



August 22, 2022

Department of Natural Resources
Attn: Olivia Salmon
101 S. Webster Street
Madison, WI 53703

Sent via e-mail to Olivia.Salmon@wisconsin.gov

RE: WMC Comments on SS 047-22 (Board Order AM-05-22), relating to revisions to ch. NR 439 to simplify, reduce, modernize, and make more efficient the reporting, recordkeeping, testing, inspection and determination of compliance requirements for sources of air contaminants

Dear Ms. Salmon,

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to submit written comments in reference to efforts by the Department of Natural Resources ("Department" or "DNR") to make revisions to NR 439. This chapter of administrative code establishes recordkeeping, testing and inspection requirements for DNR air permits for businesses in Wisconsin. NR 439 applies to all air contaminant sources in Wisconsin.

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

To begin, this is the second time WMC has commented on the Department's efforts to revise NR 439. Prior to initiating this rulemaking, DNR staff held a series of listening sessions to solicit input on potential modifications to this rule. Given substantial interest from members in this rule, WMC previously convened its own NR 439 working group and held multiple meetings to solicit member input.

Following those meetings with members, WMC submitted detailed comments to the Department on January 28, 2022. DNR staff confirmed the comments were received, but has otherwise not provided WMC with a response to those comments. As a result, some of the comments provided herein mirror what was previously provided to the Department in January.

- I. **The Scope Statement should be modified to explicitly identify the "next business day" issue, and the unlawful August 31, 2021 Next Business Day Reporting Guidance still needs to be withdrawn.**

Wisconsin DNR air permits are incredibly detailed and prescriptive documents. They contain terms and conditions defining Department expectations for virtually every nuance of operating a business that has the potential to emit air pollutants. On December 16, 2010, WDNR issued a guidance memo interpreting the next day deviation reporting requirements in NR 439.03, acknowledging therein that the rule could be interpreted as requiring next business day reporting of relatively minor things, such as submitting a report one day later than WDNR expected. WDNR legal counsel investigated the rule and concluded that the federal counterpart of NR 436.043 allows reporting of such deviation as infrequently as every 6 months. The 2010 memo shows that WDNR committed to clean up this anomaly by revising the state rule, but in the interim directed air management compliance staff to use discretion in its expectations of next business day reporting by focusing on situations with actual or potential environmental or health-related impacts, or on patterns of violations.

On August 31, 2021, the DNR formally began implemented a guidance document titled “Next Business Day Deviation Reporting.” This guidance abandons the logic and pragmatism in the 2010 memo to instead impose an incredible burden on Wisconsin sources. Alleged permit deviations that have nothing to do with exceeding an air emission limitation must now be reported to the Department the “next business day” by permitted entities. Failure to do so has been a more common allegation in enforcement actions.

As recognized by the DNR’s 2010 memo, this requirement goes well beyond what is actually required by the U.S. Environmental Protection Agency (EPA). As also noted in the February 9, 2021 DNR draft memo on the subject, the Department acknowledges that the EPA only uses the word “prompt” [42 USC 7661b.(b)(2)] and the DNR “determined that reporting within the next business day was appropriate.” However, the EPA’s approval of Wisconsin’s Title V program on December 4, 2001 (66 FR 62951) does not mention that Wisconsin’s determination of “prompt” was a key aspect of EPA’s approval. Later in this comment letter, it is mentioned that the DNR may not always respond to revision requests within the required 10 business days, giving itself flexibility to respond, yet source owners must wait for Department approval in any case. The Department should consider offering the same flexibility to sources when determining what timeframe is defined at “prompt.” Source owners have similar resource challenges as the Department; the “next business day” guidance is not appropriate, realistic, nor needed for effective action.

Moreover, the next business day guidance promulgated by the Department was unlawful, as it was a new interpretation of existing statute. Under s. 227.10, such a new interpretation can only be implemented as a result of a duly promulgated rule. Prior guidance issued by the Department on December 16, 2010 urged “enforcement discretion” given the confusion over the requirements found in the existing NR 439.03. The Department cannot simply unilaterally change its policy interpretation via guidance; it must do so with rulemaking.

Furthermore, WMC notes that it submitted a “petition for rulemaking” on September 1, 2021 in response to the DNR’s implementation of the Next Business Day Deviation Guidance on August 31. In our petition, WMC noted the overly burdensome recordkeeping and reporting requirements of the current NR 439, as well as its statutory obligation to update the rule.

In its response, DNR staff pointed to its efforts to conduct listening sessions to consider modifications to NR 439. Unfortunately, there is no mention of the next day deviation reporting policy in the proposed scope statement.

