DATE: March 30, 2022

TO: Air Management Program and Stakeholders

FROM: Kristin Hart – Air Permit and Stationary Source Modeling Section Chief, DNR


On May 25, 2021, a draft technical support document titled, “Technical Support Document: Addressing Mobile and Nonroad Engine Testing Operations in Stationary Source Permitting” (the draft TSD) was provided for public input. Written comments were received from the Outdoor Power Equipment Institute (OPEI), Wisconsin Manufacturers and Commerce (WMC), Foley and Lardner attorney Mark Thimke, and John Deere Horicon Gator Works. These written comments are attached. Comments and questions were also received during a stakeholder meeting held on June 2, 2021 from Mark Thimke of Foley and Lardner, Tony Colombari of Trinity Consultants, Greg Eirschele of RTP Environmental Associates, Kristine Kietzer of Ariens Company, and Katie Hager of John Deere.

Based on comments received, DNR will not finalize the draft TSD. Facilities may request a review of operations included in their air pollution control permits that are not stationary sources by submitting a permit application requesting their removal. The Department will review applications and make case-by-case determinations considering existing state and federal statutes and rules, as well as any additional information provided by the applicant.

The following is a summary of comments and DNR’s response.

1. Questions were received on rule history and federal approval of state definition of “Stationary Source” including when the definition was created in ch. 285, Wis. Stats., whether it was approved by EPA into Wisconsin’s State Implementation Plan (SIP), and how SIP approval was discussed by EPA. Other questions about the specific wording in state and federal definitions of stationary source asked that DNR compare the terms “is capable of” with “is (or will be)”. The commentor also asked DNR to justify how the state definition complies with s. 285.60(8), Wis. Stats.

DNR Response:

The current statutory definition of “Stationary Source” was added in 1979 as s. 144.30(23), Wis. Stats., and was approved in Wisconsin’s SIP on April 17, 1981 (46 FR 22374, April 17, 1981). EPA first defined “nonroad engine” and “nonroad equipment” in the 1990 Clean Air Act Amendments. The nonroad engine definition in 40 CFR 89.2 was finalized on June 17, 1994.

DNR’s explanation of its statutory definitions to EPA in 1981 does not provide insight into EPA’s decision to approve the SIP with regard to the federal definitions of stationary source or nonroad engines that were added or modified years later. The notice proposing approval (45 FR 38419, June 9, 1980) noted only that DNR had added the definition of, among others, Stationary Source to its rules. EPA states that, “[t]he Wisconsin Statutes contain definitions as stringent as these federal definitions or certain other provisions making the Federally promulgated definitions unnecessary in the Wisconsin Statutes.”
The definition of “Stationary Source” was submitted in 1979 to EPA for approval with a package of other new and amended state statutes in order to gain EPA approval of the state’s construction permitting program for nonattainment areas under Part D of the Clean Air Act. The proposed SIP approval notes that Wisconsin’s submittal also addressed anticipated changes to the PSD attainment area permit programs required by 1979 court decisions. These statutes have been the basis of numerous other EPA SIP approvals reaffirming EPA’s approval of Wisconsin’s Clean Air Act permitting programs.

The Clean Air Act construction permitting programs are considered “control programs” required for reducing air emissions in nonattainment areas and for maintaining clean air in attainment areas. Changes to any state’s SIP that allow emissions increases, could result in violations of the National Ambient Air Quality Standards (NAAQS). DNR must demonstrate that any relaxation of limitations does not result in backsiding of areas into nonattainment or interfere with progress toward reaching attainment (reasonable further progress) or meeting any other applicable requirement governing air pollution prevention and control in the Clean Air Act (s. 110(l) of the Clean Air Act).

Changing the interpretation of the statutory definition of “Stationary Source” results in a significant change to the emissions controlled by the Clean Air Act permit programs. Emissions from engine testing operations are significant and contribute to formation of ozone and fine particulate (PM2.5). In the three permit applications requesting engine testing removal currently before the department, removal of the engine testing operations as requested in the applications, would remove from the stationary source control programs potential emissions of roughly 275 tons per year nitrogen oxides (NOx) and over 3100 tons per year of carbon monoxide. This raises questions about the state’s ability to attain NAAQS. Section 285.63(1)(b), Wis. Stats., states that the department may approve a permit application only if a finding can be made that the source will not cause or exacerbate a violation of an ambient air quality standard or increment. Removing significant sources of emissions that have been part of stationary source permitting control programs to meet the NAAQS would require that these emissions and their impacts be considered in other SIP control programs.

The fourth sentence of the definition of Stationary Source states, “[a] stationary source does not include a motor vehicle or equipment which is capable of emitting an air contaminant while moving.” The federal definition in 40 CFR part 1068 states in part, that an engine… “is (or will be) used in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function.” The terms “capable of” and “is or will be” both speak to designed use and intended use as well as actual use of engines, motorized vehicles and other motorized mobile equipment.

Section 285.60(8), Wis. Stats., states, “[t]he department may not promulgate a rule or take any other action under this section that conflicts with the federal clean air act.” DNR does not consider the state and federal definitions of “Stationary Source” to be in conflict. EPA’s continued approval of DNR’s PSD and nonattainment area permit programs supports this understanding.

2. Questions were asked about what DNR means by roll-off testing, run-up testing, as well as other implementation questions about how DNR would determine the meaning of “fully assembled”. For example, would a lawn mower missing only side mirrors or a lawn clipping bag be considered fully assembled?

DNR Response:

“Roll-off” as used in the draft TSD referred to testing operations where a fully assembled nonroad vehicle is driven off the assembly line after completion. The term was also meant to include a fully assembled product that is turned on to quality assure operation. Facilities may use undefined terms like “roll-off”
testing” and “run-up testing” differently from DNR and from each other. DNR has decided to withdraw the draft TSD in part because of the variety of terms and operations and wide variety of nonroad equipment and products manufactured in Wisconsin, and will, instead, make case by case decisions in a permit action based on the source specific descriptions of operations supplied in a permit application.

Discussion during the stakeholder meeting also noted the difficulty in determining exactly what is meant by fully assembled in the draft TSD. DNR will consider testing of both fully and partially assembled products that are intended for sale as nonroad engines or equipment for removal from a source’s stationary source permit.

This is also consistent with the definitions in the NESHAP Subpart PPPPP that consider engines tested on test stand/cells to be stationary sources. As an uninstalled engine strapped into a test stand, the equipment is not being operated a manner consistent with its intended end use, and it is not, in its present configuration, capable of emitting while moving.

The emissions unit in these cases is the test stand or test cell such as a dynamometer. There is little dispute that such equipment is a stationary source. EPA’s August 16, 2010, letter to the Michigan Air Quality Division addressed this type of equipment used at Hyundai America Technical Center, Inc., and stated that it is to be included in federal permits as a stationary source.

3. Questions were received on what mechanism DNR would use to remove operations from permits if it was determined that the operations are not stationary sources. Conversely, if operations are not in a current permit and DNR determines that they are stationary source operations, what, if any, steps would DNR take with regard to the facility’s permit?

DNR Response:

Facilities may submit an operation permit revision application to request removal of equipment they believe is not part of the stationary source. Facilities should fully describe operations proposed for removal in the request and explain why the operations should not be considered part of the stationary source.

For permits that do not include all stationary source emissions at a facility, DNR will work with individual sources to ensure that all activities are appropriately included as stationary sources in the facility’s operation permit. DNR will consider if permits need updating at the time of renewal. If a renewal application is not expected in the next 3 years or if the facility operates under a non-Part 70 operation permit that has no expiring term, DNR may consider a mandatory revision of the operation permit under Wis. Admin. Code s. NR 407.14 if the permit must be revised to assure compliance with all applicable requirements.

