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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Environment and Natural Resources (SC-ENR)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... **HR** ... **bills and resolutions** (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (June/2014)

Senate

Record of Committee Proceedings

Committee on Environment and Natural Resources

Clearinghouse Rule 06-079

Relating to construction permit waivers and affecting small business.
Submitted by Department of Natural Resources.

January 08, 2007 Referred to Committee on Environment and Natural Resources.

February 13, 2007 **PUBLIC HEARING HELD**

Present: (5) Senators Miller, Jauch, Wirsch, Kedzie and
Schultz.
Absent: (0) None.

Appearances For

- Kevin Kessler, Madison — Department of Natural Resources
- Jeff Hanson, Madison — Department of Natural Resources

Appearances Against

- None.

Appearances for Information Only

- Scott Manly, Madison — Wisconsin Manufacturers &
Commerce

Registrations For

- None.

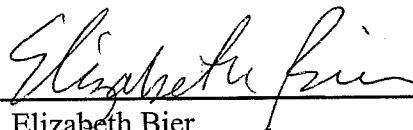
Registrations Against

- None.

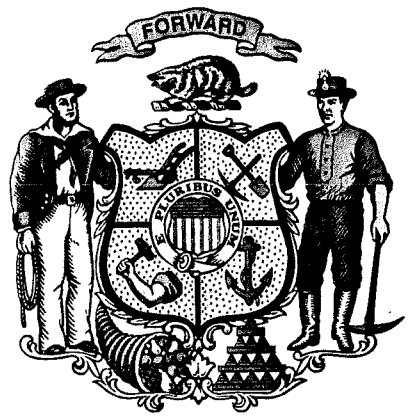
Registrations for Information Only

- None.

March 12, 2007 No action taken.



Elizabeth Bier
Committee Clerk



**Commence Construction Waivers Testimony
Kevin Kessler, Acting Director, Bureau of Air Management
Department of Natural Resources**

**Before The
Senate Committee on Environment and Natural Resources
February 13, 2007**

Members of the Committee, I thank you for the opportunity to discuss this rule package with you today. I am Kevin Kessler, acting director of DNR's Bureau of Air Management. With me today is Jeff Hanson, the Air Permit Section Chief.

Currently, when an air permit is needed for construction, one can not commence construction until the permit is received.

This requirement has been at issue with some projects companies seek to obtain necessary approvals to avoid or recover from difficult situations. Examples of which would include setting footings before ground freezing or getting back into production following a catastrophic occurrence.

2003 Wisconsin Act 118 set forth statutory changes that address this issue in creating 285.60(5m). (5m) required the department to develop regulations that would allow construction to commence in situations where an undue hardship would be placed on the applicant if they had to delay construction while waiting for an air permit.

The package before the committee sets forth criteria for a waiver allowing construction to commence prior to a permit being granted.

Criteria within the rule include:

- A complete construction permit application must be on file.
- A request for waiver contains a demonstration of undue hardship:
 - Weather, catastrophic damage, substantial economic issue that would preclude the project, other case-by-case hardship situations.
 - The project does not required limitations to avoid federal permitting requirements
 - The source is not located with 10 km of a protected area – Rainbow Lake

The department must act on the request for waiver within 15 days

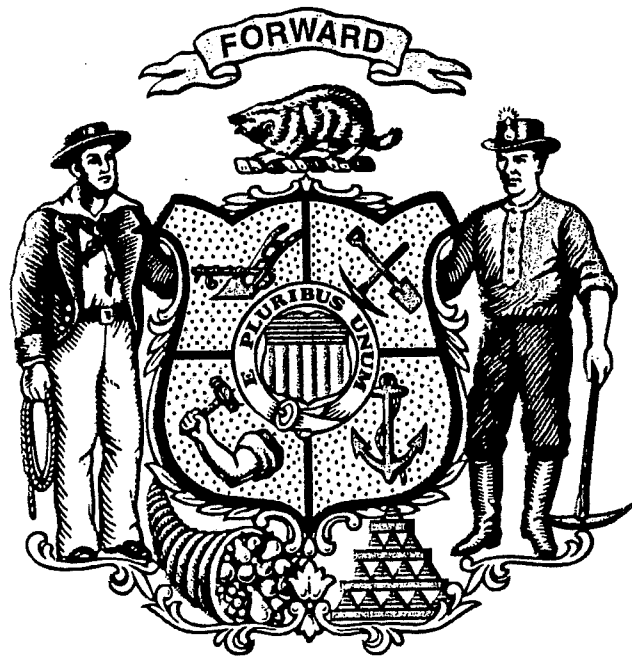
This criteria was based upon department experience, stakeholder input and similar waivers in other states – approximately 6 states have similar regulation

There is a fee for the processing of a waiver request of \$300, which was part of the Governor's budget and carried forward to the regulation

While construction can commence under a waiver, the sources covered can not start emitting until a permit is issued. DNR can rescind the waiver if the applicant is not diligent in responding to department requests for information necessary to complete the permitting process.

