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RE: Comments on Proposed Revisions to NR 439 (Board Order AM-05-22), Relating to Simplifying, Reducing, and Making More Efficient Reporting, Recordkeeping, Testing, Inspection and Determination of Compliance Requirements for Sources of Air Contaminants

I. Introduction

These comments are submitted on behalf of Wisconsin Manufacturers & Commerce (WMC) and the Wisconsin Paper Council (WPC). WPC is the premier trade association that advocates for the papermaking industry before regulatory bodies, and state and federal legislatures to achieve positive policy outcomes. WPC also works to educate the public about the social, environmental, and economic importance of paper, pulp, and forestry production in Wisconsin and throughout the Midwest.

The pulp and paper sector employs over 30,000 people in Wisconsin and has an annual payroll of $2.5 billion. Wisconsin is the number one paper-producing state in the United States, with the output of paper manufactured products estimated to be over $18 billion. Our members are dedicated to maintaining clean air in Wisconsin.

WMC is the combined state chamber of commerce and manufacturers' association, representing over 3,800 member companies spanning all sectors of the economy. Our mission is to make Wisconsin the best state in the country to do business. This mission includes ensuring permitting requirements are no more stringent than necessary to protect the environment, and do not unduly burden Wisconsin businesses.

Many WPC and WMC members operate in accordance with DNR issued air permits and are subject to NR 439 requirements. Consequently, WPC and WMC have a significant interest in this rulemaking.

Moreover, both WPC and WMC advocated for DNR to open NR 439, which is outdated and in need of revision. Both organizations also participated extensively with DNR throughout the course of this rulemaking effort.

In particular, WPC and WMC actively participated in the NR 439 Technical Advisory Committee (TAC), which met nine times in 2023. Our organizations appreciated being able to participate in the TAC process. However, DNR was still working on provisions when the TAC concluded and working group members disagreed with DNR on a number of provisions.

WMC convened eleven meetings of its own NR 439 Working Group during this rulemaking process. WPC also convened meetings and collaborated with its members extensively during this rulemaking. Both organizations submitted several sets of comments during the process, and have participated in other NR 439-related meetings with DNR.

The reason for this extensive work is due to the outdated and burdensome provisions currently in NR 439. Multiple provisions provide little or no environmental benefit while imposing a significant burden on the regulated community.

While we appreciate DNR has proposed revisions to NR 439, we strongly believe that additional changes should be made to the Rule. Moreover, multiple statutes – as explained in further detail below – *require* DNR to move forward with air permit streamlining and other reforms.

Those modifications are set forth below.

II. Preliminary Concerns and Rulemaking Process Considerations

A. Withdraw Next Business Day Reporting Guidance

As this rulemaking continues, DNR should withdraw its unlawful Next Business Day Deviation Guidance (2021 Guidance) and instead resume recognition of prior guidance issued in 2010 (2010 Guidance) that provided enforcement discretion, with a focus on "situations that have significant actual or potential environmental or health-related impacts, or that involve a pattern of recurring violations."

As WPC and WMC have repeatedly noted, the current guidance is inconsistent with state statutory requirements, far exceeds what is required by EPA, and imposes significant, unnecessary reporting burdens on Wisconsin's regulated community that often have nothing to do with addressing environmental impacts.

Moreover, the 2021 Guidance adopted a new policy that is now being enforced by DNR. Per Wis. Stat. § 227.10(1), DNR must "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." DNR cannot enforce the 2021 guidance prior to undergoing rulemaking.

Once the revised rule is adopted, this guidance will be outdated. Per DNR's proposed timeline, however, this rule is not expected to take effect until August 2025. Withdrawing the unlawful 2021 guidance *today* could provide immediate relief to sources while this rulemaking continues, and is required under ch. 227 rulemaking.

B. Identify state-only requirements of NR 439 in Plain Language Analysis

When reviewing this rulemaking, our organizations continue to hear concerns from members about state-specific requirements that go above and beyond federal regulations. This concern could be addressed in part by adopting requested changes to applicability of the rule, which is explained in more detail in *Section IV* of these comments.

However, DNR should take steps to clearly identify state-only requirements in NR 439 in its plain language analysis of the rule. Such an analysis would meet the requirements found in Wis. Stat. § 227.14(2)(3), which requires an agency to provide "a summary of and preliminary comparison with any existing or proposed federal regulation." Further, Legislative Council is required to review proposed rules for comparisons with applicable federal law under Wis. Stat. § 227.15(2)(g). A plain-language analysis of state-only requirements in the rule by DNR would assist Legislative Council with its statutorily required review.