4. Comments were made about DNR’s authority to regulate or to issue guidance or change interpretations through guidance. The draft TSD is a guidance document and as such is an unpromulgated rule, since it makes a determination that triggers rulemaking.

DNR Response:

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Since 1980, DNR has issued hundreds of permits to dozens of facilities that make or assemble nonroad engines and equipment. DNR included internal combustion engine emissions that occur during the manufacturing process in these facilities’ operation and construction permits. DNR is not aware of any public comment from sources or EPA indicating that such operations were not appropriately included in these permits. In 2016, in response to inquiries from manufacturers, EPA provided guidance to the Iowa DNR regarding John Deere’s Dubuque Works that indicated certain operations could be considered to not be stationary sources. Wisconsin DNR now has several permit applications under review which requested removal of certain engine testing operations.

In reviewing these applications for the removal of equipment long included as stationary sources, DNR paused to review existing rule and statute to determine whether or not certain operations should be considered not to be stationary sources based on the plain language of the rules. The intent was not to produce guidance, but to draft a basis for determinations that would ensure consistency and accuracy in responding to permit applications.

Because the draft TSD could be considered a guidance document, DNR has decided to withdraw the draft TSD. Instead, as DNR resumes review of applications, it will make case specific determinations through the permit process.

DNR has clear authority and a duty to issue air pollution control permits to stationary sources. As noted above, including engine testing operations in stationary source permits is not a change DNR is looking to implement through guidance. Rather, DNR is determining whether or not it is appropriate to remove from operation permits certain emissions units that have been considered stationary sources for decades.

5. DNR is ignoring the language in the definition of nonroad engine that says a source “is (or will be).”

DNR Response:

The federal definition of nonroad engine in 40 CFR part 1068 differs slightly from the definition in 40 CFR 89.2, which does not include the phrase “is (or will be).” There is no indication that these definitions are meant to cover different equipment or operating scenarios. Both definitions recognize that the actual manner of operation of an engine affects whether it is, or will be, a nonroad engine. A manufacturer may intend a generator to be moveable but if the user does not move the generator at least once during a 12 consecutive month period, that generator is considered a stationary source.

The language in the definition that discusses timing with regard to replacing an engine with another engine of a similar type and function was likely written to ensure that users of the engines are not swapping them out periodically simply to avoid stationary source regulations. Because the draft TSD will not be finalized, no further discussion is needed on whether the rule intended to address an engine that is operated briefly on a process line, exchanged with another engine that is briefly operated, over and over. The definitions of nonroad engine do not explicitly address emissions from engines during the manufacturing process.

6. Comments were received concerning the interaction of state and federal definitions of “stationary source,” the federal definitions of “nonroad engine.”

DNR Response:
As noted above, the state definition of “stationary source” is included in Wisconsin’s SIP. The term “nonroad engine” is not explicitly defined in state rule or statute, and it is reasonable to conclude that nonroad equipment can be considered “equipment that is capable of emitting while moving.” EPA has also approved into the SIP DNR’s minor and major source construction permit programs, and DNR’s Title V program approval was recently updated. All of these approvals include by reference, the definition of “stationary source” in s. 285.01, Wis. Stats.

7. DNR should align itself with EPA guidance provided to sources on whether operations at their engine manufacturing facilities are stationary sources.

DNR Response:

EPA has weighed in on the question of whether specific engine testing operations which are testing mobile and nonroad engines, as well as testing of fully assembled motor vehicles and nonroad equipment, should be considered stationary source emissions in three letters published on its website. Each letter provides guidance on determining whether different types of engine testing should be considered part of stationary source operations.

Wisconsin facilities that have applied for permit revisions to remove engine testing operations from their permits have submitted letters from EPA that responded to their requests for EPA’s opinion on the stationary source status of their specific testing operations. In addition to an analysis of the emission units with regard to state and federal rules, DNR does consider, as a part of its determinations, this body of EPA guidance and specific letters from EPA submitted with an application. EPA guidance does not include an analysis of Wisconsin statutes or regulations. EPA’s guidance does clarify that the Wisconsin DNR is the regulatory authority charged with making the decision based on its state-specific, federally-approved rules and statutes.

8. DNR should define as a stationary source, only those engine operations that meet the applicability descriptions and definitions in 40 CFR Part 63 Subpart PPPPP, the NESHAP for Engine Test Stands/Test Cells and use this to determine stationary source status at both major and area sources.

DNR Response:

Engine operations meeting the applicability description of an engine test cell/test stand in NESHAP subpart PPPPP are stationary sources. NESHAPs are authorized by § 112 of the Clean Air Act which established a two-stage regulatory process to address emissions of hazardous air pollutants (HAP) from stationary sources. Section 112 includes a source category and regulations for hazardous air pollutant emissions from engine test cells/stands in 40 CFR part 63 subpart PPPPP. DNR considers engines test stands and test cells at both major and area sources of HAP to be stationary sources if the testing meets the applicability description and definitions in subpart PPPPP. Additionally, based on the state and federal definitions of stationary source, there may be cases where an engine testing operation that is not subject to subpart PPPPP is considered to be a stationary source.

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2 EPA’s New Source Review Permitting Stationary Sources of Air Pollution webpage lists three letters on stationary source status of engine testing operations; the first, in 2010 regarding chassis dynamometers at Hyundai, the second dated November 27, 2012, on assembly line roll-off testing of automobiles, and the third on November 10, 2016, addressing nonroad engine testing operations at John Deere Dubuque Works. Available at https://www.epa.gov/nst/stationary-source-air-pollution
9. Not all engines are operated in a certified configuration including engines operated on test stands for R&D purposes. Engines operated on fixed stand and not in a configuration covered by an EPA Certificate of Conformity should be considered stationary. Conversely, nonroad engines being operated in a certified configuration regardless of whether partially or fully assembled cannot be considered stationary sources.

DNR Response:
DNR will evaluate engine testing performed for R&D purposes using the same criteria for how it evaluates other engine testing operations when determining stationary source status. A decision to retain or allow removal of R&D operations from a permit will be made on a case-by-case basis depending on whether the equipment being tested will be introduced into commerce as nonroad equipment, is capable of emitting while moving and is, in fact, operated in a manner consistent with its intended end use as a nonroad engine or nonroad equipment. When testing is performed on fully or partially assembled nonroad equipment that has been immobilized, such as when operated on a chassis dynamometer or placed on a test stand, that equipment is not capable of emitting while moving and is considered stationary source operations. R&D testing on fully or partially assembled vehicles that are able to be operated in a manner consistent with their intended end use and are not physically restrained or immobilized may be considered for removal from stationary source permits. This is consistent with both Wisconsin statutes and rules as well as federal rules and guidance.
Via email (Kristin.Hart@wisconsin.gov) and USPS

June 15, 2021

Ms. Kristen Hart
WI Department of Natural Resources
Chief, Air Permit & Stationary Source Modeling Section
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Dear Ms. Hart,

John Deere Horicon Gator Works (FID 114056250) (Gator Works) and John Deere Horicon Works downtown facility (FID 114052510) (Downtown Facility) (collectively the Horicon Works)\(^1\) appreciate this opportunity to comment on the Wisconsin Department of Natural Resources’ draft “Technical Support Document: Addressing Mobile and Nonroad Engine Testing Operations in Stationary Source Permitting” (TSD). Deere is disappointed that the TSD departs from the EPA Region 5 guidance (dated October 31, 2019) that was specifically sought by and developed for the Horicon Works at the request of WDNR. Deere had a reasonable expectation that once requested from EPA Region 5, the Department would follow EPA’s guidance as to how to classify nonroad engine emissions for purposes of stationary source regulation and permitting.\(^2\) Yet, the TSD fails to do so.