Waiver allows for construction to commence – ultimately a permit must still be issued.

We'll be happy to address any questions you may have.



**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Natural Resources Board Order No. AM-08-06

Legislative Council Rules Clearinghouse Number 06-079

Subject of Rules Construction permit waivers
and affecting small business

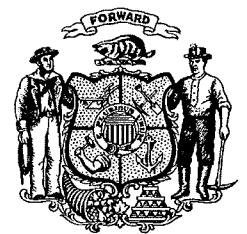
Date of Transmittal to Presiding Officers January 4, 2007

Send a copy of any correspondence or notices pertaining to this rule to:

**Carol Turner, Rules Coordinator
DNR Bureau of Legal Services
LS/5, 101 South Webster**

**Telephone: 266-1959
e-mail: turnec@dnr.state.wi.us**

An electronic copy of the proposed rule may be obtained by contacting Ms. Turner



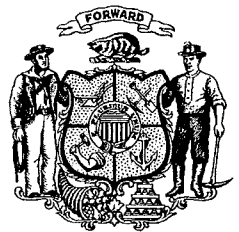
Construction Permit Waiver Rule

- Rule would allow a facility to begin construction prior to obtaining a construction permit if it can demonstrate undue hardship – e.g. adverse weather, financial, catastrophic event
- Case-by-case determination by the Department, 15 day clock.
- Estimated 10 % of projects would be exempt.
- WMC's objections:
 - Hardship criteria too restrictive; and
 - DNR hasn't gone beyond hardship demonstration.

Contact: Jeff Hanson (266-6876) for both Air rules



WISCONSIN STATE LEGISLATURE



Fiscal Estimate — 2005 Session

<input checked="" type="checkbox"/> Original	<input type="checkbox"/> Updated	LRB Number	Amendment Number if Applicable
<input type="checkbox"/> Corrected	<input type="checkbox"/> Supplemental	Bill Number	Administrative Rule Number NR 406 & NR 410

Subject

Construction permit waiver requirements and the associated fee, that will allow for construction, reconstruction, replacement, relocation, or modification of an air pollution source prior to the issuance of a permit, provided that the facility can demonstrate undue hardship.

Fiscal Effect

State: No State Fiscal Effect
 Indeterminate

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

Increase Costs — May be possible to absorb within agency's budget.
 Yes No

Decrease Costs

Local: No Local Government Costs
 Indeterminate

1. Increase Costs
 Permissive Mandatory
 2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
 4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

2003 Wisconsin Act 118 created s. 285.60(5m), Stats., which required the Department to promulgate a rule for reviewing and acting on construction waiver requests.

Under s. 285.69(1d), Stats., facilities submitting a request for a waiver to commence construction prior to receiving an air pollution construction permit will be required to pay a non-refundable fee of \$300. It is assumed there will be about 10 requests for this waiver annually. Therefore, about \$3,000 in revenue should be generated annually.

Estimates are that approximately up to 10 staff hours will be used to review each waiver request. Assuming an average salary of \$23.00 per hour and the associated fringe and supply, a total per hour staff level would be \$37.50, which would mean labor costs of about \$375 for each waiver request. It is assumed there will be about \$3,750 in expenditures related to the projected 10 annual waivers.

While there is a net difference of \$750 annually, it is anticipated that this shortfall can be absorbed by program revenue.

Long-Range Fiscal Implications

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature <i>Joe Polasek for EE</i>	Telephone No. 266-2794	Date (mm/dd/ccyy) 9/22/2004

Fiscal Estimate Worksheet — 2005 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number NR 406 & NR 410

Subject

Construction permit waiver requirements and the associated fee, that will allow for construction, reconstruction, replacement, relocation, or modification of an air pollution source prior to the issuance of a permit, provided that the facility can demonstrate undue hardship.

