

1997-98 SESSION
COMMITTEE HEARING
RECORDS

Committee Name:

*Joint Committee for
Review of
Administrative Rules
(JCR-AR)*

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR_RCP_pt01a
- 97hrAC-EdR_RCP_pt01b
- 97hrAC-EdR_RCP_pt02

- Appointments ... Appt
-
- Clearinghouse Rules ... CRule
-
- Committee Hearings ... CH
-
- Committee Reports ... CR
-
- Executive Sessions ... ES
-
- Hearing Records ... HR
-
- Miscellaneous ... Misc
- 97hr_JCR-AR_Misc_pt29d_SofC
- Record of Comm. Proceedings ... RCP
-

1997 Service of complaints —

Firstar Plaza
P.O. Box 2113
Madison, Wisconsin 53701-2113
608/251-5000
FAX 608/251-9166

Attorneys at Law in
Milwaukee and Madison, Wisconsin
West Palm Beach and Naples, Florida
Phoenix, Arizona



November 26, 1997

HAND-DELIVERY

Senator Richard Grobschmidt
Chairman
Joint Committee for Review
of Administrative Rules
100 N. Hamilton Street
Room 404
Madison, WI 53703

Re: Wausau Paper Mills Company v. Wisconsin Department of Natural Resources
Case No. 97-CV-659

Dear Chairman Grobschmidt:

You are being personally served with an authenticated copy of a Petition for Judicial Review and Rulemaking Challenge filed in Marathon County on November 25, 1997, which contests the validity of a DNR rule and whether a DNR policy should have been promulgated as a rule. In addition, the Petition contests the constitutionality of certain actions of the DNR.

You are being served with the Petition, pursuant to sections 227.40(5), 806.04(11), and 13.56(2), Stats.

Sincerely,

QUARLES & BRADY

A handwritten signature in cursive script that reads "Michael S. McCauley".

Michael S. McCauley
Waltraud A. Arts

WAA/pak
940013.30507
cc: Wausau Paper Mills Company

STATE OF WISCONSIN

CIRCUIT COURT

MARATHON COUNTY

B₁ 4

WAUSAU PAPER MILLS COMPANY,
a Wisconsin corporation,
P.O. Box 305
Brokaw, Wisconsin 54417-0305,

THIS IS AN AUTHENTICATED
COPY OF PLEADINGS FILED
ON THIS DATE

Petitioner,

v.

Case No. 97 CV 659
Code No. 30607
Administrative Agency
Review

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES, a Department of the State
of Wisconsin created by Sec. 15.34, Stats.
P.O. Box 7921
101 S. Webster Street
Madison, Wisconsin 53707-7921,

Respondent.

97 NOV 25 AM 11:48
CLERK OF CIRCUIT COURT
MARATHON COUNTY
CIVIL/FAMILY DIVISION

**WAUSAU PAPER MILLS COMPANY'S PETITION FOR JUDICIAL REVIEW
AND RULEMAKING CHALLENGE**

NOW COMES Wausau Paper Mills Company (Wausau Papers), by its attorneys Quarles & Brady, Michael S. McCauley and Waltraud A. Arts, and petitions the court for judicial review of final decisions of the Wisconsin Department of Natural Resources (a) denying Wausau Papers' request for a contested case hearing and, (b) refusing to rescind a Notice of Violation. This petition also challenges DNR's 5% maximum downtime policy (5% Policy) as an invalid rule that was not promulgated in accordance with Ch. 227, Stats. The Petition is filed pursuant to secs. 227.40(2)(e), 227.52, and 227.53, Stats.

1. Petitioner, Wausau Papers, is a Wisconsin corporation organized under Ch. 180,

Stats., and operates a pulp and paper mill in the Village of Brokaw, Marathon County, Wisconsin. Its business address for the Brokaw Plant is P.O. Box 305, Brokaw, Wisconsin 54417-0305, and its corporate headquarters are located at Wausau, Wisconsin. Wausau Papers is a resident corporation of the State of Wisconsin.

2. Respondent, Wisconsin Department of Natural Resources (DNR), is a department of the State of Wisconsin created by sec. 15.34 Stats., with its principal office located at 101 S. Webster Street, Madison, Wisconsin, 53707.

3. Wausau Papers has an air permit issued by the DNR on May 10, 1988 (Permit). The Permit allows emission of sulphur dioxide at certain limits from the Brokaw Plant. Wausau Papers has a continuous emission monitor for sulphur dioxide emissions (CEM) at the Brokaw Plant. The Permit requires Wausau Papers to install a CEM, but contains no requirements regarding the minimum "uptime" or maximum "downtime" functioning of the CEM.

4. Wausau Papers submitted a Quality Control and Quality Assurance Plan to the DNR on October 8, 1990 (QC/QA Plan). The QC/QA Plan was designed, in part, to assure compliance with the sulphur dioxide limits in the Permit. DNR never approved Wausau Papers' QC/QA Plan even though it was required by law to do so. DNR never stated that the QC/QA Plan was unacceptable, legally incorrect, or inappropriate, but it asked that the QC/QA Plan be revised after this controversy arose.

5. The QC/QA Plan set a goal of 95% "uptime" functioning time for the CEM, and stated that if there was extended failure of the CEM, Wausau Papers would report valid compliance data at least 75% of the operating time per calendar quarter.

6. Wausau Papers submitted to the DNR a quarterly monitoring report on July 30,

1997, covering the period April through June, 1997 (Report). The Report showed the CEM was functioning during 90.27% of operating time in that time period. This was the first time the CEM functioned less than 95% of the operating time since the second calendar quarter of 1993 when it functioned 90.23% of the operating time.

7. On September 17, 1997, the DNR issued a Notice of Violation to Wausau Papers stating that a violation might have occurred based on the failure of the CEM to function during 95% of the operating time of the Brokaw Plant during the period April-June, 1997. The DNR scheduled an enforcement conference for October 2, 1997, to discuss the Notice of Violation.

8. The DNR, at the enforcement conference, informed Wausau Papers that it was going to apply a policy that more than 5% "downtime" for the CEM during operating hours in a calendar quarter would constitute a violation (5% Policy). Wausau Papers believed that the CEM could be down for up to 25% of the time during a calendar quarter before there was a violation based on the content of the QC/QA Plan. Wausau Papers challenged the 5% Policy before the DNR at the enforcement conference as an invalid rule.

9. DNR's 5% Policy was based on an internal memorandum issued by a former Director of the DNR's Bureau of Air Management dated August 10, 1989, entitled "Enforcement Policy for Continuous Compliance Data." This memorandum was not sent to Wausau Papers and, on information and belief, was not sent to other affected air permittees in the State of Wisconsin.

10. The 5% Policy is a regulation, standard, and statement of general application issued by the DNR to govern its enforcement of the Wisconsin statutes and rules on air emissions and constitutes a rule as that term is defined in secs. 227.001(13) and 227.10(1), Stats.

11. DNR has not promulgated the 5% Policy under the procedures required by Ch. 227, Subchapter II, Stats., which mandate that agencies of the State, such as DNR, provide public notice and hearing regarding proposed rules, solicit public input, seek review of the Wisconsin Legislative Council, and provide notice and an opportunity for review to the Wisconsin Legislature when promulgating administrative rules.

12. The 5% Policy is an invalid rule and cannot form the basis of a Notice of Violation against Wausau Papers.

13. Wausau Papers is injured by DNR's failure to promulgate the 5% Policy as an administrative rule because it was deprived of notice of the 5% Policy, an opportunity to participate in the rulemaking process and to be heard as an affected party, and has been deprived of the procedural rights mandated by the Legislature when it required DNR to promulgate all statements of general policy used to govern enforcement as a rule.

14. The only CEM "downtime" functioning standard that may be legally applied to Wausau Papers is the 25% "downtime" during a calendar quarter standard stated in the QC/QA Plan. The CEM was in compliance with the QC/QA Plan standard during the period April-June, 1997.

