Report From Agency

REPORT TO LEGISLATURE

NR 172, 400, 404, 405, 420, 425, 439, 484, and 494, Wis. Adm. Code,
Addressing changes needed to ensure consistency with U.S EPA regulations, and repealing obsolete rules.

Board Order Number: AM-15-14
Clearinghouse Rule Number: CR 15-077

BASIS AND PURPOSE OF THE PROPOSED RULE

The objectives of these proposed rules is to address changes needed to maintain consistency with U.S. Environmental Protection Agency (EPA) regulations and to repeal obsolete rule provisions.

Propose rules resolve several notices from the U.S. EPA identifying certain provision of the state implementation plan as deficient. (*see* the Finding of Failure to Submit a PSD State Implementation Plan Revision for $PM_{2.5}$, published at 79 FR 46703 (August 11, 2014) and the Disapproval of Infrastructure SIP With Respect to Oxides of Nitrogen as a Precursor to Ozone Provisions for the 2006 $PM_{2.5}$ NAAQS, published at 80 FR 76637 (December 10, 2015)). The Department is also required to promulgate the $PM_{2.5}$ increment section of this rule by no later than March 31, 2017 under the May 21, 2015 Stipulation and Order for Judgment for *Midwest Environmental Defense Center, Inc. v Wisconsin Department of Natural Resources*, Dane County Case No. 14-CV-3366. Other proposed rules update the definition of volatile organic compound (VOC) by adding 8 compounds to the list of those currently excluded from the definition. These excluded compounds have been identified by the U.S. EPA as having negligible photochemical reactivity and therefore are not regulated as a VOC.

Rules proposed for repeal relate to the required operation of equipment to recover gasoline vapors emitted during refueling activities at gasoline stations located in southeastern Wisconsin. These rules are often referred to as Stage 2 vapor recovery. Effective April 17, 2012, s. 285.31 (5), Wis. Stats., terminated the further implementation of Stage 2 vapor recovery equipment requirements under administrative code. The U.S. EPA authorized states to remove these rules from state implementation plans because, since the 1998 model year, vehicles are required to be equipped by manufacturers with on-board vapor recovery systems. The stage 2 vapor recovery equipment at gasoline stations has been shown to interfere with the operation of these on-board systems.

SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSE

A notice of public hearing and request for public comments was published on October 5, 2015 and a hearing held on November 5, 2015. No persons attended the public hearing. The public comment period closed on November 12, 2015.

Written comment was received from U.S. Environmental Protection Agency Region V staff pointing out a typographical error in one of the compounds proposed to be added to the list of compounds excluded from the rule definition of volatile organic compound (VOC). The error

was corrected. No other comments from the public were received during the public comment period. After the close of the comment period, a letter was received from the American Coatings Association in support of the addition of one compound to the list of those compounds excluded as VOC.

MODIFICATIONS MADE TO THE PROPOSED RULE AS A RESULT OF PUBLIC COMMENT OR TESTIMONY RECEIVED

A typographical error identified through comment by U.S. Environmental Protection Agency Region V staff was corrected.

PERSONS APPEARING OR REGISTERING AT PUBLIC HEARINGS

No persons appeared at the hearing.

CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE

No changes were made to the rule analysis or the fiscal estimate and economic impact analysis.

RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

The Legislative Council Rules Clearinghouse recommended changes related to clarity, grammar, punctuation and use of plain language. All recommended changes were accepted and appropriate changes made except for a question raised concerning whether the phrase "24 hour average," should be retained in the significant monitoring concentration for PM2.5 in s. NR 405.07 (8) (a) 3m. Since the proposed concentration is zero, and the U.S. EPA regulation in 40 CFR 51.166 does not include the phrase of concern, the Department made no change in order to maintain consistency with the federal regulatory language and thereby avoid any potential confusion.

