Report From Agency

REPORT TO LEGISLATURE

NR 406, 407 and 410, Wis. Adm. Code
Air pollution permit exemptions and air pollution permit exemption fees,
and affecting small business

Board Order No. AM-09-06
Clearinghouse Rule No. 06-047

Basis and Purpose of the Proposed Rule

In 2003, s. 285.60(6)(b), Stats., was created as part of 2003 Wisconsin Act 118. This law requires the Department to exempt minor sources from the requirement to obtain air permits if emissions from the source do not present a significant hazard to public health, safety, welfare or to the environment. Thus, the Department is proposing the changes to chs. NR 406, 407 and 410 to meet this statutory requirement.

The rule proposal provides exemptions from construction and operation permitting requirements for facilities which have less than 10 tons/year of actual emissions of criteria pollutants (particulate matter, sulfur dioxide, nitrogen oxides, carbon monoxide and volatile organic compounds), and which are not subject to federal New Source Performance Standards or federal air pollution requirements for hazardous air pollutants. This exemption needs to be claimed by the facility owner or operator if the facility is required to submit an air emission inventory report.

For facilities with higher levels of emissions, projects involving construction, modification, reconstruction, relocation or replacement which have less than 10 tons/year actual emissions of criteria pollutants and which meet the other exemption criteria would be exempt from obtaining a construction permit prior to undertaking the project. However, the facility owner or operator would still need to apply for an operation permit revision for the project. The proposal includes an $800 fee for each construction permit exemption to defray engineering review costs incurred by the Department when evaluating whether a source qualifies for the exemption. The rule requires the Department to respond within 20 business days of receipt of the exemption notification. This time period is identical to that required for construction permit applications.

Lastly, two additional activities are proposed to be added to the current list of activities which are excluded from being a modification. These activities are certain changes to process lines emitting volatile organic compounds and conversion of small boilers to use an alternate clean fuel.

Summary of Public Comments

The summary and the Department's responses are attached.

Modifications Made

The summary of comments attached details the modifications made in response to comments.

Appearances at the Public Hearing

June 27, 2006 – Stevens Point – no appearances

June 28, 2006 – Madison

In support:

Scott Manley, Wisconsin Manufacturers and Commerce, 501 E. Washington Ave., Madison, WI 53703

In opposition – none
As interest may appear – none

June 29, 2006 – Milwaukee

In support – none

In opposition:

N. Neil Power, Printing Industries of Wisconsin, 800 Main Street, Pewaukee, WI

As interest may appear - none

Changes to Rule Analysis and Fiscal Estimate

The section of the plain language analysis of the rule that compares the proposed exemption rules with those in adjacent states was expanded to include additional information about the programs in Minnesota and Michigan.

Response to Legislative Council Rules Clearinghouse Report

All the recommendations were accepted and incorporated into the rule.

Final Regulatory Flexibility Analysis

The proposed rule will affect a number of small businesses. The proposal will exempt a number of small businesses from obtaining air pollution permits. This will, in general, lower their compliance costs and reporting requirements. The construction permit exemption for projects will benefit larger businesses with higher levels of emissions.

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.*

This rule reduces reporting requirements. By exempting facilities from the need to obtain a permit, it also exempts them from permit-related reporting requirements that they would otherwise have to fulfill. For example, they will no longer need to submit annual compliance certification reports, as is required of permitted facilities.

The only new reporting requirement in the rule is the requirement that sources which are already required to submit an annual emission inventory also submit a one-time claim that they are exempt from permitting. This claim is expected to be a check-off box on the emission inventory form. In response to comments, the rule was revised to eliminate the exemption claim requirement from businesses which do not report to the air emission inventory. It should be noted that the use of this exemption is optional. It is an election on the part of the facility owner to limit future actual emissions to levels that are below the exemption threshold. The exemption claim notifies the Department that the facility has elected to live under the “emission cap” instead of obtaining the otherwise required operation and construction permits.

The compliance demonstration requirements are less stringent for facilities electing to use this exemption. Unlike a traditional permit which spells out all the specific applicable requirements and their compliance

demonstration methods, under the exemption rule, the owner or operator is responsible for conducting monitoring and maintaining records "sufficient" to demonstrate compliance with the exemption rule. There is flexibility in how the owner or operator decides to make this demonstration. The only specific compliance demonstration requirement relates to the use of pollution control devices where the monitoring methods that apply to the operation and maintenance of all control devices also apply to those used by exempt facilities. Since the control devices reduce the emissions that otherwise would be emitted into the ambient air, it is extremely important that they be well maintained and operated. Under the exemption rule, compliance demonstration records are not submitted to the Department, but must be maintained on site for 5 years.

