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**RE: Comments Regarding Amendments to WI NR 400, 440 and 446 Board Order No. AM-32-05, Changes to the Clean Air Mercury Rule**

The following represent the comments of Wisconsin Public Service Corporation regarding NR 446 Board Order No. AM-32-05.

On March 28, 2007, the Wisconsin Department of Natural Resources (WDNR) Natural Resources Board (NRB) authorized the department to hold public hearings regarding revisions to WI NR 446. The initial version of NR 446 was drafted to “mirror” the EPA’s Clean Air Mercury Rule (CAMR) as required by state law. Proposed changes to NR 446 found in AM-32-05 do not follow CAMR in several important ways.

Revisions made in Board Order No. AM-32-05 have severe implications for Wisconsin’s coal-fired electrical generation units (EGUs). An independent consultant has determined that Wisconsin Public Service’s (WPS) costs of complying with the proposed state rule will exceed the costs of complying with the federal rule by a margin of approximately \$150M over the first two phases (2010-2020). These costs will be passed on to both residents and businesses within the State of Wisconsin.

The WDNR has relied on the U.S. Environmental Protection Agency (EPA) economic analysis to determine the economic impacts NR 446 will have on small businesses. NR 446 differs significantly from CAMR, and assumptions made in EPA’s economic analysis are not valid for the proposed rule. Increased energy costs will cause Wisconsin’s utilities and businesses to be placed at a competitive disadvantage.

**Mercury Deposition Modeling and Research Findings**

While there may be some benefit to reducing mercury emissions from utility stack emissions, the amount of improvement that will be seen in Wisconsin are negligible. In a study conducted by C. Seigneur (Atmospheric and Environmental Research Inc.), it was determined that only 1-5%

of the mercury emitted from Wisconsin utilities is deposited within the state for most areas.

Further, this study and two other peer-reviewed studies (USEPA CMAQ modeling study, and Selin, et al.(2007)) have determined that 60-85% of mercury deposition in Wisconsin can be attributed to sources outside of North America. The capital and ongoing operation and maintenance costs associated with the proposed version of NR 446 will be exceptionally high, and will be of little benefit to the citizens of Wisconsin.

The command-and-control arrangement for mercury emissions outlined in AM-32-05 will make little difference in the amount of mercury deposition in Wisconsin. Research shows that most atmospheric mercury deposition in Wisconsin originates in other parts of the world. It has also been proven that “hot-spots” around mercury-emitting sources will not occur in the absence of strict emission limits without trading.

The fear of “hot-spot” deposition occurring near electric utilities is not new. Prior to the start of the Acid Rain Program (ARP) and the NO<sub>x</sub> Budget Program (NBP), the “hot-spot” issue was raised. As shown in numerous environmental studies, the “hot-spot” deposition fears were unfounded. Air quality has improved significantly since the beginning of ARP, and will continue to under CAIR/CAMR.

EPA studies have shown that command-and-control regulations are actually less effective than market-based trading programs in the short- and long-term. While the two approaches have the same potential to reduce emissions, the ability to trade allowances is far more cost-effective and may result in emissions being reduced sooner.

### **Legal Issues with AM-32-05**

The more stringent emission standards proposed in AM-32-05 are not consistent with the requirements of Wis. Stat. §§ 285.11(9) and 285.27. These sections require WDNR to write rules that “mirror” the federal rules unless *all* of the conditions set forth in Wis. Stat. 285.27 are met. Wisconsin Public Service Corporation (WPSC) believes that the following items need to be addressed and rectified prior to promulgation of WI NR 446:

The WDNR has failed to complete the analyses required by Wis. Stat. §§ 285.11(9) and 285.27(2)(b). Therefore, WDNR cannot justify imposing standards more stringent than the federal rule. 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.*

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.

The WDNR has not given sufficient time to evaluate the proposed rule to determine if an economic analysis of business impacts should be conducted. The department improperly analyzed the potential effect of the proposed revisions to NR 446 on small businesses by

relying on the EPA's economic analysis which is associated with and premised upon states implementing the model federal rules.

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. A fiscal estimate would have provided critical information necessary for the regulated community to better understand and comment upon the full impact of the potential options under consideration by the department.

The department improperly and incompletely analyzed the potential effect of the proposed revisions to NR 446 on small businesses. The department improperly relied upon the EPA's economic analysis which is associated with and premised upon states implementing the model federal rules. However, the proposed revisions to NR 446 do not "mirror" or otherwise incorporate the CAMR rule language. Accordingly, EPA's small entity economic analysis cannot be used to support any option other than full implementation of the EPA's recommended model rules to implement CAMR.

The inclusion of the 90% mercury emission reduction requirement (as well as other provisions in proposed Order AM-32-05) 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. A 90% emission reduction requirement is more stringent than the reduction percentage required by the federal CAMR. Likewise, the following provisions in the proposed rule are inconsistent with, or are otherwise more stringent than, the emission standards (including administrative requirements) that are associated with the federal CAMR rule:

- The failure to allow inter-state or intra-state emission trading;
- The sunseting 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.

The statute authorizing the department to promulgate an emission standard for mercury does not require a specific percent emission reduction. *See* Wis. Stat. § 285.27(2)(b). 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.

### **Technological Issues**

While significant progress has been made in developing technologies to control mercury emissions, the state of technology is still in its infancy. Controls that will be required by CAIR for SO<sub>2</sub> reductions will also be effective in controlling mercury emissions. These controls will be needed for CAIR compliance at a later date than would be required under the proposed rule. The short timeframe allowed by NR 446 to install equipment necessary to comply with the rule will cause shortages of labor and equipment, driving the cost of compliance even higher.

### **Economic Issues**

The increased costs associated with the proposed changes to NR 446 come from several issues with the rule. First, the command-and-control method of mercury emission reductions will force affected utilities to over-control mercury emissions. CAMR is designed to work in tandem with the Clean Air Interstate Rule (CAIR) to reduce mercury emissions. The cap-and-trade program allows power plants that reduce more emissions than required to sell excess allowances to companies for which cutting emissions is not as cost-effective. This is an efficient and flexible approach. With a trading program, there is an incentive to generate extra allowances, despite the additional operating cost. Ultimately, this flexibility translates to a low-cost option for the states’ electric consumers—households, small businesses, and industry—while achieving significant reductions in mercury emissions and deposition.

WPS is pursuing reductions of mercury emissions from its generating fleet. However, the option of purchasing emission allowances to supplement periodic shortfalls and cover forced outages or unexpected events is a valuable complement to the company’s emission reduction plan.

### **Conclusion**

WPS opposes the proposed revisions to WI NR 446, and respectfully requests that WDNR incorporates rules that mirror those of CAMR.

Sincerely,



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Seigneur, C. 2007. Estimating the Contribution of Coal-fired Power Plants to the Atmospheric Deposition of Mercury in Wisconsin. Document CP263-1a. Atmospheric & Environmental Research, Inc.

Selin, N.E., D.J. Jacob, R.J. Park, R.M. Yantosca, S. Strode, L. Jaeglé and D. Jaffe, 2007. Chemical cycling and deposition of atmospheric mercury: global constraints from observations, *J. Geophys. Res.*, 112, D02308, doi:10.1029/2006JD007450.