



January 12, 2024

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RE: Comments on Economic Impact Analysis relating to modification to NR 439 (Reporting, Recordkeeping, Testing, Inspection & Determination of Compliance Requirements for Air Emission Sources), or AM-05-22

I. Introduction

These comments are submitted on behalf of the Wisconsin Paper Council (WPC) and Wisconsin Manufacturers & Commerce (WMC).

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

Many of WPC and WMC members operate in accordance with DNR-issued air permits and are subject to NR 439 requirements.

II. Background

In the Economic Impact Analysis (EIA) for this rulemaking, DNR indicates “the estimates of the cost of this rule are \$0 because the proposed rule revisions will not impose new compliance costs on businesses.” DNR further notes that “some businesses may economically benefit from the proposed revisions due to reduced regulatory compliance and administrative burdens.”

WPC and WMC appreciate that DNR has proposed several positive changes to NR 439, including some that were requested by industry. However, other provisions of the rule are problematic, and appear to expand DNR’s regulatory authority or limit important flexibility for sources. This includes portions of the rule that WPC and WMC previously requested changes, and new portions of the rule that were not previously presented to the DNR’s NR 439 Technical Advisory Committee (TAC). To the extent that this additional regulatory authority by DNR would impose additional requirements for sources, NR 439 would impose additional costs for sources. In many cases, it is unknown how DNR would utilize such new authority, so any new costs are also unknown.

In its “Notice Soliciting Comments Regarding the EIA”, DNR also requests comments on the “economic impacts of specific alternatives to the proposed rule.” Below are some proposed changes that would further enhance the positive economic impacts of the proposed rule, as well as mitigate the negative economic impacts imposed by the rule.

III. Comments on the Proposed Rule

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.

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.

C. 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 from DNR’s previous proposals, which generally stipulated that DNR may use credible evidence, but was silent as to whether sources could use credible evidence to demonstrate compliance.

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 understanding 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’s credible evidence language and the credible evidence language found in permits. Both provisions provide sources the opportunity to utilize credible evidence to demonstrate compliance with permit requirements, as provided by federal law. However, the existing EPA-approved “Part II” permit language further provides that a source may utilize credible evidence to demonstrate compliance with *applicable emission limitations*. This distinction helps ensure that sources can utilize “after-the-fact” compliance demonstrations to show that a required emission limitation has been met, regardless of any other compliance demonstrations provided under a permit.

D. The Rule should clarify that Compliance Demonstrations are not Independently Enforceable

Our previously submitted comments (dated November 7, 2023) regarding this draft rule explain our belief that compliance demonstrations should not be independently enforceable in the absence of a violation of an emission limit. Such an approach would have a positive fiscal impact both on industry and DNR by allowing resources to be directed to circumstances in which there is an actual potential impact to the environment.

Unfortunately, language in the proposed rule, such as the language contained in NR 439.055(2m), suggest such provisions are enforceable. This section provides that “the department may require...the measurement of source or air pollution control operational variables if the department determines that these requirements are necessary to ensure that the source does not exceed an applicable emission limit...”

Compliance demonstrations have long been utilized by DNR within permits as a tool for a source to show compliance with an emissions limit. However, as provided under the EPA’s credible evidence rule, such compliance demonstrations are not the only means

for a source to show compliance. The proposed language in NR 439.055(2m) implies that such provisions would be subject to DNR enforcement actions, even if it can be demonstrated by a source that an emission limit has not been exceeded.

DNR has suggested that EPA has indicated that such provisions are enforceable and reportable under federal law. DNR should provide information setting forth EPA's position on this matter, and its corresponding rationale for that position. As DNR is aware, WPC and WMC provided to DNR multiple examples of prior correspondence – involving EPA and DNR – demonstrating the broad scope of the credible evidence rule.

E. Deviation Reporting (NR 439.03(4)(am))

Proposed NR 439.03(4)(am) provides in part that the owner or operator of a source shall notify DNR of any event that causes an “emission limitation” to be exceeded within two business days of when the operator knew or should have known of the event. Moreover, additional information must be provided within ten calendar days of the event becoming discoverable.

We believe that the use of the term “emission limitation” may result in more reporting under this provision than necessary, and therefore will result in additional costs incurred by the regulated community and DNR.

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).

Our understanding is that the purpose of this provision is to require reporting within a short timeframe when there is an actual release that may impact the environment. Consequently, we 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.

Moreover, DNR's proposed use of “emission limitation” 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 adopt our proposed standard.

F. Methods of Determining Compliance and Instrument Calibration [NR 439.055(4)]

DNR is proposing to modify NR 439.055(4). NR 439.055(4) currently provides: “All instruments used for measuring source or air pollution control equipment operational variables shall be calibrated yearly or at a frequency based on good engineering practices as established by operational history, whichever is more frequent.”