FINAL REGULATORY FLEXIBILITY ANALYSIS

The changes proposed in this rule addressing consistency with EPA rules are not expected to have an adverse economic impact on small businesses. Small businesses are usually not major sources for purposes of the major source air pollution control construction permit program (PSD program) because they tend not to have large amounts of emissions. Since the Department is already implementing the PSD program, as required by U.S. EPA, the consistency changes being proposed in this rule will not have any additional economic impacts.

The adoption of the PM2.5 increment may require additional analysis by the Department during the air construction permit review for some small businesses constructing or expanding in certain parts of the state. The Department does not anticipate that this additional analysis will cause noticeable delays in permit issuance times and therefore, will not result in any significant impact to the affected small businesses.

The portion of the rule that proposes to exclude certain compounds from the definition of volatile organic compounds (VOC) to make the rule consistent with the definition in federal regulations will provide clarity to businesses in how to calculate and report VOC emissions and on the applicability of regulations.

The proposed repeal of the stage 2 vapor recovery program and related implementing rules will clarify applicable requirements for the affected small businesses and is not expected to have an adverse impact

on them. This rule is expected to positively impact owners and operators of gas stations in Southeastern Wisconsin, most of which are considered small businesses. This rule repeals outdated rule language making the regulations easier to understand.

ATTACHMENT 1
REPORT TO LEGISLATURE

Summary of Comments and Department Response
Board Order: AM-24-12
Clearinghouse Rule: CR 15-005

A notice of public hearings on the proposed rule, AM-24-12, was published on January 26, 2015. Hearings were held on March 5 and 11, 2015. No one attended the public hearings. The public comment period closed on March 16, 2015.

During the public comment period, written comments were received by mail from the United States Environmental Protection Agency; 3M Corporation, a manufacturing facility in western Wisconsin; and Clean Wisconsin, an environmental advocacy group. A summary of these comments and the Department's response is attached.

Responses to Legislative Council Rules Clearinghouse comments are also included.

A. Comments from USEPA

Comment 1. EPA does not believe it is appropriate to include the following activities in the list of exclusions when determining if construction, reconstruction, replacement, relocation, or modification has commenced in NR 406.03(1e): (a) Installation of building supports or foundations, (b) Laying underground piping or conduit, (c) Erecting storage structures, and (j) Paving. When determining which activities are allowed prior to issuance of a minor construction permit, EPA believes it is appropriate to allow facilities to begin activities that would be allowed to occur before a major New Source Review (NSR) permit was issued. If the allowed activities are inconsistent between the minor and major NSR program, it can lead to non-compliance issues in the instance in which a source mistakenly believes it only requires a minor NSR permit. For example, under the Wisconsin Department of Natural Resources' (WDNR) draft rules a source which requires a minor NSR permit may commence installation of building supports or foundations prior to issuance of a permit which is prohibited under major NSR guidance. A situation may arise in which a source believes that its project only requires a minor NSR permit, and begins constructing foundations. However, if upon WDNR's review of the source's application it becomes apparent that the source was in fact required to receive a synthetic minor or major NSR permit, and be in violation of major NSR EPA has previously discussed what activities are allowed and prohibited before a major NSR permit is issued in guidance documents. In EPA's guidance on what activities can commence prior to issuance of a prevention of significant deterioration permit, EPA explicitly prohibits the installation of building supports and foundations, paving, laying underground pipework, and construction of permanent storage structures. Thus EPA does not think activities (a), (b) and (j) are appropriate to include in the list of activities in NR 406.03(1e). EPA believes that for activity (c) the erecting of storage structures, it should be specified that only temporary storage structures are allowed in the exclusion.

Department Response
No changes are proposed in response to the above comment.

The following preconstruction activities are specifically identified as not constituting construction in the current federal definition of commence construction based on a 1978 interpretive memo from EPA: planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. In addition, based on the Department's experience reviewing construction

waiver requests, facilities are able to demonstrate considerable economic hardship from weather-related delays in trenching for installation of pipe or conduit, paving, and pouring of footings.