15. Wausau Papers attempted to remedy the problem causing the CEM failures as soon as the failures occurred, but was hampered in its efforts by the difficulty of securing replacement equipment and arranging for a back-up system that would yield information in the form required by its Permit. The action Wausau Papers took complied with the QC/QA Plan. DNR was informed of these good faith efforts on or before October 2, 1997.

16. Wausau Papers has taken corrective action to avoid any further problem with the

CEM based on equipment failure. DNR was informed of the corrective action on or before October 2, 1997.

17. The sulphur dioxide emissions at the Brokaw Plant for the period April-June, 1997, never exceeded the limits set in the Permit, and the records show that when the CEM was not functioning during that period, the sulphur dioxide emissions were under the allowable limit by more than 100 pounds per hour. DNR was provided information documenting compliance with the emissions standards on or before October 2, 1997.

18. On October 14, 1997, Wausau Papers petitioned the DNR, pursuant to secs. 285.83(1)(a) and 227.42, Stats., for a contested case hearing regarding DNR's Notice of Violation of September 17, 1997 (Petition) (Copy of Petition is attached as Exhibit A).

19. The Petition requested rescission of the Notice of Violation or a contested case hearing wherein Wausau Papers could contest the DNR'S claim that the operation of the CEM at the Brokaw Plant was a violation of law. It also challenged the 5% Policy as an invalid rule.

20. On October 30, 1997, DNR denied Wausau Papers' Petition in a final decision (Decision) (Copy of Decision is attached as Exhibit B). DNR refused to either rescind the Notice of Violation or to grant a contested case hearing. The Decision did not address Wausau Papers' challenge to the 5% Policy as an invalid rule.

21. The denial of a contested case hearing under sec. 227.42, Stats., is an appealable order under Ch. 227, Stats., sec. 227.42(2), Stats.

22. DNR has written agreements with the United States Environmental Protection Agency (USEPA) which provide that USEPA will classify and identify "major sources" of air emissions as "significant violators" once DNR has cited a "major source" facility in a Notice of

Violation for allegedly violating a term or condition of an air permit. USEPA's identification of a company as a "significant violator" is published by U.S. EPA on the Internet. The agreements provide for USEPA to bring an enforcement action against a facility which has been identified by DNR as a "significant violator."

23. Wausau Papers is aggrieved by DNR's Decision because DNR's issuance of the Notice of Violation causes Wausau Papers to be subject to USEPA's "national significant violator policy" which identifies Wausau Papers on the Internet and in other public sources as a "significant violator." The Notice of Violation also subjects Wausau Papers to potential EPA enforcement action and sanctions based on DNR's determination that a violation has occurred and Wausau Papers' status as a major source.

24. The Decision refusing to rescind the Notice of Violation, denying Wausau Papers a contested case hearing and applying the 5% Policy despite its status as an invalid rule, adversely affects the substantial interests of Wausau Papers, including but not limited to the following adverse effects:

- (a) The Decision and the Notice of Violation result in Wausau Papers being classified as a "significant violator" of the air pollution laws and subjects Wausau Papers to potential federal enforcement action based on DNR's agreements with USEPA;
- (b) The Decision and the Notice of Violation result in the public labeling of Wausau Papers as a "significant violator" which will unfairly stigmatize Wausau Papers and damage it in the eyes of its employees, shareholders, and customers. As DNR knows, DNR's Decision and Notice of Violation

will cause USEPA to name Wausau Papers' status as a "significant violator" in public sources, including the Internet, without giving Wausau Papers an opportunity to contest whether or not a violation occurred;

- (c) The Decision and the Notice of Violation result in a public record which unfairly indicates Wausau Papers violated its Air Permit. Wausau Papers' reputation and position in enforcement actions that may occur in the future is detrimentally affected by the Decision and Notice of Violation;
- (d) The Decision fails to address the status of the 5% Policy as an invalid rule and therefore subjects Wausau Papers to an illegal enforcement standard as well as denying Wausau Papers its procedural rights under Ch. 227, Stats.

25. The Decision erroneously interprets the law because it fails to use the proper standard for evaluating CEM "downtime" requirements. The only standard for measuring compliance is the QC/QA Plan and Wausau Papers fully complied with the Plan.

26. The Decision erroneously applies the 5% Policy as a basis of the Notice of Violation because the 5% Policy was not promulgated in accordance with Ch. 227, Stats., and therefore is an invalid rule and cannot be applied to Wausau Papers.

27. The Decision erroneously interprets sec. 227.42, Stats., because it finds that Wausau Papers does not meet the criteria for a contested case hearing under that statute.

28. The Decision erroneously interprets sec. 285.83(1)(a), Stats., because it finds that Wausau Papers does not meet the criteria for a contested case hearing under that statute.

29. The Decision denies Wausau Papers both substantive and procedural due process

under the United States and Wisconsin Constitutions.

30. The Decision is inconsistent with past DNR practice in regard to alleged CEM operating time requirements.

31. Wausau Papers asks the court to reverse, modify, or remand under sec. 227.57, Stats., because:

- (a) The fairness of the proceeding and the correctness of the action has been impaired by a material error in procedure and a failure to follow prescribed procedure;
- (b) The DNR has erroneously interpreted provisions of law and a correct interpretation compels a particular action;
- (c) The Decision is not supported by substantial evidence in view of the entire record;
- (d) The Decision is outside the range of discretion delegated to the DNR by law;
- (e) The Decision is inconsistent with prior and present agency policy and the deviation is not satisfactorily explained in the Decision;
- (f) The Decision is in violation of constitutional and statutory provisions;
- (g) The Decision is arbitrary and capricious and an abuse of discretion; and
- (h) Other grounds not enumerated.

32. Wausau Papers reserves the right to request the opportunity to present additional evidence under the procedures set forth in sec. 227.56, Stats.

WHEREFORE, Wausau Papers requests judicial review of said action of DNR in

accordance with Ch. 227, Stats., determining the Decision is null, void, ultra vires, and of no effect, or reversing the same, or modifying it in whole or in part, or remanding the same to DNR for further action in accordance with law.

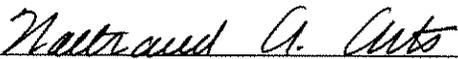
Wausau Papers, pursuant to sec. 227.40, Stats., seeks a declaration that the 5% Policy is an invalid rule and is therefore of no force and effect.

Wausau Papers requests any additional relief available at law and its costs and attorneys' fees as provided by law.

Dated this 25 day of November, 1997.

QUARLES & BRADY

Attorneys for Wausau Papers



Michael S. McCauley
State Bar No. 01015060
Waltraud A. Arts
State Bar No. 01008822

Michael S. McCauley
QUARLES & BRADY
411 E. Wisconsin Ave., Ste. 2550
Milwaukee, WI 53202-4497
414-277-5000

Waltraud A. Arts
QUARLES & BRADY
1 S. Pinckney St., Ste. 600
P.O. Box 2113
Madison, WI 53701-2113
608-251-5000

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

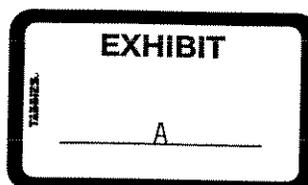
PETITION FOR CONTESTED CASE HEARING

In the Matter of:

Wausau Paper Mills Company
Brokaw Plant
DNR Notice of Violation
Casetrack No. 97-WCEE-059

1. Pursuant to Sections 285.83(1)(a)(1) and 227.42, Wis. Stats., Wausau Paper Mills Company, by its attorneys, Quarles & Brady by Michael S. McCauley, petitions for a contested case hearing on DNR's action/order issued on September 17, 1997, by which Wausau Paper Mills was included under the national significant violator policy of the United States Environmental Protection Agency (U.S. EPA). The Department's determination is described in DNR's Notice of Violation which was issued to the Company. A copy of the subject Notice of Violation is attached to this petition as Exhibit A.