WMC and WPC acknowledge that DNR conducted a limited comparison of state requirements in NR 439 as proposed versus federal requirements. This comparison can be found on pages 6-7 of the draft rule. However, the analysis is limited and silent on key sections of the rule. For example, there is no analysis of NR 439.11, related to "Malfunction prevention and abatement plans." Is this a state-only requirement?

To aid the regulated community and the public in its review of this broad rule, WMC and WPC urge DNR to clearly identify state-only requirements within the plain language analysis.

C. Redline version of NR 439

DNR provided a redline version of NR 439 for this public comment period, comparing the current NR 439 with the proposed NR 439. WMC and WPC appreciate the publishing of this redline, as it helped our organizations and the public review the changes to the rule.

However, although one was requested, DNR declined to provide a redline version comparing this proposed NR 439 with the prior version of the rule that it posted for public comment during the draft EIA comment period in January. Moving forward, WMC and WPC urge DNR to provide a redline version comparing future versions of the proposed rule to prior versions. For example, when DNR posts its subsequent version of the rule for review by the Natural Resources Board (NRB), DNR should make available a redline version comparing this current version to the NRB version. This is a commonsense way for DNR to be transparent with the rulemaking process, and will

help the regulated community and the public better compare, contrast, and understand the proposed rule.

D. Implementation Concerns

NR 439 has not been substantively revised in decades. There is little debate that this proposed rule will have a significant impact on recordkeeping and other matters for many industrial sources in the state. Thus, it is critical that sources know and understand how this rule will be implemented and how it will impact current permits.

DNR has indicated that it intends to exercise enforcement discretion and that additional guidance is forthcoming. While enforcement discretion from DNR is welcome, it is critical that sources not be put in the untenable position of deciding to comply with a new rule or existing permit provisions. WPC and WMC request that DNR engage our organizations in discussions regarding implementation of rule revisions. Sources will need a clear understanding of how it intends to implement this rule.

III. General Comments/Overall Concerns

A. DNR is statutorily required to streamline NR 439.

DNR is under multiple requirements and obligations to streamline and simplify recordkeeping and reporting requirements for air sources in Wisconsin. In addition, state statute also obligates DNR to take steps to ensure state requirements are not more restrictive than federal requirements imposed by the EPA.

This rulemaking has been triggered in part by Wis. Stat. § 285.17. This statute requires DNR to "evaluate the reporting, monitoring, and record-keeping requirements it imposes" for non-Title V permittees and *requires* DNR to "promulgate rules that simplify, reduce, and make more efficient those requirements." This requirement was first imposed on DNR in 2013, and DNR acknowledges this statutory requirement in the rule's scope statement (SS 047-22).

In addition, in this rulemaking DNR has also pointed to its statutory authority under Wis. Stat. §. 285.60, which outlines requirements for air pollution control permits. Again, however, DNR is under a statutory directive to streamline permits. Specifically, Wis. Stat.§. 285.60(10) requires DNR to "continually assess permit obligations" and take various efforts toward "permit streamlining," including reducing obligations and expanding exemptions. It must be stressed that Wis. Stat. §. 285.60(10) requires DNR to do this "continually;" it is also important to note that DNR is obligated to streamline state and federal requirements on sources. Specifically, Wis. Stat. §. 285.27(1)(a) and §. 285.27(2)(a) generally require DNR to adopt by rule standards, "including administrative requirements," consistent with any federal NSPS or NESHAP.

In its prior response to comments, DNR has suggested that obligations for s. 285.27(1)(a) and s. 285.27(2)(a) are not applicable for this rulemaking, because this rulemaking is not in direct response to new standards promulgated by the EPA under the Clean Air Act.

However, as noted previously, DNR has not updated or streamlined NR 439 in decades. During that time, EPA has imposed new standards and obligations on Wisconsin sources. Moreover, in another pending rulemaking (NR 410, or AM-10-23), DNR has stated that dramatic fee increases are necessary for sources because of "new federal air pollution regulations" enacted since 2011.

DNR cannot have it both ways: It cannot contend the fee increases associated with new EPA regulations are necessary, but refuse to streamline the administrative requirements associated with those EPA regulations. Nor is there a "time limit" for such streamlining: DNR cannot avoid making requirements more consistent with federal requirements simply because it failed to do so earlier.

