WISCONSIN PAPER COUNCIL

COMMENTS: AIR PERMIT STREAMLINING, CLEARINGHOUSE RULE 19-015 (AB-24-12B)

The Wisconsin Paper Council (WPC) in joined by the Midwest Food Processors Association (MFPA), Wisconsin Industrial Energy Group (WIEG), and Wisconsin Manufacturers & Commerce (WMC) in submitting these comments.

WPC and our colleagues appreciate the opportunity to comment on the proposed Air Permit Streamlining Rule ("Rule"). The papermaking industry is a key economic driver for Wisconsin - employing over 35,000 highly skilled men and women whose efforts continue to make us the number one papermaking state in the United States. The Wisconsin Paper Council is the premier trade association which advocates for our entire industry, an industry which is focused on sustainability and strong environmental stewardship. WPC advocates for common-sense regulation that balances a healthy environment with a healthy economy.

WPC is joined in these comments by associations representing much of Wisconsin's manufacturing industry, which is responsible for the economic prosperity of our state. WPC and our listed colleagues respectfully submit the following comments regarding the proposed changes to NR 400, 406, and 407.

I. INRODUCTION

It continues to become increasingly difficult for our members to navigate the complex web of regulatory permitting requirements. Air Pollution Control permits are no exception, and in fact have become one of the most difficult areas with which to comply. This is because of the multiple layers of regulation, including state, federal, and sometimes local rules. Wisconsin's permitting process requirements are far more complex and onerous than those of other states. WPC finds great value in any opportunity to lessen the regulatory burden on our members and simplify compliance demonstration. We support the legislature's directive in Wis. Stat. § 285.60 (10), which requires DNR to continually evaluate opportunities to streamline and simplify the permitting process.

WPC believes that stakeholders working together with regulatory agencies can significantly simplify permitting, while keeping the same environmental safeguards in place. Our members are investing substantial human and financial resources into obtaining permits, understanding permit conditions, demonstrating permit compliance, and defending unexpected enforcement actions often brought about by a misunderstanding or oversight that has no actual negative environmental impact. By simplifying permitting, the regulated community will have more resources available for actual environmental control equipment, technology improvements, and other investments that benefit the environment and our communities.

While WPC supports some of the conceptual changes in the Rule, we also have several concerns including 1) changes that are substantive and require an updated economic impact analysis, 2) the original date of the scope statement, and 3) proposed changes outside of the scope statement. In addition, WPC is concerned that opportunities to improve permitting efficiency have been missed and would urge DNR to reincorporate other streamlining opportunities into the proposal should it move forward. Overall, WPC feels that this rulemaking has transitioned from something intended to lessen the burden on permittees to an opportunity to increase regulation under the premise of streamlining.

WPC has historically been involved in the stakeholder groups charged with developing rules like this. However, in this instance, that avenue did not provide an effective opportunity for input, so WPC is providing these detailed comments related to the changes proposed.

II. WPC SUPPORTS THE ADDITION OF AN EXEMPTION FOR DRUG INCINERATORS

Wisconsin has been seriously impacted by the opioid epidemic, as well as increased use of methamphetamines. These struggles have impacted our members' workforces and the communities in which their facilities are located. WPC agrees that any equipment used for drug incineration should be exempt from complex permitting requirements because the benefit to our communities of destroying dangerous drugs outweighs any minimal impact on air quality.

III. AN UPDATED ECONOMIC IMPACT ANLYSIS IS NECESSARY

The DNR has mischaracterized the Rule as clarifying, streamlining, and expanding exemptions, and therefore concluded that the proposed changes have no negative economic impact. The Economic Impact Analysis (EIA) related to the Rule relies on the primary objective of streamlining air permitting to support this assertion and implies that the Rule does not substantively change any requirements. However, some of the proposed changes stray from the original scope statement, and instead limit exclusions and exemptions from permitting burdens. Those substantive changes have a real likelihood of increasing costs on the regulated community. It is therefore imperative that DNR perform a more detailed analysis of the proposed changes and the economic impact of those changes. Moreover, DNR should evaluate the potential economic savings associated with the additional streamlining suggestions that have not been included in the Rule.