2. In the Notice of Violation, DNR alleged that the Company violated Sections NR 439.09(8) and NR 439.09(10)(c), Wis. Admin. Code. These rules relate to the operation of continuous emission monitors (CEM's). In the NOV, DNR stated because Wausau Papers' Brokaw plant is a "major source" under the federal Clean Air Act and the Wisconsin Air Pollution Control Laws (Chapter 285 of the



Wisconsin Statutes), DNR's finding of violation in this case has caused the Company to be included under the national significant violator policy of U.S. EPA.

3. The grounds for this petition are:

- A. Wausau Papers has not violated Sections NR 439.09(8) and NR 439.09(10)(c), Wis. Admin. Code, as alleged by DNR in the Notice of Violation.
- B. DNR's finding of violation in this case is based on a 5% maximum downtime rule for CEM's which was not promulgated in accordance with the Wisconsin Administrative Procedure Act and which is therefore in violation of Chapter 227 of the Statutes.
- C. Petitioner's actions in operating its sulfur dioxide CEM were taken in accordance with guidance documents provided to the Company by DNR. The Company's actions were also in accordance with a Quality Assurance/Quality Control plan which the Company filed with DNR in 1990. DNR was required to review and approve the QA/QC plan, but has not done so. For these reasons, DNR is equitably estopped from enforcing its CEM uptime requirements in this case.
- D. The grounds for this petition and Wausau Paper Mills' position on the factual and legal issues presented in this matter are more fully set forth in the Company's October 13, 1997 response to DNR's Notice of Violation. A copy of that response is attached to this petition as Exhibit B and is incorporated herein by reference.

4. Upon information and belief, Petitioner alleges that DNR's action in having the Company identified as a "significant violator" will cause a finding of violation to appear in U.S. EPA's "Sector Facility Indexing Reports," which EPA intends to make available to the public on the Internet. Unless a contested case

hearing is granted to the Company in this matter, the Company will be unfairly exposed to the stigma of being identified as a "significant violator" without due process of law.

5. Petitioner requests that DNR either: 1) Rescind the Notice of Violation; or 2) Grant to Wausau Papers the opportunity to contest the action taken by DNR in an administrative hearing provided for under Section 285.83(1)(a)(1) of the Statutes (the statutory authority referenced by DNR in the opening paragraph of its Notice of Violation) or Section 227.42, Wis. Stats. Petitioner asserts that the conditions of Section 227.42(1) are satisfied in this matter.

Dated this 14th day of October, 1997.

Submitted by:

QUARLES & BRADY

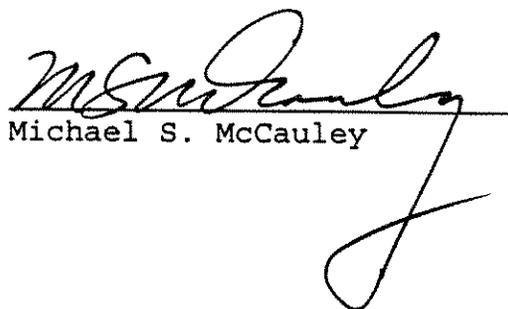


Michael S. McCauley
Attorneys for Petitioner
Wausau Paper Mills Company

VERIFICATION

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

Michael S. McCauley, being first duly sworn on oath, states that he is an attorney for Wausau Paper Mills Company, that he has read the foregoing Petition for Contested Case Hearing, and that the information contained herein is true to the best of his knowledge and belief.


Michael S. McCauley

Subscribed and sworn to before me
this 14th day of October, 1997

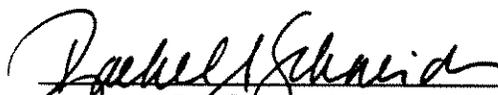

Notary Public, State of Wisconsin
My Commission: permanent

Exhibit A
State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
 George E. Meyer, Secretary
 William H. Smith, Regional Director

Northern Co-Regional Headquarters
 PO Box 818, 107 Suttiff Ave.
 Rhinelander, WI 54501-0818
 TELEPHONE 715-365-8900
 FAX 715-365-8932
 TDD 715-365-8957

September 17, 1997

FID#: 737009130
 CASETRACK#: 97-WCEE-059

CERTIFIED MAIL

Mr. Thomas J. Howatt
 Vice President and General Manager - Printing/Writing
 Wausau Paper Mills Company - Brokaw Mill
 P.O. Box 305
 Brokaw, WI 54417-0305

SUBJECT: NOTICE OF VIOLATION

Dear Mr. Howatt:

This notice is to advise you that the Department of Natural Resources has reason to believe that the Wausau Paper Mills Company - Brokaw Mill (Wausau Paper) at 2nd Street in Brokaw, Wisconsin, may be in violation of Wisconsin's air pollution rules. This notice is issued pursuant to s. 285.83(1)(a)1., Wisconsin Statutes.

Wausau Paper operates a magnesium bisulfite pulp mill and a two-stage bleach plant (oxygen followed by hypochlorite) for the production of virgin pulp at the Brokaw Mill. Stack S20 at this mill is equipped with a sulfur dioxide continuous emission monitoring system (CEM), as required under permit 88-DLJ-005. The following pulp mill operations exhaust through the S20 stack: digester evacuation blow gas scrubber, accumulator relief, brown stock washers, acid plant, Copeland reactor, and acid storage tank. The applicable emission limit for stack S20 is 258 pounds sulfur dioxide per hour, on a 24-hour rolling average basis, per ss. NR 405.08 and NR 439.09(10)(b)2, Wis. Adm. Code.

Permit 88-DLJ-005 was issued to Wausau Paper on May 10, 1988. The CEM requirement for stack S20 is set in Part I. B. 6. of this permit as follows:

A continuous emission monitor for SO₂ shall be installed on the exhaust stack (S20) for the SO₂ recovery system. The requirements set forth in Sec. NR 439.07(3), Wis. Adm. Code, shall be followed.

Section NR 439.07(3), Wis. Adm. Code, was renumbered to s. NR 439.09(3), Wis. Adm. Code, in May 1992.

Comprehensive methods and procedures for CEMs are set in s. NR 439.09, Wis. Adm. Code. Specifically, section NR 439.09(8), Wis. Adm. Code, requires the following:

*Quality Natural Resources Management
 Through Excellent Customer Service*



The owner or operator of a continuous emissions monitoring system shall comply with the quality control and quality assurance plan submitted by the owner or operator of the source and approved by the Department.

The quality control and quality assurance plan for the CEMs at the Brokaw Mill was submitted to the Department on October 8, 1990. The portion of this plan addressing CEM reliability and minimum data capture is reiterated here:

Continuous Emission Monitor Permanent Records & Out of Control Periods

As required in s. NR 439.04(2), all measurements from the continuous emission monitoring system will be retained on file for at least three years. Continuous emission monitor data shall not be used for compliance reporting when the system is out of control. Back up equipment will be installed when failures occur, to strive for valid data 95% of the time. In the event of an extended continuous emission monitor failure, Wausau Papers will report valid compliance data at least 75% of the operating time of the source per quarter.

On July 30, 1997, the Department received from Wausau Papers the quarterly CEM report for the time period of April through June 1997. This report indicates that the sulfur dioxide CEM on S20 P20 was on line for 90.27% of the operating time in that quarter. (Total monitor downtime, excluding calibration time, was 212.5 hours.) This does not meet the monitor reliability criteria of 95% monitor up-time per the operating time of the source per quarter.

It is the Department's understanding that the monitor reliability is affected by the solid electrolyte probe. Probe difficulties were the main contributor to the monitor downtime during the second quarter of 1997 noted above. Furthermore, probe difficulties were the cause of excessive downtime for this monitor during the second quarter of 1993. The monitor up-time per the operating time of the source that quarter was 90.32%, excluding calibration time.

