



January 28, 2022

Ms. Maria Hill  
Wisconsin Dept. of Natural Resources  
P.O. Box 7921  
Madison, WI 53707

*Sent via e-mail to [Maria.Hill@wisconsin.gov](mailto:Maria.Hill@wisconsin.gov)*

**RE: Comments on DNR plans to revise NR 439**

Dear Ms. Hill,

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.

As a preliminary matter, WMC supports efforts to revise NR 439. Many WMC members have air permits and are subject to this rule. Our organization is interested in providing stakeholder input to the Department in order to make significant reforms to this section of the administrative code. This past winter, WMC convened its own NR 439 working group and held multiple meetings to solicit member input with respect to this important rule. This comment submission is based on that input.

Moreover, as our organization has noted previously, the Department is under a statutory obligation to streamline air emissions reporting requirements for stationary sources. Specifically, s. 285.17 compels the Department to "promulgate rules that simplify, reduce, and make more efficient [reporting, monitoring, and record-keeping] requirements." This statutory directive to the DNR is not optional, and it has been more than eight years since the Legislature enacted this requirement.

**I. The Next Business Day Deviation Guidance still needs to be withdrawn.**

First and foremost, WMC appreciates the Department's stated interest in engaging in a meaningful dialogue with the regulated community to update this outdated rule. A number of provisions are obsolete and do not reflect current industry practices. Appropriate revisions could provide important certainty and clarity for the regulated community.

However, this process should *replace*, not supplement, the Next Business Day Deviation Guidance implemented by the Department on August 31, 2021. In addition, please note that WMC's decision to provide input on this current rulemaking effort should not be construed as an endorsement of the DNR's continued implementation of this unlawful guidance.

As noted previously by WMC and other stakeholders, the Next Business Day Deviation 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. The Department cannot simply change its policy interpretation via guidance.

Moreover, the Next Business Day Deviation Guidance has imposed an incredible burden on Wisconsin businesses. Violations that simply have nothing to do with exceeding an air emission requirement must now be reported to the Department the "next business day" by permitted entities.

In addition, this requirement goes well beyond what is actually required by the U.S. Environmental Protection Agency (EPA). As noted in the February 9, 2021 DNR 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.

Furthermore, WMC notes that it submitted a "petition for rulemaking" on September 1 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 response, the Department pointed to this current effort to rewrite NR 439.

To clarify, WMC interprets the Department's response to its petition as a denial. While the Department's NR 439 listening sessions referenced in its response are permissible under ch. 227 rulemaking requirements, they do not obligate any action by the DNR. Indeed, Wisconsin law prohibits the Department from taking any action to begin drafting the new NR 439 unless and until the agency obtains an approved scope statement. No such statement of scope has been drafted or released.

In summary, WMC again urges the Department to withdraw its Next Business Day Guidance and promptly resume its previous policy of granting reporting discretion to regulated entities in relation to deviations that do not involve an emissions exceedance. This would be a welcome first step by the Department to show it is sincere in its desire to both follow statutory directives and respond to

the requests of the regulated community. It would also help demonstrate that the DNR is interested in collaborating in earnest with Wisconsin businesses on revising NR 439. (WMC's previously submitted comments on the Next Business Day Guidance are incorporated via reference at the end of this document).

## **II. The Scope Statement should be broad, but targeted to NR 439.**

In reference to the rule rewrite itself, WMC urges the Department to craft the scope statement in a way that allows for broad reforms to assist the regulated community. Certain current air quality reporting, monitoring, and record-keeping requirements for sources subject to NR 439 requirements are overly burdensome and go far beyond what is necessary to protect the environment and public health. Thus, the scope statement should be broad enough to allow for important clarifications and the tailoring of requirements to help regulated entities meet statutorily-required compliance obligations.

In addition, the scope statement should explicitly state that the purpose of this rulemaking is to make changes to NR 439. If improvements to NR 439 necessitate changes to other chapters of DNR's administrative code, such chapters of code should be explicitly noted within the scope statement. In other words, the Department should avoid using generic terms such as "other related regulations" to refer to other chapters of the code that may be altered – such chapters of code should be clearly listed by number. This will allow for clear, proper and lawful notice to stationary sources subject to the changes being contemplated by the Department.

## **III. DNR must revise the rule to defer to federal requirements, as required by Wisconsin law.**

WMC strongly supports changes to NR 439 to reaffirm that federal requirements from the EPA prevail, and support removing provisions that go above and beyond what is required by federal law. This 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. This approach also is required by Wisconsin law.

Specifically, s. 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. Moreover, 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.

In order to bring NR 439 into compliance with the aforementioned sections of statute, WMC urges the Department to make the following changes to the rule:

- 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 allowed under the law.

- NR 439 must explicitly note 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 excessive state-only requirements that go beyond what is required under federal law. Such action would also ensure that NR 439 is in compliance with s. 285.27(1) and (2).