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

The only reporting deadline is the exemption claim which would be filed one time at a date to be determined by the Department. The actual date depends on the effective date of the rule.

3. Consolidation or simplification of compliance or reporting requirements.

The proposed rule does not change compliance requirements for any source. However, as discussed in the response to A.1. above, the benefit of being exempt from permitting is that the permit-related compliance and reporting requirements no longer apply. This provides more flexibility to the facility and eliminates the requirement for annual compliance certification reporting. Other than emission inventory reporting, which is required of all facilities whose actual emissions exceed the threshold levels, an exempt facility is not required to submit any reports to the Department. It simply needs to maintain its records on site.

For projects exempt from construction permitting at larger sources, the rule only eliminates the need for the construction permit and does not change or add any other requirements.

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 proposed rule is adding additional exemptions which may apply to some small businesses.

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

Comments were submitted by Wisconsin Manufacturers and Commerce (WMC) and the Printing Industries of Wisconsin (PIW) on behalf of their members. WMC commented that exempt facilities would be required to comply with the same recordkeeping, monitoring and reporting requirements as facilities covered under a traditional permit. Both WMC and PIW opposed the exemption claim requirement as an onerous paperwork burden.

In response to comments, the rule was revised so that facilities which are not required to submit an air emission inventory report are not required to claim the permit exemption. The intent is not to create a new administrative burden for facilities that elect to use the permit exemption. In order to continue to streamline the process, the claim is a one time claim that is expected to be a check off box on the existing emission inventory form. It will not require any additional work or the necessity to file a claim prior to taking any construction activity.

The rule does not impose any additional recordkeeping, monitoring or reporting requirements and in fact, relieves exempt facilities from those requirements that are permit-related. Other than requiring compliance monitoring of pollution control devices in conformance with administrative code requirements, the rule does not specify recordkeeping, monitoring or reporting requirements. It does requires that the

compliance monitoring records be sufficient to demonstrate compliance and that they be maintained on site.

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

The only "report" required by the rule is a one-time exemption claim that facilities who are already required to submit an emission inventory report must claim. This is expected to be a check off box on the inventory reporting form. It will not require any additional work on the part of the facility and its cost will be minimal.

Businesses using the construction permit exemption are required to submit a request to revise their operation permit. This is no different from current requirements.

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 proposed Rules allow for small emission sources to be exempt from all permitting requirements and for larger sources to be exempt from construction permitting requirements. The elimination of all permit requirements for small sources will reduce Department costs for writing permits and for storing and reviewing compliance certification reports. The construction permit exemption is estimated to allow for 40 projects per year that currently require a construction permit to be exempt from that requirement. However, these projects will still require the Department to issue an operation permit or to revise an existing operation permit.

Based on a loss of 40 construction permits per year, and an average cost per construction permit of $6,000, the revenue loss would be $240,000/year. With the proposed $800 exemption fee, the gain in fees would be $32,000/year (40 exemptions at $800 per exemption) for a net loss of funds of $208,000/year.

The elimination of the permitting requirement for small sources should have little or no effect on program revenue. Additionally, any reduced workload for permit writing will likely be shifted into ensuring these sources are in compliance with Air requirements.

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. Certain facilities and projects are exempted from permitting but are not exempt from complying with air emission standards.

Department of Natural Resources Responses to Public Comments on Proposed Revisions to chs. NR 406, 407 and 410, Wis. Adm. Code.
Board Order No. AM-09-06
July 18, 2006

The Natural Resources Board authorized public hearings on the proposed air permit exemption rules at its April 2006 meeting. These public hearings were held on June 27th in Stevens Point, June 28th in Madison and June 29th in Milwaukee. Two persons testified, both in partial support and in partial opposition to portions of the proposed rule changes.