Finally, it should be noted that this NR 439 rulemaking provides a rare opportunity to streamline the permits themselves. Many of the complexities found in permits are due to the complexities in this chapter. Streamlining the requirements in this chapter will allow help in simplifying the permits themselves.

In summary, DNR has a statutory mandate to streamline all types of air permits, including Title V permits. Moreover, DNR must take action to ensure the administrative requirements associated with federal NSPS or NESHAP requirements are consistent with applicable federal standards.

B. DNR needs explicit statutory authority to impose standards.

In addition to a statutory requirement to streamline, Wisconsin law also requires DNR to have "explicit" statutory authority to impose air permitting standards. As provided in Wis. Stat. § 227.10(2m), an agency cannot "implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency," unless that standard is "explicitly required or explicitly permitted" by statute.

DNR should conduct a robust review of NR 439, and remove any provisions that are not explicitly authorized by state statute. Such a review should include the removal of any overly broad language utilized by DNR to impose additional requirements on permitted entities that are not explicitly authorized via statute. This includes (but is not limited to) the removal of the following provisions that allow DNR to require an open-ended universe of information:

- NR 439.03(1): Allows the DNR to require "such other information as may be necessary" from sources.
- NR 439.04(1)(d): Requires sources to maintain "any other records relating to the emission of air contaminants."

- NR 439.05(1): Requires sources to provide DNR access to "information" in addition to records.
- NR 439.11(2): Allows DNR to amend a malfunction prevention and abatement plan if "deemed necessary" by the Department, which goes beyond what is explicitly authorized by statute.

In addition, we emphasize that this is not a *new* concern with this rulemaking. WMC raised this concern in prior written comments to DNR on January 22, 2022.[1] We do acknowledge that DNR did address one provision raised previously; DNR proposes to delete NR 439.11(4) which granted DNR open-ended authority related to the maintenance of air pollution control equipment. However, as highlighted above, many other problematic provisions remain.

C. Rule should allow report submittals by e-mail or paper hardcopy.

During the comment period on the draft EIA, WMC and WPC again asked DNR to allow e-mail submissions of reports required under NR 439, in addition to submissions via the DNR website or paper submittals. We noted this would reduce administrative costs for sources and presumably be easier to process than hardcopy submittals, which the rule allows.

In response, DNR deleted seven provisions throughout the proposed NR 439 allowing sources to submit hardcopy reports in addition to submitting them through DNR's web portal; the only mention of hardcopy submittals is retained in NR 439.03(10m), indicating that reports filed under NR 439.03 will still retain a hardcopy option. DNR indicated that these changes were intended to "provide flexibility and accommodate alternative submittal methods that may become available in the future."

This statement suggests that DNR believes it will be able to dictate how sources provide reports to the agency for other sections of NR 439, either in permits or through other means. If so, this is a step backwards for the rule, and could impose new compliance costs for sources. Moreover, if DNR staff elects to require report submittals to be submitted through its electronic reporting system and the system were to experience technical difficulties or otherwise go off-line, sources would be unable to submit required reports and could incur a permit violation.

WMC and WPC again urge DNR to allow e-mail submittals of required reports. Per discussions with our respective membership, this is an option extended by other states. In addition, members have noted that DNR already maintains a dedicated e-mail address for certain applications – *DNRAMAirPermit@wisconsin.gov*. DNR should consider allowing regulated sources to utilize this e-mail address for other required reports.

[1] See *Section IV.* of WMC's "Comments on Plans to Revise NR 439," accessed via https://dnr.wisconsin.gov/sites/default/files/topic/AirPermits/WMCCommentstoDNR012022.pdf.

At a bare minimum, our associations would encourage DNR to restore the recently deleted language pertaining to hardcopy reports. This would at least provide another submittal option to sources, especially if DNR's electronic system malfunctions.

IV. Specific Comments on Proposed Changes

A. Applicability (NR 439.01)

NR 439 starts off on the wrong foot. 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 on NR 439.** These federal requirements include New Source Review Performance Standards, Approval and Promulgation of State Plans for Designated Facilities and Pollutants, National Emission Standards for Hazardous Pollutants, and more.

We strongly disagree with the notion that NR 439 requirements should apply in addition to federal requirements. State rules should defer to federal applicable requirements, and not add additional requirements. If such requirements are adequate at the federal level, they should be adequate for Wisconsin. Deferring to federal requirements, and not adding state only requirements would also be consistent with DNR's stated goal for this rulemaking of "simplifying, reducing, and making more efficient reporting, recordkeeping, testing, inspection and determination of compliance requirements for sources of air contaminants." It would also be consistent with the requirements found in the rule's scope statement, SS 047-22.