**IV. DNR must revise the rule to remove permitting requirements not explicitly permitted by Wisconsin law, as required by state statute.**

In addition, WMC urges the DNR to do a robust review of the existing NR 439, and remove any provisions that are not explicitly authorized by state statute. Any such provisions are in conflict with ch. 227 rulemaking requirements, and must be removed.

Specifically, s. 227.10(2m) bars the agency 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.

Such a review should include the removal of any overly-broad language utilized by the Department to impose additional requirements on permitted entities that is not explicitly authorized via statute. This review should include (but not limited to) the following provisions that allow the Department to require an open-ended universe of information:

- NR 439.03(1): Allows the DNR to require “such other information as may be necessary” from sources.
- NR 439.04(1)(d): Requires sources to maintain “any other records relating to the emission of air contaminants.”
- NR 439.05(1): Requires sources to provide DNR access to “information” in addition to records.
- NR 439.055(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.”

**V. DNR must consolidate reporting requirements found within NR 439.03.**

Current reporting requirements found in NR 439 go far beyond what is required under federal code. Existing reporting requirements include (but are not limited to) the following:

- Emissions reports
- Quarterly excess emissions reports

- Annual compliance reports
- Semi-annual monitoring reports
- Reports specific to New Source Performance Standards (NSPS)
- Reports specific to Maximum Achievable Control Technology (MACT)
- Reporting of fuel sampling results
- Next Business Day Deviation Reporting Requirements

DNR must carefully review these existing reporting requirements, and eliminate or consolidate any reports that are not needed to meet federal EPA requirements, as required by Wisconsin law. Excess reporting leads to unnecessary duplication of workload and added costs for regulated entities. Moreover, eliminating these excess reporting requirements would ensure the Department is only using the reports for purposes explicitly authorized by state law.

**VI. DNR must modify and clarify the Next Business Day Deviation Reporting Requirements found within the administrative code (NR 439.03).**

In addition to withdrawing the Next Business Day Deviation Guidance, the applicable section of code itself must be revised. It is confusing, contradictory, and goes far beyond what is required by federal law. Moreover, even Department staff has acknowledged that the “basis for the differing requirements (next business day reporting in state code, once every 6 month reporting in federal rule) is not clear” [see *December 16, 2010 memo from Bill Baumann – AM/7 to Air Management Compliance Staff*].

Within the current code, NR 439.03(4)(a) requires reporting the next business day after the onset, malfunction or other unscheduled event which causes, or may cause an exceedance of an emission limitation, with certain exceptions. In addition, NR 439.03(4)(c) also requires next business day reporting for “any deviation” from operation permit requirements. NR 439.03(5) requires operators of continuous monitoring systems or monitoring devices to report the next business day after any malfunction that is anticipated to continue more than one week.

First, as noted previously, any applicable federal reporting requirements should supersede any NR 439 reporting requirements. This section goes far beyond what is required under federal law.

Second, as a practical matter, this section of the code is incredibly confusing. For example, under its guidance, the DNR has taken the position that problems with monitors are subject to the next day business requirements contained in other provisions of NR 439.03(4)(a). This essentially renders NR 439.03(5) meaningless, since it is specific to monitoring. This confusion and lack of clarity is another reason the DNR should defer to federal standards.

Third, DNR should simply not require next business day reporting for all permit deviations. Permits contained many detailed conditions, many of which would not cause a release of emissions if there was a deviation. For such deviations, there is not a need to require next business day reporting. Next business day reporting should focus on instances in which there is an actual release of emissions to the environment. For deviations that have no environmental impact, there is no need for next day reporting, and reporting could be submitted as part of a subsequent report.

In summary, this section of code should be rewritten to make it no more restrictive than required under federal law.

**VII. Language should be added to incorporate the EPA’s “credible evidence rule” into NR 439.**

The EPA allows the use of “credible evidence” for a source to demonstrate compliance with a relevant section of the federal code. Unfortunately, no such provision exists in the current NR 439.

WMC urges DNR to add language clarifying that a permitted source can use information consistent with the EPA’s “credible evidence rule” to demonstrate compliance with NR 439 permitting requirements. This should include allowing a source to use testing to show compliance using a wider range of parametric operating variables than defined in a permit or stack test. Such “after the fact” demonstrations should be explicitly allowed by the rule.

**VIII. DNR should consider revisions to grant automatic plan approvals if statutory requirements are met.**

Currently, NR 439.07(3) requires the DNR to respond to the source owner “within 10 business days of receipt” of a testing plan. However, WMC is aware of multiple regulated sources that indicated that the DNR routinely does not respond within the 10 business days required by the current administrative code.

The Department should consider revising this section to grant automatic approval of a testing plan after 10 business days if the source does not receive a response. This would ensure that sources could continue to operate with a valid testing plan.