The Department maintains it has more discretion when drafting rules to implement its minor source construction permit program under ch. NR 406 than for sources subject to major NSR permitting. EPA has expressed concerns about the potential violations of the major new source review program if a facility commences construction and later, when Department takes up the review of the permit application, discovers that the project is major under prevention of significant deterioration (PSD) or Nonattainment area new source review (NSR). The Department, however, believes that the hypothetical situation proposed by EPA is not a sufficient reason to overly restrict legitimate preconstruction concerns, many of which are unique to northern states such as Wisconsin because of harsh winter weather.

The Air Management Program's compliance, inspection, and enforcement activities will assure that any violations of the PSD program are handled appropriately. A facility using the minor source commence construction exclusion would do so at its own risk. Generally, larger facilities with emissions at a level triggering major source status, are well informed about air pollution control rules and requirements. Air Management Program staff are always available to facilities, large and small, to answer questions and discuss program requirements.

The Department understands EPA's concerns, and believes that with proper communication, facilities will be able to understand and successfully utilize these exclusions with no adverse impacts. To this end, the Department will
prepare outreach materials that clearly discuss considerations for and use of these exclusions including noting that commencing construction of a major source or a major modification prior to receiving a PSD permit would likely result in the loss of the opportunity to take synthetic minor limits and require application of BACT and may result in enforcement action.

Comment 2. As discussed in comment 1 above, EPA has concerns with some items included in the exclusion of 406.03(1e). Until the issues discussed in comment 1 above are resolved, EPA does not believe it is appropriate to revise NR 407.04(1)(b)3 to apply the exclusions provided in NR 406.03(1e) when determining the date the initial operation permit application shall be submitted.

Department Response:
See Department response to Comment 1. No changes are proposed in response to the above comment.

Comment 3. To ensure clarity, EPA suggests that WDNR consider revising the wording of NR 407.03(1)(1s)(d)(4) to "Other emission information <u>indicating that the source is not a natural minor source</u> becomes available".

Department Response:
The Department assumes that EPA intended to refer to NR 407.03 (1s) (d) 4. in the above comment. The Department agrees to the clarification suggested by EPA and will revise the proposed rule language as recommended.

Comment 4. In the analysis section of the rule, it states that "SECTION 8 and 9 [of the rulemaking order] amend the process for revoking construction permits……in cases where a facility has closed or was never constructed." However, there is nothing in NR 406.11(1) that provides for when facilities were never constructed.

Department Response:
The Department initially considered revising this portion of the regulation to allow revocation of construction permits when a project is never constructed, without requiring a 21-day notification. In further review, we determined that, generally, notification is only a problem when a facility has closed. In the final version of the proposed rule, we removed references to a project that was never constructed but neglected to change the analysis section of the rule. The analysis section will be corrected.

B. Comment from 3M

Comment. 3M requested that the Department reconsider the condition that a "restricted use internal combustion engine" operates no more than 200 hours per year if an emergency stationary [reciprocating internal combustion engines] RICE (NR 400.02(136m)(a)). 3M indicated that it understands that this operating limit is currently included in the definition of an "emergency electric generator." 3M acknowledges that there have not been any long-term emergency situations that required an exceedance of the 200 hour limit from existing emergency engines at 3M facilities in Wisconsin. 3M has experienced long-term emergency engine needs at other facilities in the US and is concerned with the operating limit. 3M cited the following reasons to encourage the DNR to reconsider the 200 hour limit: 1) Emergency engines are required to operate for routine testing and are allowed under federal rules to operate for limited non-emergency purposes for a combined 100 hours annually. This results in significantly less than 200 hours of the annual allocation being available for a true emergency situation. 2) Inconsistency with the federal requirements for operating limits results in conflicting and confusing restrictions. 3) Continuation of the operating limit may result in an unintended increase in permit applications for sources wanting additional flexibility for emergency operation. 4) An operating limit of 500 hours for emergency stationary RICE would allow greater flexibility and be more consistent with USEPA guidance on emergency engine use emission calculations.