Comments on these proposed rules (Board Order No. AM-09-06) were received from the following groups. Comments at the hearings were received from WMC and PIW. The written comments submitted by these groups included all of the comments made at the public hearing:

- Aggregate Producers of Wisconsin (APW)
- Kohler Company (K)
- Printing Industries of Wisconsin (PIW)
- Wisconsin Manufacturers and Commerce (WMC)
- Wisconsin Paper Council (WPC)
- Wisconsin Cast Metals Association (WCMA)
- Legislative Rules Clearinghouse (LRC)

COMMENTS AND RESPONSES
The comments identified in this section will generally follow the order they were identified in WMC's comments. This method was chosen because WMC submitted the most comments. Comments not submitted by WMC but only by other groups will be addressed last.

1**. Comment**: Facilities that are exempt [from permitting requirements] under this rule are required to comply with the same recordkeeping, monitoring and reporting requirements as sources covered under a traditional permit [WMC]. **Response**: It is not clear from this comment which exemption (the exemption from all permitting or the exemption from construction permitting only) is being addressed here. For the purpose of this response, the Department will assume this applies to the exemption from all permitting.

The purpose of this rule and these exemptions is to exempt sources from permitting requirements and not other applicable requirements. This is what s. 285.60(6)(b), Stats., requires the Department to do and what the Department is doing with this rule package. This is true of all other permit exemptions which are presently in chs. NR 406 and NR 407, and also true of the Minnesota permit exemptions cited by this commenter on numerous occasions in their written comments. In Minnesota's guidance for permit applicability it is made clear that being exempt from the requirement to obtain a permit does not exempt one from any other potentially applicable regulatory requirements.

The operation permit exemption requires sources which are already required to submit an annual emission inventory report to the Department to continue to do so. This requirement already applies to sources which may or may not need permits and is based solely on actual emissions. Additionally, the final rule requires sources which use emission control devices (and only sources which use control devices) such as baghouses and incinerators to monitor these devices and to keep records of the device monitoring. The Department believes this is necessary because sources which use control devices are potentially large sources of emissions which, if not properly controlled, could represent a significant risk to human health or the environment. For example, a baghouse typically achieves a minimum of 99% control efficiency for particulate matter emissions. Assuming a source emits only 5 tons of particulate matter, the potential emissions of particulate matter are 500 tons/year if the baghouse is not working properly.

Additionally, the rule does not require any exempt source to submit a compliance certification report as is required of any permitted source. Therefore, the Department does not concur that this is not a lessening of recordkeeping or reporting requirements.

2. **Comment**: Other States have more meaningful exemption to air permit requirements. For example, Minnesota presumes sources are exempt from permitting if their potential to emit is less than 100% of major source threshold [WMC]. **Response**: As discussed in the Rule Analysis portion of Board Order for the proposed rule, the Department believes that the construction permit exemptions allowed in Wisconsin are, in general , broader than those provided by neighboring states. For a more complete analysis of the Minnesota Program, please see the Rule Analysis for this rule.

3. **Comment**: Support the use of actual emission based exemptions and the proposed exclusions from modifications in the rule [WMC, WCMA]. **Response**: None required

4. **Comment**: The proposed actual emissions exemption threshold should be increased to 25 tons/year [WMC, APW]. **Response**: The Department believes that the 10 ton/year actual threshold proposed in this rule is appropriate. Assuming this rule is eventually adopted, the Department will have a permit exemption available for sources with emissions under 10 tons/year and will also soon have a registration operation permit available for sources with emissions under 25 tons/year. As previously discussed, sources which claim this exemption, and not one of the other numerous exemptions in the Rules for specific source categories or for sources without emission controls which have low emissions, are likely to have the potential to emit very large quantities of emissions if not properly controlled.

5. **Comment**: The Department should add exemptions based on the source's potential to emit such as those that exist in Minnesota [WMC]. **Response**: In developing the proposed rule, the Department worked for many months with interested parties, including representatives of WMC. Prior to these comments, no significant discussion occurred and no proposal was received by the Department for basing exemptions on the Minnesota potential to emit thresholds. That being said, the Department believes that the exemptions provided in Wisconsin are in general , broader than those provided by neighboring states.