As explained below, EPA Region 5 is correct that the direct nonroad engine emissions from product testing at the Horicon Works are not subject to stationary source regulation or permitting. The engines purchased and used in assembly activities meet the definition of “nonroad engine” and their emissions are not otherwise subject to regulation as “test cells” under 40 CFR 63 Subpart PPPPP (with the exception of P81, Engine Test Cell #162). This emission unit meets the description of a test cell in the regulation but is not located at a major source for HAP. Region 5’s conclusion is consistent with the Clean Air Act, which generally prohibits states from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new nonroad engines or nonroad vehicles. Region 5’s decision is also consistent with 25 years of previous EPA

\(^1\) The Gator Works and Downtown Facility are collectively referred to as the Horicon Works solely as a matter of convenience for purposes of these comments. Each facility is a discreet, separate source for all purposes

\(^2\) The TSD itself states that DNR will follow EPA’s direction on specific activities occurring at individual facilities.
determinations that nonroad engine emissions are exempt from Clean Air Act stationary source permitting requirements.

Despite EPA's past determinations, WDNR now asserts that it has discretionary authority to permit nonroad engine emissions under state law. The TSD does not consider Wis. Stat 285.11(16) which prohibits WDNR from being more restrictive than the federal Clean Air Act with respect to defining the Horicon Works as a "stationary source" that includes nonroad engine emissions. It also ignores the requirements of Wis Stat 227 which require WDNR to exercise such discretion, to the extent it exists, through rulemaking. Wis. Stat 285.01(41) also clearly states that a "stationary source [e.g., the Horicon Works] does not include a motor vehicle or equipment which is capable of emitting an air contaminant while moving." The TSD is inconsistent with WDNR's own past interpretations of stationary source permitting requirements.

**Modifications Requested to the TSD**

WDNR lacks authority to regulate nonroad engine emissions under its stationary source program. Deere respectfully requests that the TSD be modified to reflect the following:

1. Align with the existing EPA determination from Region 5 (and Regions 7, 9 and 10, and various states) that nonroad engine emissions at the Horicon Works are not subject to stationary source regulation or permitting. Specifically, concurrence that emissions from nonroad engines during and after the assembly process, during complete equipment performance testing for research and development (R&D), and for quality control purposes are not subject to stationary source regulation or permitting.

2. Clarify that references to regulating nonroad engine emissions from "test cells" be limited to the definition of that term in 40 CFR 63 Subpart PPPPPP and as clarified in the Federal Register preambles associated with these regulations.

3. Remove the unsupported assertion that nonroad engines moving through an assembly process are functionally a single engine that is disqualified from being an exempt nonroad engine pursuant to 40 CFR 1068.30(2)(iii) and 40 CFR 89.2.

**Relevant Background of the Horicon Works**

The Horicon Works manufactures nonroad utility vehicles and riding lawn tractors. All the equipment produced at the Horicon Works include nonroad engines that are acquired as either certified in compliance with, or exempt from, applicable U.S. EPA and California Air Resources Board (CARB) nonroad engine and equipment emission
standards. Importantly, all nonroad engines used by the Horicon Works are acquired as complete units and are capable of emitting while moving when they arrive at the Horicon Works.

The TSD is broadly written and confuses the types of operations that may occur at a facility. For purposes of these comments on the TSD, there are four categories of nonroad engine emissions from the Horicon Works that must be considered.

1. **Run Off Tests (Assembly Process)** — As the products are manufactured during the assembly process, the equipment can be turned on to ensure the quality of the assembly. The run off tests do not meet the definition of an “engine test cell” for the NESHAP Subpart PPPPP regardless of HAP major source classification. Run off testing for nonroad equipment is a quality check of the nonroad equipment and not testing of the engine itself.

2. **Run Off Tests (Completed Goods)** — Sample testing of completed goods for quality control. The run off tests do not meet the definition of an “engine test cell” for the NESHAP Subpart PPPPP regardless of HAP “major source” classification. Run off testing for nonroad equipment is a quality check of the whole nonroad equipment and not testing of the engine itself. These run off tests are performed on equipment that can emit while moving.

3. **Complete Vehicle and Component R&D Testing** — Research and development activities are performed at Horicon Works. The R&D process includes taking assembled vehicles (at times there are instances where some pieces may be removed for the testing) capable of self-propulsion and performing a variety of performance testing or component testing. Types of research could include product safety analysis, sound testing, vibration analysis, extreme environments such as severe wind, hot or cold conditions, roll brake, and driving tests. These vehicles could be existing products for sale to the public or prototypes of potential future products. The run off tests do not meet the definition of an “engine test cell” for the NESHAP Subpart PPPPP regardless of HAP “major source” classification. These R&D tests are performed on equipment that can emit while moving.

4. **Engine Test Cell** — The Downtown Facility has a single test cell with an internal combustion engine used for engine testing for R&D. This test cell does not meet the definition of an “engine test cell” for the NESHAP Subpart PPPPP but would if

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3 Engines installed in nonroad equipment produced and tested at these facilities are certified to meet the applicable nonroad engine emission standards as outlined in 40 CFR Parts 1039, 1048, 1051, 1054, 1060, and/or 1068, or are subject to exemptions set forth in 40 CFR Part 1068 (such as prototype or export-only engines). Each type of engine installed in nonroad equipment meets the definition of an “engine” in 40 CFR § 1068.30 and satisfies the requirements of the standard setting part to which they are certified or exempt from.
the facility were classified as a "major source" for HAPs. Deere does not object to this specific emission unit remaining in the permit.

As explained below, the TSD should clarify that the first three categories of activities are exempt from stationary source permitting and regulation.

Communications Concerning Nonroad Engine Permitting and Regulation for Deere Facilities

As mentioned, Deere and WDNR have been in discussions on these issues since 2019. The scope and burden associated with the permitting of nonroad engine emissions has grown overly burdensome. The rigid operating schedules and extensive recordkeeping requirements imposed by WDNR issued air permits pose significant challenges for Deere. Air permits limit engine run times during each hour creating a substantial logistical burden. The extensive recordkeeping requirements and limitations on operating schedule impact the speed of change for Deere's departments and limit product line growth potential in terms of R&D on new equipment models and the ability to make improvements to existing products.

Deere first worked with EPA Region 7 and the State of Iowa to clarify the proper classification and treatment of nonroad emissions in Deere manufacturing facilities. Each concluded that the nonroad engine emissions from assembly processes and testing at Deere's Dubuque Works are not subject to stationary source regulation and permitting⁴. A similar decision was reached by Iowa DNR for the Deere Product Engineering Center. Consequently, Iowa DNR removed the burdensome permitting terms from the air permits issued to both facilities.

In 2019, Deere approached WDNR about making similar permit changes for the Horicon Works. Notwithstanding the TSD, WDNR has relied upon Region 7's guidance to remove the nonroad engine permit terms from Wisconsin air permits issued to non-Deere facilities.⁵ Deere sought the same treatment for Horicon Works. WDNR requested that Deere seek yet another EPA determination, this time from EPA Region 5. Deere submitted such a request and by letter dated October 31, 2019, EPA Region 5 concluded in relevant part that, "EPA's view is that direct emissions from the engines during product testing described in your letter are not subject to stationary source permitting requirements as long as those engines meet the applicable definition of 'nonroad' engine."