Department Response:
No changes are proposed in response to the above comment.

The Department, in crafting rule language to define "restricted use engines" and exempt them from permit requirements, intends to expand the existing emergency generator permit exemption to cover those engines that are exempt from needing to meet a standard under the federal reciprocating internal combustion engine (RICE) rules. For this reason, the proposed rule directly references the engine descriptions and operational requirements necessary to be considered an exempt RICE under the federal rules. In this way, the state and federal rules will be aligned. It is important to understand that the federal (RICE) rules were written to regulate emissions of criteria and toxic air pollutant emissions from different types of engines and do not directly address permitting or exemptions from permitting.

The proposed operational restrictions in the definition of "restricted use engine" are necessary because the Department is creating an exemption from permit requirements and needs to assure that emissions from the exempt units are low. The restrictions in the proposed exemption limit both engine output and hours of operation. If the Department were to increase the hours of operation from 200 to 500 hours per year, the size restriction would need to be lowered from the current 3000 kW in order to show that emissions from the exempt units stay low. While the Department is not aware of a facility that needed to exceed the 200 hour restriction in the more than 20 years of implementing the existing emergency generator exemption, many facilities have emergency generators with total outputs near 3000 kW. For this reason, the Department believes it is more important, and offers more flexibility, to retain the relatively high engine output threshold, and keep the hours of operation at 200. Also, if a facility were to experience an emergency that required

operation in excess of 200 hours in a year, the Department has the authority, under s. NR 436.03, Wis. Adm. Code, to approve continued operation of emergency or reserve equipment under such circumstances.

The 200 hour per year limit in the definition of "restricted use engine" has another important consequence. A facility may rely on the 200 hour per year restriction in the definition as the "operational capacity" of the equipment. This is important when determining if a facility's status is major, natural minor, or synthetic minor under both the Title V operation permit program and the major new source review (PSD) program. Emissions from all equipment, including emergency generators, must be considered when determining status under the Title V and PSD programs. With no hour restriction or with an increase from 200 to 500 hours in the definition, the maximum emissions calculated from emergency equipment would increase substantially and some facilities previously considered natural minor sources would now require synthetic minor operation permits. Some facilities anticipating using the natural minor exemption, also proposed in this rule, would find their facilities no longer meet the definition of "natural minor" if operational hours were not restricted to 200.

Finally, it is important to note that a facility has no obligation to limit the total hours of operation of their emergency equipment. The only reason to limit total hours of operation of a generator is to maintain an exemption from construction and/or operation permitting requirements. Many facilities routinely include emergency generators in construction permits and therefore, have to meet only the operational restrictions in the federal RICE rules.

C. Comments from Clean Wisconsin

Comment 1. Changing definition of "commence construction" for minor sources.
Notwithstanding the definitions of "commence construction" and "commence modification" in Wis. Admin. Code s. NR 400.02, this proposed rule change excludes 10 activities when determining if a construction air permit will be required for minor sources under ch. NR 406.

It is not necessary or appropriate to define "Commence construction, reconstruction, replacement, relocation or modification" in Wis. Admin Code ch. NR 406. Wis. Admin. Code ch.NR 400 already provides definitions of "Commence construction" and "Commence modification" that are applicable to chapters NR 400-499.

Additionally, the proposed definition more narrowly defines what it means to "commence construction" compared to the current definition found in NR 400 by allowing certain pre-construction activities such as site clearing and grading that previously required a construction permit. As noted in EPA guidance, allowing such pre-construction activities will have the "undeniable disadvantage of allowing a good deal of activity at sites which may be highly susceptible to environmental impact."

