



## Wisconsin Manufacturers & Commerce

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July 5, 2006

Kristin Hart  
Department of Natural Resources  
3911 Fish Hatchery Road  
Madison, WI 53711

Dear Ms. Hart,

Thank you for the opportunity to submit written comments with respect to the Department of Natural Resources (DNR) latest iteration of the draft Registration Operation Permit (ROP) document.

Wisconsin Manufacturers & Commerce (WMC) is a business trade organization with more than 4,300 members statewide in the manufacturing, energy, commercial and service sectors. Roughly one-quarter of the private sector employees in Wisconsin are employed by WMC members.

The comments which follow reflect WMC's serious concerns regarding the draft ROP template, as well as the Department's apparent willingness to significantly deviate from an agreed-upon ROP structure. Without serious revisions to the draft ROP as outlined below, this new permitting tool will fail to reach its potential for meaningful streamlining. As such, WMC cannot support implementation of the draft permit, nor can we characterize it as achieving permit streamlining goals consistent with 2003 Act 118.

Moreover, WMC conditionally supported the underlying rule allowing for registration permits for smaller sources. We expected an opportunity to discuss broadening this important permitting tool to larger sources, and we, of course, expected DNR to advance this rule to EPA for approval with key provisions intact. Since that rule was adopted, DNR unilaterally deleted key provisions from its EPA submittal, apparently made commitments to EPA to impose modeling, and otherwise made it clear the Department no longer intends to implement that registration permit program adopted by the Natural Resources Board and approved by the Legislature.

Beyond a reversal on its commitments to WMC and other industry representatives that negotiated the final rule in good faith, we believe these actions by DNR outside of the formal administrative rules process violate the letter and spirit of chapters 227 and 285 rulemaking procedures. Accordingly, WMC believes these actions, including the subject draft permit, are inconsistent with the formally adopted rule. We request DNR

change the permit to reflect this rule and request provisions unilaterally deleted by DNR be reinstated with EPA. In the alternative, we believe DNR must undertake revisions to the underlying rule that addresses the key issues at hand, including provisions deleted in its EPA submittal and the requirement for modeling that were not contemplated in the rule. This process would assure compliance with relevant statutory administrative rule procedures even if the resulting program falls short of our expectations.

### **Background: The need for air permit reforms**

Before citing specific concerns with the draft ROP, it is important to place the permit streamlining effort into its proper context. In response to overwhelming interest among the Legislature and Governor to enact legislation aimed at growing Wisconsin's economy, WMC undertook a significant research effort to determine what was responsible for continuing job losses, especially in the manufacturing sector.

The research involved direct surveys and responses from business leaders in Wisconsin. The overwhelming response indicated that a poor regulatory climate was not merely a perception, but a fact which contributed to missed opportunities for economic growth and development. Specifically, the study found:

- The inability to obtain timely permits was the single most significant regulatory impediment facing companies wishing to expand or locate in Wisconsin. Specific examples revealed business opportunities lost to other states because of Wisconsin's inability to provide regulatory approvals more quickly.
- Businesses are more concerned with the administration of the regulatory system than with the environmental standards themselves.
- The expanding scope of "Wisconsin Only" rules puts our state at an economic disadvantage in an increasingly competitive marketplace.
- Agency staff who write permits and develop rules were not aware of, nor concerned about the business implications of their actions.

The listening sessions and surveys were rife with stories of companies describing competitive disadvantages due to Wisconsin's regulatory policies and procedures. Participating companies verified with specific examples how the state's regulatory system makes the cost of doing business here more expensive, and circumstances that generally put Wisconsin facilities at a cost disadvantage.

The disadvantage caused by our regulatory climate clearly made Wisconsin a less-attractive place to invest capital than competitors in other states. However, the competitive disadvantage also existed between Wisconsin and out-of-state facilities owned by the same company. In that regard, it was notable how often Wisconsin lost the competition for capital investment between facilities within the same national or multi-national company.

The Legislature and Governor agreed that fundamental changes to the manner in which Wisconsin administers environmental permit programs were in order. The desire to reform Wisconsin's regulatory climate culminated in 2003 Act 118, the Job Creation Act. This law mandated significant reforms to Chapter 285 air permitting and Chapter 30 navigable water permitting, as well as important changes to the manner in which administrative rules are created under the guidelines set forth in Chapter 227.

The Chapter 285 air permit reforms contemplated a number of important permitting tools, including registration permits, general permits, consolidated permits, facility-wide permits and construction permit waivers. **Unfortunately, none of these newly created air permitting tools are available for facilities in Wisconsin.** The Air Bureau's response to the Legislature's landmark regulatory reform mandate has been a series of belated half-steps and half-measures. This is unacceptable.