IV. THE RULE MAY BE VULNERABLE TO LEGAL CHALLENGES

The Rule is vulnerable to a legal challenge in several areas based on how long ago the scope statement was issued and the deviations from the statutory requirements by DNR in preparing the rulemaking.

a. The Rule is based on a scope statement from 2012.

DNR is relying on a scope statement from 2012 for this proposal. Although that scope statement is arguably valid until February of 2020, the agency's reliance on it is not good practice and does not respect the legislative intent behind recent revisions to the rulemaking process. Wisconsin law now mandates scope statements expire 30 months after publication.[1] Had this scope statement been approved under current law, it would have expired in mid-2015. Moreover, regulatory agency authority has changed significantly since 2012, as have economic and environmental concerns of the regulated community. It is imperative that new administrative rules have up-to-date approval from contemporary elected officials, be based on current and accurate information, and are acted on in a timely manner. The agency should review the 2012 scope statement in light of the subsequent statutory changes to ensure that the authority it relied upon in 2012 is still adequate for this rule. Best practice would be for DNR to revise and resubmit the scope statement.

b. The statutes require a 'one rule for one scope statement' ratio.

DNR has already promulgated one rule under this particular scope statement (*see* CR 15-005). Issuance of a second rule under the same scope statement is contrary to the plain language of Chapter 227.

[1] 2017 Wisconsin Act 39, at https://docs.legis.wisconsin.gov/2017/related/acts/39; see also Wis. Stat. § 227.135(5).

Throughout § 227.135, the statutory language refers to the statement of scope as applying to one, single rule. The section discusses "the rule" and the "statement of scope of the proposed rule." Nowhere does the language authorize an agency to promulgate more than one rule under the same scope statement. Although this proposed rule could be characterized as a two-part rule, with AB-24-12a as part one and the current proposal as part two, that process is not explicitly authorized by statute and does not help DNR avoid a legal challenge based on the agency's lack of explicit authority to continue promulgating multiple rules under a single scope statement. The rigorous scoping process is required to provide necessary gubernatorial and legislative oversight in the early stages of rulemaking. It provides the public and regulated community with notice and an opportunity for input. The promulgation of numerous rules, specifically rules that go well beyond the original scope statement, have the opposite effect. For these reasons, DNR should revise and re-submit the scope statement.

c. <u>The Rule proposes substantive changes not included in the original scope statement.</u>

Wisconsin law is clear that if, after a scope statement for a rule has been approved, an agency changes the scope of the proposed rule in "any meaningful or measurable way," the agency shall prepare and obtain approval of a revised statement of scope. (Wis. Stat. §227.135(4)). Accordingly, once a proposed rule is changed, agencies cannot work on the proposal until a new scope statement is approved. (*Id.*).

The scope statement, approved by the Governor on December 28, 2012, explained that the primary objective of the rule is "to improve operational efficiency for, and to simplify the permitting processes administered under chs. NR 406 and 407…" while remaining consistent with the Clean Air Act (CAA). (*See* SS 002-13). The scope statement intended for the Rule to "make more facilities eligible for simplified permitting" and expand exemptions from overly burdensome permitting requirements.

Most of the changes proposed do not streamline permitting and may in fact do the opposite by making air pollution control permitting more burdensome, limiting exemptions, and continuing unnecessary and burdensome practices related to application and revisions for permits.

First, revising the definition of "reconstruction" to include minor sources will increase, rather than decrease, regulatory burden. This exclusion in the current language was intentional and the basis for removing it (because minor source regulations include references to "reconstruction") is not to improve operational efficiency or simplify permitting. In fact, a search turned up only one instance where "minor source" and "reconstruction" were used in the same statute, (§ 285.61(3)) and the language does not conflict with the exclusion of minor sources from the definition of "reconstruction." This change is a substantive change that is more likely to increase the regulatory burden than decrease it. Currently, minor sources are arguably excluded from some permitting requirements related to reconstruction. This will eliminate reliance on any such exclusion.