Additionally, as discussed in the Rule Analysis, the term "potential to emit" as used in the Minnesota program is equivalent to the term "maximum theoretical emissions" in the Wisconsin program. In Wisconsin, sources with low maximum theoretical emissions are already exempt under the existing Rules from obtaining construction or operation permits

6. **Comment**: The Department should include an exemption for small boilers that is the same as that in Michigan [WMC]. **Response**: In developing the proposed rule, the Department worked for many months with interested parties, including representatives of WMC. During this time, the Department asked numerous times for any suggestions for specific exemptions which could be analyzed and possibly included in the proposed rule. No suggestions were received. The Department is willing, in the future, to examine this request, but believes there is insufficient time to examine the request and that adding such a provision would likely require a second public comment period as additional exemptions of this sort were not proposed with the original rule.

7. **Comment**: We are opposed to having to submit a "claim of exemption" [WMC, APW, PIW]. **Response**: The proposed rule requires that all sources which want to claim exemption from all permitting requirements notify the Department of such a claim. The Department is proposing to amend the proposed rule such that only sources which are required to report to the air emission inventory be required to make such a claim. This is consistent with the intent of the original rule proposal. The Department anticipates that such a claim be made by simply marking a box on the air emission inventory report following promulgation of the rule The Department does not believe this is a significant burden for any source or requires any expertise. This claim is necessary because sources not required to obtain a permit are billed at a flat rate and not per ton of emissions and so that the Department will know which state operation permit applications no longer need to be reviewed. Without such an initial claim, the Department will be unable to properly bill the affected sources and will still need to contact each source to determine if the state operation permit needs to be reviewed and issued.

Additionally, the use of this exemption is optional for all sources which meet the applicability requirements. A source which could claim this exemption is not required to use this exemption and limit

its emissions. This again reinforces the need for an exemption claim for sources which want to use this exemption.

The proposed rules also requires sources which are required to have operation permits to submit a claim of exemption from construction permitting when the operation permit revision requested is submitted. The Department has already developed and amended revision request from in which a box is marked for claiming exemption from construction permitting under these provisions. Since submittal of the operation permit revision request is already required by rule, the Department does not believe this adds any additional burden to the affected sources. Additionally, without a claim of exemption from construction permitting, the operation permit revision reviewer would need to contact the applicant to determine why the proposed change is exempt from construction permitting. Thus, the requirement to claim the exemption will add to the efficiency of the program without adding any additional work for affected facilities.

8. **Comment**: Operation permit revisions are not required to be reviewed within any specified time period and sources cannot operate until such requests have been reviewed and approved [WMC]. **Response**: Section NR 407.13, Wis. Adm. Code, requires the Department to issue the majority of significant revision requests within 9 months after receipt of a complete application. Sources which submit a complete application for a significant revision may construct the units covered under that revision request prior to the Department approving the revision

9. **Comment**: The Department should put in place deadlines for reviewing these operation permit revision requests and endeavor to act on requests for smaller sources in an expeditious manner [WMC]. **Response**: The Department is planning to act on these revision requests (all such requests, not just those claiming exempting from construction permitting under this rule proposal) in as expeditious fashion as time and resources allow. The Department does not see any merit in establishing more expeditious timelines for “smaller sources” but is willing to discuss the possibility of reviewing smaller source applications more quickly than those for larger emitters (i.e. small sources would always be given priority).

10. **Comment**: The draft rule creates new monitoring and recordkeeping requirements and also directs sources to undertake any other monitoring or recordkeeping found in the rules that may be applicable. The DNR should drop any monitoring or recordkeeping requirements from the rule [WMC, APW]. **Response**: The only recordkeeping and monitoring requirements in the rule are that sources monitor control equipment in accordance with the procedures established in s. NR 439.055, Wis. Adm. Code. This Code section establishes minimum control device monitoring requirements for sources that are not subject to more stringent requirements under other rules. The Department believes such monitoring is appropriate because, as mentioned in response to comment 1., sources using control devices to limit actual emissions are potentially very large sources of air emissions if the control device is not operating properly. The purpose of the monitoring is to allow a source to demonstrate that the control device was operating and operating with an acceptable efficiency.

The rule does not establish any other reporting or monitoring requirements. However, this is a permit exemption rule and not an exemption from all requirements of the ch. NR 400 series or other Statutory or Federal requirements. Thus, if the facility is subject to some other recordkeeping or monitoring requirements to demonstrate compliance with those other requirements, then the recordkeeping or monitoring required by those requirements must be met by the source.