Furthermore, although the proposed definition purports to align the state definition with the federal definition, the proposed definition allows certain activities (installation of building supports or foundations, laying underground piping, and construction of permanent storage facilities) that have been explicitly excluded from the federal definition according to EPA guidance.

Finally, Clean Wisconsin is concerned that allowing all of this additional activity may result in additional pressure on DNR to ultimately approve permits for projects due to substantial prior investment in such activities. Similarly, allowing this additional activity that requires substantial investment before permitting decisions are required may undermine DNR's efforts to require environmentally sound design or operational change.

Department Response:
As discussed in the response for Comment A.1., no changes are proposed in response to the above comment.

The following preconstruction activities are specifically identified as not constituting construction in the current federal definition of "commence construction" based on a 1978 interpretive memo from EPA: planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. Adding these activities explicitly to the proposed rule language makes the state interpretation of what constitutes "commencing construction" consistent with the federal definition.

As noted by Clean Wisconsin, the Department is also proposing to allow additional activities not included in the federal definition of "commence construction" including installation of building supports and foundations, laying of underground pipe or conduit, and paving. The Department now has several years of experience in evaluating preconstruction waiver requests under s. NR 406.03 (2). This section allows the Department to approve a waiver so that the source may commence construction, reconstruction, replacement, relocation or modification of an air pollution source prior to the Department issuing a construction permit to the source. Facilities have been able to demonstrate considerable economic hardship from weather-related delays in trenching for installation of pipe or conduit, paving, and pouring of footings. These weather-related delays are unique to northern climates and do not affect the more southerly states. In order to address the impacts long, cold winters have on construction in Wisconsin, these activities have been included in the proposed rule as well.

The Department has found that approvals of preconstruction waivers have no effect on the outcome of final permit decisions. Allowing the proposed activities by rule will not change the way the Department ultimately regulates a facility, but will increase efficiency for both the source and the Department by reducing the need for application and review under the waiver process. The waiver provision under s. NR 406.03 (2) will be retained to allow sources to request waiver for activities not addressed by the proposed rule.

Companies using the proposed exclusions do so at their own risk. If activities allowed by the proposed rule have been started, additional costs might be incurred if the application review shows that changes to equipment specifications or stack parameters are needed . This same outcome is also a possibility under the current waiver provisions. The Department will provide guidance for facilities that discusses the risks of proceeding with the proposed activities prior to issuance of a permit. The Department will use its compliance and enforcement authority as necessary to implement major source construction or major modification requirements consistent with USEPA regulations and policy.

Comment 2. Natural Minor Source Operating Permit Exemption
This proposed rule defines a natural minor source for the purposes of exempting natural minor sources from requiring an operation air permit. A natural minor source is defined as meeting all of the following:

1) Is not a major source under Wis. Admin. Code chs. 405, 407, or 408;
2) Is not a synthetic minor source under Wis. Admin. Code ch. 407 or having a permit condition that allows the source to avoid being a major source under Wis. Admin. Code chs. 405 or 408; and
3) Is not a part 70 source.

Clean Wisconsin believes that the proposed definition language could be modified to better align with the federal definition of a "natural minor" source. A better alignment may prevent a loophole through which sources that should properly be classified as synthetic minor sources could be defined as natural minor sources under the proposed definition.

The definition of a synthetic minor in Wis. Admin. Code ch. 407 only refers to federally-enforceable permit conditions that prevent a source from being major source. However, EPA guidance and memorandums are clear that federally-enforceable limits on a source's potential to emit can be established by mechanisms other than permits. For example, they can also be established by rules promulgated in EPA-approved SIPs that apply to entire classes of sources.

If such rules exist in Wisconsin's SIP, or are created in the future, a source whose emissions would be above the major source threshold but for limitations established in the rule would be eligible for the natural minor exemption under the proposed rule under the following logic:

- It would not be a major source under Wis. Admin. Code chs. 405, 407, or 408 because its potential to emit is lower than the major source thresholds.
- It would not be a synthetic minor as defined in Wisconsin rule because its potential to emit is not limited by a federally-enforceable permit condition.
- It would not be a part 70 source because its potential to emit is lower than the major source thresholds.