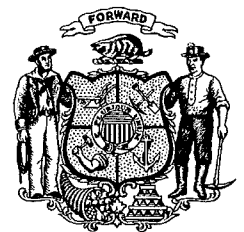
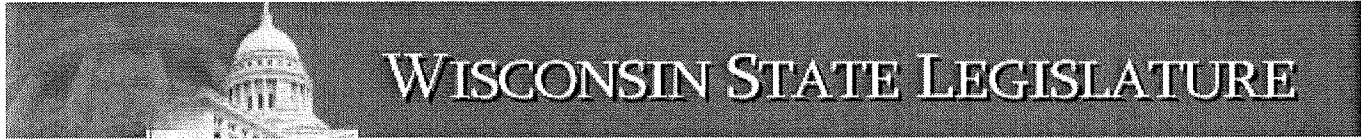
One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
 One-time costs associated with this rule package are the administrative costs associated with the rule revision process.

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes		\$ 3,325	\$ -
(FTE Position Changes)		(FTE)	(FTE)
State Operations — Other Costs		425	-
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$	\$ -
B. State Costs by Source of Funds			
		Increased Costs	Decreased Costs
GPR		\$	\$ -
FED			-
PRO/PRS		3,750	-
SEG/SEG-S			-
State Revenues <small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>		Increased Revenue	Decreased Revenue
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS		3,000	-
SEG/SEG-S			-
Total State Revenues		\$ 3,000	\$ -

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	\$ 3,750	\$
Net Change in Revenues	\$ 3,000	\$

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature <i>Joe Polasek</i>	Telephone No. 266-2794	Date (mm/dd/ccyy)



ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
RENUMBERING AND AMENDING, AMENDING
AND CREATING RULES

The Wisconsin Natural Resources Board adopts an order to **renumber and amend** NR 406.03; to **amend** NR 410.03(intro.) and to **create** NR 406.03(2) and 410.03(1)(bm) relating to construction permit waivers and affecting small business.

AM-08-06

Summary Prepared by the Department of Natural Resources

Statute interpreted: ss. 285.11(6), 285.60(5m) and 285.69(1d), Stats. The State Implementation Plan developed under s. 285.11(6), Stats., is revised.

Statutory authority: ss. 227.11(2)(a) and 285.11(1) and (6), Stats.

Explanation of Agency Authority

Section 227.11(2)(a), Stats., gives state agencies general rulemaking authority. Section 285.11(1), Stats., gives the Department authority to promulgate rules consistent with ch. 285, Stats. Section 285.11(6), Stats., gives the Department the authority to develop a state implementation plan for the control of air pollution. Section 285.60(5m)(a), Stats., directs the Department to promulgate rules to allow a source to commence construction of an air pollution source prior to receipt of a construction permit based on a showing that construction prior to issuance of the permit is necessary to avoid undue hardship. Section 285.69(1d), Stats., directs the Department to assess a fee of \$300 for any source requesting a waiver under s. 285.60(5m), Stats.

Related Statute or Rule

This rule relates directly to regulations in ch. NR 406, Wis. Adm. Code, and applicable permit fees in ch. NR 410, Wis. Adm. Code, for the permitting of activities that result in air pollutant emissions.

Plain Language Analysis

2003 Wisconsin Act 118, created s. 285.60(5m), Stats., which requires the Department to develop rules to allow a person who owns or operates air pollution sources to commence construction on a project that requires a construction permit prior to receiving the permit, in certain circumstances. This rule is being developed in response to this directive. It would be responsive to the s. 285.60(5m), Stats., directive by allowing a person to apply for a construction permit waiver while their construction permit is being processed. Waivers can be granted for undue hardship, which may include weather conditions, catastrophic equipment damage at a source where a construction permit is needed for replacement equipment or other hardship situations that may arise on a case-by-case basis.

Summary of, and Comparison with, Existing or Proposed Federal Regulation

There are no existing or proposed regulations at the federal level to allow for granting a construction permit waiver.

Comparison with Rules in Adjacent States

Michigan has a similar rule while Iowa and Illinois do not. Michigan may grant a waiver prior to the submittal of the permit application. The applicant can then proceed, at their own risk, as the state still has the ability to deny the application. Michigan does not issue waivers for major sources nor those that are subject to the federal National Emission Standards for Hazardous Air Pollutants. Minnesota grants waivers on minor permit modifications only.