The Department understands that an outside firm was brought in during the second quarter of 1997 to set up a back up CEM in the event that the probe problems caused monitor downtime to approach 25% of the operating time of the source that quarter, which Wausau Papers understood would trigger noncompliance. However, Wausau Papers did not activate a back up CEM during that quarter. This was explained in a letter to the Department from Wausau Papers dated August 15, 1997.

Based on this information, the Department has reason to believe that Wausau Paper has violated the CEM requirements of section NR 439.09(8), Wis. Adm. Code, during second quarter of 1997.

The minimum valid compliance data capture requirement for purposes of reporting is set in s. NR 439.09(10)(c), Wis. Adm. Code, as follows:

For purposes of reporting exceedances, on the basis of a 24-hour rolling average under this subsection, any hourly average may be included in only one 24-hour period. An exceedance shall be based on at least 18 and not more than 24 valid recordings of hourly average emission rates in any 24 hour period.

Thus, valid compliance data for a limit averaged over 24 hours, such as the 258 pound per hour SO2 limit on stack S20, consists of a minimum of 18 hours of data in any 24 hour period of process operation.

According to the July 30, 1997, quarterly CEM report submitted by Wausau Paper, fewer than 18 hours of compliance data for stack S20 were collected on 8 days during the second quarter of 1997. Those days were April 3, May 30, June 1, 9, 10, 11, 12, and 18, 1997. No back up compliance data for these days has been provided.

Based on this information, the Department has reason to believe that Wausau Paper has violated the CEM minimum valid compliance data capture requirement on 8 days during second quarter of 1997, as set in s. NR 439.09(10)(c), Wis. Adm. Code.

The Department is authorized to seek an injunction or other appropriate relief for enforcement of a violation, including a forfeiture of not less than \$10 nor more than \$25,000 for each violation, pursuant to s. 285.87(1) of the Wisconsin Statutes. Any person who intentionally commits an act that violates or fails to perform an act required by laws relating to air pollution may be fined not more than \$25,000 per day of violation or imprisoned for not more than six months or both, pursuant to s. 285.87(2) of the Wisconsin Statutes. Each day of continued violation is a separate offense.

The Department wishes to make you aware that this Wausau Paper facility is a major source and as such is included under the national significant violator policy of the United States Environmental Protection Agency (EPA). The significant violator policy allows EPA to take the lead and begin federal enforcement action if the above cited violation is not resolved or referred to the Wisconsin Department of Justice by approximately January 30, 1998.

The Department feels that an enforcement conference would be helpful in resolving this matter. An enforcement conference has been scheduled for the following:

TIME: 1:00 p.m.
 DATE: October 2, 1997
 PLACE: Department of Natural Resources
 5301 Rib Mountain Drive
 Wausau, WI 54401

At the enforcement conference we will wish to discuss the following:

1. Your plan for corrective action, including specific dates and activities for resolving the alleged violation and preventing similar future violations.
2. Any available data you have indicating the sulfur dioxide compliance status of stack S20 during periods of monitor downtime (such as scrubber operating parameters, process operating parameters, stack test correlations, etc.).

If you have any technical questions, please contact Eileen Ingwersen at (715) 421-7842. If you have any questions concerning this notice or if you need to request a different date and/or time for the conference, please contact me at (715) 365-8935.

Sincerely,



Michelle DeBrock-Owens
Environmental Enforcement Specialist

cc: Enforcement File, Rhinelander
CASETRACK File, Rhinelander
Eileen Ingwersen, Wisconsin Rapids
Tom Woletz, Eau Claire
Mike Scott, LC/5
Lloyd Eagan, AM/7
Steve Dunn, AM/7
Bureau of Air Mgmt., AM/7-ENF
Mr. Darrell Jeffries, Wausau Paper Mill Company, P.O. Box 305, Brokaw,
WI 54417-0305
Stephanie A. Valentine, Enforcement Section (Michigan/Wisconsin), Air
Enforcement and Compliance Assurance Branch (AE-17J), Air and Radiation
Division, U.S. Environmental Protection Agency - Region 5, 77 West
Jackson Boulevard, Chicago, IL 60604-3590.



Exhibit B

October 13, 1997

Ms. Michelle DeBrock-Owens
Wisconsin Department of Natural Resources
Northern Co-Regional Headquarters
P.O. Box 818
107 Sutliff Avenue
Rhineland WI 54501-0818

Re: Wausau Paper Mills
Brokaw Plant
Response to DNR Notice of Violation
DNR Casetrack No. 97-WCEE-059

Dear Ms. DeBrock-Owens:

This letter provides Wausau Paper Mills' response to DNR's Notice of Violation (NOV) dated September 17, 1997. The NOV advised the Company that it "may be in violation of Wisconsin's air pollution control rules." This letter summarizes the position of the Company as presented to DNR in the enforcement conference held on October 2, 1997, at the Department's Rib Mountain offices near Wausau.

Overview of the Company's Position

The subject of the Notice of Violation is allegedly "excessive downtime" of the Company's continuous emission monitor system (CEM) for sulfur dioxide (SO₂) on the main stack of the Company's pulp mill. This issue was first raised when Wausau Papers filed its quarterly report for the CEM system with DNR on July 28, 1997. During the second quarter (running from April 1 through June 30, 1997), the Company experienced 10.5% downtime on the CEM. This was caused by unusual problems the Company had in replacing faulty SO₂ probes in the CEM system. It should be noted that at no time did the SO₂ emissions from the Company's pulp mill exceed or even approach the permitted emission limitation. [The problem was with the monitor only -- not with the SO₂ control system.] The emission limit (established by a 1988 permit) is 258 pounds of SO₂ per hour.

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 2

As indicated in more detail below, records show that the average emission rate from the pulp mill for the days when the CEM was down was in the range of 120-150 pounds of SO₂ per hour, more than 100 pounds per hour under the allowable limit.

We understand that DNR, as a matter of policy, believes that a notice of violation or a letter of noncompliance may be issued to a source if quarterly CEM system downtime is greater than 5.0%. This policy was stated in a memo by Don Theiler (former Director of DNR's Bureau of Air Management), dated August 21, 1989, to various Department personnel. However, to the best of our knowledge, the DNR policy memo (which contains the 5% downtime rule) was never (prior to this case) communicated to affected sources in Wisconsin. The requirement does not appear anywhere in DNR's (or federal EPA's) rules.

It is unfair for DNR to first communicate the 5% requirement to Wausau Paper Mills in the process of issuing a Notice of Violation. The NOV should be rescinded in this case because:

1. The Company was led to believe by DNR that the maximum downtime requirement for CEM's was 25%. The Company understood that 95% uptime was a goal or guideline, but that 75% uptime was a minimum requirement. This guidance was reflected in Wisconsin DNR's Air Management Operations Handbook, a copy of which was provided to Wausau Papers by DNR in 1989.
2. On October 8, 1990, the Company filed with DNR a quality assurance/quality control (QA/QC) plan for the SO₂ CEM. This document was filed with the Department in Madison, as required by Section NR 439.09(8), Wis. Adm. Code. The QA/QC plan stated the Company's understanding regarding required uptime for the SO₂ CEM. The plan stated that the Company would "strive for" valid data 95% of the time, but that 75% operating time was required. DNR did not respond to the Company regarding the QA/QC plan. Prior to this NOV case, the Department never advised Wausau Paper Mills that its understanding regarding required uptime for the SO₂ CEM was incorrect.

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 3

3. The Company's air permit for the pulp mill (Permit No. 88-DLJ-005, issued on May 10, 1988) contains a condition which requires the Company to install and operate a SO₂ CEM on Stack S20 at the mill. The permit does not contain any requirement regarding the percent of uptime of the CEM. The permit condition states simply that the requirements set forth in Chapter NR 439 shall be followed. Chapter NR 439 does not contain any minimum requirements for uptime for a CEM. Chapter NR 439 references federal EPA regulations contained in 40 CFR Part 60. The federal regulations (in particular Appendix B to Part 60) do not contain any express requirements for minimum uptime (or maximum downtime) for a CEM.