**I. The draft ROP is significantly different than the negotiated and adopted rule.**

After the Legislature mandated DNR to pursue the ROP as a new permitting tool, WMC worked closely with the agency to develop the rules governing the ROP program. We and our members invested significant time and resources in a series of negotiations and stakeholder meetings leading to a proposed rule that was approved by the Natural Resources Board and the Legislature.

The general theme of the reform was creation of a ROP available to sources with low actual emissions as an "off the shelf" permit that could be applied for online. Having met the criteria in the rule, sources could obtain coverage under the ROP in 15 days **without the need to conduct air dispersion modeling**. Perhaps most meaningful, the negotiated ROP would allow sources to make changes at their facility to meet market demand without the substantial burden of going through the construction permit process or conducting air dispersion modeling, as long as they stayed below the 25 ton-per-year (TPY) emission cap.

**The ability to operate under the ROP without seeking construction permits or doing additional air modeling is the most meaningful aspect of the proposal.** This provision is truly the essence of what sets the ROP apart from the costly and cumbersome traditional permit process identified above as a barrier to economic growth. Unfortunately, the Department has proposed to eviscerate this important provision, and eliminate the envisioned permit flexibility for many sources with particulate emissions.

Specifically, the Department is proposing to require sources with particulate matter (PM) emissions of 5 TPY or more to conduct air dispersion modeling prior to coverage under the ROP. This provision is contrary to the rule that was agreed-upon by stakeholders, the Natural Resources Board, and the Legislature. It is also wholly inconsistent with a meaningful streamlining tool.

The draft permit further diminishes the usefulness of the ROP by requiring many sources with PM emissions greater than 5 TPY to also model any changes at their facility while covered under the ROP. That is, if a PM source in most "industrialized" counties model emissions above 30  $\mu\text{g}/\text{m}^3$  in order to gain coverage under the ROP, then that source will also be required to model any process changes at their facility. Thus, the ability to make process changes to meet market demand without having to jump through regulatory hoops is absent for these facilities.

These requirements take the ROP back to the command-and-control style of permitting, and will result in costly delays and cumbersome regulatory burdens. **In short, the proposed changes present unacceptable and avoidable regulatory burdens that severely detract from the ability of the ROP to provide relief to the regulated community.**

Although we disagree with any modeling threshold in the ROP, we certainly cannot understand why the Department wishes to require sources to model emissions at 5 TPY, while the proposed exemption rule would exempt sources from permitting altogether at 10 TPY. These are the types of counterintuitive and inconsistent policies that cause Wisconsin to stand out as a regulatory backwater.

Also problematic is that these and other critical changes to the adopted registration permit program were the result of negotiations with EPA outside of Wisconsin's formal rulemaking process. For example, WMC expected DNR to advance the underlying registration permit rule to EPA for approval with key provisions intact. On July 28, 2005, DNR did submit to EPA in its entirety those rule changes pertaining to registration and general permits as revisions to Wisconsin's State Implementation Plan (SIP). However, in a Nov. 14, 2005, letter to EPA, DNR's Lloyd Eagan withdrew key provisions as part of the SIP revision, including provisions

of utmost import to industry such as a “safe harbor” for applicants pending DNR review and for those undertaking due diligence on the applicability of other requirements.. The fact those provisions remain in the state rule is absolutely meaningless as they are not part of the State’s federally approved program, putting businesses that rely upon them at risk of violating the federal Clean Air Act. This created a legal trap known at the time by only DNR, EPA and possibly those environmental groups objecting to the safe harbors. Those businesses relying upon the promulgated and published rules were out of the loop and out of luck.

It appears that the Nov. 14, 2005, DNR SIP submittal to EPA that fundamentally changed the registration permit program was not even part of EPA’s official docket. This request to remove key provisions was referenced in EPA’s final rule, which resulted in our recent inquiry as to its genesis. Once in hand, it was clear the Nov. 14 letter was a DNR SIP revision request that changed the underlying regulatory obligations for Wisconsin businesses. Another noteworthy comment by EPA in its final rule publication was that “WDNR is requiring the applicant to perform an air dispersion modeling analysis as part of its application for coverage.” 71 FR 5980 (Feb. 6, 2006). We reasonably surmise, then, that the requirement at issue with the draft permit was also part of DNR and EPA negotiations.

This “back-channeling” between DNR and EPA was specifically addressed in 2003 Wis. Act 118 in that provision that required any SIP revision to be subject to public and legislative review. (See Wis. Stat. §285.14(2).) Moreover, these changes are fundamental revisions to that rule adopted by the Natural Resources Board and approved by the Legislature. So beyond a reversal on its commitments to WMC and other industry representatives that negotiated the final rule in good faith, we believe the SIP withdrawals are inappropriate because they essentially invalidate the meaning of adopted administrative rules. Because these actions were done by DNR outside of the formal administrative rules process, they violate the letter and spirit of chapters 227 and 285 rulemaking procedures.

