

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 410.03(1)(b); to **amend** 410.03(intro.) and to **create** NR 406.035, 406.04(1f) and (1k), 406.07(3), 406.11(1m), 410.03(1)(a)8. to 10. and (b)(intro.) and 2. to 4. relating to changes to chs. NR 406 and 410 for providing the linkage of the state air permitting programs with federal changes to air permitting program and affecting small business.

AM-32-04b

Analysis Prepared by the Department of Natural Resources

Statutes Interpreted: ss. 285.11(6), 285.60 and 285.61, Stats. The State Implementation Plan developed under s. 285.11(6), Stats. is revised.

Statutory Authority: ss. 227.11(2)(a), 285.11(1) and (6), 285.60(6), 285.67 and 285.69(1), Stats.

Explanation of Agency Authority

Section 227.11(2)(a) gives agencies general rulemaking authority. Section 285.11(1) gives the Department authority to promulgate rules consistent with ch. 285, Stats. Section 285.11(6) gives the Department the authority to develop a state implementation plan for the control of air pollution. Section 285.60(6) gives the Department the authority to develop rules to exempt sources from permits. Section 285.67, Stats., gives the Department authority to promulgate rules creating criteria and procedures for revising permits. Section 285.69(1) gives the Department the authority to charge fees for construction permits and for exemptions from construction permit requirements.

Related Statute or Rule

These rules relate directly to regulations for the permitting of activities that result in air emissions in chapters NR 406 and 410.

Plain Language Rule Analysis

On December 31, 2002, the United States Environmental Protection Agency (EPA) published regulations that significantly change the way new and modified sources of air pollution are permitted. Wisconsin has three years in which to either adopt the federal rules or submit "different but equivalent regulations" as a State Implementation Plan revision.

Since promulgation of these federal rules, the Department has evaluated the rules, established a stakeholder group to advise the Department and, working with the stakeholder group, developed a proposal for revising Wisconsin's New Source Review (NSR) regulations. The proposed rule changes to adopt the federal rule revisions were authorized by the Natural Resources Board for public hearing in December of 2003.

The proposed rule changes necessary to implement the federal program can not be utilized unless additional changes are made to the state construction permitting regulations. The Department continued to meet regularly with the same group of stakeholders to garner advice on how best to revise the state

permitting regulations to implement the federal program changes. Through these meetings, the Department has developed a proposal for implementing the December 31, 2002, changes to the federal regulations in Wisconsin which it believes meets all of the following goals:

1. Develop a rule that reduces the administrative burden of the NSR program on both permittees and the Department.
2. Develop a rule that is as effective as the current rule in protecting the environment and in allowing for public input on proposed projects.
3. Develop a rule that meets the Department's statutory obligations.
4. Develop a rule that is likely to be approved by USEPA.

The proposed rule revisions have been designed to take as much advantage as possible of the flexibility made available by EPA under the proposed changes that adopt the federal air construction permitting revisions. These changes to the federal permit program were made with the intention of allowing projects that will not result in significant increases in air contaminants to be excluded from the federal construction permit program requirements. To utilize this flexibility, corresponding exemptions from the state construction permit program have been proposed. It must be noted that EPA did not provide any additional flexibility within the federal operation permit program, as a result, corresponding flexibility can not be afforded to the state operation permit program. Therefore, projects that have been proposed to be exempt from the construction permit program will be able to commence construction without prior Department approval, but must obtain an operation permit revision prior to operating in such a way that would be in conflict with its operation permit. As a result, the Department will have the opportunity to review the changes and make its findings available for public comment while the facility is conducting modifications but before operating in a modified state, if such operation is in conflict with existing permit requirements. Other projects that have the potential for greater environmental consequences, may still take advantage of the federal air permitting changes; however, the state construction and operation permit program will continue to provide for Department review and public comment prior to the facility beginning construction of such changes and operation in a modified fashion.

Federal changes to the new source review program promulgated by EPA on December 31, 2002 are being addressed in order AM-06-04. Those changes affect chapters NR 405 and 408 and are being proposed on a schedule parallel with the changes proposed in this order. Because the proposed changes to chapters NR 405 and 408 will establish options for regulated facilities to employ through construction permit exemptions or issuance of state construction permits under chapter NR 406, changes to chs. NR 406 and 410 are proposed here to provide for the linkage necessary for implementation consistent with the federally mandated changes contained in AM-06-04. These changes would affect the permitting requirements for many larger emission sources in Wisconsin.