This loophole could be avoided if the definition of a natural minor source followed the language in EPA guidance: a natural minor source is a source that does "not have the physical or operational capacity to emit major amounts (even if the source owner and regulatory agency disregard any enforceable limitations)."

Clean Wisconsin suggests the following definition be used to avoid this potential loophole:

NR 407.02 (4m) "Natural minor source" means a source that meets all of the following criteria:

(a) Does not have the physical or operational capacity to be a major source under this chapter, ch. 405, or ch. 408 even if any federally enforceable limitations are disregarded.

(b) Is not subject to a standard, limitation or other requirement under section 111 of the Act (42 USC 7411).

(c) Is not subject to a standard or other requirement under section 112 of the Act (42 USC 7412), except for a source subject solely to regulations or requirements under section 112(d)(5) or (r) of the Act (42 USC 7412 (d)(5) or (r))

(d) Is not an affected source.

Alternatively, the definition of a synthetic minor could be changed:

NR 407.02(9) "Synthetic minor source" means any stationary source that has its potential to emit by federally-enforceable conditions or limitations so that it is not a major source.

Then, the proposed natural minor definition could be changed to read in part:

NR 407.02 (4m) (b) is not a synthetic minor source under this chapter and does not have a federally-enforceable condition or limitation that allows the source to avoid being either a major stationary source under the definition in s. NR 405.02 (22) or a major source under the definition in s. NR 408.02 (21).

Department Response:

No changes are proposed in response to the above comment.

The Department believes that the proposed language is sufficient to ensure that only a source which is truly a natural minor source will be eligible for the natural minor operation permit exemption.

The Department has defined the term "natural minor source" by stating that such sources are not major, not synthetic minor, and not Part 70. These terms have all been defined in Wisconsin Natural Resources Code for many years. Using these previously defined terms ensures that the "natural minor" definition proposed in this rule will be consistent with past implementation of the state's air permitting programs.

Comment 3. Non-expiring operation permits non-part 70 sources
This proposed rule makes operation permits for non-part 70 sources non-expiring unless the Department specifies an expiring term on the basis of 1) ongoing or recurring non-compliance or enforcement action; 2) a request by the permittee; or 3) a determination by the Department.

Clean Wisconsin is strongly opposed to this rule change and believes that all pollution permits should have a specified expiration date. We are concerned that this exemption, along with the natural minor source operating permit exemption, unjustifiably removes period review of permits that is necessary to ensure that the State meeting its obligation to adequately monitor and control air pollution.

According to our review of the DNR's air permit database as of February 2015, the vast majority (>75%) of air pollution sources that have been classified by the DNR are classified as non-part 70 sources that will no longer either require operating permits (in the case of natural minor sources) or permit renewals (in the case of synthetic minor sources). Thus, these rule changes are leaving only a small fraction of air pollution sources subject to scheduled permit reviews.

Furthermore, having non-expiring permits will limit opportunity for public involvement to only the initial permit issuance. Under the current rules, operation permit renewals follow the procedure outlined in Wis. Stat. 285.62, which provides opportunity for public comment.

The proposed rule change also lacks specificity and leaves unanswered critical questions including:

1) Under what circumstances (other than ongoing/recurring non-compliance, as provided for in the proposed rule) would the DNR make a determination to require an expiration term under the proposed rule?
2) How would the DNR identify non-compliance with respect to air pollution regulations lacking scheduled permit review, and in what way would violations of air pollution regulations be systematically identified and tracked?

Department Response
No substantive changes are proposed to this portion of the rule. Please see the response to comments from rule clearinghouse for clarifying changes being made.