Second, the removal of exemptions, such as those being removed from portions of NR 406.03, does not streamline or simplify the permitting process. It may, as asserted by DNR in this instance, help gain EPA approval, but no support documentation was included for the assertion that removing these exemptions, i.e. adding *more* regulation, was being required by EPA. To the extent DNR is making substantive changes requested by the EPA, the regulated community and the public would be well served to have a full understanding of the rules and regulation upon which DNR is relying in interpreting these requirements. The intent was to streamline permitting *while* remaining consistent with federal law, which is to say that the changes made to expand exemptions and streamline permitting cannot violate the CAA, but the scope statement does not cover changes made to increase regulation under the premise that EPA is requiring it. All of the changes in Sections 4 through 7 increase regulation, in direct opposition of the scope statement.

Likewise, Section 9 limits waiver availability for construction permits, and is outside the scope statement. This change further complicates and reduces the availability of waivers. Specifically, this change is intended to address a federal requirement that a permit be obtained before beginning construction, but the language may have unintended consequences. For example, DNR asserts that a construction permit must be reissued if certain changes are made to the construction plan, as discussed in section V below. However, if this language is added, it could significantly slow a project, which will have a serious economic impact on the permittee. For example, if a facility obtains a construction permit, but during the project, something significant changes requiring the facility seek a revised or reissued construction permit from DNR, which DNR is asserting will require a full notice and comment period, and if a waiver of the requirements is no longer available based on this proposed additional language, that project will be on hold until the new construction permit goes through the entire notice and hearing process, even if the change could otherwise be considered an administrative one. We understand that this specific question has recently arisen in the permitting context. DNR should reconsider this language and add a more general statement regarding "subject to federal regulations" to § 406.03(2)(a). In addition, and as discussed in detail below, DNR should increase opportunities for administrative revisions to permits.

Furthermore, the changes in Section 12 and 13 relating to Plant-Wide Applicability Limitations (PALs) are more restrictive and limit the exemptions available. The intent described in the scope statement was to make broad permits, like PALs, more accessible to facilities. WPC members have opined that PALs are overly burdensome to the point of being unusable, and these changes exacerbate, rather than provide relief from, that burden. It is unclear which of these changes is being required by EPA, but changing the note, which *may* require a permit, to codified language which *shall* require a permit, is a substantive change, not within the scope statement, and could have an economic impact that has not been evaluated by DNR.

Section 16 also adds a substantive change that is not included in the scope statement. Though DNR asserts that this change reflects their interpretation of the term up until now, that does not mean that the interpretation is correct. The change will result in fewer exemptions. Currently, a change at a stationary source could be excluded if the *actual* emission resulting from the change did not exceed the maximum theoretical emissions (MTE) levels listed. However, DNR is proposing to make that comparison between the MTE of the change (rather than actual emissions) and the MTE levels listed. Because the MTE is always going to be higher than actual emissions, this change will reduce when the permit exclusion is available. DNR asserts that they have always interpreted this subsection to compare the MTE of the change and are merely changing the language to match their interpretation. However, that interpretation is simply incorrect. If the language was intended to compare MTE, it would have spelled that out. In every other place where the code is addressing the MTE, the "maximum theoretical emissions" language is included. The absence of that language means the intent was to compare actual emissions. On top of that suggested addition, DNR proposes rewriting NR 406.04(4)(j)2 such that both (j)1 and (j)2 must be met for the exclusion. Currently, the change can be exempt under either (j)1 or (j)2. The change makes the exclusion only apply to changes that satisfy both (j)1 *and* (j)2, further limiting the availability of the exclusion, and substantively changing who may be required to obtain a permit. Once again, the change is the opposite of what is proposed in the scope statement, reducing the availability of exclusions.[2]