The proposed rule is very similar to Michigan's except that we are requiring submittal of a complete air pollution construction permit application prior to acting on the waiver request. As with Michigan's rule, the Department won't accept waiver requests for major sources or major modification to sources, both in attainment and non-attainment areas within Wisconsin.

Summary of Factual Data and Analytical Methodologies

This rule is being developed as a result of statutory changes. The proposed language of the rule does not deviate from the directive to develop this rule.

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of Economic Impact Report

The proposed rule is not expected to have a significant effect on small businesses nor have a significant economic effect on any entity. However, under s. 285.69(1d), Stats., any person filing a waiver request will be required to pay a \$300 non-refundable fee.

Effect on Small Business

The proposed rule is not expected to have any significant adverse effect on small businesses. Small businesses may benefit from this rule based on the discussion above.

Agency contact person: (including email and telephone): Joseph Brehm, telephone 608/267/7541, e-mail; Joseph.Brehm@dnr.state.wi.us

SECTION 1. NR 406.03 is renumbered NR 406.03(1) and, as renumbered, is amended to read:

NR 406.03(1)(title) PERMIT REQUIREMENT. ~~No~~ Except as provided in sub. (2), no person may commence construction, reconstruction, replacement, relocation or modification of a stationary source unless

the person has a construction permit for the source or unless the source is exempt from the requirement to obtain a permit under s. 285.60(5), Stats., or under this chapter. Applications for the construction permit shall be submitted on forms which are available from the department at its Madison headquarters and regional offices.

SECTION 2. NR 406.03(2) is created to read:

NR 406.03(2) WAIVER OF CONSTRUCTION PERMIT REQUIREMENTS. (a) A person who is required to obtain a construction permit under s. 285.60, Stats., may request a waiver from the department in order to commence construction, reconstruction, replacement, relocation or modification of an air pollution source prior to the department issuing a construction permit to the source under this chapter. A waiver request shall be made in writing and shall include an explanation of the circumstances that justify the request and when those circumstances arose or may be anticipated to arise. The waiver request shall be signed by a responsible official for the facility.

(b) The department may grant a waiver provided that all of the following conditions are satisfied:

1. The person has submitted a complete construction permit application for the source to the department.
2. The person has submitted a complete waiver request to the department which demonstrates that undue hardship will be caused if a waiver is not granted. Undue hardship may result from any of the following:
 - a. Adverse weather conditions.
 - b. Catastrophic damage of existing equipment.
 - c. A substantial economic or financial hardship that may preclude the project in its entirety.
 - d. Other unique conditions.
3. The person has paid the waiver review fee required under s. NR 410.03(1)(bm).

(c) The department shall act on the waiver request within 15 days of receipt of a complete request and respond to the applicant either approving or denying that request.

(d) The source may commence construction, reconstruction, replacement, relocation or modification when a waiver is granted.

Note: A waiver does not relieve the applicant from the obligation to comply with any other applicable regulations or requirements. If the applicant proceeds with construction after a waiver is granted, they do so at the applicant's own risk. Granting the waiver does not obligate the department to approve the air permit application for the source.

(e) The source referenced in par. (b)1. may not be initially operated until a construction permit is issued.

(f) The department may not grant a waiver for a source that requires a permit under ch. NR 405 or 408 or requires a permit to establish enforceable limitations on potential to emit to avoid permit requirements of ch. NR 405 or 408.

(g) The department may not grant a waiver to a source located or to be located within 10 kilometers of a Class I area under this subsection.

(h) The department may rescind a waiver granted under this subsection if the owner or operator does not diligently respond to department inquiries on the construction permit application or if the department preliminarily determines that the source will not meet the criteria for permit approval under s. 285.63(1), Stats.

SECTION 3. NR 410.03 (intro.) is amended to read:

NR 410.03 (intro.) Any person required under s. 285.60, Stats., to obtain a construction permit for a direct source shall pay an application fee which is the sum of the basic fee under sub. (1) and any additional fees under sub. (2). Any person requesting revision of a direct source construction permit shall pay the basic fee in sub. (1)(a)5. Any person required under s. NR 406.04(1)(i) to obtain a determination of exemption

from the department shall pay the basic fee in sub. (1)(b). Any person requesting a waiver to commence construction under s. 285.60(5m), Stats., or s. NR 406.03(2) shall pay the basic fee in sub. (1)(bm). Any person required under s. 285.60, Stats., to obtain a construction permit for an indirect source or a determination of an exemption under s. NR 411.04 for an indirect source shall pay the appropriate fee under sub. (3).