DNR may have the authority to require a minimum amount of "uptime" for CEM's. However, affected sources should be given clear, advance notice of any such requirement. An affected source should not learn of this requirement first in the form of a Notice of Violation. The Department apparently desires to impose and enforce a maximum 5% downtime requirement. However, it should do so prospectively and with adequate notice to affected sources. Don Theiler's 1989 memorandum on this subject was never circulated to affected sources in the state. DNR's reliance on the 5% maximum downtime requirement stated in that memorandum is unenforceable as a matter of law. The requirement constitutes a "rule" which was not promulgated in accordance with the Wisconsin Administrative Procedure Act. Wisconsin Electric Power Company v. DNR, 93 Wis. 2d 222 (1980).

In the case of Wausau Paper Mills, the Company filed with DNR a document clearly indicating that the Company understood that it should "strive for" 95% uptime on the CEM, but that 75% uptime was required. The Company based its QA/QC plan on guidance from DNR and on documents which DNR provided to the Company. The Company was never advised by DNR that its understanding regarding this matter was incorrect and relied on DNR to its own detriment. For this reason, DNR is equitably estopped from enforcing a 95% uptime requirement until the Department rules on the adequacy of Wausau Papers' QA/QC plan which was submitted to DNR for review and approval seven years ago. State v. City of Green Bay, 96 Wis. 2d 195 (1980).

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 4

Chronology of Actions Taken by Wausau Papers to Avoid Downtime on the CEM

Attachment 1 to this letter is a summary/chronology of the good faith efforts made by Wausau Papers to promptly correct problems which it had with the SO2 CEM, beginning in early April of 1997. In reviewing the chronology, it is important to consider the following factors:

1. Wausau Papers has had seven years of experience with its SO2 CEM. Usually, a SO2 probe lasts from 6 to 9 months before it needs to be replaced. The Company's CEM normally operates well above 95% "uptime" per quarter.
2. When a SO2 probe goes bad in the CEM unit, it is necessary to replace it with a reconditioned probe. Westinghouse (the manufacturer of the CEM) is no longer making new SO2 probes for its CEM units. Thus, the probes must be "reconditioned" by Westinghouse and put back into service. The cost for this ranges from \$3,000 to \$7,000 per probe, and it takes 2-4 weeks for a probe to be reconditioned.
3. A reconditioned probe cannot be tested by Wausau Papers prior to its placement in the CEM unit to make sure that it will function properly. The only way for the Company to see if the replacement probe will work is to place it in the CEM unit under actual operating conditions. [Westinghouse does test each probe after it is reconditioned by the manufacturer and before it leaves Westinghouse's plant. However, the probes are sensitive instruments and can sometimes be damaged in transit.]
4. After a replacement probe is placed into the CEM unit, it takes approximately 24 hours for the probe to be calibrated and stabilized in the gas stream coming through the stack. Thus, a minimum of one day of CEM downtime is experienced before a replacement probe begins to function normally so that the CEM obtains accurate emission readings.

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 5

5. As indicated in the Company's QA/QC plan, Clean Air Engineering of Pallatine, Illinois was called in to provide back-up CEM capability when Probe No. 1 failed on June 9, 1997. Wausau Papers also began a search for a replacement probe from other paper mills with SO₂ CEM's. Clean Air Engineering's back-up CEM capability was not utilized, because CAE had difficulty in obtaining usable SO₂ emission data for Wausau Papers. The equipment which CAE originally had on site produced readings in "parts per million." When it arrived at Brokaw, CAE did not have equipment which could yield SO₂ emission information in pounds per hour, as required by the DNR air permit. This resulted in a delay in getting the CAE monitoring equipment on line. On June 12, 1997, Wausau Papers succeeded in purchasing a third SO₂ probe from Badger Paper Mills in Peshtigo. The No. 3 probe went on line in the morning of June 13, and Clean Air Engineering's back-up CEM services were not required after that.

Based on the chronology set forth in Attachment 1 and on the above considerations, it is clear that Wausau Paper Mills made good faith efforts to address the problems which were experienced with the SO₂ monitor during the second quarter of 1997. The facts that two reconditioned SO₂ probes failed within days of each other constituted events beyond the control of the Wausau Papers. Clean Air Engineering was called in promptly to initiate back-up CEM capabilities. However, before CAE could make the changes necessary to produce valid CEM data for Wausau Papers, the Company was able to purchase and install a replacement SO₂ probe in the monitor which functioned properly.

Wausau Papers complied with its quality control and quality assurance plan, in accordance with the provisions of Section NR 439.09(8), Wis. Admin. Code. As provided in the QA/QC plan, the Company installed back-up equipment when the failures of the SO₂ probes occurred. This was done by installing replacement, back-up probes on three separate occasions. The Company called in Clean Air Engineering as additional back-up support when one of the replacement probes failed before the second replacement probe could be reconditioned. Prior to the time when Clean Air Engineering could produce valid emission data for Wausau Papers, the Company purchased and installed a third, working SO₂ replacement probe. As

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 6

indicated in the QA/QC plan, Wausau Papers installed back-up equipment when failures occurred, to "strive for" valid data 95% of the time. Also in accordance with its QA/QC plan, Wausau Papers did report valid compliance data at least 75% of the operating time of the source in the second quarter of 1997. For these reasons, there was no violation of Section NR 439.09(8) in this case.

Data which Demonstrates that Emissions from Stack S20 Were in Compliance with the SO2 Emission Limit During the Periods of CEM Downtime

The Department requested available data which the Company has indicating the sulfur dioxide compliance status of Stack S20 during the periods of monitor downtime. This section responds to that request and provides information which demonstrates that the Company maintained compliance with its SO2 emission limit on the days when the CEM on Stack S20 was not operating.

An understanding of the sulfur dioxide control system at the Brokaw mill is necessary for this discussion. Permit 88-DLJ-005 established a sulfur dioxide permit limit of 258 pounds per hour for Stack S20. This limit is complied with using venturi scrubbers that are an integral part of the pulp mill's cooking acid preparation system. The installation of the venturi scrubbers in 1981 was an award winning engineering project because of the unique application of sulfur dioxide control into a manufacturing process. This approach eliminated the production of waste byproducts associated with sulfur dioxide scrubbers of the same vintage.

The absorption of sulfur dioxide depends primarily on pH. Typically, the higher the pH the more sulfur dioxide is absorbed. Because the scrubbing fluid is used for acid making, the pH of the entire acid making system is monitored closely and controlled within specific tolerances. The acid making system consists of the two venturi scrubbers, an absorption tower and cooling venturi. The scrubbing fluid runs counter current to the gas stream, resulting in a gas stream being discharged from Stack S20 that typically runs at half of Wausau Papers' permitted limit for SO2.

Attachment 2 is a plot of pH in venturi #1 versus sulfur dioxide emissions in pounds per hour. Maintaining the pH in venturi #1 between 5.5 and 5.8 results in sulfur dioxide being discharged at

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 7

150 pounds per hour or less. Attachment 3 is a plot of pH in venturi #2 versus sulfur dioxide emissions in pounds per hour. Similar discharges of 150 pounds per hour or less of sulfur dioxide are expected with a pH of 6.5 to 7.0.

The pH operating set point ranges of venturi #1 and #2 are 5.5 to 6.5 and 6.0 to 7.0 respectively. The data in Attachment 4 are the recorded pH's during the downtime of the CEM. The time periods are broken down into four (4), six (6) hour segments. For example, the 1:00 to 6:00 readings cover 12:00 midnight to 6:00 inclusive (i.e., the reading is taken at the end of the hour for the preceding hour.) The pH's for venturi #1 and 2 are recorded as maximum and minimum for the six hour period. This data demonstrates that emissions of sulfur dioxide were in compliance with the Company's permit on April 3, May 30, June 1, 9, 10, 11, 12 and 18.