Section 227.135(1)(b) requires the Department to include “a description of existing policies relevant to the rule and of new policies proposed to be included in the rule.” However, the Department’s policy on next business day deviation reporting is not explicitly included in the scope statement. **WMC urges the DNR to modify SS 047-22 to include its next business day deviation policy.**

Moreover, initiating rulemaking on NR 439 does not simply allow the Department to continue to implement its new policy on next day deviation guidance. The guidance remains an unlawful violation of s. 227.10(2m); the guidance must be withdrawn while the proposed rule is promulgated. **Thus, WMC again urges the Department to withdraw its unlawful next business day deviation guidance and resume its policy of enforcement discretion prescribed by its December 10, 2010 guidance on the topic.**

II. DNR should modify the scope statement to clarify that NR 439 can be no more restrictive than federal law.

The scope statement makes various references toward “remaining consistent” or “resolving inconsistencies” with federal law. For example, the first paragraph of Section #2 of the scope statement states (in part) the following:

“The primary objective of the proposed rule is to simplify, reduce, modernize, and make more efficient, requirements for sources of air contaminants related to reporting, recordkeeping, testing, inspection and demonstrating compliance administered under ch. NR 439, Wis. Adm. Code, **while remaining consistent with the federal Clean Air Act (CAA) [emphasis added]** and retaining approvability by the U.S. Environmental Protection Agency (EPA)...”

However, Wisconsin law stipulates that state requirements need to be more than simply “consistent” with federal law. In fact, they need to be no more stringent than federal law. Section 285.27(1) and (2) requires that the DNR “may not be more restrictive in terms of emissions limitations” for federal new source performance standards and for federal hazardous air contaminants. Additionally, section 285.01(16) defines “emissions limitation” or “emission standard” to include a “requirement relating to the operation or maintenance of a source to assure continuous emission reduction.” In other words, this statute makes clear that permitting requirements for Wisconsin regulated entities may not go above and beyond federal requirements.

WMC strongly supports changes to NR 439 to reaffirm that federal requirements from the EPA prevail, and supports removing provisions that go above and beyond what is required by federal law. Such an approach ensures that regulated entities in Wisconsin do not have to comply with two sets of standards (state and federal), and simplifies compliance for regulated entities while still ensuring adequate oversight. Moreover, this approach is required by Wisconsin law.

Thus, WMC urges the following changes to the SS 047-22:

- **Modify the reference in Section #2 from “while remaining consistent with the federal Clean Air Act (CAA)” to instead state “while being no more restrictive than the federal Clean Air Act (CAA).”**
- **Incorporate into the scope statement an objective that any requirements on sources, including (but not limited to) reporting, recordkeeping, and monitoring, must be removed or revised to ensure that they are no more restrictive than federal standards, and provide the greatest amount of compliance flexibility provided under the law.**
- **Incorporate into the scope statement an objective to update NR 439 to clarify that in the case of a state requirement conflicting with a federal requirement, the federal requirement shall prevail.**

These changes would provide important clarity to regulated entities, and remove expensive and burdensome Wisconsin-only requirements that go beyond what is required under federal law. Such action would also ensure that the proposed rulemaking under SS 047-22 is in compliance with s. 285.27(1) and (2).

III. DNR should modify the scope statement to seek the removal of permitting requirements not explicitly permitted by Wisconsin law, as required by state statute.

Section 227.10(2m) bars the Department of Natural Resources from enforcing requirements that are not explicitly authorized via statute. Since s. 227.10(2m) [2011 WI Act 21] was signed into law after the enactment of many provisions found in NR 439, WMC presumes that no such review has occurred previously.

There are numerous examples of overly-broad language within the current NR 439. Such provisions include, but are not limited to, the following:

- NR 439.03(1): Allows the DNR to require “such other information as may be necessary” from sources.
- NR 439.04(1)(d): Requires sources to maintain “any other records relating to the emission of air contaminants.”
- NR 439.05(1): Requires sources to provide DNR access to “information” in addition to records.
- NR 439.055(5): Allows DNR to require more monitoring, measurement, or calibration of equipment “if the department determines that these requirements are necessary.”

- NR 439.11(2): Allows DNR to amend a malfunction prevention and abatement plan if “deemed necessary” by the Department, which appears to go beyond what is required by statute.
- NR 439.11(4): Requires sources to operate air pollution control equipment to be “operated and maintained in conformance with good engineering practices.” WMC is concerned how the DNR unilaterally determines what constitutes a “good engineering practice.”

While the scope statement points to efforts to simplify or reduce requirements within NR 439, there is no mention of removing requirements not explicitly authorized by statute. Given that no Department review has apparently been conducted since the enactment s. 227.10(2m), and WMC has provided a list of provisions that lack explicit statutory authorization, such a review is entirely warranted. **Thus, WMC urges the Department to modify the scope statement to seek the removal of provisions that lack explicit statutory authorization under s. 227.10(2m).**

IV. The references to “modernization” and “new technology requirements” have no basis in statute and should be removed.

As noted previously, the scope statement’s stated primary objective is to “simply, reduce, **modernize, [emphasis added]** and make more efficient, requirements for sources...” WMC is concerned with the inclusion of the term “modernize” in the rulemaking’s objective, which is included in the relating clause and throughout the scope statement. This term does not have a basis in the relevant statute.

