

(AR-18J)

**November 27, 2001**

Eric Uram  
Midwest Associate Representative  
Sierra Club Midwest Office  
214 North Henry Street, Suite 203  
Madison, Wisconsin 53703

Dear Mr. Uram:

Thank you for your March 12, 2001, letter regarding the Sierra Club Midwest Office's comments on Wisconsin's Title V operating permit program. Your comments were submitted in response to the United States Environmental Protection Agency's (USEPA's) Notice of Comment Period on operating permit program deficiencies, published in the Federal Register on December 11, 2000. Pursuant to the settlement agreement discussed in that notice, USEPA will publish in the Federal Register notices of program deficiencies for individual operating permit programs, based on the issues raised that USEPA agrees are deficiencies, and will also respond by letter to other concerns that USEPA does not agree are deficiencies.

We reviewed the issues that you raised in your March 12, 2001, letter and determined that these issues do not indicate any program deficiencies in Wisconsin's Title V operating permit program. USEPA's response to each of your program concerns is enclosed.

We appreciate your interest and efforts in ensuring that Wisconsin's Title V operating permit program meets all federal requirements. If you have any questions regarding our analysis, please contact Beth Valenziano at (312) 886-2703 or Susan Siepkowski at (312) 353-2654.

Sincerely yours,

/s/

Bharat Mathur, Director  
Air and Radiation Division

Enclosure

cc: Lloyd Eagan, Director  
Bureau of Air Management  
Wisconsin Department of Natural Resources

**Enclosure**  
**USEPA's Response to Sierra Club Midwest Office Comments on**  
**Wisconsin's Title V Operating Permit Program**

1. *Comment: Wisconsin has no means for generating funds. The minimum fee should insure that the cost of the program's implementation and enforcement is recovered through fees.*

Wisconsin's Title V fee authority is in section (s.) 285.69(2), Wisconsin Statutes (Wis. Stats.), and in s. Natural Resources (NR) 410.04, Wisconsin Administrative Code (Wis. Adm. Code). S. 285.69(2)(c), Wis. Stats., requires that operating permit program fees be appropriated for operating permit program activities, in accordance with 40 C.F.R. § 70.9. Wisconsin's original January 1994 program submittal contained the requisite fee demonstration and Wisconsin's fee met the presumptive minimum. Since USEPA's interim approval of Wisconsin's program, Wisconsin has made changes to its program and has submitted those changes to USEPA for approval. USEPA is currently reviewing those changes and will act on them in a subsequent action.

2. *Comment: Many permits reviewed include what could be perceived as a blanket exemption from compliance during malfunction, upset, startup, and shutdown by not including language specific to these situations. What was included, a malfunction prevention and abatement plan, may not allow for Notice or Finding of Violation exempting the facility from compliance during those situations. Permits only allow for violations to occur during normal operating conditions.*

Based on a review of Wisconsin's statutory and regulatory authority, the permits reviewed by the commenter, and WDNR's response to this comment, USEPA finds no basis to conclude that Wisconsin's permits include a blanket exemption from compliance during malfunction, upset, startup, and shutdown. In response to the commenter's concerns, WDNR e-mailed the following statement to USEPA on June 7, 2001:

[WDNR] has the authority to regulate emissions during all periods of operation, including during malfunctions and during startup/shutdown. In general, all requirements in an operation permit must be met at all times. If the permit is silent with respect to emissions during startup/shutdown and malfunctions, the emission limits and other requirements in the permit must be met at all times. Wisconsin's air pollution statutes and rules and WDNR's operation permits do not allow for [blanket exemptions] or excuse violations

during malfunctions, startup or shutdown. While WDNR has the authority to approve emissions in excess of emission limits in certain circumstances, this [enforcement discretion] authority is exercised sparingly and each situation is addressed on a case by case basis. There is no blanket exemption from compliance during periods of malfunction or startup/shutdown.

