



Wisconsin Utilities Association  
44 East Mifflin Street, Suite 202

**To: Robert Eckdale, DNR Bureau of Air Management**

**From: Wisconsin Utilities Association, Dairyland Power Cooperative**

**Re: Supplemental Comments on NR 446 Procedural Concerns**

**Date: June 11, 2007**

On behalf of Wisconsin's investor-owned gas and electric utilities and Dairyland Power Cooperative (DPC), the Wisconsin Utilities Association (WUA) and DPC submit the following supplemental comments to point out several procedural deficiencies in the promulgation of the draft revisions to NR 446 (Order AM-32-05) and reserve the right of WUA members and DPC to raise them in subsequent proceedings:

1. The inclusion of the 90% mercury emission reduction requirement violates the statutory requirement for state and federal consistency with regard to the promulgation of a mercury emission standard. As a consequence, proposed Order AM-32-05 exceeds the department's statutory rulemaking authority and is inconsistent with the Scope Statement prepared by the department. Likewise, the following provisions in the proposed rule are inconsistent with, or are otherwise more stringent than, the emission standards associated with the federal CAMR rule:
  - The failure to allow inter-state or intra-state emission trading;
  - The sun setting of emission allowances granted to retired units;
  - The failure to allow banking of mercury reductions;
  - The creation of an unworkable and overly complex output-based allocation methodology;
  - The retirement of any unused new unit set-aside allocations that could be crucial to compliance of existing generation.
2. The statute authorizing the department to promulgate an emission standard for mercury does not require a specific percent emission reduction. Rather, this statute directs the department to make a finding that a more stringent "standard is needed to provide adequate protection for public health or welfare" and, further, to make "a finding that the chosen compliance alternative reduces risks in the most cost-effective manner." Wis. Stat. § 285.27(2)(b) 3. Despite these requirements, the department included language in proposed Order AM-32-05 focusing on a 90% mercury emission reduction requirement without first making

- the statutorily required findings (supported by written documentation) that residual risks to public health exist after implementing CAMR and that a 90% reduction requirement is the most cost-effective compliance alternative to reduce those risks.
3. The department lacks authority to simply adopt the proposed mercury emission standards for existing sources. *See*, Wis. Stat. §§ 285.11(9) and 285.27(1). Rather, the department must first undertake an analysis and make the findings required under Wis. Stat. § 285.27(2)(b) before adopting the proposed mercury standards for existing sources. *Id.*
  4. The department's "Scope Statement Relating to Revisions to the State Mercury Rule" dated June 6, 2005 is inadequate and/or inaccurate. Specifically, the Scope Statement indicated that the revised rule would "mirror" the federal Clean Air Mercury Rule ("CAMR"). However, the draft rule that was published contains provisions that do not mirror CAMR. As a consequence, the department has generally failed to meet its obligations and rulemaking responsibilities as set forth in Wis. Stat. ch. 227, including Wis. Stat. § 227.135.
  5. The deficiencies described above further resulted in the Scope Statement failing to provide affected parties with the requisite knowledge and notice needed to effectively evaluate their right to request an economic impact report as permitted under Wis. Stat. § 227.137.
  6. The department violated procedural rulemaking requirements, including Wis. Stat. § 227.16 (6), when it issued a hearing notice containing three alternative approaches (referred to as "Option 2," "Option 3," and "Option 4") for reducing mercury emissions from coal-fired electrical steam generating units as a part of the hearing notice for proposed revisions to Wis. Admin. Code § NR 446.
  7. The department improperly and incompletely analyzed the potential effect of the proposed revisions to NR 446 on small businesses by improperly relying upon the EPA's economic analysis which is associated with and premised upon states implementing the model federal rules.
  8. Wis. Stat. § 227.14(2m)(4) requires the department to prepare a fiscal estimate for each proposed rule before it is submitted to the legislative council staff for review, under Wis. Stat. § 227.14(2m)(4)(b). The department failed to include a "reliable estimate" of the costs of compliance with the revisions to NR 446 for the 48 existing electric generating units that are operated by the eight utilities named in the estimate.