11. **Comment**: Ch. NR 438, Wis. Adm. Code, (air emission inventory reporting) is still applicable to sources under this rule [WMC, APW]. **Response**: The purpose of this rule proposal is to provide an exemption from permitting requirements. It is not and was never intended to provide an exemption from air emission inventory requirements.

12. **Comment**: The DNR should consider alternative emission thresholds for hazardous air pollutants than those in NR 445 [WMC]. **Response**: The emission thresholds established in NR 445 apply to all sources in the state. Additionally, the emission thresholds were established to protect human health from significant harm from exposure to hazardous air pollutants. Also, unlike other sources, exempt sources

need only maintain their actual emissions below NR 445 thresholds as opposed to maintaining potential emissions below NR 445 thresholds for other sources. The rule was revised to include the "incidental emitter" provisions of s. NR 445.11 which narrows the scope of the rule to certain processes and substances of concern.

13. **Comment:** May sources presently covered by permit ask to have their permit revoked and then comply with the exemption requirements only [WMC]? **Response**: In general, this should be allowable. There may be permits that have been issued for other purposes such as PSD/NAA major source review avoidance which cannot be revoked.

14. **Comment**: We object to the $800 fee for reviewing the construction permit exemption and request a fixed turnaround time for reviewing such requests [WMC, APW, PIW]. **Response**: The Department believes this fee is both reasonable and necessary for reviewing this exemption. The exemption review will require Department work-time and will require a response from the Department as to whether the project is exempt from construction permit requirements. Additionally, the proposed fee is substantially less than the minimum construction permit review of $2,300 and the average construction permit review fee of $8,000. Finally, in order to ensure a quick turnaround of such requests, the Department is amending the rule to require a Department response within 20 business days of receipt of the exemption request. This time period is identical to that required for construction permits.

15. **Comment**: Are facilities which are exempt from obtaining an operation permit under this rule also exempt from obtaining a construction permit [PIW]? **Response**: Yes, the rule states that such facilities are exempt from construction permitting and need not claim the construction permit exemption as long as they maintain actual emissions below 10 tons/year for criteria pollutants and meet the other applicability requirements in the proposed rule.

16. **Comment**: Clarify NR 406.04(2m) such that facilities operating under a general or registration operation permit are exempt from construction permit requirements [WMC, APW]. **Response**: The Department believes this is clear in the rule. Assuming the facility complies with the operation permit requirements and is not subject to major source review, the facility is exempt from construction permitting. Additionally, this general exemption is outside the scope of this rule proposal. If further clarification is needed, the Department is willing to consider such changes for future rule making proposals.

17. **Comment**: Does s. NR 406.04(1)(zi)2. apply to the entire facility or to units being constructed, modified, or reconstructed as part of a single project [K]. **Response**: The emission thresholds only apply to the emissions units being constructed, modified, replaced, relocated and reconstructed as part of a single project.

18. **Comment**: Why is the 12-month rolling average of 1,666 lb/month used rather than 12-month 10 ton/year limitation in s. NR 406.04(1)(zi)2.a. [K]? **Response**: This limitation is used to ensure that the emission cap is practicably enforceable.

19. **Comment**: The operation permit revision request should be submitted prior to commencing operation and not prior to commencing construction [K]. **Response**: Under existing rules, ch. NR 407, Wis. Adm. Code, requires that the operation permit revision request be submitted prior to commencing construction. This rule does not change this requirement. Placing the requirement in ch. NR 406 is to serve as a reminder of this already existing requirement.

20 **Comment**: Does the claim of exemption from construction need to be submitted prior to commencing construction [K]? **Response:** Yes, this claim should be submitted along with the operation permit revision request.

21. **Comment**: The exclusion from modification in NR 406.04(4)(i) should be expanded to include the use of biofuels [WPC]. **Response**: Biofuels which meet the requirements to be considered distillate oil are exempted under this provision. The Department is willing to examine excluding certain biofuels under similar rule provision, but is presently unaware of what biofuels would need a similar exemption.

22. **Comment**: The phrase “as a result of the project” should be added to the end of NR 406.04(1)(zi)4 [WPC]. **Response**: This change will be made as it is consistent with the intent of the provision.

23. **Comment**: The rule should specify a time when the operation permit revision is due under NR 406.04(1)(zi)5. [WPC]. **Response**: The present rule requires submittal of the revision application prior to commencing construction. No change is proposed to be made.

All comments submitted by the LRC have been addressed in the final rule.