SECTION 4. NR 410.03(1)(bm) is created to read:

NR 410.03(1)(bm) Any person requesting a waiver of construction permit requirements under s. 285.60(5m), Stats., or s. NR 406.03(2) shall submit under s. 285.69(1d), Stats., a \$300 fee with the request. The fee is non-refundable.

SECTION 5. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

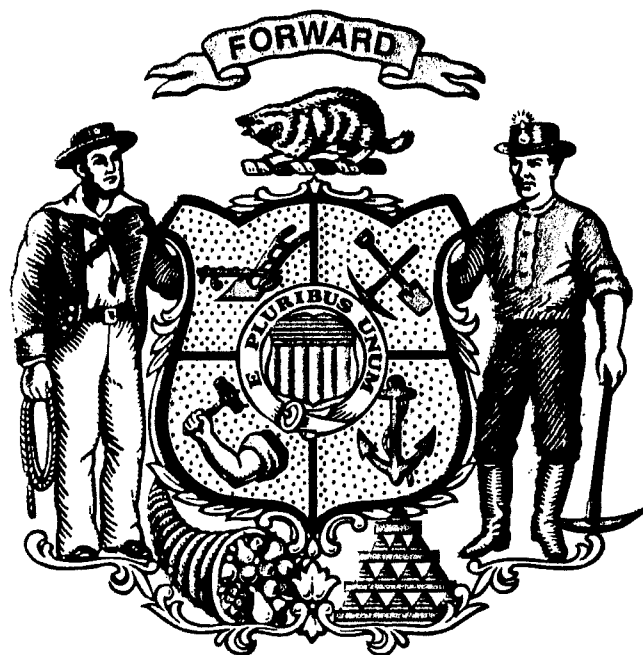
SECTION 6. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on October 25, 2006.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)





WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 06-079

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

2. Form, Style and Placement in Administrative Code

The rule places criteria that identifies air pollution sources not eligible for the waiver of construction permit requirements in two separate provisions, the last sentence in s. NR 406.03 (2) (a) and in s. NR 406.03 (2) (f). The preferred drafting style is to place comparable provisions in shared or adjacent text.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the treatment clause for SECTION 1, a comma should be placed before “as renumbered.”

b. The department should review the use of the phrase “initially operated” in s. NR 406.03 (2) (e) to ensure that the provision is clear and can be consistently applied. For example, does the initial operation of a source include operating the source at a small portion of its capacity to conduct testing of pollution control or process equipment?

c. The use of the phrase “diligently respond” in s. NR 406.03 (2) (g) is potentially ambiguous. The department should review the use of this phrase to ensure that it is clear.



**WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE**

Ronald Sklansky
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Richard Sweet
Clearinghouse Assistant Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 06-079

AN ORDER to renumber and amend NR 406.03; to amend NR 410.03 (intro.); and to create NR 406.03 (2) and 410.03 (1) (bm), relating to construction permit waivers and affecting small business.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

06-23-2006 RECEIVED BY LEGISLATIVE COUNCIL.

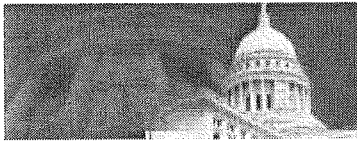
07-24-2006 REPORT SENT TO AGENCY.

RS:JES

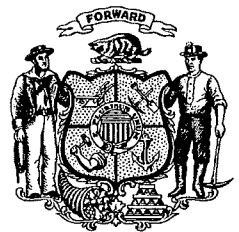
LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]
Comment Attached YES NO
2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]
Comment Attached YES NO
3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]
Comment Attached YES NO
4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]
Comment Attached YES NO
5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]
Comment Attached YES NO
6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]
Comment Attached YES NO
7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]
Comment Attached YES NO



WISCONSIN STATE LEGISLATURE



REPORT TO LEGISLATURE

NR 406 and 410, Wis. Adm. Code
Construction permit waivers and affecting small business

Board Order No. AM-08-06
Clearinghouse Rule No. 06-079

Basis and Purpose of the Proposed Rule

Section NR 406.03(2) is being proposed in response to 2003 Wisconsin Act 118, which created s. 285.60(5m), Stats. That provision requires the Department to promulgate rules under which a facility is allowed to commence construction, reconstruction, replacement, relocation or modification of an air contaminant source prior to issuance of the construction permit. Under s. 285.69(1)(d), Stats., and proposed language in ch. NR 410, the Department may charge a \$300 fee for processing a waiver request.