To assure the pH controls work properly, an automatic system for cleaning the pH probes to maintain sensitivity has been incorporated into the operation of Venturi #1 and 2. The pH probes are cleaned with the automatic system once every hour for a duration of 5 minutes per wash. The cleaning fluid is condensate from the evaporators with a pH of 2.5. During the wash cycle, the control valves for magnesium hydroxide are locked into their last position while the pH probe reads the pH of the cleaning solution. Sometimes this results in recording the pH of the wash as opposed to the pH of the scrubbing fluid. This explains the two lower pH values of 3.0 and 2.5 for June 18, 1997, on Attachment 4.

DNR Has Not Issued NOV's to Other Companies in Wisconsin for Allegedly "Excessive Downtime" on SO2 CEM's.

Wausau Papers appears to have been "singled out" for disparate treatment by DNR in this matter, compared to other paper mills with downtime experiences with SO2 CEM's. This conclusion is based on records provided to us by the Department.

No other mill has received a NOV for allegedly excessive downtime on a SO2 CEM. In four cases in recent years, DNR issued "Letters of Noncompliance" -- not more serious NOV's -- to mills which experienced downtime on their CEM's which DNR considered to be excessive. One mill received three LON's for the same issue at the same facility! The company in question did not receive a NOV.

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 8

DNR has attempted to justify the issuance of the NOV to Wausau Papers in this case by claiming that the Company had "excessive downtime" on its CEM due to probe difficulties in 1993 and that it should have taken steps to prevent a re-occurrence of the same type of problem. This argument has no merit for the following reasons:

1. In the 1993 situation, DNR did not issue a LON or otherwise advise the Company that the Department considered downtime over 5% to be a violation. Other companies at least were advised in writing (by means of Letters of Noncompliance) of DNR's expectations in this area. Wausau Papers received nothing -- even though the Theiler memo had been written in 1989 -- 4 years prior to the time in question.
2. In the 1993 situation, DNR could have and should have reviewed and acted on the Company's QA/QC plan which had been filed with the Department in 1990. Such a review could have informed Wausau Papers of DNR's 95% uptime requirement. DNR failed to act on the plan.
3. Unlike the other mills which received LON's, Wausau Papers was never advised by DNR that quarterly downtime on the CEM in excess of 5% could be considered a violation. The Company was first informed of this "requirement" in the process leading up to the issuance of the current NOV.

DNR has also cited Section NR 439.09(10)(c), Wis. Admin. Code, as being violated by Wausau Papers in this matter. However, that rule does not apply to the facts of this case. By its express terms, Section NR 439.09(10)(c) applies to "exceedances" of an applicable emission limit. In this case, there are no exceedances of the hourly SO2 emission limit, as indicated above. Section NR 439.09(10)(c) does not establish performance specifications or "minimum valid compliance data capture" requirements for CEM's, as claimed by DNR. Rather, it simply sets forth the method for calculating when an exceedance has occurred. Because there are no exceedances in this case, Wausau Papers has not violated Section NR 439.09(10)(c).

Ms. Michelle DeBrock-Owens

October 13, 1997

Page 9

"Corrective Action" Has Already been Taken, and There is no "Continuing Violation" Related to the Operation of the Company's CEM.

As stated above, Wausau Papers has not violated any rule or otherwise lawful requirement pertaining to the operation of its CEM. The Company's CEM normally records valid SO2 emission data well above 95% of the time each quarter. For example, for the most recent quarter (July 1 to September 30, 1997), the CEM recorded valid data 98% of the quarter.

The Company now has two back-up SO2 probes available for use when a probe fails in the CEM unit. Thus, even if a second probe fails while the first probe is being re-conditioned at Westinghouse (a 2-4 week process), there now is a third probe on site and available for use in the CEM. Moreover, as additional back-up, the Company will continue to have Clean Air Engineering available to provide SO2 CEM readings in a pounds-per-hour format in the event of an extended downtime period. Finally, as a further back-up measure, Wausau Papers will continue to maintain records of the pH levels in the Venturi scrubbers (as explained above) which constitutes a supplemental compliance monitoring capability.

These measures can and will be incorporated into the Company's QA/QC plan. However, Wausau Papers first requests DNR to respond in writing as to the Department's requirements for CEM's and the adequacy of the Company's current QA/QC plan which was submitted in 1990.

SUMMARY AND CONCLUSIONS

For the above-stated reasons, we urge the Department to reconsider its decision regarding the issuance of a Notice of Violation in this case. We believe that the Department should indicate in writing to the Company DNR's expectations regarding CEM uptime. DNR should issue a determination on Wausau Papers' QA/QC plan which was submitted in 1990 and has never been reviewed and approved by the Department. The Department's requirements on required CEM uptime per quarter should be communicated to all affected sources in the state. The Department must utilize the rulemaking process to include a requirement of this type in DNR's Chapter NR 439 regulations.

Ms. Michelle DeBrock-Owens

October 13, 1997

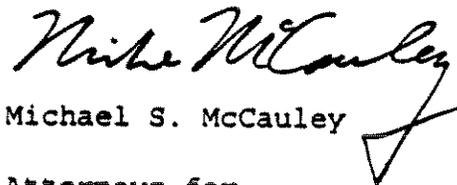
Page 10

Finally and most importantly, DNR should act immediately to rescind its Notice of Violation in this case. DNR's letter to Wausau Papers, dated September 17, 1997, indicated that by issuing the NOV, DNR had caused Wausau Papers to be included under "the national significant violator policy" of U.S. EPA. In addition, the NOV will result in the Company being identified as having "violated" its 1988 Clean Air Act permit for the pulp mill in U.S. EPA's "Sector Facility Indexing Reports," which EPA will make available to the public on the Internet. Thus, the Company will be unfairly exposed to the stigma of being identified as a "significant violator" without due process and without the right to contest DNR's erroneous findings in this case. As a matter of fundamental fairness and simple justice, DNR should either rescind the Notice of Violation or grant Wausau Papers the opportunity to contest the violations alleged in the NOV in an administrative hearing provided for under Section 285.83(1)(a)(1) of the Wisconsin Statutes (the statutory authority referenced by DNR in the opening paragraph of the Notice of Violation issued in this case).

Please feel free to contact us if you have any further questions or comments regarding this matter.

Very truly yours,

QUARLES & BRADY



Michael S. McCauley

Attorneys for
Wausau Paper Mills Company

MSM:lr
Attachments
cc/attach.:

Ms. Lloyd Eagan - DNR, Madison
Mr. Tom Woletz - DNR, Eau Claire
Mr. Mike Scott - DNR, Madison
Ms. Eileen Ingwersen - DNR, Wisconsin Rapids
Mr. Steve Dunn - DNR, Madison
Ms. Stephanie A. Valentine - U.S. EPA Region 5

**Chronology of Actions Taken by Wausau Papers
To Avoid Excessive Downtime on CEMS for Stack S20**

Date	Description	Down time attributed to SO ₂ probe	Down time attributed to electronics	Down time attributed to O ₂ probe
April 3, 1997	Replaced SO ₂ probe #1 with probe #2 off shelf.	34.5		
May 30, 1997	Replaced SO ₂ probe #2 with probe #1 off shelf. Card Calibration.	28		
June 1, 1997	Replaced controller.		16	
June 9, 1997	Probe #1 failed, no spare probe, #2 is out for reconditioning. Clean Air Eng. (CAE) setting up equipment. Looking for spare from another facility.	24		
June 10, 1997	CAE setting up equipment. Looking for spare from another facility.	24		
June 11, 1997	CAE setting up equipment. Purchased probe from Badger Paper	24		
June 12, 1997	Probe #3 purchased from Badger Paper being installed.	24		
June 13, 1997	CEM on-line 10:30 am. CAE released.	5.5		
June 18, 1997	New O ₂ probe installed.			26

A SO₂ probe takes 24 hrs to stabilize.

Turn around time for probe reconditioning is 2-4 weeks.

