



March 3, 2021

Wisconsin Department of Natural Resources  
Attn: Maria Hill  
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Sent via e-mail to [Maria.Hill@wisconsin.gov](mailto:Maria.Hill@wisconsin.gov)

RE: Comments on February 9, 2021 guidance document for *Next Business Day Deviation Reporting* related to requirements in Chapter NR 439 of the administrative code

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to comment on the DNR's new guidance related to *Next Business Day Deviation Reporting*. **WMC is strongly opposed to the new guidance and urges the department to promptly withdraw the document.**

As currently proposed, this guidance would impose substantial and unnecessary compliance costs onto the regulated business community. Instead of enacting this guidance, WMC requests that the Department revise Chapter NR 439 to streamline recordkeeping and reporting requirements, as it committed to do in 2010, and as required by the Wisconsin Legislature when it enacted s. 285.17(4) nearly eight years ago.

### **Background**

WMC is the largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes, and from every sector of the economy. Since 1911, our mission has been to make Wisconsin the most competitive state in the nation to do business. This mission includes ensuring a regulatory environment that does not unduly burden Wisconsin businesses.

WMC has heard from several member businesses highlighting legal and implementation concerns with the proposed guidance. These comments serve to summarize and, when appropriate, expand on these concerns.

### **Legal Concerns**

**DNR has Failed to Undertake New Rulemaking in Violation of Wisconsin Statute 285.17(4)**

Wisconsin Statute 285.17(4) states the following:

*“The department shall evaluate the reporting, monitoring, and record-keeping requirements it imposes, as of July 2, 2013, on owners and operators of stationary sources that are required to have operation permits under s. 285.60 but that are not required to have operation permits under the federal clean air act. The department shall promulgate rules that simplify, reduce, and make more efficient those requirements, consistent with any applicable requirements under the federal clean air act.”*

Despite this clear statutory directive, Chapter 439, *Reporting, Recordkeeping, Testing, Inspection and Determination of Compliance Requirements*, has not been substantively revised within the past eight years.

In addition, there are certainly opportunities for the DNR to simplify its administrative code and better align it with federal law. For sources covered under Part 71, the Environmental Protection Agency (EPA) only requires immediate deviation reporting for deviations which involve exceedance of an emission limitation. Even in that case, the source is allowed 10 days to report the deviation to the EPA (see OMB No 2060-0336). For all other deviations, reporting in the semi-annual monitoring report is the only requirement.

Moreover, the DNR has also previously recognized the need to update this administrative code to remove ambiguities and better reflect federal requirements. A December 16, 2010 DNR guidance document (enclosed) states, in part, the following:

*“The counterpart Clean Air Act provision to s. NR 439.03(4)(c) allows reporting of such deviations as infrequently as once every 6 months. The basis for the differing requirements (next business day reporting in state code, once every 6 month reporting in federal rule) is not clear. The Air Program intends to revise s. NR 439.03(4)(c) to make it consistent with the federal rule as part of a future cleanup package. However, there is no specific timeline for that effort.”*

Conversely, the February 9, 2021 guidance document suggests the Department has reconsidered its position and determined that no administrative code rewrite is required. It is unclear when that decision occurred, how that decision was made, or how that decision is consistent with state statute.

**WMC requests that the Department withdraw this proposed guidance document and instead initiate a rulemaking to update Chapter NR 439 as the agency is required to do under the law.** The DNR’s failure to update this administrative code is in violation of s. 285.17(4), and conflicts with previous guidance issued by the Department.

New Guidance Creates a New Conflict with NR 439.03(4)(a) and Constitutes Rulemaking

NR 439.03(4)(a) specifies the following circumstances for reporting:

*“The owner or operator of a source shall report to the department the next business day following the **onset [emphasis added]**, any malfunction or other unscheduled event at the source...”*

Conversely, NR 439.03(4)(c) states the following:

*“The owner or operator of a source which has been issued an operation permit shall report to the department by the next business day any deviation from permit requirements, the probable cause of the deviation, and any corrective actions or preventive measures taken or which will be taken to prevent future deviations.”*

While the language of these two sections is similar, the section requiring next business day reporting of all deviations does not contain the word “onset.” This is an important omission that provides a fundamentally different reporting requirement.

