximum emissions with any control devices in operation and” has been struck from the proposed rule and the proposed rule now states that “All compliance emission tests shall be performed with the equipment operating at capacity or as close to capacity as practicable **or under other conditions as specified in an applicable requirement or approved by the department.**”

WMC/WPC Comment s. NR 439.07(2)

DNR should identify items that do not require notification. For example, DNR should clarify that routine CGA, RAAs and opacity filter audits do not require notification. In addition, it would be useful for DNR to provide a form, which could be used voluntarily, to assist sources in submitting the required test plan information.

Response:

Section NR 439.07(2), Wis. Adm. Code, identifies compliance activities that require notification. Continuous emission monitoring quality assurance activities not listed do not require notification.

Once the rule changes are adopted, the department may consider developing an optional test plan form to assist sources in submitting complete test plan information.

WMC/WPC Comment s. NR 439.07(4)

Notification of Test Plan Revision (NR 439.07(4)): Commenter requested flexibility beyond 7 days to notify DNR prior to cancelation or rescheduling of a test.

Response:

The 7 calendar day test plan revision requirement in s. NR 439.07(4), Wis. Adm. Code, is consistent with federal test plan revisions regulations and provides the department an opportunity to review the changes or make scheduling adjustments.

WMC/WPC Comment s. NR 439.07(5)(a)

Testing Facilities (NR 439.07(5)(a)): The new language added to this provision should be modified to read “meeting the requirements of EPA Method 1.”

Response:

The commentor’s clarifying language has been added to s. NR 439.07(5)(a), Wis. Adm. Code.

WMC/WPC Comment s. NR 439.07(8)(b)(1)

Sootblowing (NR 439.07(8)(b)(1)): In addition to the equation set forth in this provision, WPC and WMC request that DNR incorporate alternative language. The additional language would allow reporting of a

straight average of values from the three runs in the event that the fraction of time spent sootblowing during testing exceeded the fraction of the time typically spent sootblowing in a 24-hour period.

Response:

Section NR 439.07(8)(b)(1), Wis. Adm. Code, utilizes a weighted-average result to determine particulate matter emissions during compliance tests employing sootblowing during a portion of the test period. The weighted-average determination accounts for the entire time sootblowing. It also allows an arithmetic average if continuous sootblowing occurs during the entire test period, therefore no change was made to the proposed rule language.

WMC/WPC Comment s. NR 439.07(9)

Emissions Test Report: (NR 439.07(9)): Much of the information required under this proposed revision is provided in the test notification. DNR should consider not requiring duplicative information to be sent. In addition, as mentioned in the context of the test notification, it would be useful for DNR to provide a form, which could be used voluntarily, to assist sources in submitting the required test report information.

Response:

The emission test report documents the actual process operating conditions, test method sampling procedures, and analytical procedures utilized on-site during the test series, not the proposed test methods or proposed operating conditions.

The department may consider developing an optional test report form to assist sources in submitting complete test report information.

Public Comments – Section NR 439.075 -- Periodic compliance emission testing requirements

WMC/WPC Comment s. NR 439.075(4)(b)

Commenter requested language be added to specify that DNR shall approve or deny a request for a testing waiver at least 14 calendar days before the scheduled test, or the waiver is presumed approved. Such language would also be consistent with proposed changes to test plan evaluations by DNR under NR 439.07(3).

Response:

Language has been added to the proposed rule to specify the department shall respond to the owner or operator within 14 calendar days of receipt of the request.

WMC/WPC Comment s. NR 439.075(4)(c)

Commenter requested language that specifies that requests for a testing waiver are presumed approved by DNR if they meet the criteria specified in the proposed NR 439.075(4)(a)4. Alternatively, DNR may consider providing a date certain to respond to and approve a test extension request, such as 7 calendar days before the required test date.

Response:

Language has been added to the proposed rule language to specify the department shall respond to the owner or operator within 14 calendar days of receipt of the request.

Public Comments – Section NR 439.08 -- Methods and procedures for periodic fuel sampling and analysis

WUA Comment s. NR 439.08

WUA proposes the inclusion of a statement under NR 439.08 to allow a facility to use a fuel sampling and analysis method approved under a federal standard applicable to the source. Adding this statement would simplify the fuel analysis requirements and alleviate the need for facilities to request an alternate method approval from WDNR for methods that have already been approved, and in many cases required, by EPA. For example, a source subject to fuel oil sampling under NR 439.08(2) may also be subject to fuel analysis under 40 CFR Part 75, which requires different ASTM procedures than those listed in the current and proposed NR 439.08(2). This can lead to confusion and the need to conduct multiple fuel analyses to obtain the same data (e.g., sulfur content).