Accordingly, WMC believes these actions, including the subject draft permit, are inconsistent with the formally adopted rule. We request DNR change the permit to reflect the underlying rule and request provisions unilaterally deleted by DNR be reinstated with EPA. In the alternative, we believe DNR must undertake revisions to the underlying rule that addresses the key issues at hand, including provisions deleted in its EPA submittal and the requirement for modeling that were not contemplated in the rule. This process would assure compliance with relevant statutory administrative rule procedures even if the resulting program falls short of our expectations.

Finally, one has to ask whether there is value in investing time in future DNR stakeholder processes when the agency has shown a willingness, by example, to unravel a negotiated agreement after it was approved by their own Board and the Legislature. If the modeling requirements proposed in the draft ROP remain in the final permit, we believe the agency risks losing a considerable amount of trust and credibility with the regulated community.

## **II. The proposed modeling requirements are unnecessary.**

The basis for prescriptive and cumbersome modeling requirements proposed in the draft ROP are undocumented, and the 5 TPY modeling threshold is unfounded. We question why the Department has not made available for inspection or critique its own modeling analysis used to justify the proposed modeling requirements.

When the original ROP template was considered last fall, the Department conducted an environmental analysis showing that the ROP would be protective of air quality. The September 28, 2005 "Analysis and Preliminary Determination" for the ROP states:

*It has been determined that emissions from a facility covered under a ROP will not result in an exceedance of the ozone or fine particulate ambient air quality standard. (Page 7)*

The analysis confirms that the low emission rates and stack requirements serve as the basis for the determination. The Department's own analysis also concluded that ROP programs in other states allow sources to emit twice as much (50 TPY) as Wisconsin's draft ROP, without the stack requirements in our rule. Thus, the DNR analysis concluded *"Wisconsin's Type A ROP is more protective of the air quality than the registration permits of the other states review."*

The DNR's own analysis clearly indicates that air quality is protected without the punitive modeling requirements proposed in the draft ROP. The undocumented hypothetical modeling scenario upon which the Department is apparently basing the modeling requirement does not justify crippling the usefulness of this permitting tool. Those requirements will only succeed in layering additional costs and time-consuming burdens into the permit, making it substantially less-attractive without achieving an environmental benefit.

Also relevant is the fact DNR's rationale is based on hypothetical violations to a secondary PM standard (TSP) that EPA revoked decades ago. In other words, there are no health concerns raised, only a potential dust problem based upon a Wisconsin-only standard.

It is extremely frustrating that other states have adopted ROP programs that are substantially more useful as that proposed in Wisconsin, with fewer permit requirements, and have found them to be protective of air quality. **Yet even after the Governor and Legislature statutorily directed the DNR to adopt the ROP as a meaningful permitting tool, the agency insists on layering cumbersome command-and-control requirements in the ROP.** Why must Wisconsin continue to lag behind other states in terms of offering a competitive regulatory climate?

We are aware that the Department has cited §285.63(1)(b) as the basis to inflict additional modeling requirements on facilities in the draft ROP. However, the determination required under that statute was met when the DNR issued the September 28, 2005 air quality analysis. Further, there is absolutely nothing in the statute that requires the Department to make their determination solely on hypothetical air dispersion modeling.

In fact, the modeling requirement is contrary to a finding in the February, 2004 Legislative Audit Bureau evaluation of the air management program which found that too much time was being spent by staff on modeling for small sources. The audit specifically recommended reducing staff time spent on modeling, including eliminating the modeling requirement for small sources. We do not understand why, when presented with a golden opportunity to implement this recommendation from the audit, the Department is insisting upon snaring small facilities in the modeling spider web.

We steadfastly maintain that modeling requirements are both unnecessary and unwarranted with respect to the ROP. As discussed above, the modeling requirements were not contemplated in the rule that was approved by the Natural Resources Board, nor were they contemplated in the rule presented to the Legislature for approval. We question whether the Department has the legal authority to impose a permit condition of general application that is not required by the NR 407.105 rules.

Because this regulatory requirement is not a part of the NR 407 registration permit rule, and because it would have such a profound impact on sources seeking coverage under the ROP, the Department should promulgate the modeling requirements as a separate rule before seeking to inflict the regulatory burden on Wisconsin businesses. Regulatory requirements of this gravity should be run through the Chapter 227 rulemaking process to give the public and policymakers adequate opportunity for review.