Also, as we note above and have previously indicated in other comments, Wis. Stat. § 285.27(1)(a) requires that if a standard of performance is promulgated under section 111 of the federal Clean Air Act for new stationary sources, DNR shall promulgate a similar emission standard, "**including administrative requirements that are consistent with administrative with federal administrative requirements."** Furthermore, Wis. Stat. §285.27(2)(a) contains the same referencing administrative requirements in the context of standards for Hazardous air contaminants promulgated under section 112 of the federal Clean Air Act.

Wis. Stat. ch. 285 does not define the term "consistent." The Merriam-Webster dictionary, however, defines "consistent" as "Marked by harmony, regularity, or steady continuity: free from variation or contradiction." (See Consistent Definition & Meaning - Merriam-Webster). Imposing additional requirements on these sources beyond federal requirements is inconsistent with federal requirements as additional requirements vary from federal requirements. Consequently, as noted previously, DNR should identify the provisions in NR 439 that go beyond the requirements specified in 40 CFR part 60 to part 63. In addition, DNR should modify NR 439 as necessary to ensure state administrative requirements track federal requirements.

B. Definitions (NR 439.02)

1. 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.

2. Deviation (NR 439.02(5m)): If DNR wishes to define “deviation,” 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.

3. 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.

4. 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.

5. 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.

6. 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.”

C. Reporting (NR 439.03)

1. 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.”

As referenced above, these overly broad, catchall provisions granting DNR undefined authority should be eliminated. Regulatory requirements should be defined to provide the regulated community notice of applicable requirements.

2. Monitoring Reports: (NR 439.03(1)(b)): WPC and WMC support allowing non-part 70 sources to submit monitoring reports every 12 months rather than every 6 months.

3. 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.

4. "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, 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.

5. Reporting Events Causing an Emission Limit Exceedance (NR 439.03(4)(am)): This provision requires the owner or operator of a source to notify the DNR of any event at the source that causes an emission limitation to be exceeded within two business days of when the source "knew or should have known" of the event. Moreover, additional information must be provided within ten calendar days of the event becoming discoverable.

   Wis. Stat. § 285.01(16) defines emission limitation as "a requirement which limits the quantity, rate, or concentration of emissions of air contaminants on a continual basis. An emission limitation or emission standard includes a requirement relating to the operation or maintenance of a source to assure continuous emission reduction." This definition is also contained in NR 400.02(58).

   The purpose of this provision is (or should be) to require reporting within a short timeframe when there is an actual release that may impact the environment. Consequently, as we have noted in past comments, we continue to believe 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. The additional language does not appear necessary. If there is an operational or maintenance issue with a source that causes, for example, a limit on the concentration of emissions to be exceeded, it would need to be reported within two business days.

In addition, the proposed language requires reporting within two business days of when an operator or owner "knew or should have known" of the event. The reference to "should have known" should be removed from the rule. Such language requires sources to gather information and to make a judgment, in all cases, when the source shown have known of the issue, when in fact DNR has already been informed that there was an issue. Such an approach also results in DNR staff having to review and potentially second guess the actions of facility to establish when a facility "should have known" of an event.

Also note that a source is also required to report information to DNR within 10 calendar days of the event becoming "discoverable." Note that the language above uses the phrase "should have known." DNR should explain if there was an intended difference between "discoverable" and "shown have known."

6. 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.

7. 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.

D. Recordkeeping (NR 439.04)

1. Malfunction Records (NR 439.04(1)(b))

This provision as proposed requires records detailing all malfunctions that cause or "**may cause"** any applicable emission limit to be exceeded. The reference to "may cause" should be deleted. Eliminating this language would mirror the language deleted at NR 439.03(4)(am) relating to deviations that "**may cause"** any emission limitation to be exceeded. Moreover, DNR would still receive notifications of such an event pursuant to the deviation reporting requirements.

2. Requirement to Retain "Any Records" relating to Emissions of Air Contaminants (NR 439.04(1)(d))

   As referenced above, 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.

3. 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.

4. Provisions Pertaining to NR Chapters NR 419 to NR 424 (NR 439.04((3)-(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.