Response:

The introduction to s. NR 439.08, Wis. Adm. Code, states that “alternative methods may be used if approved, in writing, by the department.” Therefore, a facility would be able to obtain approval to use applicable methods approved in a federal standard including specific fuel sampling and analysis methods contained in a permit. Conditions included in a permit are considered approved in writing by the department and available to be used by the source.

Public Comments – Section NR 439.09 -- Methods and procedures for continuous emission monitoring

WMC/WPC Comment s. NR 439.09(9)(a)

Continuous Emission Monitoring for Opacity (NR 439.09(9)(a)): Language should be modified to “Opacity monitors shall complete at least one cycle of sampling and analyzing for each successive 10-second period....” This language would clarify that completing more than one cycle in 10 seconds is consistent with the rule.

Response:

The department has added the clarifying language to s. NR 439.09(9)(a), Wis. Adm. Code.

WMC/WPC Comment s. NR 439.09(9)(b)

Continuous Emissions Monitoring for other Pollutants (NR 439.09(9)(b)): For clarification, this language should be modified as follows (noted in bold):

Sulfur dioxide, nitrogen oxides, oxygen, carbon dioxide, carbon monoxide, hydrogen sulfide, total reduced sulfur, filterable particulate matter, mercury, hydrogen chloride, predictive emission monitoring system, and VOC monitors shall complete at least one cycle of sampling, analyzing, and data recording for each successive 15-minute period. The values recorded shall be averaged hourly. Hourly averages shall be computed from at least 4 data points equally spaced over each one-hour period of source operation, except during periods when calibration, quality assurance or maintenance activities are being performed. During these periods, a valid hour shall consist of at least 2 data points separated by a minimum of 15 minutes (i.e. two quadrants of an hour).

Response:

The department has added the clarifying language to s. NR 439.09(9)(b), Wis. Adm. Code.

WMC/WPC Comment s. NR 439.09(10)

Excess Emission Reports (NR 439.09(10)): As revised, this section provides detailed criteria for a summary excess emission report, as well as detailed criteria for a full excess emission report. However, although the section provides criteria for when both reports are required, it is unclear when only the summary excess emission report is required.

The rule should clearly state when only a summary excess emission report is required. This may be achieved by noting that unless the conditions specified in NR 439.09(10)(ar) are met, only a summary excess emission report is required.

Response:

As a result of this comment, the department has added “summary” for clarification to s. NR 439.09(10)(ag), Wis. Adm. Code.

Public Comments – Section NR 439.11 – Malfunction prevention and abatement plans

WMC/WPC Comment s. NR 439.11

General comment about over-broad authority allowing DNR to amend a malfunction prevention and abatement plan if “deemed necessary” by the Department under NR 439.11(2).

Response:

The department removed language from the draft rule under s. NR 439.11(2), Wis. Adm. Code, allowing DNR to amend a malfunction prevention and abatement plan. The final proposed rule language now states that “The department may require a source to amend the plan if deemed necessary for malfunction prevention or the reduction of excess emissions during malfunctions.”

WMC/WPC Comment s. NR 439.11

MPAPs should not be incorporated into air permits.

Response:

Both DNR and EPA policy prohibit the reference of a plan outside of a permit as a compliance demonstration method. If there are still permits that reference the MPAP as compliance demonstration, DNR will remove this language to conform to the policy as these permits are renewed or revised. Compliance demonstrations in a permit may also be used as indicators or items within an MPAP.

WUA Comment s. NR 439.11

WMC/WPC Comment s. NR 439.11(1r)

WDNR should consider adding a minimum inclusion threshold for the MPAP.

Commentors believe some changes proposed in NR 439.11(1r) are overly broad and burdensome.

Response:

In response to this comment, the department has modified s. NR 439.11(1) (a) and (b), Wis. Adm. Code, to state that an air contaminant source is required to “prepare and follow a malfunction prevention and abatement plan for each emissions unit, operation, or activity that meets any of the following criteria:

(a) Has the potential to emit hazardous air pollutants listed under section 112 (b) of the act or hazardous air contaminants under ch. NR 445 for which emission limits have been established by an air pollution control permit.

(b) Emits more than 15 pounds in any day or 3 pounds in any hour of any air contaminant for which emission limits have been established by an air pollution control permit.”

The department has also modified s. NR 439.11 by removing proposed sub. (1r)(a), and (d) for identification of individuals responsible and a listing of materials and spare parts.