### **III. Unjustified recordkeeping and reporting requirements defeat the intent of streamlining.**

The draft ROP contains a requirement in Section E. 9. forcing sources to keep a record of any changes at the facility, and a statement that the facility will continue to qualify for the ROP after the changes are made. Section F. 5. then requires sources to report this information to the Department on an annual basis. Again, this represents a level of unnecessary paperwork that is consistent with the costly and undesirable command-and-control culture of permit micromanaging. Forcing sources to document changes that do not change their compliance status is unwarranted, and inconsistent with streamlined permitting. Contrary to the approach in the draft ROP, permit streamlining should look for ways to reduce paperwork.

It is worth noting that this “streamlined” ROP contains, as DNR staff characterized it at the June 21, 2006 public hearing, the same recordkeeping and reporting requirements as traditional permits. Unfortunately, we agree with this assessment, and believe it is indicative of the fact that the draft permit does not provide streamlining of administrative/paperwork requirements. For example, the same prescriptive and cumbersome reporting requirements under NR 438.04, which apply to major sources of air emissions, also apply to low-emitting sources covered under the proposed ROP. Further, the substantial recordkeeping requirements found in NR 439 applicable to major sources apply equally to the low emission sources covered under the draft ROP.

We believe that permit streamlining necessitates a distinction between the level of recordkeeping and reporting requirements between small sources and much larger sources exceeding the “major” threshold. We believe that smaller emission sources simply do not need to provide the same level of detail as the Department requires of a power plant or an oil refinery. Nor do we believe the Legislature or Governor intended that the Department include these burdensome administrative requirements in the ROP.

We also strongly object to the compliance certification requirement in the draft ROP, which again is the same compliance certification requirement found in traditional permits. Section F of the draft permit would require these small sources to, among other unnecessary and unwarranted requirements, identify “the compliance status of the source with respect to air pollution requirements in ch. 285, Wis. Stats., chs. NR 400 to 499, Wis. Adm. Code, and applicable federal air pollution requirements in the Clean Air Act (42 USC 7401 to 7671q) and 40 CFR Parts 50 to 97.”

In other words, the Department expects these small sources to identify how they have complied with every aspect of Wisconsin’s state air

pollution laws, hundreds of pages of administrative code, and thousands of pages of the Clean Air Act statutes and guidance. Worse yet, the draft permit further requires the source to certify to the completeness and accuracy of this report under oath, which exposes businesses to citizen lawsuits for unintentional paperwork violations. This substantial requirement is inconsistent with streamlined administrative requirements, and is not necessary for enforcement purposes.

#### **IV. The ROP will fail as a permitting tool as proposed in the draft permit.**

The modeling and administrative requirements in the draft ROP are sufficiently prescriptive and burdensome that there is very little distinction between the ROP and a traditional negotiated permit. Having polled many of WMC members (both large and small) on the draft ROP, responses overwhelmingly indicated that the ROP as proposed would be less useful and less attractive than the negotiated and approved ROP rule.

Indeed, the response was virtually unanimous that there is no incentive to cap emissions at 25 TPY under the ROP. That is, facilities would be better served to stick with traditional permits and emit at higher rates because the permit process is so similar. It is certainly ironic that the Department's proposed modeling requirements (purportedly to protect air quality) will serve as a disincentive for sources to limit emissions and participate in the ROP program.

In addition to the troubling new modeling requirements, we are also very concerned that the 10 page draft ROP proposed last fall has now morphed into a 24 page permit. We do not believe that increasing the length of the permit by 140% is taking our state in the right direction in terms of streamlining, or the overall goal of simplification. We hear consistently that the application forms for air permits in Wisconsin are significantly more lengthy and complicated than other states, and we believe that a 24 page permit does not fulfill the objective of being "simplified" or "off the shelf."

#### **VI. Conclusion.**

Thank you for the opportunity to provide these comments. We are certain that many management staff in the Air Bureau share these frustrations, and we appreciate that many DNR staff actually do support streamlining the permit process. For this reason, we believe there is hope for restoring the ROP as a useful tool if substantial changes are made.

Our concerns referenced above are by no means an exhaustive list of the unnecessary administrative burdens and unwarranted permit conditions. Unless fundamental changes are made to the draft ROP, including but not limited to removal of the unnecessary modeling requirements, and a significant scaling-back of administrative requirements, the ROP will fail to reach its potential as a permit streamlining tool. Based upon the feedback from our own members, the Department should not expect a large number of businesses to participate in the ROP program as drafted – there is simply very little incentive to do so.

Indeed, WMC cannot and will not support the ROP as drafted. Without serious changes that reflect the Legislature's intent when they passed Act 118, the ROP cannot be characterized as meaningful permit streamlining. If the draft permit does not receive fundamental changes to modeling, recordkeeping, monitoring, compliance certification and other administrative requirements, WMC will shift our focus to statutory changes to realize the promise of streamlining, consistent with programs in other states like Minnesota. We simply cannot catch-up to our competition in other states by taking baby steps.

Sincerely,

**Scott Manley**  
Environmental Policy Director