EPA concurs with Wisconsin that Wisconsin's underlying statutes and regulations do not create a blanket exemption from compliance. S. 285.60(7), Wis. Stats., states: "A person who obtains a permit under this section shall comply with all terms and conditions of the permit." 40 C.F.R. § 70.6(a)(6)(i) and s. NR 407.09(1)(f)1., Wis. Adm. Code, require each permit to state that the permittee must comply with all conditions of the permit, and any permit noncompliance constitutes a violation of the Act, which is grounds for enforcement action. This provision is included in Part II, section L(2) of the permit. (Part II is included in every Title V permit and contains all of the general permit conditions that apply to all facilities.)

Further, the general conditions in Part II of the permit include additional provisions for malfunction, upset, startup, and shutdown, including:

Section D(1)(b)-(c), which deals with notifying the department of any malfunctions or unscheduled events which may cause any emission limitation to be exceeded, or deviations to occur. It specifies the timing of the notification, requires sources to report the cause and duration, and the corrective and prevention measures taken, in accordance with s. NR 439.03, Wis. Adm. Code.

Section D also deals with advance reporting of schedules for planned startup and shutdown of equipment and the measures to be taken to minimize the down time, in accordance with s. NR 439.03(6), Wis. Adm. Code. This section states: "Advance reporting does not relieve any person from the duty to comply with any applicable emission limitations".

Section F, which deals with the requirement to submit Malfunction Prevention and Abatement Plans for preventing, detecting, and correcting malfunctions or equipment failures which may cause any applicable emission limitation to be violated or which may cause air pollution, in accordance with s. NR 439.11, Wis.

Adm. Code.

And Section M(1)(b), which states that the permittee shall maintain records detailing all malfunctions which cause any applicable emission limitation to be exceeded, including logs to document the implementation of the plan required under s. NR 439.11, Wis. Adm. Code.

Some specific permit limits may state that they are applicable except for periods of startup, shutdown, or malfunction. However, such exceptions are based on the provisions of the underlying applicable requirement, and include other requirements which apply during periods of startup, shutdown, and malfunction. For example, a common limit for visible emissions is found in Wisconsin Electric Power Company's Oak Creek permit (Facility ID 241007690):

Opacity may not exceed 20% except during periods of normal startup and shutdown. Normal startup and shutdown shall be defined in the startup and shutdown plan. (S. NR 431.04(2), 436.03(2)(b))

The compliance demonstration for this limit is a continuous monitoring system (thus data is collected at all times), and excess emissions reporting requirements are for any 6 minute period during which the average opacity exceeds 20 percent except during periods of normal startup and shutdown. (s. NR 439.09(10)). The permit requires the source to report excess emissions during startup and shutdown and identify the cause of any malfunction and the measures taken to reduce excess emissions.

For all of these reasons, USEPA believes that Wisconsin's program does not provide for a blanket exemption from compliance during malfunction or upset. Any person may comment on WDNR's draft Part 70 permits and/or petition the Administrator to object to individual permits believed to contain unlawful exemptions.

3. *Comment: For maintenance conditions, generous allowances are written into permits, allowing for large increases in emissions for extended periods.*

USEPA looked at the two utility permits, Northern States Power Co. Bay Front, and Wisconsin Electric Power Oak Creek Station, the commenter mentioned in its letter, and did not find any terms or conditions providing for "maintenance allowances". The Title V permits do not create additional

provisions for startups, shutdowns, and malfunctions.

Part II D(2) of the permit states that advance reporting of planned startup and shutdown of equipment does not relieve any person from the duty to comply with any applicable emission limitations.

40 C.F.R. § 70.6(g) expressly prohibits "lack of preventative maintenance" as a defense. Therefore, EPA agrees that Title V does not provide authority to excuse exceedances resulting from "lack of preventative maintenance".