Figure 2
Venturi #2 pH vs SO₂ Emissions

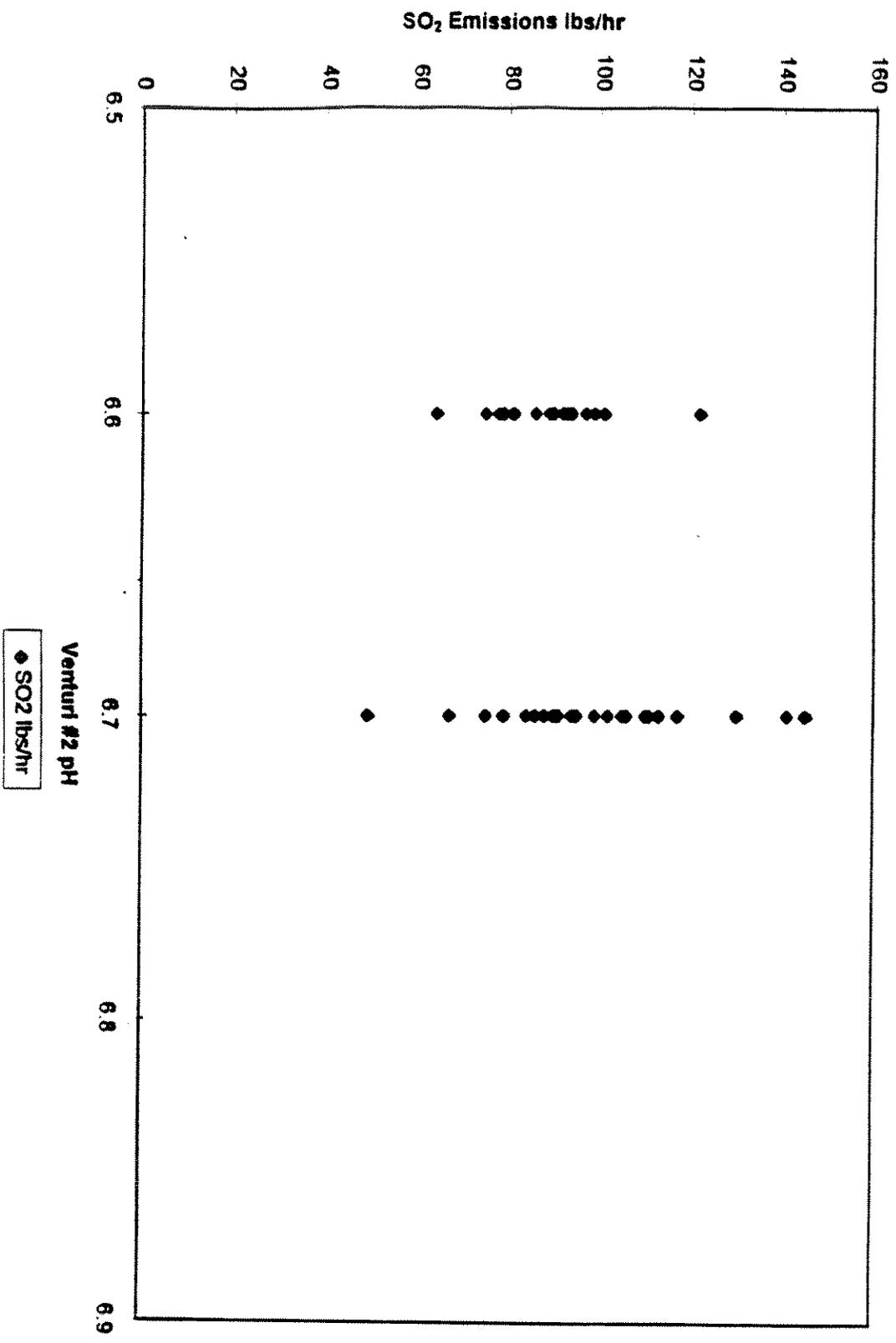
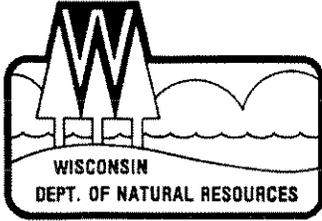


Table 1

**pH Data for Venturi Scrubbers on Wausau Papers
Recovery Operation Process P20 Stack S20**

Date	Time		Venturi #1 pH		Venturi #2 pH	
			Maximum	Minimum	Maximum	Minimum
April 3, 1997	1:00	6:00	5.6	5.6	6.6	6.5
	7:00	12:00	5.7	5.6	6.7	6.6
	13:00	18:00	5.7	4.8	6.7	6.6
	19:00	0:00	5.7	5.7	6.7	6.7
May 30, 1997	1:00	6:00	5.2	4.0	7.1	5.6
	7:00	12:00	5.7	4.0	7.2	7.0
	13:00	18:00	5.7	5.4	7.0	6.9
	19:00	0:00	5.4	5.3	6.9	6.8
June 1, 1997	1:00	6:00	5.5	5.2	6.9	6.7
	7:00	12:00	5.8	5.8	6.8	6.7
	13:00	18:00	5.7	5.5	6.9	6.7
	19:00	0:00	5.8	5.7	7.0	6.7
June 9, 1997	1:00	6:00	7.2	5.8	7.5	7.4
	7:00	12:00	6.5	5.8	6.9	6.8
	13:00	18:00	5.7	5.7	6.9	6.9
	19:00	0:00	5.7	5.7	6.9	6.9
June 10, 1997	1:00	6:00	5.8	5.7	6.9	6.9
	7:00	12:00	5.8	5.7	6.9	6.9
	13:00	18:00	5.7	5.7	6.9	6.9
	19:00	0:00	5.8	5.7	6.9	6.9
June 11, 1997	1:00	6:00	5.7	5.7	6.9	6.8
	7:00	12:00	5.7	5.7	6.9	6.8
	13:00	18:00	5.7	5.7	6.9	6.9
	19:00	0:00	5.7	5.7	6.9	6.9
June 12, 1997	1:00	6:00	5.7	5.7	6.9	6.9
	7:00	12:00	5.7	5.7	6.9	6.9
	13:00	18:00	5.8	5.5	6.9	4.3
	19:00	0:00	5.8	5.5	6.7	5.5
June 18, 1997	1:00	6:00	5.8	3.0	6.8	2.5
	7:00	12:00	5.5	5.3	6.8	6.7
	13:00	18:00	5.7	5.5	6.8	6.8
	19:00	0:00	5.8	5.7	6.8	6.8



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Meyer, Secretary

PO Box 7921
101 South Webster Street
Madison, Wisconsin 53707-7921
TELEPHONE 608-266-2621
FAX 608-267-3579
TDD 608-267-6897

October 30, 1997

*Rec'd
11/3/97
MGM*

IN REPLY REFER TO:

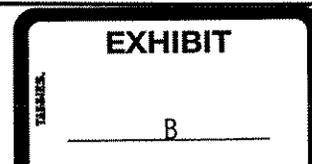
Mr. Michael S. McCauley, Esq.
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497

SUBJECT: Petition for a Contested Case Hearing Regarding
an action taken by the DNR and the issuance of a Notice of
Violation for Wausau Paper Mills Company, Brokaw Plant

Dear Mr. McCauley:

The Department of Natural Resources has received your Petition on behalf of Wausau Paper Mills Company (Wausau Papers), requesting a contested case hearing regarding an action taken by the Department by which Wausau Papers was included under the National Significant Violator Policy of the EPA and the issuance of a Notice of Violation (NOV) in which said action was memorialized. The contested case hearing has been petitioned for pursuant to sec. 285.83(1)(a)1 and sec. 227.42, Wis. Stats. It has been determined, however, that sec. 285.83(1)(a)1, Wis. Stats. is not the applicable statute under which to present the petition for contested case hearing, and that your petition has not met the statutory requirements for requesting a contested case hearing regarding the issuance of the NOV under sec. 227.42, Wis. Stats. Therefore, the Department hereby denies your request for a contested case hearing on the following grounds:

1. Section 285.83(1)(a)1, Wis. Stats. states that when a notice is issued, it may include an order specifying that necessary corrective action be taken. Such an order becomes effective unless the person named in the notice and order requests a hearing before the Department. Thus, for a person to request a hearing under sec. 285.83(1)(a)1, Wis. Stats., an order has to be issued. Furthermore, it is the Department's position that the hearing described in sec. 285.83(1)(a)1, Wis. Stats. is not a contested case hearing, since it is not specified that such a hearing shall be a contested case hearing. (See, 285.81(1)(b), Wis. Stats., wherein it states that a hearing granted under that section shall be a contested case hearing under ch. 227.) In the current situation, no order was issued with the NOV. Therefore, a hearing may not be requested by Wausau Papers, nor granted under sec. 285.83(1)(a)1, Wis. Stats.