Based on this language difference, it is unclear if the current administrative code requires next business day reporting following **onset** or the next business day following **discovery** of the deviation. A burden of **discovery** would be far more appropriate as many deviations, such as missing initials on a required inspection or not recording a required pressure drop reading, are very difficult to detect by the next business day

The DNR itself previously recognized that current administrative code is inconsistent in this regard. The aforementioned next business day deviation reporting guidance from December 16, 2010 also states the following:

*“Section NR 439.03(4) contains two separate next day reporting requirements. Sub (a) addresses any malfunction or event “which causes or may cause...any emission limitation...to be exceeded...” Sub (c) addresses any (emphasis added) deviation from permit requirements. Sub (c) could be interpreted as requiring next day reporting of such relatively minor things as submitting a permit required report as little as a day late. There has been inconsistent statewide interpretation, implementation, and enforcement of this requirement.”*

Because the proposed guidance creates a new policy and agency interpretation of the law, it must be promulgated as a rule per section 227.10(1) of the Wisconsin Statutes.

**To remedy this ambiguity, WMC again requests that the DNR withdraw the guidance and instead pursue a rule change under NR Chapter 439. Alternatively, the DNR could alter the**

**guidance to clarify that deviations are only subject to next business day reporting following discovery of the deviation.** Such a change would mitigate, but not eliminate, the burden on the regulated community.

### **Implementation Concerns**

If the Department declines to withdraw this guidance, WMC encourages the DNR to consider the following recommendations for altering this guidance:

#### **Application of Reporting Required under NR 445.16 or Federal s. 111 or 112 Standards:**

In the guidance, the DNR provides a summary in which the following is stated:

*“Reporting required under either s. NR 445.16 or federal §§ 111 or 112 standards do not need to be submitted under ch. NR 439; See s. NR 439.01(1), Wis. Adm. Code.”*

WMC concurs that reporting under these identified sections is not subject to NR 439 requirements. However, it is unclear whether any deviation from a requirement under these sections needs to be reported under NR 439 (i.e. next day) or reporting such an event in an otherwise required quarterly or semi-annual report would be sufficient.

An example of a potential deviation is downtime for a monitoring system which is required to be operated under a federal s. 111 or s. 112 standard, with any associated downtime being reported in a quarterly report to the Department. If required to be reported the next business day, this type of reporting is duplicative and unnecessary for businesses.

**WMC recommends the guidance specify that any deviation from NR 445.16 or federal s. 111 or s. 112 standards are exempt from required next business day reporting requirements.**

#### **Eliminate Required Pre-Certification of Next Day Deviation Reports**

As identified in the proposed guidance, NR 439.03(10) requires each deviation report to be certified by the responsible official. However, the administrative code does not specify that the report needs to be certified prior to submittal. There are practical issues, such as vacation, illness, travel, remote work arrangements, wireless communication problems, etc., with having the responsible official certify every report prior to submittal.

**WMC recommends the guidance specify that uncertified reports be accepted for the purposes of meeting the next day reporting requirement, provided the certified version is still**

**submitted in an expeditious manner.** This flexibility is still consistent with the administrative code and would resolve practical concerns without impacting the overall requirement.

#### Deviations Immediately Corrected

Some deviations are identified almost immediately. It is common in modern parametric monitoring to identify a system parameter which begins to drift out of range but is immediately identified and followed by nearly instantaneous corrective measures, resulting in the return of the system to normal operation within minutes. Such instances are representative of the strength of corrective action response at a regulated facility with a mature compliance program.

**WMC recommends that the guidance be changed to specify deviations that are immediately corrected and do not involve an emission exceedance are exempt from next business day deviation reporting requirements.**

#### Excessive Reporting

One of the most frustrating aspect of this new guidance is that it will lead to burdensome, excessive, and wholly unnecessary additional reporting by the regulated community. These reports have nothing to do with a legitimate deviation from emissions requirements.