**IX. DNR should utilize the EPA’s definition of “annual” within NR 439.02.**

Section NR 439.02 provides definitions for this chapter of administrative code. WMC encourages the Department to consider adding a definition of “annual” that is consistent with EPA requirements. As an example, the DNR should consider adding the following definition:

““Annual” means occurring once per year, not to exceed 13 months after the previous action or task, unless a specific due date has been determined.”

Such a definition would be consistent with EPA’s use of the term “annual” within the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations, due dates for annual and semi-annual report submittals, as well as EPA’s (and the DNR’s) use of annual training requirements under Resource Conservation and Recovery Act (RCRA) regulations. This proposed definition is also more consistent with annual requirements to calibrate radiation survey meters from the Nuclear Regulatory Commission (NRC). The NRC defines “annually” to mean “either (1) at intervals not to exceed 1 year or (2) once per year, at about the same time each year (plus or minus 1 month).”

The reason for this suggestion is that the DNR has enforced a definition of “annual” that is inconsistent with the EPA’s federal definition. Under the current administrative code, the DNR has sometimes interpreted an “annual” requirement to mean that a compliance action must occur within 365 days of a previous compliance action. For example, under this interpretation, an

inspection that occurred on November 12 of one year could not occur on November 17 of the next year, since more than 365 days had elapsed. Such an interpretation is unnecessarily restrictive and also inconsistent with multiple definitions found in the federal code.

Thus, WMC urges the DNR to consider the aforementioned definition of “annual” that is consistent with federal law.

**X. DNR should consider changes to calibration frequency of instruments to mirror manufacturer recommendations.**

Currently, NR 439.055(4) states the following:

“All instruments used for measuring source or air pollution control equipment operational variables shall be calibrated yearly or at a frequency based on good engineering practice as established by operational history, whichever is more frequent.”

WMC is aware of instances where the manufacturer recommendation regarding calibration frequency is a period of several years. However, the current administrative code requires calibration frequency on an annual basis. This adds costs to the source and additional environmental impacts from unnecessary annual calibrations.

Thus, WMC encourages the Department to consider revising the code to allow sources to calibrate equipment in accordance with manufacturer recommendations, even if that is longer than an annual basis.

**XI. DNR should carefully examine the rule to ease compliance burdens for the regulated community.**

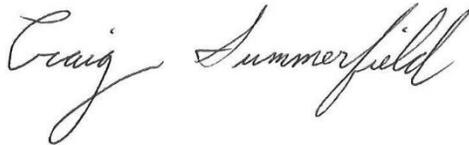
Finally, the Department should thoroughly review NR 439 to incorporate revisions to ease reporting burdens for the regulated community to the maximum extent practicable. Such candidates for revision include, but are not limited to, the following:

- NR 439.01(2): Provides that “permits or orders may contain additional requirements.” Permits should not be a mechanism to create new recordkeeping, reporting, or testing obligations beyond what is explicitly authorized by statute.
- NR 439.07(4): Requires sources to notify the Department of a modification to a test plan at least five business days prior to the test. The Department should consider inclusion of a phrase such as “if practicable” or “if possible” for sources in this section, to account for unforeseen mitigating circumstances.
- NR 439.03(b): Provides that “a summary of the monitoring results” may be submitted to the Department. However, the required contents of that summary are largely undefined in the code.
- NR 439.03: Refers to reporting requirements for sources. If the Department is considering incorporating references to electronic reporting in this section (or anywhere in the rule) such references should make clear that electronic reporting is *optional*, not *mandatory*, for sources.

- NR 439.05: Prohibits a source from denying access to records requested by the Department. Such Department access to records should be limited to those records required to be kept by a permit, and access should be limited to the business hours of a source.
- NR 439.055(6): Refers to additional requirements that can be imposed by the DNR following “consultation with the owner or operator of the facility.” Such requirements should be *agreed upon* by the facility; the source should not simply *consulted*.
- NR 439.095(4): Refers to monitoring system malfunctions, and notes “the department may grant a temporary exemption” in the event of a monitor malfunction. This section should be adjusted to be self-implementing. In other words, in the event of a temporary monitor system malfunction, an exemption is presumed and can be demonstrated by a source “after the fact.”
- NR 439.11(1): Requires sources to update a malfunction prevention and abatement plan, regardless of whether or not anything has changed since the last update. The Department should consider adding “as applicable” or “if necessary” to this section.

Thank you for the opportunity to provide comments on the planned rewrite of NR 439. WMC looks forward to continuing to collaborate with the Department on changes to this important rule. In the meantime, please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Craig Summerfield".

Craig Summerfield  
Director of Environmental & Energy Policy

*Enclosure – “WMC Comments on Next Business Day Deviation Reporting – 2021.3.3”*