Finally, Section 28 removes the ability of a permit revision to be undertaken administratively if an operation permit is revised to simply incorporate the requirements of the construction permit. Administrative permit revisions are very useful, significantly less burdensome, and reflect that certain

[2] WPC also notes that the term "maximum theoretical emissions" is found nowhere in Chapter 285 of the Wisconsin Statutes, meaning that there is no explicit authority for the creation of additional requirements that rely on maximum theoretical emissions.

revisions do not require the same amount of scrutiny as other types of permit amendments. Currently, NR 407.11(1)(e) theoretically allows an operation permit to be revised administratively if the permittee is simply including the requirements from the construction permit, so long as the construction permit went through the notice and comment process that any other operational permit would be required to go through. During recent discussions with DNR staff relating to this change, DNR asserted that the construction permits are not currently required to go through the process in the listed statute (§ 285.62(1)-(7)) so NR 407.11(1)(e) is confusing and not approvable by EPA. They noted that construction permits are currently completed in tandem with operation permits. However, construction permits are required to go through a substantially similar notice and comment period found in § 285.61. Moreover, the intent behind this rulemaking, as well as § 285.60(10) which requires DNR to continue to evaluate permit streamlining, is to reduce the burden of obtaining a permit while still protecting our air and water. Reducing the events that are considered administrative changes increases the burden of regulation, and the cost of compliance. This section could have simply been amended to cite to the correct statute (§ 285.61).

V. DNR DID NOT ADEQUATLEY ADDRESS ALL OF THE SPECIFIC ISSUES PROPOSED IN THE SCOPE STATEMENT

The scope statement listed several specific items to be addressed by DNR in this rulemaking. On that list was a directive that DNR promulgate rules for administrative construction permit revisions.

Although both the scope statement and statute require DNR to assess and lessen obligations of air pollution control permits, DNR did not thoroughly evaluate the option of administrative permit revisions for constructions permits.

The scope statement notes that "WDNR will… propose language changes…regarding administrative permit revisions for construction permits." In addition, Wis. Stat. § 285.60(10) states DNR shall assess and lessen obligations of permitting, consistent with state and federal law, including expanding construction permit waivers. However, in response to this charge from the legislature, DNR claims that the underlying statutes do not allow revisions of construction permits without notice, even for administrative purposes. No further explanation is given.

WPC disagrees with DNR's statutory analysis. First, Wis. Stat. § 285.67 requires DNR to promulgate rules establishing criteria and procedures for revising air pollution control permits, which includes construction permits. The language is clear authority for DNR to propose rules allowing for administrative revisions of construction permits. In addition, the existence of a statute that separates revision (along with suspension and revocation) of permits from the multiple sections discussing issuance of air pollution control permits means that the process for revision should be different, and less burdensome, than issuance of an original permit.

However, DNR asserts that a construction permit revision must go through the same notice and hearing requirements as an original construction permit application. Accepting DNR's assertion that a revision is actually a reissuance means that a revision is essentially the same as a new application for a construction permit, and that the same requirements apply to a revision as do to a new application. Even in that instance, there is statutory authority for DNR to exempt revisions (or reissuances) from the extensive list of permitting requirements. Wisconsin Stat. § 285.60(5m)(b) contemplates rulemaking for this very purpose. That section states that DNR "may allow construction, reconstruction, replacement, or modification of a stationary source prior to issuance of a construction permit on a case-by-case basis or on bases specified in rule." The quoted language authorizes DNR to promulgate rules regarding when the agency can waive construction permit requirements, including doing so for administrative changes. If

requirements are waived, including the requirement to obtain or change a construction permit, then the notice and hearing requirements in §285.61 are no longer applicable.

The language does not require that a construction application or revision be pending, nor does it limit the bases on which DNR can waive permit requirements. It simply says that DNR may promulgate rules exempting permit requirements. If DNR can promulgate rules exempting sources from permit requirements in general, it certainly has authority to promulgate rules exempting requirements from permit revisions or reissuances. Therefore, DNR can promulgate rules that exempt a construction permit from the requirement to be revised in instances of administrative changes.