In 2020, WDNR followed Region 5's guidance and removed the nonroad engine requirements from the Gator Works operation permit (No. 114056250-P08). However,

⁴ EPA Region 7 letter dated November 10, 2016 to State of Iowa.
⁵ Toro Co, Air Pollution Control Operation Permit No. 642028970-F30; Kohler Co., Air Pollution Control Construction Permit No. 16-JJW-26.
WDNR has paused the request to make similar changes for the Downtown Works, instead issuing the TSD.

EPA and States Have Consistently Opined that Nonroad Engine Emissions Are Not Regulated as Stationary Sources

The EPA Region 5 and 7 determinations issued to the Deere Dubuque and Horicon Works are the most recent in a long line of EPA determinations concluding that nonroad engine emissions are not regulated as stationary sources. The TSD avoids discussing these older determinations. Instead, the TSD relies upon EPA determinations pertaining to onroad motor vehicles/engines (Hyundai and GM Orion) and a determination related to a jet engine test cell. These determinations are not precedential for addressing permitting of nonroad engine emissions outside a test cell. The Clean Air Act treats onroad and nonroad engines differently as explained by EPA Region 7 to the Iowa DNR in a determination dated November 10, 2016:

Under Clean Air Act (CAA) section 302(z), a "stationary source" is defined as "... any source of air pollution except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 216." As stated, the two exceptions from the definition of a stationary source are (1) direct emissions from internal combustion engines for transportation purposes; and (2) direct emissions from nonroad vehicles or engines. CAA section 216(10) defines a "nonroad engine" as "an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to the standards promulgated under section 7411 JCAA § 11.1.] of this title or section 7521 [CAA § 202] of this title." A "nonroad vehicle" is defined under section 216(11) as "a vehicle powered by a nonroad engine and that is not a motor vehicle, or a vehicle used solely for competition." Additionally, EPA's regulations at 40 CFR 1068.30 define "nonroad engine" to include, in part, an internal combustion engine that "is (or will be) used in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers)."

Our reasoning here, that the emissions at issue are not stationary source emissions, is distinct from a November 27, 2012 memo from EPA Region 5 (the GM memo) which details a situation where motor vehicles were being tested for "road readiness" to ensure they were ready for introduction into commerce. The GM memo only discusses motor vehicles and how the facts at issue in that memo led EPA to view those motor vehicles as "ready for transportation purposes," and, therefore, not subject to stationary source requirements. Here, the exhaust emissions from John Deere's assembly line testing are not stationary source emissions because the direct emissions at issue are from certified nonroad engines and nonroad engines are categorically excluded from the stationary source definition.
Unlike internal combustion engines used for transportation purposes, the Clean Air Act categorically excludes nonroad engine emissions from the definition of stationary source. The TSD's reliance on EPA determinations concerning vehicles used for transportation purposes is misplaced.

Horicon Works has only nonroad engine emissions. Presumably the TSD would reference any EPA determination that had found nonroad engine emissions to be subject to stationary source regulation. Yet, the TSD fails to do so. Like WDNR, Deere has found no EPA determination that nonroad engine emissions are subject to stationary source regulation and permitting. Deere did find the following EPA and State determinations that refute the conclusions reached in the TSD.

EPA Region 9 Letter to CARB dated June 25, 1996 - This determination was developed in consultation with staff at EPA's Office of Air Quality Planning and Standards, Office of Mobile Sources, Office of General Counsel and other EPA regional offices after the promulgation of EPA's rules concerning nonroad engines. The determination states in relevant part, "After the exclusion date, new engines meeting the "nonroad" engine definition must be regulated as nonroad engines and excluded from stationary source considerations such as new source review and Title V."

EPA Region 10 Letter to the State of Alaska dated April 16, 1998 - The EPA responded to questions from the Alaska Department of Environmental Conservation concerning various nonroad engine emissions. Region 10 responded in relevant part that "as you are aware, the 1990 Clean Air Act Amendments define the terms 'nonroad engine' and 'nonroad vehicle', and importantly, redefine the term 'stationary source' so as to exclude 'nonroad engines'." Region 10 also determined that the 1990 Clean Air Act Amendments preempt state authority to establish emission standards for nonroad engines and vehicles with limited exceptions for California. Region 10 opines that there are SIP programs that states can implement to regulate nonroad engines that are installed and operated at stationary sources (which is not the case at Horicon Works) but that require SIP rulemaking and approval.

EPA Region 7 Letter to the State of Iowa dated November 10, 2016 re Deere Dubuque Works - EPA Region 7 consulted with EPA's Office of Air Quality Planning and Standards and Office of the General Counsel to determine that engines meeting the definition of "nonroad engine" installed in a final product or a partially installed assembled unit intended to become a final product are not stationary sources. The fact that the equipment is only partially or fully assembled has no bearing on EPA's position. The determination relies, in part, on explicit language in EPA's regulations at 40 CFR 1068.30 defining "nonroad engine" to include an internal combustion engine that "is (or will be) used in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway
The nonroad engines purchased and used by Horicon Works clearly meet this definition.

**Wisconsin DNR Permit No. 16-JWW-164 Issued to Kohler Co. on January 27, 2017** - In issuing an air permit to Kohler Co, WDNR itself determined that nonroad engine emissions are not subject to stationary source permitting or regulation under federal or state law:

During the review of the projects discussed above, US EPA Region 7 issued an applicability determination dated November 10, 2016, related to the engine testing operations at John Deere Dubuque Works in Dubuque, Iowa. After consultation with EPA's Office of Air quality Planning and Standards and the Office of General Counsel, US EPA Region 7 provided guidance to the Iowa Department of Natural Resources which stated that direct emissions from a certified nonroad engine do not constitute a “stationary source” as defined under the Clean Air Act. At the time of preparation of this preliminary determination, it is unclear to the Department whether certification is a necessary condition to be considered a nonroad engine exempt from being considered a stationary source under the Clean Air Act, as the definition of a nonroad engine does not include certification as a requirement. All of the engines tested at Kohler Co. – Engine Plant are considered nonroad engines. Until additional information is available on this issue, the Department will only exclude those test stations or fuels that are used for certified nonroad engines. The test stations or fuels discussed above that are not being further reviewed under construction permit 16-JJW-164 include:

**Process P72A, Stack 8050, Control C02** – Twenty (20) 40-HP Production Test Stands

**Process P72B, Stack 8050, Control C02** – Two (2) 40-HP Production Audit Stands

**Process P74E, Stack 8050, Control C02** – One (1) 130-HP Diesel Dynamometer Test Stand

**Diesel fuel use in certified engines on Process P75A, Stack 8045, Control C01** – Eighteen (18) 40-HP Test Stand

**Diesel fuel use in certified engines on Process P75C, Stack 8045, Control C01** – Two (2) 130-HP Diesel Chassis Stations

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6 The TSD incorrectly states that EPA Region 7's determination did not rely on explicit language in federal definitions. That is not accurate.
The permit will require the permittee document that the engines tested or using diesel on these stands be certified nonroad engines.

Deere cannot comment on the specific facts of this Kohler decision; however, Deere can confirm that the nonroad engines purchased for use at Horicon Works are certified or otherwise exempt from certifications when they arrive at each facility.

Wisconsin DNR Permit No. 642028970-F30 Issued to Toro Co. on May 15, 2017 - In issuing an air permit to Toro Co, WDNR determined that nonroad engine emissions are not subject to stationary source permitting or regulation under federal or state law:

"During the review of this operation permit renewal, US EPA Region 7 issued an applicability determination dated November 10, 2016, related to the engine testing operations at John Deere Dubuque Works in Dubuque, Iowa. After consultation with EPA's Office of Air quality Planning and Standards and the Office of General Counsel, US EPA Region 7 provided guidance to the Iowa Department of Natural Resources which stated that direct emissions from a certified nonroad engine do not constitute a "stationary source" as defined under the Clean Air Act. The term "stationary source" means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 216 (of the Clean Air Act).

