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TO: Andrew Stewart, Permits & Stationary Source Modeling Section Chief

FROM: Barbara Pavliscak, Statewide Operation Permit Manager /s/ **BNP 12/12/2011**

SUBJECT: Policy on Permit Shield Statements in Operation Permits

EXECUTIVE SUMMARY

Historically, poorly-founded permit shield statements in operation permits have caused the department problems, and have caused confusion and legal problems for our regulated community. But they continue to be asked for by permit applicants. So to improve the consistency with which Permit Writers address permit shield requests, the following guidance is to be implemented:

- 1) All permit shield statements must be based on a **diligent review** performed by the applicant and reviewed by the department.
- 2) Do not put shield statements in an operation permit that have not been specifically **requested** by the applicant.
- 3) **Documentation** of the diligent review for any shield statement will be provided by the department in its permit review documents.
- 4) Permit shield statements will **not be automatically carried over** to new operation permits, upon revision or renewal, unless the conditions under 1 and 2 are satisfied within the analysis for that new operation permit.
- 5) A diligent review should include, at the least, a comprehensive review of every change over the entire life of the emissions unit to ensure that none of the changes or maintenance efforts constituted a modification.
- 6) In the interest of conserving department resources, the diligent review required under 1 and as described under 5 should be supplied by the applicant.

BACKGROUND

While some may believe that permit shield statements in the Preamble of operation permits have no legal basis and are included for purposes of clarity and convenience, the opposite is actually true. Except for the cases noted under s. NR 407.09(5)(b), any 'negative declaration' statement included in the Permit Shield portion of the operation permit's Preamble has the effect of absolving the permittee henceforth.

Historically, there have been instances where DNR implementation of the permit shield provisions has been scrutinized and found to be incomplete, or incorrect. In those cases, the shield was based on the date that the application has listed for last construction or modification, and unfortunately the information in the application is not always reliable. It is far too easy for the applicant to simply refer to some date long ago when the equipment was first installed, or from a previous application.

In many cases, the permittee has made changes to equipment such as improvements, life extensions or fundamental changes to operation. It is a question of rule whether such changes are treated as a modification or rebuild or replacement. Applicability of the rule is not based on the long ago date but is based on the most recent date that such changes were commenced. It is not expected that the typical applicant would appreciate this important distinction between when a piece of equipment was installed and when some subsequent change was made.

This issue is more important when the date of installation is further back in time because there is more likelihood that such changes were made. Also, the issue is more important as the complexity of the equipment increases because such equipment has high capital value and has more repairs and improvements. For example, any large boiler paper machine, foundry equipment or other manufacturing equipment should be carefully considered before a shield is based on the date specified in an application. It very well may be that the shields statements for these emissions units would stand up to a more robust and thorough analysis, but in many cases the analysis was not thorough and the shield is questionable.

So for reasons of good professional business and as a service to our customers, the department needs to address this issue, and establish a policy for when, how and why permit shield statements in the Preamble will be included.

In the preliminary discussions of the issue, which began in 2009, we learned that standard practices for implementing shield statements in the Preamble have not been fully developed. So a side benefit of this discussion will be an agreement and documentation of the standard practices for use of permit shield statements.

REGULATORY BASIS FOR PERMIT SHIELDS

Regulations related to this area of discussion were found in the following two places (underlining added for emphasis).

Wisconsin Statutes, s. 285.62 Operation permit; application, review and effect.

(10) EFFECT OF PERMIT.

- (a) Except as provided in par. (b), the issuance of an operation permit, including an operation permit that contains a compliance schedule, does not preclude enforcement actions based on violations of this chapter that occur before, on or after the date that the operation permit is issued. The inclusion of a compliance schedule in an operation permit does not preclude enforcement actions based on violations of this chapter to which the compliance schedule relates, whether or not the source is violating the compliance schedule.
- (b) Unless precluded by the administrator of the federal environmental protection agency under 42 USC 7661c (f), compliance with all emission limitations included in an operation permit is considered to be compliance with all emission limitations established under this chapter and emission limitations under the federal clean air act that are applicable to the stationary source as of the date of issuance of the operation permit if the permit includes the applicable emission limitations or the department, in acting on the application for the operation permit, determines in writing that the emission limitations do not apply to the stationary source and the operation permit includes that determination.

Wisconsin Administrative Code, s. NR 407.09 Permit content.

(5) PERMIT SHIELD.

- (a) An operation permit shall include a provision pursuant to and consistent with s. 285.62 (10) (b), Stats.
- (b) Neither s. 285.62 (10) (b), Stats., nor any condition in a permit may alter or affect the following:
 - 1. The authority of the administrator under section 303 of the Act (42 USC 7603).
 - 2. The liability of an owner or operator of a stationary source for any violation of applicable requirements prior to or at the time of permit issuance.
 - 3. The applicable requirements of the acid rain program.
 - 4. The ability of EPA to obtain information from a source pursuant to section 114 of the Act (42 USC 7414).

Review of these statutes and code language indicate that in cases where the determination has been made that a regulation is non-applicable, and if the applicant requests it to be in the operation permit, then the department shall include the provision in the operation permit.