In fact, WPC supports more extensive rulemaking related to revisions of construction and operation permits. Wisconsin Stat. § 285.60(6) encourages exemptions from permitting requirements, including construction permits, when "the potential emissions from the sources do not present a significant hazard to public health, safety or welfare or to the environment." If a source has obtained a construction permit for construction, reconstruction, replacement, or modification of a stationary source, then DNR has already determined that the emissions will not violate the criteria for permit approval laid out in §285.63. Once that determination is made, changes to construction permits that do not increase total emissions should be considered administrative changes, and an expedited process should be provided by rule to handle those changes. Section 285.63(6) directly addresses this type of situation by allowing DNR to waive a permit approval requirement for the modification of a source if that source already has an air pollution control permit (including a construction permit) and the source is meeting the requirements of that permit. In other words, DNR could and should promulgate rules allowing administrative revisions to construction permits where the permit changes would not increase emissions.

To summarize, WPC believes that DNR has missed an opportunity to significantly streamline construction and operating permitting, and lessen the burden on both the agency and the regulated community by promulgating rules that would do the following:

- Allow any changes that do not increase overall emissions to be considered administrative changes or to be exempt from NR 406, including like-kind equipment replacement. DNR should clearly define "like-kind" to broadly include equipment carrying out the same function with the same or fewer emissions as the initial application.
- Allow an 'up-to' limit so facilities can obtain a permit that would allow for some minimal changes, such as the addition of a space-heating unit, without being forced to reapply for a new permit.
- Allow changes in ownership or responsible officials to be considered administrative changes.
- Clarifying that a construction permit covers all categories of construction: construction, reconstruction, replacement, and modification of a source, and prescribing a method for administrative permit revision (in lieu of a new application) if the underlying reason for the construction or the construction category changes. For example, if during reconstruction, new information regarding the equipment is discovered or an incident permanently inhibits reconstruction and requires replacement, the permit holder should be able to revise the construction permit provided the emissions of the new proposal are not more than the original construction permit allowed.
- Clarify that notice and hearing requirements do not apply to revisions that do not amend the total emission limits.
- Consider removal of non-air pollution related conditions from permits, and allow permit to reference other documents rather than listing specifics so that the non-permit documents can be regularly updated to remain current with work practices without the need for a permit revisions.

- More specifically define DNR's authority in NR 439 to help permittees understand expectations of permit conditions.

VI. THE AGENCY SHOULD PROVIDE SUPPORTING DOCUMENTS WHEN RELYING ON EPA

Finally, WPC recommends that DNR provide documentation and/or citations when asserting that a particular change is required by EPA. In many instances, DNR relies on EPA as the requirement for a change that increases regulation and limits the actions and sources that may qualify for an exemption. However, without the supporting information, it is difficult for entities not intimately involved in the detailed discussions of the rule changes to opine on the prudence of those particular changes or evaluate whether a less burdensome resolution is available. Having supporting document to evaluate while reviewing these rules would avoid misunderstandings and help support the changes suggested by DNR.

Additionally, the U.S. Department of Justice has opined that federal guidance can no longer be relied upon for a civil enforcement action, so DNR must avoid citing guidance as justification for these changes, or as justification for an enforcement action.[3] The DNR must keep in mind that the agency's authority comes from the Wisconsin legislature, and not the EPA. Of course, the state must ensure programs do not violate the CAA, but the legislature sets state policy, and the EPA does not wade into minutiae of program administration.

VII. CONCLUSION

WPC strongly supports decreasing the regulatory burden of permitting. However, for the foregoing reasons, WPC does not support several of the proposed change and urges DNR to refocus this rulemaking on air pollution control permit streamlining.

[3] Memorandum on Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases, https://www.justice.gov/file/1028756/download, January 25, 2018.