All of the engines tested at Processes P84, P106, and P107 are considered nonroad engines. Toro has requested that Processes P84, P106, and P107 be removed from their operation permit, consistent with this publication. The renewed permit will require the permittee to document that the engines tested on these stands are nonroad engines. Furthermore, Toro is an area source for Federal HAPs and is not subject to the National Emission Standard for Hazardous Air Pollutants (NESHAP) for Engine Test Cells/Stands in 40 CFR Subpart PPPPP. Therefore, all specific permit language, applicable requirements, and emissions estimates pertaining to Processes P84, P106, and P107 will be removed in this operation permit renewal."

Iowa DNR Letter to John Deere dated April 3, 2017 – Iowa DNR was asked to determine whether nonroad engine emissions from the Deere Product Engineering Center in Waterloo, Iowa were subject to stationary source permitting requirements. The Iowa DNR determined that "the emissions from nonroad engines installed in vehicles such as tractors and combines at vehicle test stations are mobile source emissions and not stationary source emissions. The emissions from these units are not included in the stationary source potential to emit and are not required to obtain Air Quality construction permits."

EPA Region 5 Letter to John Deere Horicon Works dated October 31, 2019 – At the request of WDNR, Deere obtained a determination from EPA Region 5 concerning nonroad engine
emissions from the Horicon Works. Region 5 determined that direct emissions from product testing at the Horicon Works are not subject to stationary source permitting if they meet the applicable definition of "nonroad engine." Region 5's determination relies, in part, on explicit language in EPA's regulations at 40 CFR 1068.30 defining "non road engine" to include an internal combustion engine that "is (or will be) used in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers)." The nonroad engines purchased and used by Horicon Works clearly meet this definition.

**Wisconsin WDNR Permit No. 114056250-S08 dated April 15, 2020** – In issuing an air permit to Deere Gator Works, WDNR determined that nonroad engine emissions were not subject to stationary source permitting or regulation:

On October 31, 2019, EPA determined that the emissions from the nonroad engines during product testing at this facility are not subject to the stationary source permitting requirements. John Deere has requested to remove testing line P20 from their operation permit. When excluding the emissions from P20, the MTE of this source is below 100 TPY for all criteria pollutants. Therefore, this source becomes a Part 70 minor source after this permit revision.

Although the TSD suggests that EPA has only recently opined on whether nonroad engine emissions should be subject to stationary source regulation, the preceding determinations show that is not that case. EPA, and states, have been active and consistent on this issue for at least 25 years.

**The TSD Fails to Distinguish the EPA's Previous Determinations**

The TSD largely ignores the previous state and EPA nonroad engine determinations, choosing instead to assert that EPA and states – including WDNR – have been wrong. Precisely, the TSD argues that "EPA's guidance failed to fully consider 40 CFR 1068.30(2)(iii) and 40 CFR 89.2, which specifically exclude from the definition of nonroad engine those engines operated at a single location for more than 12 consecutive months and requires engines that replace an engine at the same location to be included when calculating consecutive time." This conclusion is misplaced for several reasons.

As an initial matter, the factual predicate is wrong. EPA Region 5's October 31, 2019 determination for the Horicon Works explicitly references 40 CFR 1068.30(2)(iii) and fails to conclude that it has any applicability here. For its part, WDNR is clearly aware of 40 CFR 1068.30(2)(iii), yet it did not suggest that it applied to nonroad engines in an assembly process despite having issued multiple decisions on the issue.

Substantively, Deere does not agree with WDNR's application of the regulation. 40 CFR 1068.30 states in relevant part:
Nonroad engine means: (1) Except as discussed in paragraph (2) of this definition, a nonroad engine is an internal combustion engine that meets any of the following criteria:

i. It is (or will be) used in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers).
ii. It is (or will be) used in or on a piece of equipment that is intended to be propelled while performing its function (such as lawn mowers and string trimmers).
iii. By itself or in or on a piece of equipment, it is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

(2) An internal combustion engine is not a nonroad engine if it meets any of the following criteria:

(i) The engine is used to propel a motor vehicle, an aircraft, or equipment used solely for competition.

(ii) The engine is regulated under 40 CFR part 60, (or otherwise regulated by a federal New Source Performance Standard promulgated under section 111 of the Clean Air Act (42 U.S.C. 7411)). Note that this criterion does not apply for engines meeting any of the criteria of paragraph (1) of this definition that are voluntarily certified under 40 CFR part 60.

(iii) The engine otherwise included in paragraph (1)(iii) of this definition remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation. For any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced, include the time period of both engines in calculating the consecutive time period.

The equipment produced at Horicon Works clearly meet the criteria in 40 CFR 1068.30(1)(i) and (ii). Yet, 40 CFR 1068.30(2)(iii) applies only to equipment that fits within the engine category described in 40 CFR 1068.30(1)(iii) (see bolded language quoted above) and not to equipment that falls into the categories described in 40 CFR 1068.30(1)(i) and (ii). In other words, the disqualification from the definition of “nonroad engine” in 40 CFR 1068.30(1)(iii) does not apply to the equipment produced at the Horicon Works.7

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7 The substantive language in 40 CFR 89.2 is the same as 40 CFR 1068.30(2)(iii).
This regulatory limitation is intentional. 40 CFR 1068.30(1)(ii) and (2)(iii) are explicitly limited to equipment that uses a nonroad engine that can be moved to a location and then function while stationary at that location (e.g., a generator, a crusher plant, etc.). The emission profiles and regulatory issues with these types of sources are unique.

In contrast, 40 CFR 1068.30(1)(i) and (ii) define equipment that uses a nonroad engine and which functions as the piece of equipment moves. Without question that is the type of equipment manufactured at the Horicon Works which is made clear by the rule providing examples of lawn mowers and garden tractors. Contrary to the TSD's assertions, 40 CFR 1068.30(2)(iii) does not apply to such equipment and cannot be used to support WDNR's assertion that EPA Regions 5 and 7, Iowa DNR and Wisconsin WDNR were wrong in past decisions.

The TSD further strains credibility in asserting that the nonroad engines moving down an assembly line are effectively a single source, performing the same function in a manufacturing process. These engines perform no function at the Horicon Works. The certified nonroad engines are merely a component purchased in commerce and assembled into the piece of equipment being manufactured at the Horicon Works. The purpose of the engine is solely to power the nonroad equipment and serves no function in the manufacturing process as an engine-powered generator or air compressor would. Each engine's function is specific to the product being assembled.

The reference to “function” in 40 CFR 1068.30(2)(iii) is again driven by the purpose of the regulation. It applies to transportable equipment after it leaves a manufacturing operation and then performs a function to support the host facility (e.g., generators collocated at a stationary source).

The TSD also incorrectly asserts that the nonroad engines passing through an assembly line are “replacements” for one another on the assembly process, and therefore constitute a single, monolithic stationary engine. This despite each engine being a different unit with a unique serial number. WDNR previously determined that waste-to-gas engines that are exchanged on a periodic basis are not a single, monolithic nonroad engine, but rather remain separate units that must undergo unit specific permitting each time they are replaced. The TSD offers no justification for taking a different position in these two contexts.

The TSD also concludes that nonroad engine emissions from an assembly process are not addressed by federal regulations. Yet WDNR ignores the federal definition of “nonroad engine” in 40 CFR 1068 which clearly states that excluded “nonroad engine” encompasses an engine that “is (or will be) used in or on a piece of equipment” that is mobile. Testing that is performed on a partially assembled piece of equipment is covered under this definition since the exemption extends to engines that “will be” used in that piece of equipment. This

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8 Construction Permit No. 07-RSG-201.
regulatory language could serve no other purpose than to specifically exempt nonroad engines operated during an assembly process.