5. Provisions Relating to Compliance (NR 439.055(2m))

   Among other things, this provision provides DNR with almost unlimited authority to require anything from sources "to ensure that requirements of NR 400 to 499, standards of performance for new stationary sources…or emission standards for hazardous air contaminants…are met." This broad grant of authority by DNR to itself should be eliminated in the rule. Such broad grants of authority provide no reasonable notice of the requirements that may be imposed.

   WMC and WPC previously raised this concern during the draft EIA comment period. In response, DNR noted that this provision was simply renumbered and relocated from NR 439.055(5). However, the provision is still a broad grant of authority to DNR, unnecessary, and lacks explicit statutory authorization.

Moreover, as noted previously in these comments, this provision is not a "new" concern for the regulated community. WMC objected to this provision in prior comments submitted to DNR in 2022.

6. 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.

7. Pressure Drop Monitoring Devices (NR 439.055(3)(b))

   This change would eliminate the option for a pressure drop monitoring device to meet accuracy requirements by being within plus or minus 1 inch of the water column. During the draft EIA comment period, we previously asked DNR to remove this change. DNR declined to do so, and indicated that DNR believes "that sources are currently using devices that would meet at least a 5% accuracy requirement for measuring pressure drop."

   Upon further discussions with members, we believe the proposed 5% threshold would still impose a new burden on sources, and again urge DNR to retain the current language. However, if DNR believes it is critical to make a change here, our members believe the threshold could be lowered from "plus or minus 1 inch" to "plus or minus 0.5 inches." DNR could further specify "the range must be greater than 0." This compromise would give DNR more accurate readings, but also help ensure that sources would not need to replace equipment (and incur new costs).

8. Calibration, Replacement or Validation of Instruments for Measuring Air Pollution Control Equipment Operational Variables (NR 439.055(4))

   DNR's proposed language should be modified to provide additional flexibility, while still ensuring instruments are appropriately maintained. A strict reading of the proposed language adds a direct new burden to regulatory sources that does not exist in the current language. That burden is to ascertain whether or not "written manufacturer recommendations" exist, and whether or not such recommendations are current for all compliance instruments. As proposed, the regulated source would need to fully research this for all compliance instruments, even if only to verify that "there is not a maximum interval recommended by the manufacturer." This significant burden can be avoided by a slight change in rule language. To that end, 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.

E. Methods and Procedures for Determining Compliance (NR 439.06)

1. 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.

2. 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), suggest 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.[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.

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. For example, a permit could allow the use of formulation data in a statement by the vender or manufacturer. To address this issue, DNR could add to the beginning of the paragraph "Unless otherwise authorized in a permit…"

F. Methods and Procedures for Periodic Compliance Emission Testing (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

[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/rtcpart3.pdf

to operate at capacity or as close to capacity as possible, may conflict with the requirement to test under conditions resulting in “maximum emissions.”

2. Emission Test Notification (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.

3. Test Plan Evaluation (NR 439.07(3))

   This provision provides in part that if DNR does not respond within 14 calendars days specifying that amendments are needed, the test as described may be performed. WPC and WMC support this automatic approval provision.

4. Notification of Test Plan Revision (NR 439.07(4))

   This provision requires sources to notify DNR at least seven calendar days before a test. In addition, sources would be required to notify DNR 7 days prior to the cancellation of a test, and specify the date the test is rescheduled or arrange a date with DNR.

   DNR should incorporate more flexibility in this provision. For example, when circumstances are unforeseen and beyond the owner’s control, it is highly unlikely that the owner would know seven days in advance. Similarly, the seven-day requirement for notifying DNR of any test plan changes may not be necessary when there are minor variations that occur.

   DNR should also accommodate schedule changes to the extent possible. For example, there could be a stack test crew on site, but operational problems prevent stack testing that day. The operational problems are solved the next day. Being able to move forward with the test would be more efficient, more timely and less costly.

5. 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.”

6. 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.

7. Heat Input: (NR 439.07(8)(b)(4))

   WPC and WMC support the alternative proposed in the rule for determining heat input.

8. 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.

G. Periodic Compliance Emission Testing Requirements (NR 439.075)

1. 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.

2. Requests for Test Waivers (NR 439.075(4)(b))

   This section requires sources to submit waiver requests at least 60 "calendar" days prior to the required test date. However, the section does not specify a date at which the waiver must be reviewed and responded to by DNR.

   We urge DNR to add a date certain as to when DNR must respond to such requests, to provide sources with certainty that a waiver request is reviewed in a timely manner. Specifically, we request 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).

