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 RULE 04-106

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 October 2002.]

1. Statutory Authority

a. The rule creates a number of exemptions to the requirement that a person may not commence construction, reconstruction, replacement, relocation, or modification of a stationary source unless the person has a construction permit for the source. See, for example, s. NR 406.04 (1b), (1e), (1g), (1h), and (1k). The analysis accompanying the rule cites among other statutes, s. 285.60 (6), Stats., as authority for this rule-making. Subsection (6) authorizes the department to exempt types of stationary sources from any of the requirements of s. 285.60, Stats., relating to air pollution control permits, if the potential emissions from the sources do not present a significant hazard to public health, safety or welfare, or to the environment. The analysis accompanying the rule should indicate whether the department has determined that each of the exemptions in the rule meet this condition. If an exemption does not meet the condition, then the department would not have this authority to include the exemption in this rule under s. 285.60 (6), Stats.

b. Similar to the previous comment, the analysis accompanying the rule cites s. 285.11 (17), Stats., as authority for promulgating the rule and as one of the statutes interpreted by the rule. Subsection (17) directs the department to "(p)romulgate rules, consistent with the federal clean air act, that modify the meaning of the term "modification" as it relates to specified categories of stationary sources, to specific air contaminants and to amounts of emissions or increases in emissions." The department should indicate in the analysis accompanying the rule whether the modifications of the term "modification" in the rule are consistent with the federal

Clean Air Act. If these changes are not consistent, then the department would not have the authority to make these changes under s. 285.11 (17), Stats.

2. Form, Style and Placement in Administrative Code

a. In the state regulatory analysis, it appears that there is no mention of Iowa. [See s. 227.14 (2) (a) 4., Stats.]

b. The rule contains a number of references to federal code provisions created by the Clean Air Act by references to sections in the Act, contrary to the preferred drafting style. [See s. 1.07 (3) (a), Manual.] See, for example, ss. NR 400.02 (64) and 406.04 (1k) (b). The preferred style is to cite the U.S. Code reference and, if desired, to include a reference to the named federal act in a note. In addition, use of the preferred drafting style for this reference will remove the use of the parentheses to contain the alternative version of these references that are in these provisions in the rule.

c. The rule includes in s. NR 406.04 (1h) (c) the phrase "construction of a new emissions unit, as defined by s. NR 405.02 (12) (a) or 408.02 (13) (a)." The cited definitions are not in the current administrative code. [See comment 4. e. on referencing proposed administrative code provisions.] If these two definitions of "new emissions unit" are identical, the definition of this phrase should be placed in s. NR 400.02. If the definitions are not identical, then par. (c) should be clarified to indicate which definition applies. Similarly, the rule cites two definitions at "significant emissions increase" in s. NR 406.04 (1k) (intro.).

d. The treatment of s. NR 410.03 (1) (b) 1. by SECTION 13 in the rule results in subd. 1. having a different form than the other items listed in subds. 2. to 7. in s. NR 410.03 (1) (b).

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the summary accompanying the rule, the list of statutes authorizing rule-making includes s. 285.11 (6), Stats. This subsection does not specifically authorize rule-making and should not be included in this list.

b. In the summary accompanying the rule, the list of statutes interpreted by the rule should include s. 285.69 (1), Stats., due to its interpretation in the treatment of s. NR 410.03 (1) and (2). In addition, this list of statutes interpreted by the rule cites ss. 285.60 and 285.61, Stats. Since there are many provisions in these statutes that are not interpreted in the rule, the department should identify the specific provisions within these statutes that the rule interprets.

c. The analysis accompanying the rule refers to department order AM-06-04. If this order contains the text of a rule that has been submitted to the Legislative Council Rules Clearinghouse, then the analysis should also provide a reference to the clearinghouse rule number for this rule. If the order contains a rule that has not been submitted to the Clearinghouse, then the department should include in the analysis information on where the reader of the rule that is the subject of these comments may obtain a copy of the order.

d. The fifth paragraph in the plain language rule analysis accompanying the rule refers to "the following changes to chs. NR 406, 407, and 410." This reference should include a reference to ch. NR 400 as the rule amends s. NR 400.02 (64).