The Horicon Emission Units are Not Subject to 40 CFR Part Subpart PPPPP

The TSD places great significance on EPA regulating certain test cells under 40 CFR Part Subpart PPPPP. Unlike nonroad engines in an assembly process, test cells are permanent fixtures at stationary sources. The Horicon Works has only one test cell. The remaining activities (items 1 through 3 above) are not test cells.

Further, no activities performed at the Horicon Works are subject to Subpart PPPPP. The applicability of Subpart PPPPP (40 CFR 63.9285) is as follows:

You are subject to this subpart if you own or operate an engine test cell/stand that is located at a major source of HAP emissions.

(a) An engine test cell/stand is any apparatus used for testing uninstalled stationary or uninstalled mobile (motive) engines.
(b) An uninstalled engine is an engine that is not installed in, or an integrated part of, the final product.
(c) A major source of HAP emissions is a plant site that emits or has the potential to emit any single HAP at a rate of 10 tons (9.07 megagrams) or more per year or any combination of HAP at a rate of 25 tons (22.68 megagrams) or more per year.

As an initial matter neither the Gator Works or the Downtown Facility is a major source. Also, the nonroad engines used at Horicon Works are installed in, and an integrated part of, the final product, with the limited exception for P81, Engine Test Cell #162. The nonroad engines are not “uninstalled” which is a prerequisite for the applicability of Subpart PPPPP. 40 CFR Part Subpart PPPPP simply does not apply to Horicon Works and the regulation has no bearing on whether WDNR has authority to regulate nonroad engine emissions as a stationary source.

The TSD states that EPA’s past determinations fail to account for Subpart PPPPP. Here again, that is not correct. The November 10, 2016 EPA Region 7 determination discusses the applicability of Subpart PPPPP to the Dubuque Works, but it did not alter the EPA’s conclusion. WDNR itself considered Subpart PPPPP when it issued determinations that Kohler and Toro’s respective nonroad engine emissions are exempt from stationary source regulation. In those determinations, WDNR did not conclude that Subpart PPPPP changed its conclusions.

State Law Does Not Authorize WDNR To Regulate Nonroad Engine Emissions as Stationary Source
The TSD makes no credible argument that the federal Clean Air Act regulates nonroad engine emissions as a stationary source. The TSD asserts for the first time that the WDNR has discretionary authority to do so under state law.

The WDNR's newly found discretionary authority ignores Wis Stat 285.01(41) which defines "stationary source" as excluding nonroad engine emissions:

"Stationary source" as any facility, building, structure or installation that directly or indirectly emits or may emit an air contaminant only from a fixed location. A stationary source includes an air contaminant source that is capable of being transported to a different location. A stationary source may consist of one or more pieces of process equipment, each of which is capable of emitting an air contaminant. A stationary source does not include a motor vehicle or equipment which is capable of emitting an air contaminant while moving.

Horicon Works acquires fully assembled, certified or exempt nonroad engines for use in its manufactured equipment. It is beyond dispute that these nonroad engines are capable of emitting an air contaminant while moving.

The TSD does not address Wis. Stat 285.11(16) which limits WDNR's authority to defining "stationary source" in a manner that is no more restrictive than the federal Clean Air Act. Perhaps realizing this restriction, the TSD states that nonroad engine emissions from assembly processes "are required to be regulated as stationary source emissions under the Clean Air Act." However, that is clearly not the position of EPA and other states (see above). That has also not been the position of WDNR.

**TSD Position on Neighboring States**

In developing the TSD, WDNR asked regulators in other states (including Iowa, Michigan, Illinois and Minnesota) about their approach to nonroad engine testing in stationary source permits. Five states responded but the TSD fails to provide any specific information making it difficult to precisely comment upon this topic.

Although unclear, it appears that WDNR found no state that treats the first three categories of activities performed at the Horicon Works (see above) as being subject to stationary source permitting. According to the TSD, two states unconditionally treat mobile and nonroad engines emissions as excluded from the stationary source permitting. The remaining three states appear to treat test stands for nonroad engines as part of the stationary source, but Horicon Works is not addressing its single test cell in these comments.

Deere's own discussions with Michigan DEQ staff revealed that the State has issued a determination concerning chassis dynamometer test cells. Although Horicon Works is not
commenting on its single test cell and does not manufacture transportation vehicles, Michigan's position on chassis dynamometer test cells is instructive. Michigan AQD determined that motor vehicle test operations, including chassis dynos, are subject solely to Title II of the CAA and are not stationary sources. This was based upon the definition in Title II of the CAA that "The term motor vehicle means any self-propelled vehicle designed for transporting persons or property on a street or highway." Absent a voluntary request from a company to include such operations in a stationary source permit, Michigan AQD will not include such activities in permits.

Based upon the TSD and other information located by Deere, finalizing the TSD would make Wisconsin an outlier in regulating nonroad engine emissions as a stationary source. Deere has operations in Iowa and Wisconsin for which nonroad engine emission requirements are intentionally excluded from the stationary source air permit. These decisions were supported by EPA Regions 5 and 7, the State of Iowa (Dubuque Works and Product Engineering Center) and State of Wisconsin (Gator Works). Other manufacturing companies have also had their nonroad engine terms removed from stationary source air permits (Toro and Kohler).

The TSD is a Rule and Must Undergo Rulemaking

The draft TSD, if finalized, would change existing WDNR policy. It concludes for the first time that WDNR has the discretionary authority to impose permit terms/conditions on nonroad engine emissions and will begin exercising that purported discretion pursuant to the TSD. The TSD will presumably require modification of Wisconsin permits (at a minimum, Kohler, Toro and Gator Works). That is per se a rule and must undergo rulemaking. See, Wis. Stat 227.10 ("Each agency shall 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."

The TSD would also crystallize a change in WDNR position that had been previously memorialized in various contexts, including air permitting decisions directly affecting the Horicon Works. Courts have routinely held that an agency cannot flip between different interpretations of a statute without undergoing rulemaking. See, Schoolway Transp. Co. v. DMV, 72 Wis. 2d 223, 237, 240 N.W.2d 403 (1976); Lamar Central Outdoor v. State of Wisconsin Division of Hearings and Appeals, No. 2017AP1823, P. 24 (2019).

Conclusion

Deere has committed significant resources to working with the WDNR, EPA and Iowa to remove the unnecessary and burdensome nonroad engine emission requirements from its stationary source permits. There has been unanimous agreement that nonroad engine emissions be removed from Deere air permits. Yet, the TSD, if finalized, would change Wisconsin DNR's position and leave Deere's Wisconsin operations subject to more
burdensome requirements than its competitors and Deere plants in other states. Deere respectfully requests that WDNR stand by its longstanding past decisions, those of EPA and other states, and revise the TSD as requested in the beginning of this letter.

Deere would welcome the opportunity to meet again with WDNR on these issues if that would be helpful.

Sincerely,

[Signature]

Wayne Southall
June 15, 2021

Wisconsin Department of Natural Resources
Attn: Kristin Hart
P.O. Box 7921
Madison, WI 53707-7921
Sent via e-mail to Kristin.Hart@wisconsin.gov


Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to comment on the DNR’s new draft guidance document titled “Addressing Mobile & Nonroad Engine Testing Operations in Stationary Source Permitting.” The new guidance document is an unpromulgated rule and, as a result, is unlawful. WMC urges the DNR to withdraw this “technical support document.”

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. That mission includes ensuring that businesses can operate in a fair, lawful, and transparent regulatory environment in the state.

