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Memorandum

To: Wisconsin Environmental Leaders

From: David Bender, Garvey McNeil & McGillivray, S.C.

Date: May 4, 2007

Re: DNR's Rulemaking Authority for Mercury

Many of you have asked about DNR's rulemaking authority for regulating mercury in light of the federal Clean Air Mercury Rule and 2003 Act 118's requirement to "be consistent" with certain federal laws. Claims by industry that DNR must adopt the lax, and likely illegal, federal Clean Air Mercury Rule ("CAMR") are without merit. In fact, Wisconsin law requires the DNR to adopt mercury rules based on health standards, which prohibits adoption of CAMR.

The Clean Air Mercury Rule

The Bush Administration repealed the EPA's prior determination that mercury from power plants should be regulated pursuant to Clean Air Act § 112—the hazardous air pollution provision. Instead, the Bush EPA proposed to regulate mercury emissions from power plants pursuant to the New Source Performance Standard ("NSPS")¹ provision in Clean Air Act § 111. The Bush EPA's rule, the "Clean Air Mercury Rule" or "CAMR," is therefore promulgated under the authority in § 111. *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Final Rule*, 70 Fed. Reg. 28606 (May 18,

¹ Contrary to its name, New Source Performance Standards also include standards of performance for existing sources. 42 U.S.C. § 7411(d).



2005).² This fact is important, as noted below, because it determines the statutory authority under which DNR must promulgate a state mercury rule and whether the DNR must adopt the federal rule.

The CAMR requires reduction of mercury from existing coal-fired power plants by instituting a national cap on mercury emissions and establishing a trading system for mercury credits. States are given an annual emission budget with the assumption that the states will provide credits to in-state sources for use in inter-state trading. Under CAMR, Wisconsin would receive a budget for 2010 through 2017 of 1,780 pounds of mercury annually. From 2018 forward, Wisconsin's budget would be 702 pounds annually. This program is optional for states. *See* 70 Fed. Reg. at 28621. States can either adopt the trading program set forth in CAMR, or enact another method to comply with its CAMR "budget"—including more stringent limits. *Id.*

It is important to note that, while CAMR includes technology-based mercury limits for new sources, the CAMR "cap and trade" program is promulgated pursuant to Clean Air Act § 111(d), the provision applicable to existing sources.

Whether to Adopt the Federal Trading Program

Wisconsin law requires that the DNR adopt rules "similar to" federal law when EPA promulgates rules "for new stationary sources... under section 111 of the federal clean air act..." Wis. Stat. § 285.27(1) (emphasis added). This requirement to be consistent does not apply when EPA promulgates rules for existing sources under Clean Air Act § 111, such as the CAMR.

Wisconsin law also provides that if EPA promulgates "an emission standard for hazardous air contaminant... under section 112 of the federal clean air act, the department shall promulgate by rule a similar standard..." Wis. Stat. § 285.27(2). This provision, however, only applies if EPA's standard is promulgated pursuant to Clean Air Act § 112, which is not the basis for the CAMR.

² Note that the federal-uniformity requirement in Wis. Stat. § 285.27(1)(a) applies to a "standard of performance for new stationary sources." However, CAA § 111 applies also to existing sources. *See* 42 U.S.C. § 7411(d) (standards of performance for existing sources). Therefore, the requirement to "true up" new source standards with the federal rule do not apply to the provisions of CAMR that regulate existing sources.

In other words, because CAMR is a trading program for existing sources, and is promulgated pursuant to § 111, rather than § 112 of the Clean Air Act, DNR is not required to promulgate a rule similar to CAMR.³

DNR Is Required To Adopt Health and Welfare-Based Mercury Limits
Pursuant to § 285.27(2)(b)

Wis. Stat. § 285.11(9) requires DNR to “[p]repare and adopt minimum standards for the emission of mercury compounds or metallic mercury into the air, consistent with s. 285.27(2)(b).” Section 285.27(2)(b), in turn, provides:

If an emission standard for a hazardous air contaminant is not promulgated under section 112 of the federal clean air act, the department may promulgate an emission standard for the hazardous air contaminant if the department finds the standard is needed to provide adequate protection for public health or welfare. The department may not make this finding for a hazardous air contaminant unless the finding is supported with written documentation that includes all of the following:

1. A public health risk assessment that characterizes the types of stationary sources in this state that are known to emit the hazardous air contaminant and the population groups that are potentially at risk from the emissions.
2. An analysis showing that members of population groups are subjected to levels of the hazardous air contaminant that are above recognized environmental health standards or will be subjected to those levels if the department fails to promulgate the proposed emission standard for the hazardous air contaminant.
3. An evaluation of options for managing the risks caused by the hazardous air contaminant considering risks, costs, economic impacts, feasibility, energy, safety, and other relevant factors, and a finding that the chosen compliance

³ It should also be noted that Wis. Stat. § 285.27 only requires DNR to adopt rules similar to federal law if federal law establishes a “standard of performance” or an “emission standard.” CAMR is neither because it does not require a minimal emission performance by a power plant, nor is it “a requirement which limits the quantity, rate or concentration of emissions of air contaminants on a continuous basis.” Wis. Stat. § 285.01(16). Rather, CAMR is a trading program that allows virtually unlimited emissions so long as the source holds credits for the emissions. Therefore, the requirements in § 285.27 to adopt similar standards does not apply, regardless of whether the EPA’s CAMR trading program was promulgated for new sources pursuant to § 111, or pursuant to § 112.

alternative reduces risks in the most cost-effective manner practicable.

4. A comparison of the emission standards for hazardous air contaminants in this state to hazardous air contaminant standards in Illinois, Indiana, Michigan, Minnesota, and Ohio.

Notably, by using the word “shall,” Wis. Stat. § 285.11(9) requires DNR to promulgate mercury rules, pursuant to Wis. Stat. § 285.27(2)(b), based on the amount of reduction necessary to “provide adequate protection for public health or welfare.” This effectively prohibits DNR from adopting CAMR (Options 3 and 4 in DNR’s April 10, 2007 Notice of Hearing), which not a rule promulgated pursuant to Wis. Stat. § 285.27(2)(b), and which is not a health-based standard designed to “provide adequate protection for public health or welfare.”⁴ DNR’s only option is to establish mercury limits based what is necessary to provide “adequate protection for public health or welfare.” Wis. Stat. §§285.11(9), 285.27(2)(b).

⁴ Courts have interpreted the delegation of authority to promulgate health-based air pollution standards to require the standards be set based on health, and not cost considerations. *Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457, 466-71 (2001). The CAMR trading program, however, was explicitly based on cost considerations.