This rule would allow, under certain circumstances, a facility to begin construction of an air pollution source prior to obtaining an air construction permit. Waivers would only be issued for circumstances where the requester can demonstrate that undue hardship would occur if the waiver is not granted. Circumstances which may pose an undue hardship include adverse weather conditions, financial hardship and other catastrophic events at a facility. The Department may also grant waiver requests on a case-by-case basis for situations which constitute undue hardship. The Department is required to make a determination on the waiver request within 15 days.

Summary of Public Comments

On August 7 and 8, 2006, the Department conducted public hearings on the proposed rule changes in Stevens Point and Madison, respectively. Oral comments were received at the Madison hearing from a representative of Wisconsin Manufacturers and Commerce (WMC). No one appeared at the Stevens Point hearing.

Written comments were received from Wisconsin Manufacturers and Commerce.

The comments and the responses to them are given in the attached Responses to Comments document.

Modifications Made

No modifications were made as a result of public hearing.

Appearances at the Public Hearing

August 7, 2006 – Stevens Point – no appearances

August 8, 2006 – Madison

In support – none

In opposition – none

As interest may appear:

Robert Fassbender, Wis. Manufacturers & Commerce, 10 E. Doty St., Suite 500, Madison, WI 53562
Jim Boullion, Associated Contractors of Wis., 4814 E. Broadway, Madison, WI 53716

Changes to Rule Analysis and Fiscal Estimate

None were required.

Response to Legislative Council Rules Clearinghouse Report

The rule was modified to reflect the Clearinghouse comments.

Final Regulatory Flexibility Analysis

The proposed rule will not have a significant economic impact on a substantial number of small businesses. The proposed rule is not a required regulation but rather an optional step that a small business may take, under certain circumstances, to expedite the construction of an air pollution source. Based on estimates, the Department expects to receive about ten construction permit waiver requests annually. The fee for a waiver request is \$300. If granted a waiver, the Department believes that there could be a positive economic impact for that facility by allowing construction to start earlier than would normally be allowed.

7A. Identify and discuss why the rule includes or fails to include any of the following methods for reducing the impact on small business.

1. Less stringent compliance or reporting requirements.

There are no compliance or reporting requirements associated with this rule. The rule does require a waiver request be submitted, documenting the need for the waiver and any potential adverse effects on their facility should the waiver not be granted.

2. Less stringent schedules or deadlines for compliance or reporting.

There are no schedules for compliance or reporting. The rule does require a complete construction permit application be submitted prior to, or at the same time the waiver request is made. This is required to ensure that the Department can make a proper decision regarding the waiver request.

3. Consolidation or simplification of compliance or reporting requirements.

The proposed rule does not change compliance or reporting requirements for any source.

4. Establishment of performance standards in lieu of design or operational standards

The proposed rule change does not create additional design or operational standards.

5. Exemption from any or all requirements of the rule.

The rule can assist a business in getting an earlier start on the project that requires a construction permit. The construction permit application is required under another regulation.

7B. Issues raised by small business during the rule hearings, changes made as a result and reasons for rejecting alternatives suggested by small business.

No issues were raised by small business during the rule hearings.

7C. Reports required by the rule and estimated cost of preparation.

The rule requires a written waiver request be submitted to the Department. No estimated costs are available but they are expected to be minimal when compared to the cost of the project that is being proposed.

7D. Measures or investments needed to comply with the rule.

There are no measures or investments needed to comply with the rule.

7E. Additional cost to the state for administering or enforcing a rule which includes any methods identified in A.

The Department expects that additional costs will be in about of \$375 for reviewing and acting on a waiver request. Part of the cost will be recovered by the \$300 fee required to be submitted with the

wavier request. There will be a shortfall of about \$75 for each waiver request which the Department should be able to absorb.

7F. Impact on public health, safety and welfare caused by any methods identified in A.

There should be no impact on public health, safety and welfare as the methods identified in A. do not change any of the applicable requirements.