These comments focus on the following concerns with the draft guidance:

1. This guidance is an unpromulgated rule, since it makes a determination that triggers rulemaking.
2. The Department lacks the explicit statutory authority to issue this determination.

Guidance is an Unpromulgated Rule

The DNR “Technical Support Document” includes information in reference to the value and applicability of EPA guidance. For example, in the first paragraph on page five below “Discussion,” the document includes the following statement:

“[EPA] Guidance does not hold the same weight as regulations or court decisions and is case specific.”
However, this “technical support document” is not an administrative rule. There was no scope statement, no approval by the Governor or Natural Resources Board, nor other procedural and transparency requirements associated with Ch. 227 rulemaking.

Instead, this “technical support document” is simply an agency guidance document. While the DNR may have little regard for federal agency guidance, the Wisconsin Supreme Court recently noted the following in reference to state agency guidance:

> [Guidance documents] are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. They simply "explain" statutes and rules, or they "provide guidance or advice" about how the executive branch is "likely to apply" a statute or rule. They impose no obligations, set no standards, and bind no one. They are communications about the law — they are not the law itself. They communicate intended applications of the law — they are not the actual execution of the law. Functionally, and as a matter of law, they are entirely inert. That is to say, they represent nothing more than the knowledge and intentions of their authors.


In short, guidance documents are “inert” and “bind no one,” including the regulated community.

However, this “technical support document” is not designed to be “inert” and is clearly intended to be used by the Department to make determinations. As noted in the fifth paragraph of page 2:

> “DNR approved removal of emission testing processes from two permits based on these EPA recommendations before halting additional decisions pending the outcome of this assessment.”

In other words, the DNR is changing its interpretation of the applicable law. However, Wisconsin law requires the DNR to promulgate “each statement of general policy and each interpretation of a statute” as a rule [See s. 227.10]. In other words, this draft “technical support document” is clearly an unpromulgated rule, and must be withdrawn.

**DNR Lack Explicit Statutory Authority to Make Determination**
Absent from the “technical support document” is a discussion over the Department’s statutory authority to issue this determination. The document suggests in multiple sections that the EPA grants the Wisconsin DNR the authority to issue this determination. For example, as noted in the fifth paragraph of page 2:

“EPA caveated its recommendations by stating that DNR is the regulatory authority and is responsible for making the final determinations for excluding emissions from stationary source permitting.”

However, the Wisconsin DNR does not derive its authority from the EPA. Instead, the agency derives its authority from the Wisconsin Legislature. To that end, 2011 Act 21 holds that the agency can only implement any requirements that are “explicitly required or explicitly permitted by statute or a rule.”

There is certainly nothing in Wisconsin statute or rule that explicitly allows the DNR to make this type of sweeping determination that contradicts EPA guidance. Nor does EPA guidance confer any authority for the Wisconsin DNR to ignore 2011 Act 21.

Conclusion

The draft “technical support document” is an unpromulgated rule. It offers a “conclusion” that is akin to making a determination that triggers Chapter 227 rulemaking requirements. As noted by the Wisconsin Supreme Court, agency guidance is “inert.” Moreover, the Department lacks the explicit statutory authority to issue this determination.

**The best way to resolve these concerns is to withdraw this guidance document.** The rulemaking process affords the regulated community and the general public the opportunity to participate in earnest in these policy determinations.

Thank you for your consideration of these comments.

Sincerely,

Craig Summerfield
Director of Environmental & Energy Policy
Ms. Kristin Hart  
NR Program Manager  
Wisconsin DNR  
Division of Environmental Management  
Kristin.hart@wisconsin.gov

Via electronic submission.


Dear Ms. Hart,


OPEI is an international trade association representing more than 100 manufacturers and their suppliers of gas and electric-powered outdoor power equipment, golf cars, and personal transport and utility vehicles. OPEI member products are ubiquitous in U.S. households and businesses, including equipment such as lawnmowers, garden tractors, grass trimmers, chain saws, snow throwers, generators, utility vehicles and other similarly powered lawn and garden and vehicle applications. Many OPEI members manufacture small spark-ignited engines and small spark-ignited engine powered equipment in Wisconsin, and as a result are regulated by current and proposed stationary engine emission rules.

The Document’s proposal may result in significant cost and hardships for manufacturers, and/or may prohibit manufacturers from expanding engine and/or engine equipment manufacturing in Wisconsin.

Small spark-ignited, large spark-ignited, and recreational engines are generally nonroad by EPA definition, and as such should not be considered stationary sources;
even if not installed or installed to partially assembled equipment. For this reason, OPEI respectfully requests the DNR exclude from stationary reporting requirements small nonroad spark-ignited (U.S. EPA Part 1054), large spark-ignited (U.S. EPA Part 1048), recreational (U.S. EPA Part 1051) and stationary generator (U.S. EPA Part 60JJJJ) engines that are tested (“run-up”) in their U.S. EPA certified nonroad configuration.

Nonroad Spark-Ignited Engines Are Not Stationary Sources

The Document concludes that the following activities should be included in air pollution control permits because they meet the definition of “stationary source” under state or federal law:

1) Emissions from engine test cells/stands for performance testing of installed engines, no matter the type of equipment the engine will eventually be installed in. This is because engines undertaking this activity are in an immobile state and therefore are not emitting an air contaminant while moving, consistent with NESHAP regulations;

2) Emissions from operation of partially assembled motor vehicles and other nonroad equipment prior to being introduced into commerce, because the partially assembled equipment is similarly immobile and not capable of emitting while moving; and

3) Emissions from fully or partially assembled motor vehicles and other nonroad equipment that will not be introduced into commerce.

OPEI respectfully requests the DNR reconsider interpretations 1) and 2) above for engines classified as small nonroad spark-ignited, large spark-ignited, and recreational under their respective U.S. Environmental Protection Agency CFR 40 Parts 1054, 1048, 1051 (“the OPEI subject engines”). OPEI requests the DNR exclude from stationary reporting requirements these engines, as well as engines under 60JJJJ that are production line run-up in their U.S. EPA certified configuration.
The OPEI subject engines are separate and unique regulatory categories defined by EPA CFR 40 Parts 1054, 1048 and 1051, and by Part 1068.30 “Nonroad engine” definition as an engine that:

1) is *(or will be)* used in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors...);

2) is *(or will be)* used in or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); and

3) *by itself or in a piece of equipment*, it is portable and transportable, meaning designed be capable of being carried or moved from one location to another. *Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer or platform.* *(Emphasis added.)*

The OPEI subject engines are *always* consistent with these definitions, regardless of their equipment installation condition.

On the other hand, as pointed out in the Document, 1068.30 “Nonroad engine” definition offers that the following is not a nonroad engine:

1) the engine is used to propel a motor vehicle, an aircraft, or equipment used solely for competition;

2) is regulated under 40 CFR part 60. *Note this criterion does not apply for engines meeting any of the criteria of paragraph (1) of this definition that are voluntarily certified under 40 CFR part 60*; and

3) the engine otherwise included in (1)(iii) of this definition remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility or installation. For any engine (or engines) that replaces an engine at a location and that *is intended to perform the same or similar function* as the engine replaced, include the time period *for both engines* in calculating the consecutive time period.
The OPEI subject engines generally do not meet the nonroad engine definition exceptions 1) and 2) above. However, the Document implies that 40 CFR 1068.30(2)(iii) (nonroad engine definition exception 3) above) may include engines for run-up purposes, suggesting that it is a continuous replacement of engines at a single location. OPEI strongly disagrees with this interpretation as the spirit and intent of this exception, and that it allows for the classification of the OPEI subject engines as stationary for the purpose of reporting. First, OPEI believes the intent of exception 3) applies to an installation that is intended to perform a stationary installation function, such as run a pump or generate electricity; engines run-up for setting purposes and manufacturing quality inspection serve no function. Second the exception describes the calculation of the time period for replacement engines considering just two engines (“include the time period for both engine”); manufacturers may test dozens or hundreds of engines a day. If the intent of this section was to exclude run-up engines from the nonroad definition, as implied by the Document, the language of this exception would have suggested something beyond just two (“both”) engines in a year.