Summary of, and Comparison With, Existing or Proposed Federal Regulations

While EPA published regulations that change the way new and modified sources of air pollution are permitted, EPA did not address how those changes would be linked to State minor source construction permits or operation permits. EPA did not address the linkage into these permitting programs because of the vast variation in State permitting requirements across the United States.

Although EPA, in its rule making, provided for exemptions from the federal permit requirements, EPA has relied on the backdrop of State construction permit programs and Title V operation permit programs to provide for air quality assessments of changes and public awareness of facility projects. As a result, these rule revisions provide implementation tools for the Federal rule changes and have been developed with the Federal rules as a backdrop.

Comparison with Rules in Adjacent States

Michigan, Minnesota and Illinois have been required to implement the federal permitting rule changes since March 3, 2003 because their federal permit programs have not been approved into their respective State Implementation Plans. These states have yet to revise their state permit programs so that the federal permitting changes can be fully implemented. The State of Indiana has federal permitting rules approved into its State Implementation Plans, has submitted its program revisions to EPA and is waiting for approval. Indiana's requested rule change is also intended to provide the interface between the federal permit rule changes with their state permitting requirements. Minnesota, Michigan and Illinois are utilizing their existing fee structure to fund work efforts in the implementation of the federal rule changes. Indiana has proposed additional fees to support work activities associated with the rule changes. Iowa, which also has its federal permit program approved into its State Implementation Plan, has undertaken discussions with stakeholders to prepare program revisions, but has yet to submit any changes to EPA.

Summary of Factual Data and Analytical Methodologies

The proposed rule revisions have been developed to implement revisions made to corresponding federal regulations.

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

The proposed rule revisions will require Department resources to implement. The Department is proposing changes to its construction permit fee schedule contained within chapter NR 410 to fund this work activity. Proposed fees are based upon the existing fee structure for Department review of activities of a similar nature, such as control technology review and ambient air quality analysis. Businesses that choose to take advantage of the regulatory flexibility will have reduced permit fees in the long run because many projects that had previously required review under the federal construction permit program will not be reviewed under that program under the proposed rule revisions. Thus the time expended by the Department for the review of the exclusions provided by the federal rule (and the associated fees that were generated) will be offset by reduced federal construction permit activity.

Effect on Small Business

Since these rules affect the permitting of major sources of air pollution, it is unlikely that many small businesses will be impacted by them. Although a small percentage of major sources are small businesses, these rules provide for the ability to implement federal permitting changes that are intended to streamline the permitting process, in the state's construction permit programs. As a result, any effect on small businesses would be to their benefit.

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[Drafter's note: Sections 1, 2, 3 and 5 make reference to s. NR 405.18 and 408.11. NR 405.18 and 408.11 are being created within Board order AM-06-04]

SECTION 1. NR 406.035 is created to read:

NR 406.035 ESTABLISHMENT OR DISTRIBUTION OF PLANT-WIDE APPLICABILITY LIMITATIONS. Notwithstanding the provisions of s. NR 406.04(1) and (2), a construction permit is required for each of the following:

(1) Establishing a plant-wide applicability limitation under s. NR 405.18 or 408.11.

(2) Distribution of allowable emissions following expiration of a plant-wide applicability limit under s. NR 405.18(9) or 408.11(9).

Note: Reopening of a plant-wide applicability limitation to accommodate an increase of the plant-wide applicability limitation is accomplished using the procedures in s. NR 405.18(8)(b)1.c. and (11)(a)3. or 408.11(8)(b)1.c. and (11)(a)3. Reopening of a plant-wide applicability limitation to accommodate a decrease of the plant-wide applicability limitation is accomplished using the procedures in s. NR 406.11(1m).

SECTION 2. NR 406.04 (1f) and (1k) are created to read:

NR 406.04(1f) MODIFICATIONS TO SOURCES UNDER PLANT-WIDE APPLICABILITY LIMITATIONS. Notwithstanding the provisions of subs. (1) and (2), no construction permit is required for modification of a source that is regulated by a plant-wide applicability limitation under s. NR 405.18 or 408.11 provided all of following criteria are met:

(a) The modification will not cause or exacerbate an exceedance of an ambient air quality increment or standard.