It remains the responsibility of the permit holder to meet all applicable requirements including submitting emissions inventory, monitoring reports and certifying compliance each year. This rule does not affect the Department's ability to track compliance at a non-Part 70 sources. Instead it will facilitate the ability to shift resources to compliance activities. Non-Part 70 sources with potential emissions of 80% or more of the major source threshold would continue to be inspected as required under EPA agreement.

The intention of the proposed rule is to give the Department more flexibility in focusing resources. Under the Clean Air Act, operation permit programs are funded through emission fees. Fees gathered from major sources may only be used on permit and compliance activities at major

sources. Similarly, fees collected from non-Part 70 sources may only be used on permit and compliance activities at non-Part 70 sources. The resources available for non-Part 70 activities are limited. This proposal allows the Department to focus non-Part 70 resources on compliance and monitoring activities.

The Department is committed to processing revisions to non-Part 70 operation permits as necessary. Permit revisions are required under ss. NR 407.13 and 407.14, Wis. Adm. Code, to incorporate any new construction, significant changes to compliance demonstration methods, and to include new applicable requirements. The revision procedures will be used to provide the opportunity for public input prior to a final decision on the permit revision.

The Department acknowledges there are certain situations where setting an expiration date in a non-Part 70 permit may be appropriate. Ongoing or recurring non-compliance at a source or a request from the permittee as provided for in the proposed rule are two examples. Another reason may be to implement requirements in federal regulations. The language included in the rule allowing the Department to make a determination for when it is appropriate to establish an expiration date is intended to provide opportunity to address unforeseen situations as of the date of the rule making. Additionally, this gives the Department the ability to work with Clean Wisconsin, as well as other stakeholders, to establish protocols for certain situations through policy directives or other means.

D. Comments from the Wisconsin Legislative Council Rules Clearinghouse

The Legislative Council Rules Clearinghouse provided the following comments on the rule.

Comment 1. In s. NR 407.09(1)(b)3. (intro.), it appears that "all" or "any" should be inserted before "of the following".

Department Response
The Department concurs and will make the recommended change.

Comment 2. In s. NR 406.03(1e)(intro.), quotation marks should be added around "commence construction" and "commence modification" and "that" should replace "which" after "chapter". In addition, "will" should be changed to "shall".

Department Response
The Department concurs and will make the recommended change with the exception of replacing "will" with "shall".

A facility is not required to exclude the listed activities to determine whether or not construction has commenced. The current definition of commence construction is intended to remain valid in this chapter. The term "will" will be changed to "may" to clarify that the use of the exclusion is voluntary.

Comment 3. In s. NR 407.02(6)(Note), it appears that the material is substantive and should be placed in the text of the rule instead of in the Note. [s. 1.09(1), Manual.]

Department Response
The language in the definition contained in s. NR 407.02(6) directly mirrors federal language so the Department would prefer not to move the note to rule language. Instead, the Department will

change the note as follows to clarify that implementation of the definition is consistent with EPA Policy.

~~NR 407.02 (6) (Note) A source that is subject to a standard or other requirement under section 112 of the Act (42 USC 7412) that caused the source to be classified as a part 70 source remains a part 70 source regardless of a reduction in potential emissions which would otherwise make the source a non-part 70 source.~~

NR 407.02 (6) (Note) A United States Environmental Protection Agency memorandum dated May 16, 1995 from John S Seitz, Director Office of Air Quality Planning and Standards, addresses when a major source of hazardous air pollutants [a source subject to a standard under section 112 of the Act] can become an area source rather than comply with the major source requirements. Specifically, the memorandum clarifies that facilities may switch to area source status at any time until the "first compliance date" of the standard. The memorandum is available at http://www.epa.gov/oaqps001/permits/memoranda/pteguid.pdf.

Comment 4. In s. NR 407.03(1s)(title), "Source" should be inserted after "minor" and before "Exemption".

Department Response
The Department concurs and will make the recommended change.