Finally, the Document points out that the DNR developed its own evaluation of stationary source, which includes consideration of whether a piece of equipment in the process of being manufactured is equipment capable of emitting while moving. First, OPEI is concerned that this evaluation established a de facto definition of “stationary engine” which is in direct conflict with the 40 CFR Part 1068 definition, as described above and is prohibited by the Clean Air Act. Second, regardless of an alternative definition, the DNR must conclude that in the case of the OPEI subject engines, they are indeed capable of emitting while moving, regardless of the fact that they are temporarily fixed to a run-up station, because that is what they are largely designed to do.

It is important here to note the OPEI subject engines are typically in their EPA certified configuration at the end of the engine assembly process and are capable of emitting in a mobile application when they are run-up, regardless of what application the engine may eventually be installed to. As a result, when the OPEI subject engines are
run-up at an engine and/or equipment manufacturing facility, they comply with their respective EPA 40 CFR Parts, as well as with the definition of nonroad engine in 40 CFR Part 1068, are not considered stationary, and are indeed capable of emitting if moving.

OPEI recognizes that not all engines are in a certified configuration. This may include engines operated on test stands for R&D purposes. Engines operated on fixed stand and not in a configuration covered by an EPA Certificate of Conformity should be considered stationary for the purpose of the reporting.

**The Proposed Changes Should be Carried Out Through A Rulemaking Process**

OPEI is concerned the Document is an unpromulgated rule under Wisconsin law. The Document offers a “conclusion” that is akin to making a determination that triggers Chapter 227 rulemaking requirements, as required by 2011 WI Act 21. Specifically, through the Document, the DNR is adopting a “statement of general policy” and must utilize the rulemaking process [See s. 227.10(1)].

The interpretation in the Document is also inconsistent with state law. Under Wisconsin law, such air emission rules promulgated by the Wisconsin DNR must be “consistent with but no more restrictive than the federal clean air act” [See s. 285.11(16)]. Given the EPA guidance on this issue, OPEI is concerned the DNR is attempting to adopt a position that is more stringent than federal law.

If the DNR feels that the current rules and statutes are inadequate, OPEI believes it needs to work through the rulemaking process to change the rule or with the Wisconsin Legislature to change the statute. It cannot use a “technical support document” as an end-around to the statutorily-required and transparent rulemaking process.

Finally, OPEI questions the 06/24/2021 date of the Document. OPEI is concerned this implies that the new draft guidance will be implemented less than 10 days after comments are received, and that revisions will not be seriously considered. As noted earlier, the proposed changes may result in significant cost hardships for manufactures. These hardships include reanalyzing stationary emission contributions,
updating permits, and possibly significant facility changes that will require months, if not more to implement.

With regards to these procedural challenges, OPEI believes the best way to resolve these concerns is to withdraw this guidance document. Instead, the rulemaking process affords the regulated community and the general public the opportunity to participate in earnest in these policy determinations.

**Conclusion**

OPEI appreciates the DNR initiative to clarify stationary permit requirements. However, OPEI is concerned the proposed technical guidance document significantly changes long-standing requirements, has the potential to create unnecessary hardships on manufacturers, may impact economic growth in Wisconsin, and is inconsistent with federal and state rulemaking procedures. As outlined in these comments, OPEI respectfully requests the DNR consider (1) exempting engines that are in EPA certified configurations from stationary engine designation and reporting and/or (2) conduct a formal rulemaking with proposed changes to allow stakeholders sufficient opportunity to review proposals and provide feedback.

Thank you for the opportunity to provide these comments. I am available to discuss these comments and concerns at your convenience.

Sincerely,

Greg Knott
Vice President, Standards & Regulatory Affairs
Outdoor Power Equipment Institute
Comments on draft Non road Technical Support Document

From: Thimke, Mark A.  MThimke@foley.com
To: Hart, Kristin L - DNR Kristin.Hart@wisconsin.gov
CC: Bonar-Bridges, James I - DNR James.BonarBridges@wisconsin.gov

Kristin,

Below are my personal comments relating to the draft technical support document. (Not representing any parties with respect to the comments.) I took the short form email I sent and expanded it for clarity. Thanks for the opportunity to participate in the discussions.

Mark

Thank you for the opportunity to comment on the proposed on-road engine technical support document. The following comments are intended to improve the guidance by noting the important areas to be reviewed and considered by the Department as to when a non-road engine is considered a “mobile source” and emissions from the engine are exempt from stationary source requirements.

In developing a guidance or technical support document, a fundamental premise is that the guidance/technical support document does not create new law or impose new interpretations that must be followed. Rather, guidance/technical support document represents a position but not the only position. The guidance/technical support document should expressly acknowledge the limitations as to what is guidance/technical support document and that only courts are empowered under Wisconsin law to interpret statutes and regulations.

Moreover, each position expressed in a guidance/technical support document should cite the underlying law, rule or regulation on which the position is based. This approach is routinely used by the Department in other guidance/technical support documents.

For this technical support document, the Department should undertake the following analytical approach:

(1) The key words for the technical support document are in the fourth sentence of the definition of stationary source – Wis. Stat. § 282.01(41): “A stationary source does not include a motor vehicle or equipment capable of emitting an air contaminant while moving.”

(2) The language divides non-stationary sources into two categories – motor vehicles and equipment capable.

(3) The two categories above correspond to the two categories exempted from stationary sources in the Clean Air Act, 42 U.S.C. § 7602(z) – (1) internal combustion engines used for transportation purposes and (2) non-road engines.

(4) For purposes of this technical support document, only the Clean Air Act related definition, rule and guidance relating to non-road engines is relevant. References to engines used for transportation purposes are irrelevant and should be removed from the guidance.
For this technical support document, the Department should review its SIP submittals and SIP approvals relating to Wis. Stat. § 285.01(41) – “equipment capable of emitting an air contaminant while moving.”

(a) Did the Department represent to U.S. EPA and/or did U.S. EPA recognize that the language in Wis. Stat. § 285.01(41) was intended to be the same as the federal definition of “non-road” engines in 40 C.F.R. § 1068.30, which defines a non-road engine as one that “is (or will be) used in or on a piece of equipment.”

(b) More specifically, did the Department represent and/or did U.S. EPA recognize that the Wisconsin definition, which included in the word “capable,” was intended to be the same as the federal definition, which used the words “is (or will be).”

(c) Did the Department represent and/or did U.S. EPA recognize that the Wisconsin definition using the word “capable” was intended to be more stringent than the federal definition using the words “is (or will be).” If so, in what sense was the use of the word “capable” to be more stringent than “is (or will be)?”

6. If no specific statement or representation was made at the time of the SIP submittal/approval, explain how the technical support document complies with Wis. Stat. § 285.60(8).

The above comments are intended to assist in assuring the technical support document is in accord with the interpretation represented to the U.S. EPA and the public at the time of the SIP submittal/approval. Alternatively, if no interpretation was expressed at the time of the SIP submittal/approval, then the current guidance needs to comply with Wis. Stat. § 285.60(8) and an explanation needs to be included showing that the interpretation satisfies this statutory directive.

Again, appreciate the opportunity to submit comments that will hopefully assist in the development of the final technical support document.

Mark

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