(b)The modification does not trigger a requirement under section 111 or 112 of the Act (42 USC 7411 or 7412).

(c) The modification does not consist of the construction of a new emissions unit, as defined in s. NR 405.02(12)(a) or 408.02(13)(a), which is a significant emissions unit under s. NR 405.18(2)(h) or 408.11(2)(h) or a major emissions unit under s. NR 405.18(2)(b) or 408.11(2)(b).

(d) Emissions from the source, as modified, will be able to comply with the plant-wide

applicability limit.

(e) Any increase in emissions, due to the modification, of air contaminants not regulated by a plant-wide applicability limitation, does not exceed the maximum theoretical emission levels specified in sub. (2)(b), (c), (cm), (d) and (f).

Note: For new or modified sources for which no construction permit is required, an operation permit application may be required to be submitted under s. NR 407.04(b)3. prior to commencing construction or modification.

(1k) PROJECTS EVALUATED FOR SIGNIFICANT NET EMISSIONS INCREASE.

Notwithstanding the provisions of s. NR 406.04(1) and (2), no construction permit is required for a modification to an existing major stationary source, as defined in s. NR 405.02(22), or an existing major source, as defined in s. NR 408.02(21), which does not result in a significant emissions increase, as defined in s. NR 405.02(27m) or 408.02(32m), provided all of the following criteria are met:

(a) The modification will not cause or exacerbate an exceedance of an ambient air quality increment or standard.

(b) The modification does not trigger a requirement under section 111 or 112 of the Act (42 USC 7411 or 7412).

(c) The modification does not require enforceable conditions to limit potential to emit.

Note: For new or modified sources for which no construction permit is required, an operation permit application may be required to be submitted under s. NR 407.04(1)(b)3. prior to commencing construction or modification.

SECTION 3. NR 406.07(3) is created to read:

NR 406.07(3) A source that undergoes a modification which is exempt from the requirement to obtain a construction permit under s. NR 406.04(1f) or (1k) shall be treated as a new or modified source

for the purposes of the emission limitations under chs. NR 400 to 499 unless the modification is excluded from being considered a modification under s. NR 406.04(4).

SECTION 4. NR 406.11(1m) is created to read:

NR 406.11(1m) The department may reopen or revise a construction permit to reflect a decrease in a plant-wide applicability limit pursuant to s. NR 405.18(8)(b) or 408.11(8)(b), using the procedures in s. NR 405.18(5) or 408.11(5), respectively.

SECTION 5. NR 410.03(intro.) is amended to read:

NR 410.03(intro.) **Application fee.** 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 under sub. (1)(b). 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 6. NR 410.03(1)(a)8. to 10. are created to read:

NR 410.03(1)(a) 8. \$10,150, per air contaminant regulated under a plant-wide applicability limitation, when establishing a plant-wide applicability limitation under s. NR 406.035(1).

9. \$4,850 for the increase of a plant-wide applicability limitation under s. NR 405.18(11) or 408.11(11).

10. \$4,850 for the distribution of allowable limits upon expiration of a plant-wide applicability limitation under s. NR 406.035(2).

SECTION 7. NR 410.03(1)(b) is renumbered NR 410.03(1)(b)1. and as renumbered is amended to read:

NR 410.03.03(1)(b)1. ~~Any person requiring \$800, for~~ a determination of exemption under s. NR 406.04(1)(i) ~~shall pay a fee of \$800.~~

SECTION 8. NR 410.03(1)(b)(intro.) and 2. to 4. are created to read:

NR 410.03(1)(b)(intro.) Each person requesting a determination of exemption under ch. NR 406 shall pay the following applicable fee:

2. \$1,100 for a determination of exemption under s. NR 406.04(1f) for a modification to a stationary source which is regulated by a plant-wide applicability limitation.

3. \$4,400 for a determination of exemption under s. NR 406.04(1k).

4. \$700, for a detailed air quality modeling analysis of the projected air quality impact of a determination of exemption under s. NR 406.04 (1f) or (1k).

SECTION 9. 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 10. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on February 22, 2006.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)