Comment 5. Does the content of the second note following s. NR 407.03 (1s) contradict the text of the rule in s. NR 407.03(1s)(c)3., relating to withdrawal of pending operation permit applications?

Department Response
The intent of the note is to clarify that a facility is not required to operate under the natural minor source exemption even if it meets the definition of a natural minor source. The Department has made the following changes to s. NR 407.03(1s)(c)1. and the second note to fix the apparent contradiction.

(c) *Notification to the department.* 1. An owner or operator ~~with~~ claiming exemption under this subsection and who has an existing permit or who has submitted a permit application under this chapter or under ch. NR 406, shall notify the department of an intent to operate under this exemption.

(NOTE) ~~Nothing about this exemption is intended to preclude an owner or operator from requesting and receiving an operation permit from the department.~~ The exemption in this subsection does not preclude the owner or operator of a natural minor source from requesting, and the department from issuing, an operation permit as allowed under s. 285.60(2)(b), Stats.

Comment 6. In s. NR 407.14(1m)(f), it is unclear how the requirement that an expiring term for a non-part 70 source operation permit must be at least 18 months from the date of the final revision interacts with the directive in s. NR 407.09(1)(b)4., that the Department may not specify an expiring term for a non-part 70 source of less than five years. Is s. 407.14(1m)(f) an exception to s. NR 407.09(1)(b)4.? It would be helpful if the Department would clarify its intent regarding these rules.

Department Response
The intent of the rules is to provide a facility time to prepare a renewal application when the Department determines that its operation permit will be revised to include an expiration date. Separately, the Department is stating that it may not revise an operation permit to set an expiration date that would result in a permit term of less than 5 years, which is the term for major source

operation permits. To clarify, the Department has made the following changes to ss. NR 407.09 (1) (b) 3. and 4. and NR 407.14 (1m) (f):

NR 407.09 (1) (b) 3. The term of a non-part 70 source operation permit does not expire unless the department specifies an expiring term in the permit upon considering any of the following:

a. Ongoing or recurring non-compliance or enforcement action taken by the department or the administrator.

b. A request by the permittee.

c. A determination by the department.

4. The term specified by the department under subd. 3. for a non-part 70 source ~~may not be less than 5 years.~~ shall be at least 5 years from the date of the last issued initial or renewed operation permit. When establishing an expiration date, the department shall provide adequate time for the permit holder to prepare and submit a renewal application consistent with the timelines in s. NR 407.04 (2).

NR 407.14 (1m) (f) A decision by the department to establish an expiring term in a non-part 70 source operation permit as allowed in s. NR 407.09 (1) (b) 3. ~~An expiring term established in a non-part 70 source operation permit shall be at least 18 months from the date of final revision approval.~~

Comment 7. In s. NR 445.09 (3) (d), in the first sentence, "who" should be changed to "that".

Department Response
The Department concurs and will make the recommended change.

E. Other Comments

Comment 1. The Department received comments with responses to the solicitation for information on economic impacts regarding the recordkeeping requirements created for the restricted use engine exemption. The commenter had installed resettable hour meters on each emergency generator as required by federal rule but did not have the ability to read and record the meters after each use of the generator. Despite this limitation, he did have the means to demonstrate that the engines did not operate more than 200 hour per year. The commenter's contention was that requiring records to be kept after each use of the generator added a burden and a cost to operation not intended by the federal RICE rule.

Department Response
Since the intent of the exemption is to better align state and federal requirements regarding emergency generators and other limited use engines, the Department has reconsidered the requirements in s. NR 407.03 (1) (w) 1., based on possible conflicts with recordkeeping requirements of the federal rules. Since this proposed rule was undertaken, in part to align state and federal regulations, the department has made the following change:

NR 406.04 (1) (w) 1. ~~Each time an engine is operated, the date, duration in hours, and purpose of operation~~ The electrical output in kilowatts, or the equivalent in brake horsepower, of each engine.