Department of Natural Resources Responses to Public Comments on Proposed Revisions to
chs. NR 406 and 410, Wis. Adm. Code
Board Order AM-08-06
September 25, 2006

COMMENTS AND RESPONSES

The WMC's oral hearing comments and written comments are essentially the same so they are being addressed jointly in these responses. WMC comments are divided into six sections, so those sections with their titles will be used for purposes of organizing this document. Each section will be summarized, with Department responses following. WMC's comments, on occasion, extend outside the scope of this rule making. In those cases, the DNR responses indicate that the responses are limited to issues relevant to the provisions of the proposed rule.

Section I. Background – The Need for Air Permit Reforms

Comment: WMC has provided a broad overview of regulatory reform and air permit streamlining in Wisconsin, discussing background issues and the Jobs Creation Act, Wisconsin Act 118.

Response: These comments are not related to the content of the proposed rule package. While they offer insights into permit streamlining progress, they are not germane to this particular rule making effort. Progress in regard to permit streamlining will be detailed in a separate report that is due prior to the Board hearing this proposal.

Section II. The Proposed Rule Misses an Opportunity for Significant Streamlining Reforms.

Comment: Waivers could allow Wisconsin to take advantage of new economic development by allowing projects to get started before the lengthy permit review is completed. However, WMC believes that the proposed rule would make it unnecessarily difficult, if not impossible, for waivers to be granted in many cases if the focus of the proposed rule doesn't allow for a case-by-case determination in addition to hardship waiver requests.

Response: The Department believes that the proposed rule is not as narrow in scope as WMC apparently believes. The proposed rule specifically allows for economic or financial hardship waivers "that may preclude the project in its entirety", as well as waivers in "other unique conditions". "Other unique conditions" allows for a case-by-case determination for hardship situations that could not previously have been identified or specified in the rule. While the statutes state "case-by-case basis or on bases specified in rule" may be made for granting of waivers in other instances, neither meetings with external stakeholders nor public comments provided any examples of situations where a waiver would be justifiably granted in situations that are other than hardship were related. The Department believes that proposed rule complies with the statutory directive and provide for a waiver to allow construction to commence, prior to issuance of a permit, in situations that are case-by-case in nature and are not in conflict with the Clean Air Act.

Section III. The Proposed Rule Will not Mitigate Documented Delays in Construction Permit Processing.

Comment: WMC comments that the proposed rule should be broadened to allow waivers beyond those narrow circumstances involving undue hardship. They state that timeliness is critical to capital investment in a new project.

Response: The proposed rule allows for waivers to be granted based on undue economic burdens or hardships. While the granting of a waiver from the requirement to have a permit prior to commencing construction may expedite the time frame for when construction can actually begin, granting of the waiver will have absolutely no positive impact on the amount of time necessary to complete the permit review process. Projects for which a waiver is granted are still required to obtain the construction permit.

Moreover, as reported by the Legislative Audit Bureau in its February 2004 report, the state has completed construction permit reviews within statutory time requirements in most situations. In those instances where the review time was extended beyond these periods, the LAB found that these delays were due to unique circumstances at those facilities.

Section IV. Hardship Criteria Should be Less Prescriptive

Comment: WMC suggests several proposed rule language changes to the hardship criteria. The first and second suggestions recommend that the Department "shall" (currently "may") issue a waiver if the person submitting a complete waiver request describing (currently "demonstrating") the undue hardship that may occur if a waiver is not granted.

Response: The Department believes that the current language is appropriate. Section 285.61(5m), Stats. requires the Department to promulgate rules that will provide for a waiver from the requirement to obtain a construction permit prior to the commencement of construction based on a showing that construction prior to issuance of the permit is necessary to avoid undue hardship. The specific criteria under which such a waiver may be granted is not specified by the statute. While most waiver requests that meet the requirements within the proposed rule will be granted, there may be limited circumstances where granting of a waiver is not approvable, such as when ultimate permit approval is in doubt. Thus the Department has crafted this regulation consistent with the statute.

Comment: WMC suggests that the proposed rule should include timelines and related obligations to notify applicants of the status of the waiver request based on those used for construction permit applications.

Response: The Department, under the proposed rule is required to act on the request for a waiver within 15 days of receipt of the waiver request, mirroring the requirement of the statute. Neither s. 285.61(5m), Wis. Stats, nor the proposed rule anticipate an exchange of information that would require any follow-up review periods. As stated in the proposed s. NR 406.03(2)(c) and s. 285.61(5m), Wis. Stats, the Department shall act on, meaning approve or deny, the request within 15 days of receipt.