The proposed new language provides:

All instruments used for measuring source or air pollution control equipment operational variables shall be calibrated ~~yearly or at a frequency based on~~

~~good engineering practice as established by operational history~~, replaced, or validated at a frequency based on written manufacturer recommendations or as required by an applicable standard, whichever is more frequent. If there is not a maximum interval recommended by the manufacturer or as required by an applicable standard, the time between calibrations, replacements, or validations may not exceed one year.

Thus, under the current rule, there is a minimum calibration time of one year, if good engineering practices established by operational history demonstrate a longer time is appropriate. Under DNR's proposed language, however, the period may be shorter than a year, even if good engineering practices demonstrate a longer prior is appropriate, if the manufacturer's recommendations are for periods less than a year.

For facilities that have historically dealt with calibration issues during annual shutdowns, the elimination of the reference to "good engineering practice as established by operational history" could have a significant impact if one manufacturer's recommendation was for less than a year. If this results in the need for more frequent shutdowns, there would likely be a significant impact on the facility, and there could be additional, unnecessary emissions as a result of the additional shutdowns. Consequently, DNR should retain the reference in the rule to "good engineering practice as established by operational history."

G. Methods and Procedures for Periodic Compliance Emission Testing (NR 439.07(1))

Both the existing and proposed language contains similar language relating to compliance emission tests. The language in the proposed rule provides: "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 as approved by the department."

While the current rule and the proposed rule reference operating at "capacity", DNR's description of the provision suggests it intends to clarify that emissions tests should be performed under conditions resulting in maximum emissions with control devices operating and at **maximum rated** capacity. It is worth noting that there are also costs associated with operating at maximum capacity, such as fuel costs.

Also, over the course of a test, there is likely to be variability regarding the capacity reached. DNR should provide further clarification of what is expected regarding operating at maximum "rated" capacity.

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.

I. Malfunction Prevention and Abatement Plans (NR 439.11)

The proposed NR 439.11(1)(a) would require any source that has the potential to emit federal HAPs or a hazardous air contaminant listed in NR 445 to be included in the Malfunction Prevention and Abatement Plan (MPAP). Unlike the current rule, there is no inclusion threshold. As a result, many sources that were not previously included in an MPAP because they did not meet the 15 lbs/day or 3 lb/hr criteria in the current rule would need to be added.

The revised rule does allow for the exclusion of insignificant sources. However, there are plenty of thresholds set under NR 407 that would equate to less than 15 lbs/day or 3 lbs/hour. For example, the NR 407 inclusion threshold for Benzene is 22.8 pounds per

year. However, under the draft NR 439, a source emitting only 25 lbs/year would now be subject to MPAP requirements even if that was the only pollutant emitted.

Adding all these new sources to MPAPs would increase O&M costs for facilities due to increased inspections, maintenance activities, calibration requirements, and other requirements. Moreover, these activities can often only be done if equipment is taken offline, which would incur additional compliance costs.

These substantial costs must be considered in DNR's final EIA. In addition, DNR should consider retaining the current 15 lbs/day or 3 lb/hour MPAP exclusion found in the current rule.

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.

IV. Other Considerations

DNR has indicated that it intends to abide by its original timeline for this rulemaking, with a goal of implementing the revised NR 439 by August 2025.

WPC and WMC had previously asked DNR to consider an expedited timeline, as sources need relief from the antiquated requirements and overly broad language of NR 439. That said, we agree that it is more critical to get the rulemaking language correct as opposed to completing the rulemaking quickly.

In addition, there are other actions DNR can take now to help the regulated community:

A. Next Business Day Deviation Guidance

As this rulemaking continues, DNR should withdraw its unlawful Next Business Day Deviation Guidance (issued in 2021) and instead resume recognition of prior guidance (issued in 2010) 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 it imposes significant, unnecessary reporting burdens on Wisconsin's regulated community that often have nothing to do with addressing environmental impacts.

B. Redline Version of NR 439

During the DNR's NR 439 Technical Advisory Committee process, DNR provided a redlined version of NR 439 to stakeholders as changes were considered. The redline versions helped committee members and the public better understand what DNR was seeking to change, and how the proposed language changes interacted with existing language. However, DNR did not provide a redline version for this public comment period on the EIA.

Under ch. 227 rulemaking, DNR is still required to hold a public comment period on the rule itself. WPC and WMC urge DNR to make a redline (or strikethrough version) of the proposed changes to NR 439 publicly available for the next public comment period, so that stakeholders and the public can better review and understand the draft rule.

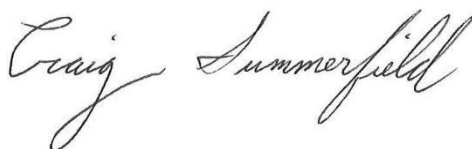
V. Conclusion

WPC and WMC thank DNR for considering these comments, and our comments throughout this important rulemaking process. As always, please do not hesitate to contact us with questions, and we are more than happy to meet to discuss further.

Sincerely,



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