Furthermore, s. NR 439.11, Wis. Adm. Code, states that no owner or operator may fail to carry out any required malfunction and abatement plan. The malfunction and abatement plan requirements, S. NR 439.11, Wis. Adm. Code, also include maintenance provisions, as well as the time periods allowed for maintenance. The plan specifies the maximum intervals for inspection and routine maintenance of the air pollution control equipment, and a description of the activities and maximum intervals for routine maintenance and inspection of instrumentation installed and operated to monitor the air pollution control equipment as required under s. NR 439.055(1). S. NR 439.11(1)(e), Wis. Adm. Code, specifies that corrective procedures shall achieve and maintain compliance with the applicable emission limitation as expeditiously as possible but not longer than the time necessary to discontinue operation of the source consistent with safe operating practices.

S. NR 436.03(2)(b), Wis. Adm. Code, does provide that no person may cause, allow, or permit emissions in the ambient air in excess of the limits set in NR 400-499, Wisconsin's air pollution control rules, except when the emissions are temporary and due to scheduled maintenance, startup or shutdown carried out in a plan and schedule approved by the department. These provisions require a case by case approval from WDNR.

4. *Comment: Some permits reviewed excused facilities from emission reporting requirements and substituted those requirements with a recordkeeping process (amounts and dates of fuels used) that did not include any stack monitoring or emission analysis.*

Part 70 requires monitoring necessary to assure compliance, which can include parametric monitoring in lieu of or supplemental to stack testing. In the two utility permits the commenter referenced, there were limits which had

parametric monitoring rather than stack testing. These instances were justified in the permit, as discussed below. WDNR has policies (outlined in Wisconsin's Air Permit Compliance Demonstration Guidance 3/31/94), regarding what type of testing is required for various circumstances. In addition, the monitoring may also be affected by the provisions in the underlying applicable requirements, such as New Source Review, New Source Performance Standards, Maximum Achievable Control Technology, etc.

For example, in the Northern States Power Co. Bay Front permit (Facility ID 802033320) there is a note which states: "The permittee is exempt from the biennial opacity compliance test required by NR 439.075(3)(b), provided they operate a continuous opacity monitor that meets the performance specification requirements of NR 439.09, pursuant to NR 439.075 (4)(a)2." In this case, continuous data collection is preferred over a biennial test.

An example of data to emissions analysis can also be found in a note in the Bay Front permit which states, "The continuous carbon dioxide and stack flow rate monitors required by [specific permit citation] are used to convert sulfur dioxide continuous emission monitoring data to units of the applicable emission limitations."

Wisconsin's compliance demonstration guidance states in part:

Control device and process parameter monitoring can be used to demonstrate continuous compliance when the parameters being measured have a correlation established with actual emissions. The best way to establish this correlation is through simultaneous stack testing and parameter measurements. Data from stack tests previously conducted may be used. Where stack testing is not practical for establishing correlations, other methods can be used. These include calculation of emissions using raw material specifications and approved emission factors.

Methods chosen to establish a correlation and the frequency of parameter monitoring will depend first on the underlying standard on which the regulation is based, but also on the variability of emissions and parameters, and how close emissions levels are to emission limits. A source with highly variable emissions and parameters will need to do more work to establish a correlation

and monitor parameters more frequently than a source whose emissions and parameters are stable and which operates at less than 50% of the emission limit.

USEPA believes that this guidance, as applied in the permit, is reasonable.

5. *Comment: permits limit the use of credible evidence during a violation by permit language stating "compliance is determined by..."*

Although Wisconsin permits sometimes used this language at the time the two permits referenced were issued (December 1997 and June 1998), WDNR does not interpret such language to limit the use of credible evidence. In many cases, the "compliance is determined by" statement is in the underlying federal standard. In the fall of 1998, USEPA notified WDNR that such language may be misconstrued to limit the use of credible evidence. WDNR agreed to no longer use such language in permits, and as an additional precaution WDNR added the following language to the compliance demonstration description in every permit:

Notwithstanding the compliance determination methods which the owner or operator of a source is authorized to use under ch. NR 439, Wis. Adm. Code, the Department may use any relevant information or appropriate method to determine a source's compliance with applicable emission limitations.