Comment: WMC suggests that the language in the proposed rule on economic and financial hardship be changed to one that adversely impacts the feasibility of the project. This could provide the Department with more discretion to grant waivers. WMC states that this could enhance the state's ability to attract significant economic development projects.

Response: The Department understands WMC's comments and believes that the proposed language in s. NR 406.03(2)(b)2. will enhance the state's ability in that regard. It should be noted however, the determination on granting a waiver is based on undue hardship. Most environmental regulations may have an impact on the feasibility of a project. This doesn't necessarily mean that the project will not proceed as planned as most responsible businesses will budget time to obtain necessary regulatory approvals into their project plans.

Comment: WMC's understanding is that waivers can be made available to all synthetic minor sources, or at a minimum those sources that would not be considered major based on air emission limitations in the Wisconsin Administrative Code.

Response: Projects that are subject to chapters NR 405 (PSD requirements) and NR 408 (nonattainment area major sources) are not eligible for waivers. In addition, if it is necessary to establish enforceable restrictions in an air permit so that NR 405 or 408 permit review is avoided, that project is not eligible for a granting of a waiver. Because these restrictions are necessary to avoid permitting requirements under the Clean Air Act, these restrictions must be in place prior to the commencement of construction. To grant a waiver to such sources would be contrary to s. 285.60(8), Wis. Stats. The Department agrees with WMC's comment that for some sources, other applicable enforceable requirements are already included in the Wisconsin Administrative Code that may limit potential to emit, such that NR 405 and 408 permit requirements are not in play.

Comment: WMC requests that the word "diligently" be removed from the phrase which requires facilities to "diligently respond" to the Department requests for additional information on the construction permit application. WMC contends that the word is very subjective and an undefined term.

Response: The Department believes that the use of the word "diligently" is appropriate in this instance. As mentioned in the comments above, it is used in the context of requesting additional information on a construction permit application. It implies an urgency to the Department's request for information, which if not received in a timely manner, could result in that the waiver unfortunately needing to be rescinded because the Department would not be able to issue the permit based on the information in the initial permit application.

Comment: WMC states that the proposed rule should clearly state that a facility which receives a construction permit waiver faces no legal liability should the waiver be rescinded based on a Department determination that the permit cannot be approved or issued. (This comment was made as part of the comment listed immediately above concerning the word "diligently".)

Response: The Department has made it very clear in the proposed rule that the applicant proceeds with construction at his or her own risk after a waiver is granted. Granting a waiver does not obligate the Department to approve the air permit application nor does it relieve the permit applicant from a duty to comply with applicable air pollution control requirements.

Section V. Suggestions for Expanding the Scope of the Rule

Comment: WMC believes that the rule should be expanded to allow for case-by-case waiver requests or on other bases specified in rule. The waivers could be issued on a general case-by-case basis without a demonstration of hardship. WMC suggests that the case-by-case waivers could be authorized "at the discretion of the Administrator" for those situations that would allow Wisconsin to capture significant economic development projects with the requirement to demonstrate undue hardship. WMC believes that it may not be considered undue hardship for companies to move projects to other states that can issue permits on a more timely basis. Since a waiver doesn't relieve a source of the obligation to meet construction permit obligations or conditions, there is no environmental reason not to allow waivers to be issued in these instances.

Response: The Department believes that the term "hardship" has a broader definition than WMC apparently believes. The Department believes that issuing waivers at the sole discretion of the Secretary or Division Administrator is inappropriate and lacks the necessary regulatory criteria to meet approval of US EPA for adoption of these regulations into the federally approved State Implementation Plan.

Comment: WMC strongly suggests that the Department consider altering the definition of "commence construction" which would allow for initial site work to be done, without the need for a waiver.

Response: The Department has agreed to examine the definition of "commence construction" in the future, but it will not be done as a part of this rule package.

Section VI. Conclusion

Comment: WMC believes that the construction permit waivers hold a great deal of potential but that the potential will not be realized based on the proposed rule. They state that the Department was given the tools to issue waivers without a showing of hardship and without an adverse impact on air quality.

The proposed rule should be amended as suggested. WMC would be happy to work with the Department toward that end.

Response: The Department believes that the proposed rule with amendments as mentioned in this document, reflects the intent of the statutes and does offer great deal of potential. Should experience

show that waivers are warranted in other circumstances, the Department is willing to discuss those possibilities. The Department has always valued stakeholder input on it's rule development and will continue to do so in the future.