HISTORICAL DISCUSSIONS ON SHIELDS

During the statewide Permit Conference Call in July 2008, it was generally stated that permit writers should, *“Delete permits shields that are based simply on the date of construction unless you have determined that there have been no modifications, etc. Unless you make a serious investigation of this the shield is of little, if any, value. Doing this investigation will often require a significant work effort.”*

Later, on the February 3, 2009, statewide Permit Conference Call, it was concluded that *“Permit shields based on date installed are unsupportable unless a historical review of modification/rebuild/replacement has been added to the application review. Shield should never include ch. NR 405. (Pierce).”* and that Permit Writers should continue to follow guidance set in July 2008 permit call.

In the course of these discussions, the following notable points were made:

- Because of the complexity and controversy, shields for requirements of ch. NR 405 (PSD) or 408 (NSR in NAA), or 440 (NSPS) should never be added to a permit. If the applicant requests such a shield you should refer the matter to your supervisor.
- In many cases, the review of the application documents results in a careful and useful analysis that shows that a regulation does not apply, and the department makes a definitive determination of non applicability. Clearly DNR wants to document such determinations so they are readily available to others. The Preliminary Determination document is a more than adequate repository for such information, and reiterating these determinations in the permit shield part of the Preamble is not necessary.
- Very few applicants request a shield. The department should adopt and implement a standard practice that shield statements are added only when requested and approved after diligent review.
- The department’s review documents are more than adequate repositories for a description of the diligent review that went into the determination of non-applicability. To keep permit more consistent and streamlined, the department will not rely upon the use of footnotes in the permit itself to document where the review has provided a definitive determination of non-applicability. This will also result in fewer permit revisions.
- Removing shield terms at renewal or at revision may be resisted by the applicant. The applicant has the opportunity to request the shield. DNR will request information needed to sufficiently evaluate the shield. Simply because a shield term was in a previous permit does not mean that the department cannot request additional information pertaining to the shield.

RECOMMENDED GUIDANCE ON PERMIT SHIELDS FOR PERMIT STAFF

Review of the statutes and code language related to the permit shield within our operation permits indicate that in cases where the determination has been made that a regulation is non-applicable, and if the applicant requests it to be in the operation permit, then the department shall include the provision in the operation permit. What these regulations do not speak to is the level of analysis sufficient to make such negative declaration. Given the legal import of Permit Shield statements, it has been the standard policy of the Air Program since before 2008 to not automatically carry over permit shield statements, but to include or retain them *only after* a comprehensive and diligent review has been done, to verify that the statements are still true in light of the ongoing management and maintenance that occurs at most facilities.

To formalize this standing policy, and to improve the consistency with which Permit Writers address requests for permit shield statements, conduct the reviews of such requests, and in how they utilize permit shield statements in the permits that they write, the following guidance shall be followed:

- 1) **Diligent Review** - Where the applicability of a rule is dependent on the modification date of an emissions unit, the department will not include a permit shield statement unless a diligent review has been performed by the applicant and reviewed by the department.
- 2) **Requested** – The department will not put shield statements in the operation permit that have not been specifically requested by the applicant.
- 3) **Documentation** – The department will document the basis of any determination of regulatory non-applicability, or any shield statement, during the permit review. The permit review documents are a more than adequate repository for documentation of regulatory non-applicability.
- 4) **No Automatic Carry-over** – The department will not automatically carry over any permit shield statement from a previous permit to new operation permits, upon revision or renewal, unless the conditions under 1 and 2 are satisfied within the analysis for that new operation permit.
- 5) A diligent review would consider every change over the entire life of the emissions unit to ensure that none of the changes or maintenance efforts constituted a modification. This would include but is not limited to the following, for each project that cost at least \$25,000:
 - Description of the project
 - Complete four-factor (nature, purpose, frequency and cost) analysis
 1. Nature and Extent
 - a. whether major components are being replaced or modified
 - b. whether the source has categorized the project as non-routine in its own documents
 - c. whether the change could be performed during full functioning of the facility
 - d. whether the materials need to undertake the change are already on the site
 - e. whether the change will take a significant time to perform
 - f. whether the change will add parts
 - g. whether the changes, taken as a whole, constitute a routine effort
 2. Purpose
 - a. whether the purpose is to extend the useful life of the facility
 - b. whether the project will allow enhanced operation (i.e. increased use, new fuel,..)
 3. Frequency
 - a. whether the change is performed frequently in a typical unit's life
 4. Cost
 - a. whether the change is costly in absolute terms and relative to replacing the unit
 - b. whether the change is a capital expense
 - c. how does the cost compare to the normal maintenance costs for the facility
 - Complete analysis of PSD/NSR applicability
 - Analysis of NR 406 applicability to each project
 - Complete list of any and all exemptions or exempt activities claimed
 - Complete analysis of NSPS applicability for the unit and each project undertaken on the unit (if NSPS shield being sought)
 - Complete list of relevant USEPA/WDNR opinions and/or decisions
- 6) In the interest of conserving department resources, the diligent review required under 1 and as described under 5 should be supplied by the applicant.

This guidance may be modified at a later date based on feedback during implementation, or if it becomes apparent that additional or different elements should be considered for review of Permit Shield requests.