Section 285.17(4) requires the DNR to “promulgate rules that simplify, reduce, and make more efficient” requirements for sources. However, the term “modernize” does not appear anywhere s. 285.17, which is cited by the Department for this rulemaking.

To be clear, certain types of “modernization” may not be problematic for regulated sources in Wisconsin. Some modernization of the administrative code may occur as a result of efforts to reduce and simplify requirements currently found in NR 439.

However, WMC opposes the inclusion of “modernization” as a primary objective for this rulemaking. This is especially true when examining the last paragraph of Section #8 of the scope statement. This section states, in part, the following:

“Sources in the state that emit air contaminants are subject to ch. NR 439, Wis. Adm. Code, but the majority of sources, including small businesses, are not expected to experience economic impacts beyond those noted above. During the rulemaking process, the department plans to review current control device and monitoring technology requirements and ensure flexibility in the rule text to apply to future technology. The department anticipates that the majority of the potential cost of the rule could result from **the purchase of equipment to comply with expanded monitoring requirements [emphasis added]**. However, many sources already use this technology due to existing permit and federal requirements. New technology requirements

could cost between \$0-\$50,000 per facility for up to approximately 130 facilities whose actual emissions meet or exceed major source thresholds, depending on the type of technology and if the equipment is already installed at the facility....”

“Expanded monitoring requirements” for sources is inconsistent with the statutory obligation for this rulemaking under s. 285.17(4). The statutory mandate for this rulemaking was to find efficiencies and reduce burdensome requirements for sources, not to create new burdensome requirements.

In addition, the reference to “expanded monitoring requirements” is inconsistent with other sections of the scope statement indicating that the use of new technology is optional. In particular, the last paragraph of Section #2 notes that this rulemaking will “give facilities the option of using technology.” Given this statement, it is unclear why the Department references expanded monitoring requirements.

Thus, WMC urges the Department to strike the term “modernization” from the objective of the scope statement, as well as removing the reference to “expanded monitoring requirements.” These references lack explicit statutory authorization, and are inconsistent with other sections of the scope statement. If a source wishes to expand its monitoring capabilities, such an action should be optional under the new rule.

V. WMC supports keeping electronic reporting optional, not mandatory.

The last sentence of Section #2 of the scope statement references giving facilities “the option to submit data electronically to the department.” **WMC appreciates the Department explicitly stating that any electronic reporting system proposed by the DNR within the rule would be optional, not mandatory, under the proposed NR 439.** Further, when the Department begins drafting the rule, WMC supports inclusion of language making it explicitly clear that electronic reporting is optional.

Moreover, a new mandate imposing electronic reporting would be inconsistent with the statutory directive under s. 285.17(4), as it would make NR 439 more burdensome for regulated sources instead of less burdensome.

VI. Conclusion

WMC has, and will continue to, collaborate with and provide feedback to the Department as it considers revisions to NR 439. There are a number of opportunities for significant improvements to NR 439 that could meaningfully reduce compliance burdens for Wisconsin sources while still meeting federal Clean Air Act requirements.

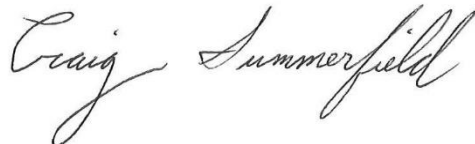
However, the first step is to ensure the Department’s efforts are properly targeted toward streamlining, not *strengthening*, administrative burdens on the regulated community. **Thus, WMC urges the Department to make meaningful changes to SS 047-22. This includes ensuring the rulemaking focuses on making Wisconsin administrative code no more restrictive than**

federal law, removing provisions not explicitly authorized by state statute, and removing references to “modernization” and “new technology requirements” from the scope statement. Such changes would demonstrate a willingness by the Department to engage in a meaningful dialogue with Wisconsin’s regulated community, and also ensure this rulemaking meets all statutory requirements.

Finally, WMC once again urges the Department to withdraw its unlawful August 31 “Next Business Day Reporting” guidance and resume its prior policy allowing reasonable enforcement discretion. This would provide meaningful relief to regulated sources while the NR 439 rulemaking process continues.

Thank you for your consideration of WMC’s comments. WMC hopes the DNR seriously considers incorporating the aforementioned changes into the scope statement. Regardless, WMC will continue to engage the Department on this important rulemaking, and looks forward to the DNR’s response to these comments.

Sincerely,

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

Craig Summerfield
Director of Environmental & Energy Policy

Enclosures –

WMC Comments on Next Business Day Deviation Reporting – 2021.3.3

WMC Petition for Rulemaking on NR 439 – 2021.9.1

WMC Comments on DNR Plan to Revise NR 439 – 2022.1.28