

**BEFORE THE ASSEMBLY NATURAL RESOURCES COMMITTEE**

Proposed LRB 2567 )  
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**COMMENTS OF  
MIDWEST ENVIRONMENTAL ADVOCATES**

**March 30, 2005**

Thank you, Chairman Gunderson and members of the Assembly Natural Resources Committee for the opportunity to testify today. My name is Melissa Scanlan and I am the Executive Director of Midwest Environmental Advocates, Inc., a non-profit environmental law center that provides legal and technical assistance to communities working for clean air and water. Midwest Environmental Advocates opposes LRB 2567.

We are concerned about the impacts of this proposal on air quality and public health because the bill will allow greater emissions of air pollution. We are concerned about the unintended impact of the bill on stifling businesses. And we are concerned that the bill violates the Clean Air Act. We urge you to oppose this bill.

The proposed bill will do the following: 1) exempt major sources of air pollution from the requirement to control air pollution through construction permits, 2) undercut the DNR's ability to impose air emission limits that protect public health, 3) avoid DNR review and control of pollution emitted by facilities that obtain registration permits, and 4) skew the public's understanding of the barriers to the manufacturing industry by focusing only on regulatory barriers to growth.

## **1) The Proposed Exemptions from Construction Permits Violate the Clean Air Act.**

Act 118 authorized the DNR to create rules allowing sources with similar emissions to obtain general operation permits, but did not authorize exemptions from the construction permit requirements. Sec. 285.60(3), Wis. Stats. The proposed bill requires the DNR to promulgate rules that allow facilities that obtain general air permits to obtain an exemption from the requirement to obtain a construction permit. *See* Section 2. The largest sources of air pollution in the state (utilities, paper mills, etc.) could get a general operating permit - per changes made by Act 118. If this new bill is passed, once a major source gets a general operating permit, it could then be exempt from any future construction permit requirements. Exemptions from construction permit requirements will lead to more uncertainty about what is in our air and allow greater emissions of health harming air pollution.

This violates the Clean Air Act and goes well beyond the authority the legislature originally granted the DNR through Act 118.

### **a) The Proposed Bill Goes Beyond Act 118.**

Although Act 118 did allow the DNR to create rules to exempt sources from construction permit requirements if they qualify for **registration** permits, the legislature did not explicitly exempt sources that qualify for **general** operation permits from the requirement to obtain a construction permit. *Compare* Wis. Stat. §285.60(2g) to § 285.60(3). This regulatory scheme was consistent with claims that Act 118 would be implemented in a way that did not violate the Clean Air Act. Under Act 118, the

registration permits are specifically limited to sources with low emissions, where the general permits will be available to Wisconsin's largest sources of pollution.

**b) The Proposed Bill Violates the Clean Air Act.**

The Clean Air Act requires the DNR to regulate the construction of any stationary source "as necessary to assure that national ambient air quality standards are achieved."

42 U.S.C. §7410(a)(2)(C). The DNR cannot assure that national ambient air quality standards are achieved when it allows exemptions from the requirement to obtain a construction permit, as proposed by this bill.

The DNR is currently operating its Title V operating permits program under a Notice of Deficiency from the U.S. E.P.A. The proposed bill would take the DNR further away from correcting the deficiencies in its Title V program. The bill would allow a Part 70 major source obtain a general operating permit and then be exempt from obtaining construction permits for future modifications.

Title V does not provide the authority for the establishment and maintenance of the Prevention of Significant Deterioration (PSD) and New Source Review (NSR) provisions, which originate in construction permits. *See* 69 Fed.Reg.10167, 10170, March 4, 2004, Notice of Deficiency for Clean Air Act Operating Permit Program in Wisconsin. Requirements must exist independent of the Title V permit. 69 Fed.Reg. at 10170. Consequently, by exempting new or modified major sources of pollution from the requirement to obtain a construction permit, there will be no vehicle to apply substantive PSD and NSR provisions to a Part 70 source.