3. Extensions for Testing (NR 439.075(4)(c))

   This section requires sources to submit all requests for extensions in writing in advance of the test date. We further would request the rule specify a date certain for DNR to review and respond to the extension request.

   Specifically, DNR should consider including language that specifies that such requests 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 and approve a test extension request, such as 7 calendar days before the required test date.

H. Methods and Procedures for Continuous Emission Monitoring (NR 439.09)

1. Continuous Emission Monitoring for Opacity (NR 439.09(9)(a))

   This 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.

2. Continuous Emissions Monitoring for other Pollutants (NR 439.09(9)(b))

   For clarification, this language should be modified as follows (noted in italics):

   > 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).*

3. 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.

I. Malfunction Prevention and Abatement Plans (MPAP) (NR 439.11)

1. MPAPs should not be Incorporated into Air Permits

   WPC and WMC strongly believe that MPAPs should not be incorporated into permits. MPAPs are what the name suggests, they are plans. As DNR knows, sources are subject to frequent change. Requiring a permit revision for MPAP changes could hinder the ability to make timely changes that potentially impact the

environment and safety. DNR should encourage updates to MPAPs by not including them into permits.

Moreover, note that even if the MPAPs are not included in a permit, DNR would still have the ability to enforce MPAP requirements that are explicitly specified in the proposed NR 439.11.

2. Federal Hazardous Air Pollutants and Hazardous Air Contaminants under NR 445 in MPAP

NR 439.11 currently provides that an owner or operator of a source that is required to have an air permit "which may emit **hazardous substances [emphasis added]** or emits more than 15 pounds in any day or 3 pounds in any hour of any air contaminant" must have an MPAP. DNR has apparently interpreted this language to require any source that "may emit" a hazardous substance, regardless of amount, to have an MPAP[3]. Under the proposed changes, an MPAP would be required "for each emissions unit, operation, or activity that meets any of the following criteria:

- Has the potential to emit hazardous air pollutants listed under 112(b) of the act or hazardous air contaminants under ch. NR 445.
- 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…."

The term "hazardous substances" has generally been used in reference to Wisconsin's "hazardous substance" spills law, pursuant to which hazardous discharges are reported, and most environmental cleanups occur. Under DNR's current interpretation of the law, "hazardous substance" has a narrative description. There are no chemicals currently listed as a "hazardous substance" nor any numeric thresholds regarding when a chemical becomes hazardous. *See* Wis. Stat. §292.01(5); Wis. Stat. 285.01(21).[4]

Note that DNR has proposed to change the terminology to refer to "hazardous air pollutants" and "hazardous air contaminants," consistent with terminology used in NR 445 and 112(b) of the Clean Air Act. Unlike the definition of hazardous substances, there are specific chemicals and thresholds listed for federal hazardous air pollutants and state hazardous air contaminants.

DNR should not require MPAPs for emissions less than the identified thresholds under 112(b) or NR 445. To do so would impose additional administrative costs on

[3] See Guidance AM-19-0079, available at "Guidance - Air Program Publications and Guidance" (widencollective.com).

[4] DNR's enforcement of "emerging contaminants" as it relates to "hazardous substances" is currently the subject of litigation.

sources, and be contrary to the goal of this rulemaking, as stated in the rule's scope statement.

3. MPAP Exclusions (NR 439.22(1g))

   WPC and WMC support the exclusions DNR is proposing in the draft rule. The exclusions of these minor emission units, operations and activities helps streamline the MPAP and meshes with emission reporting exclusions.

4. Maximum Intervals for Inspection, Routine Maintenance for Inspecting, Maintenance, and Calibration, Replacement or Validation (NR 439.11(1r)(bm))

   Regarding, calibration, replacement or validation, this language should be modified to match the language contained in section IV.D.6 of these comments, which set forth the timeframe for required calibrations, replacements or validations of instruments for measuring air pollution control equipment operational variables.

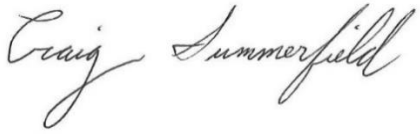
5. Operation of New Equipment (NR 439.11(6)(d))

   This section references exclusions under "(1m)." However, there is no "(1m)" under the revised rule. It appears the correct reference is "(1g)."

V. Conclusion

Thank you for your consideration of these comments. We appreciate DNR once again considering extensive comments on NR 439 from WMC and WPC. We look forward to continuing to work with DNR to advance a rule that provides meaningful permit streamlining and administrative relief for sources, as required by law.

Sincerely,



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