e. The rule references a number of rule provisions which are not in the current version of the Administrative Code. See, for example, the references to ss. NR 405.18, 405.19, 408.11, and 408.12 in ss. NR 406.03 and 406.04 (1b) (intro.); the reference to ss. NR 405.20 and 408.13 in s. NR 406.04 (1e) (intro.); the reference to ss. NR 405.02 (27m) and 408.02 (32m) in s. NR 406.04 (1k) (intro.); the reference to s. NR 408.14 in s. NR 410.03 (1) (b) 3.; and the reference to s. NR 405.02 (24m) (e) and (f) in s. NR 410.03 (1) (b) 5. The analysis accompanying the rule indicates that the changes in this rule are "proposed to provide for the interface necessary for implementation consistent with the federally mandated changes contained in [order] AM-06-4." It is not clear from this statement if order AM-06-04 contains a proposed rule and if this rule references provisions in the rule in AM-06-04 based on the assumption that the rule in order AM-06-04 will be promulgated. If, indeed, this rule is referencing provisions created by AM-06-04, then at the very least the department should clearly indicate that fact in the analysis and identify the relevant provisions cited in the order. Preferred procedures for developing and promulgating interrelated rules are to promulgate the first rule before referring to provisions in it in the second rule, combine the rule proposals into one rule, or move the rules as a package simultaneously through the administrative rules promulgation process called for in ch. 227, Stats.

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

a. The department should review the analysis accompanying the rule and remove duplicative language. For example, the first, fourth, and fifth paragraphs in the plain language rule analysis are identical to the first, third, and four paragraphs in the federal regulatory analysis. Also, most of the sixth paragraph in the plain language rule analysis is identical to the second paragraph in the state regulatory analysis.

b. The section in the analysis accompanying the rule on anticipated costs incurred by the private sector addresses the effects of the fees proposed in the rule. Under s. 227.14 (4) (b) 3., Stats., as created by 2003 Wisconsin Act 118, the department must determine whether the rule will have a significant effect on the private sector and, if there is such an effect, the anticipated costs that will be incurred by the private sector in complying with the rule. The fiscal estimate and this portion of the analysis accompanying the rule should report the department's determination required under this statute and, as appropriate, the anticipated compliance costs.

c. The use in the rule of the verb "trigger" in the expression "the modification does not trigger a requirement under…" appears to be colloquial. See s. NR 406.04 (1b) (b), (1e) (b), (1h) (b), and (1k) (b). The department should consider replacing this phrase with terminology more appropriate for the statutes or administrative code. An example of appropriate language is "the modification is not subject to any requirement under…."

d. Section NR 406.07 (3) refers to "(a) source that undergoes a modification which is exempt from the requirement to obtain a construction permit under s. NR 406.04 (1b), (1h) or

(1k)…." Section NR 406.04 (1k) (intro.) refers to "a project" rather than a modification at one of the specified sources. For purposes of these provisions, if a "project" under s. 406.04 (1k) is the same as a "modification" for purposes of s. NR 406.07 (3), then the same term should be used in both provisions. If there is a difference between a "project" and a "modification," then the department should modify s. 406.07 (3) to clarify its applicability.

e. The department's use of the phrases "required to obtain a determination of exemption" and "requiring a determination of exemption" in ss. NR 410.03 (intro.) and 410.03 (1) (b) (intro.) implies that at least some of the persons that meet the conditions for an exemption to a construction permit under s. NR 406.04 will also have to apply for and obtain a determination from the department to receive the exemption. In addition, the new fees created in s. NR 410.03 (1) (b) 2. to 7. specify the amount of the fee for a determination of exemption under the specified subsections in s. NR 406.04. However, neither of these subsections or provisions contain an explicit requirement for the determination. The department should revise the rule, as appropriate, to ensure that the applicability of this determination requirement and related department fees is clear.

f. Section NR 410.03 (1) (b) 4. is not clear on what the fee for a determination of exemption under s. NR 406.04 (1h) should be if the modification ***does*** meet the criteria for minor revision under s. NR 407.12 (1) (b) 2. Similarly, it is not clear what the fee will be under s. NR 410.03 (1) (b) 5. for a determination of exemption under s. NR 406.04 (1e) for a pollution control activity that ***is*** listed in one of the cited provisions.

g. If the department intends to perform a detailed air quality modeling analysis of the projected air quality impact as part of all determinations of exemption under s. NR 406.04 (1b), (1e), (1g), (1h), and (1k), then the department should change "fee" in s. NR 410.03 (1) (b) (intro.) to "fees" to reflect that the $700 air quality modeling analysis fee in s. NR 410.03 (1) (b) 7. will always apply.

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

Section 227.14 (2) (a) 3., Stats., as created by 2003 Wisconsin Act 18, requires the analysis accompanying a rule to contain a summary of and a preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule. While the analysis accompanying the rule does discuss relevant federal regulations, it does not contain the required summary of the federal permitting requirements corresponding to the state permitting requirements affected by the rule nor the required preliminary comparison between the federal and state requirements.