2. Section 227.42(3), Wis. Stats. states that 227.42 does not apply to actions where hearings at the discretion of the agency are expressly authorized by law. In sec. 285.83(1)(a)1, Wis. Stats., it states that "(i)nstead of an order, the department may require that the alleged violator appear before the department for a hearing..." Since the Department is authorized -- but not required -- to conduct a hearing, such a hearing is at the discretion of the agency. (It can be argued that the Department did, in fact hold such a hearing on October 2, 1997.) Therefore, pursuant to sec. 227.42(3), Wis. Stats., sec. 227.42, Wis. Stats. does not apply to the Department's action in this matter and Wausau Papers does not have the right to seek a contested case hearing under sec. 227.42, Wis. Stats.

3. In the alternative, even if sec. 227.42, Wis. Stats. were determined to be applicable to your petition, the request for contested case hearing is denied for failure to meet the requirements of sec. 227.42, Wis. Stats. In order to obtain a contested case hearing, each of the conditions of sec. 227.42(1), Wis. Stats. must be satisfied, and it is not sufficient to simply state that the conditions are satisfied. Wausau Papers has not shown that it has or can satisfy any of the four requirements enumerated under sec. 227.42(1), Wis. Stats. Specifically, the petition is denied for the following reasons:

a. The petition fails to allege any injury or threatened injury to a substantial interest which is caused by the Department's action or inaction, as required under sec. 227.42(1)(a), Wis. Stats. Although an injury is not specified in the petition, it is stated that "unless a contested case hearing is granted to the Company in this matter, the Company will be unfairly exposed to the stigma of being identified as a 'significant violator' without due process of law." To the extent that this statement alleges an injury, the statement itself contends that such an injury or threat of an injury is related to the granting or denial of a contested case hearing. Moreover, there is no injury to a substantial interest specified in the October 13, 1997 response to the NOV (incorporated by reference). Although an injury is alluded to in the summary because it is alleged that the EPA will make information available to the public on the internet and therefore expose Wausau Papers to the stigma of being identified as a "significant violator", such an action (and alleged injury) is due to EPA's actions and decisions, and not the Department's. Therefore, the petition fails to meet the requirements of sec. 227.42(1)(a), Wis. Stats.

b. The petition fails to allege that there is no evidence of legislative intent that the interest which would have to have been allegedly injured is not to be protected. Therefore, the petition fails to meet the requirements of sec. 227.42(1)(b), Wis. Stats.

c. Although it might be assumed, the petition fails to allege that any possible injury to Wausau Papers is different in kind or degree from injury to the general public caused by the Department's actions. Therefore, the petition fails to meet the requirements of sec. 227.42(1)(c), Wis. Stats.

d. There is no dispute of material fact, and the petition fails to allege that there is a dispute of material fact, as required under sec. 227.42(1)(d), Wis. Stats. To the extent that disputes have been alleged, for example whether Wausau Papers has violated s. NR 439.09(8) or NR 439.09(10)(c), Wis. Adm. Code or whether the Department is equitably estopped from enforcing its CEM uptime requirements, all are disputes of law, not of fact. Therefore, the petition fails to meet the requirements of sec. 227.42(1)(d), Wis. Stats.

It is noted by the Department that in addition to requesting a contested case hearing, the petition also requests that the DNR rescind the Notice of Violation. The Department asserts that it is not proper to ask for rescission of the NOV within a petition for contested case hearing and therefore, will not entertain such a request. A request to rescind the NOV should be made under separate cover, and directed to the enforcement specialist who issued the NOV.

NOTICE OF APPEAL RIGHTS

If you believe you have a right to challenge this decision, you should know that Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to ss. 227.52 and 227.53, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition shall name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to s. 227.42, Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30 day period for filing a petition for judicial review.

This notice is provided pursuant to s. 227.48(2), Stats.

Sincerely,



Stan Druckenmiller
Executive Assistant

cc: George Meyer - AD/5; Lloyd Eagan - AM/7; Eileen Ingwerson, Wisc. Rapids
Mike Scott - LS/5; Eve Dennison, LS/5; Tom Woletz, Eau Claire;
Michelle DeBrock-Owens, Rhinelander



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Connie M. Eberhardt
Paralegal
eberhardtc@doj.state.wi.us
608/266-5778
FAX 608/267-2223
TTY 608/267-8902

January 12, 1998

Mr. Steven W. Krieser
Assembly Clerk
Wisconsin State Assembly
125 West, State Capitol
Madison, Wisconsin 53702

Re: Moran v. Sullivan; Case No. 97-CV-2780

Dear Mr. Krieser:

I am sending you an affidavit for your signature. Please sign it before a notary public and return it to me by January 20, 1997. You may wish to keep a copy for your records.

If you have any questions, please call me at 266-5778. Thank you for your attention to this matter.

Sincerely,

Connie M. Eberhardt
Paralegal

Enclosure

3. My duties include receiving and maintaining a record of lawsuits served upon JCRAR and its members.

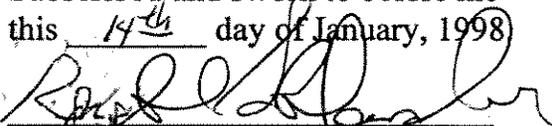
4. I have searched my records concerning the service of the above-captioned matter, and upon such review I was unable to locate a file indicating service has been obtained by the petitioner which sets forth the matters complained about in the instant case against the respondent named herein.

Dated this 14th day of January, 1998.



STEVEN W. KRIESER

Subscribed and sworn to before me
this 14th day of January, 1998



Notary Public, State of Wisconsin

My Commission: is permanent



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Connie M. Eberhardt
Paralegal
eberhardtcem@doj.state.wi.us
608/266-5778
FAX 608/267-2223
TTY 608/267-8902

January 13, 1998

Mr. John A. Sumi
Senate Clerk
Wisconsin State Senate
100 North Hamilton Street, Room 404
Madison, Wisconsin 53702

Re: Moran v. Sullivan; Case No. 97-CV-2780

Dear Mr. Sumi:

I am sending you an affidavit for your signature. Please sign it before a notary public and return it to me by January 20, 1997. You may wish to keep a copy for your records.

If you have any questions, please call me at 266-5778. Thank you for your attention to this matter.

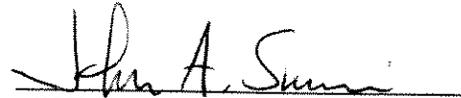
Sincerely,

Connie M. Eberhardt
Paralegal

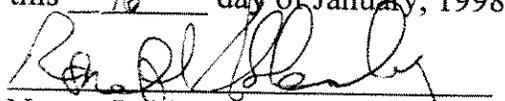
Enclosure

4. I have searched my records concerning the service of the above-captioned matter, and upon such review I was unable to locate a file indicating service has been obtained by the petitioner which sets forth the matters complained about in the instant case against the respondent named herein.

Dated this 16th day of January, 1998.


JOHN A. SUMI

Subscribed and sworn to before me
this 16th day of January, 1998.


Notary Public, State of Wisconsin
My Commission: is permanent