The proposed blanket exemption from construction permit requirements for new and modified major sources operating under general operation permits clearly violates the

Clean Air Act. 42 U.S.C. §7410(a)(2)(C) (requiring enforceable emission limits and regulation of construction to protect ambient air quality); 42 U.S.C. § 7502(c)(5) (requiring construction and operation permits for new or modified stationary sources in nonattainment areas). Likewise, this bill will run afoul of Wisconsin law prohibiting the DNR from promulgating rules that violate the Clean Air Act. Wis. Stat. §285.60(8).

Lastly, from a business perspective, this bill is bad news. If facilities are allowed to construct in an unregulated manner – under exemptions or even general construction permits – there will be more pollution put into the air. When a large business that clearly has to comply with the Clean Air Act goes to construct and goes through the modeling required to see how close the area is to violating federal health-based air standards, it may find that there is no more room for growth in that area. This is one of the reasons S.C. Johnson has been challenging the Oak Creek power plant proposal. Johnson knows that if Oak Creek is allowed to construct and emit pollution into an area that is already failing to meet federal health-based standards, it will be even more difficult if not impossible for Johnson to expand in the future.

## **2) The Proposal Undercuts the DNR's Ability to Protect Public Health.**

The bill would allow a polluting factory to file a legal challenge to a proposed limit on air pollution contained in an operating permit, and by the act of filing the legal challenge avoid having to reduce air pollution until ordered by a court. *See* Section 6.

This proposal weakens DNR's ability to impose air pollution limits in operation permits and stacks the deck in favor of industry. If all a facility needs to do to

avoid implementing an emission limit is file a legal challenge, the facility has a strong incentive to litigate when the costs of litigation are less than the costs of meeting the emission limits. Legal challenges are typically multi-year undertakings, so the facility could avoid reducing pollution for several years.

Moreover, legal challenges of this sort will go before an administrative law judge and will involve DNR attorneys, all of which is paid for by taxpayers. Giving industries an incentive to litigate will ultimately cost taxpayers who have to pay for the state to defend the legal challenges.

Lastly, in a time of shrinking budgets, the DNR will want to avoid such litigation as it will require more staff time. This will give industries greater leverage when negotiating permit terms because they will be able to threaten DNR with a legal challenge if the DNR does not capitulate to their demands. The DNR will have to weigh the added costs of the legal challenge and the inability to impose pollution controls during the litigation against accepting weaker limits on pollution.

This provision will clearly have the impact of creating an uneven playing field, holding public health protections hostage to industry litigation.

### **3) The Proposal Allows Facilities to Operate Indefinitely Without DNR Oversight.**

The proposal prohibits the DNR from imposing an expiration date on registration and general air permits, except when requested by the facility or when required by the Clean Air Act. *See* Sections 3, 4, and 5.

The purpose of requiring permit renewals at regular intervals, typically every five years, is to ensure the DNR provides the necessary regulatory oversight to reduce

pollution when necessary and implement any changes to air rules. Prohibiting the DNR from exercising this most basic of regulatory oversight functions will essentially lock facilities into permit limits and not allow the DNR to take steps to protect public health.

Circumstances change as air pollution in certain areas gets better or worse. Areas that were relatively clean when a permit is issued may later have so many sources of air pollution that they become listed as “non attainment” due to the dirty air. The DNR needs the flexibility to review permits it has issued and reduce pollution when the circumstances call for such reductions.

#### **4) The Proposal Skews Public Understanding of Barriers to Manufacturing.**

The proposed bill contains a provision that requires the Dept of Administration to prepare a report on regulatory barriers to the growth of the manufacturing sector in Wisconsin. *See* Section 7. The DOA will have 13 months to prepare the report and submit it to JCRAR. The DOA report will cover regulatory barriers from rules regulating the environment, employment, financial services, utilities and transportation.

With Wisconsin's manufacturing base shrinking, it is important to understand the causes. Studying the regulatory barriers to the manufacturing industry's growth is useful, but only part of the picture. The proposed report will be skewed and inaccurate because it is limited to regulatory barriers. There are multiple other barriers to growth in Wisconsin, not the least of which is international trade agreements and competition from other countries. If such a report is prepared, the scope of the report should be expanded to include all barriers to growth in manufacturing, and not simply regulatory barriers.