In order to comply with an issued operation permit, facilities may log thousands (or more) of data points daily from applicable equipment. As it is difficult for facility staff to monitor every value daily, data collection systems are typically configured to provide an automated flag of a parametric value which appears to be of concern, or data is organized via a summary report which is generated (weekly, monthly) for review. These data systems have been proven to be highly effective in satisfying the requirements for semiannual monitoring and certification submittals, where data can be reviewed to confirm the status of compliance with the primary deadline consisting of the timely submittal of the next semiannual report.

Many deviations are already reported via regular semiannual monitoring and certification reports. Thus, it is difficult to understand the value in reporting such events twice to DNR staff.

Previous guidance (December 16, 2010) discouraged this unnecessary reporting by encouraging “enforcement discretion” by Air Program staff at the DNR. This guidance, in part, stated the following:

*“...the Air Program should use discretion in pursuing enforcement of s. NR 439.03(4) violations by focusing on those situations that have significant actual or potential environmental or health-related impacts, or that involve a pattern of recurring violations. Generally, events reported under 439.03(4)(a) are more likely to create such potential impacts, while deviations reported under NR 439.03(4)(c) are less likely to be as significant. Sub (c) violations are unlikely to be classified as HPV’s.*

*Enforcement discretion should also be used in instances where violation of the next business day reporting requirement of NR 439.03(4)(c) would be the basis (especially if it is the sole basis) of an enforcement action, unless there are extenuating circumstances.”*

Unfortunately, the new February 9, 2021 guidance removes any mention of “enforcement discretion,” and thus suggests that unnecessary, duplicative reports by the regulated community are no longer of concern to the Department.

**WMC recommends that the guidance, if not withdrawn, be changed to specify equipment deviations that do not involve an emission exceedance and are already accounted for in a subsequent report are exempt from next business day deviation reporting requirements.**

#### Insufficient Time to Investigate Suspected Deviations

After reviewing all relevant information, it is common for a regulated business to determine that potential deviations are not deviations at all. Upon learning of an issue, regulated entities often need to gather additional information to understand the context of a suspected deviation. For example, a facility may identify a loss of monitoring data in a primary system. A subsequent review then identifies that the missing data has been retained in a secondary monitoring system and is available for compliance demonstration. The initial indication of a deviation has been invalidated and deviation reporting would no longer be required.

Unfortunately, the new February 9, 2021 guidance would not allow the facility to undertake this type of review and would instead require the facility to submit this unnecessary report.

**WMC recommends that the guidance be changed to ensure a regulated entity has sufficient time to investigate suspected deviations prior to filing a report.**

#### Conclusion

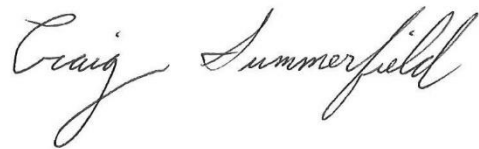
**WMC urges the DNR to promptly withdraw the proposed February 9, 2021 guidance on next business day deviation reporting until such time that the DNR takes steps to implement s. 285.17(4), which required the Department to “evaluate the reporting, monitoring, and record-**

keeping requirements it imposes” and “promulgate rules that simplify, reduce, and make more efficient” air permitting requirements.

If the DNR declines to withdraw the proposed guidance, WMC encourages the Department to make the aforementioned changes to the guidance that will lessen the serious compliance costs that will otherwise be inflicted upon the regulated community.

As the DNR considers next steps, WMC stands ready to work with the Department to revise NR 439 to make it more consistent with federal regulations and reduce unnecessary burdens on the business community. Thank you for the opportunity to provide comment on the February 9, 2021 guidance document related to *Next Business Day Deviation Reporting*.

Sincerely,

A handwritten signature in cursive script that reads "Craig Summerfield". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Craig Summerfield  
Director of Environmental & Energy Policy

Enclosure – Memo to Air Management Compliance Staff, *Next Business Day Deviation Reporting Requirement*, dated December 16, 2010