WMC/WPC Comment s. NR 439.11(6)(d)

Operation of New Equipment (NR 439.11(6)(d)): This section references exclusions under “(1m).” However, there is no “(1m)” under the revised rule. It appears the correct reference is “(1g).”

Response:

This is a typo that has been corrected.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

May 31, 2024

Gail Good
Director, Bureau of Air Management
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707-7921

Dear Ms. Good:

This letter responds to the May 9, 2024, email from Maria Hill, Section Manager, Compliance, Enforcement and Emission Inventory. In this e-mail, the Wisconsin Department of Natural Resources asks for the U.S. Environmental Protection Agency's input on certain concerns raised by your stakeholders during the public participation process for the proposed revisions to NR 439 "Reporting, Recordkeeping, Testing, Inspection and Determination of Compliance Requirements."

1. Are all conditions in a permit, including compliance demonstration methods independently enforceable?

For a state Part 70 Operating Permit Program to be approved, it must include the enforcement authority provisions of 40 C.F.R. § 70.11. 40 C.F.R. § 70.11(a)(2) requires that states be able to "seek injunctive relief in court to enjoin **any violation of any program requirement, including permit conditions** [emphasis added], without the necessity of a prior revocation of the permit." Furthermore, 40 C.F.R. § 70.11(a)(3)(i) states that "Civil penalties shall be recoverable for the violation of any requirement; **any permit condition** [emphasis added]; any fee or filing requirement; any duty to allow or carry out inspection, entry or monitoring activities or, any regulation or orders issued by the permitting authority." In its November 20, 2001, full approval of the Wisconsin Title V program, EPA has found that WI Stat § 285.83 addresses these requirements. (See 66 FR 62951.)

The permit content requirement in 40 C.F.R. § 70.6(a)(6)(i) requires all state-issued Part 70 permits to include a provision that states "The permittee must comply with all conditions of the part 70 permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for

denial of a permit renewal application.” This requirement is included in the permit content requirements of the approved Wisconsin Title V rules at NR 407.09(1)(f)(1). The regulations are clear that all conditions in a permit are independently enforceable, and that failure to comply with conditions such as parametric monitoring included in a permit to ensure compliance with an emission limitation are potentially subject to enforcement action, even when there is evidence to support that a violation of the associated emission limitation has not occurred.

- 2. 40 CFR Part 70 does not include a definition of deviation. The department is proposing the definition below. Stakeholders have requested we add “a deviation is not always a violation” from 40 CFR Part 71. Would it be acceptable to include this portion of 40 CFR Part 71 without including the full Part 71 definition of deviation?**

“Deviation” means any instance in which a source is not in conformance with a permit requirement or applicable regulation, including exceedances and excursions.

WDNR could add the language that “a deviation is not always a violation” to its proposed definition of deviation without incorporating the full Part 71 definition of deviation. Nothing in this statement is tied to the rest of the Part 71 definition of deviation. This is simply a statement of fact and does not provide any clarity as to when a deviation does or does not constitute a violation.

- 3. Below is department proposed language for credible evidence language which mirrors 40 CFR Part 70.**

Nothing in this chapter shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements.

Stakeholders have requested the language below that is currently in part II of our permits.

Notwithstanding the compliance determination methods which the owner or operator of a source is authorized to use under this permit [would change “permit” to “chapter” for the rule revision], any relevant information or appropriate method may be used to determine a source’s compliance with applicable emission limitations.

Would the stakeholder’s proposed language jeopardize Wisconsin’s Title V program and SIP approvability?

While the two provisions are similar, there are two key differences between the language proposed by WDNR and the language that has been requested by the stakeholders. The first is the proposed rule states that “any credible evidence or information” may be used while the language suggested by the stakeholders is “any relevant information or appropriate method.” The second difference is that the proposed rule language uses the term “applicable

requirements” and the language requested by stakeholders uses the term “applicable emission limitations.” The language in WDNR’s proposed revision closely mirrors the language in 40 C.F.R. § 51.212 (c) (the February 24, 1997, Credible Evidence Revisions at 62 FR 8314). The proposed stakeholder language, however, would impermissibly broaden the category of evidence to be used, while narrowing the scope of applicable situations. *See also* Section 113(e) of the Clean Air Act, 42 U.S.C § 7413(e). The stakeholder language would not be an approvable change to Wisconsin’s Title V program.

If you have any questions regarding this letter, please contact me or Rachel Rineheart, of my staff, at rineheart.rachel@epa.gov or 312-886-7017.

Sincerely,

**Mooney,
John**

Digitally signed by
Mooney, John
Date: 2024.05.31 09:42:10
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John Mooney, Director
Air and Radiation Division