Because this language is now part of WDNR's boilerplate permit format, permits issued before WDNR added this provision will include the clarifying language upon permit renewal. In addition, although the permit language speaks specifically to the state's ability to use any credible evidence, it does not preclude any other person from using credible evidence, including USEPA, sources, and the public.

6. *Comment: permits include unenforceable conditions as a practical matter.*

USEPA was unable to verify that Wisconsin has a program and/or regulatory deficiency based on the commenter's general claim that permit conditions are unenforceable as a practical matter.

Wisconsin's Title V rules are substantially equivalent to 40

C.F.R. § 70.6(c)(1) which requires that permits contain terms to assure compliance with permit terms and conditions. [For a more detailed discussion of the authority for part 70's monitoring requirements, see USEPA's November 16, 2000 response to the Wyoming Outdoor Council's Pacificorp permit petition.]

In our review of WDNR's permits, USEPA has not found any significant concerns regarding the enforceability of WDNR's permit conditions. USEPA considers practical enforceability an important component in its review of Title V permits, and will continue to evaluate permit enforceability in future permit reviews to ensure that WDNR's Title V permits meet the part 70 requirements. USEPA also suggests that the public take advantage of individual permits' public comment periods, and raise any specific enforceability concerns with the permitting authority at that time. The draft permit public comment period is an important component of the permit issuance process, and is an ideal time for the permitting authority to address any enforceability concerns and fine tune any permit language if necessary.

Wisconsin's Air Permit Compliance Demonstration Guidance from March 1994 discusses the applicability of CAM, NSPS, MACT, the draft periodic monitoring guidance, and how and when periodic monitoring and testing must be performed. This guidance also contains procedures to ensure that permit limits are practically enforceable.

In addition, Wisconsin's Title V permits are set up in a format such that for every applicable requirement there is a corresponding compliance demonstration and a corresponding monitoring, recordkeeping and reporting requirement. This format helps to ensure practical enforceability of permit terms.

7. *Comment: Wisconsin rule NR 407.03 gives blanket exemptions to entire source categories that are not clearly authorized through part 70.*

The federal operating permit program defines what sources are subject to the program. See 40 C.F.R. § 70.3. In contrast, Wisconsin's operating permit program requires all sources to get an operating permit unless specifically exempt. Wisconsin's operating permit program is broader in scope than part 70, and includes synthetic minor sources and true minor sources. The exemptions are only intended to exempt minor sources that are not otherwise subject to part 70.

USEPA identified the exemptions in s. NR 407.03(1)(d), (g), (h), (o), (s), (sm), and (t), Wis. Adm. Code, as interim approval issues because they did not adequately ensure that the exemptions cover only non-part 70 sources. This was primarily a prohibitory rule recordkeeping issue. See USEPA's final interim approval of Wisconsin's program, published March 6, 1995 (60 Fed. Reg. 12128-12137). USEPA reviewed changes to these exemptions as part of the Agency's action on Wisconsin's corrective program submittal finding that Wisconsin had corrected the exemptions identified as interim approval issues. See 66 Fed. Reg. 54734, October 30, 2001.

WDNR demonstrated to USEPA in its initial operating permit program submittal that the other exemptions provided in NR 407.03 do not exempt part 70 sources from the State's part 70 program, except for those USEPA specifically identified as interim approval issues. Therefore, EPA disagrees with this comment.

Wisconsin submitted some new and revised exemptions as part of its March 28, 2001 program package to USEPA. USEPA will review and act on these additional State program changes in a separate rulemaking action. Although USEPA has not yet completed its review, WDNR did submit documentation demonstrating that all part 70 sources are required to obtain a permit, and the Wisconsin Attorney General certified this in the opinion dated January 5, 2001.