

Clearinghouse Rule 10-047

Report to
Legislative Council Rules Clearinghouse
NR 400, 404 to 408, and 484, Wis. Adm. Code
Natural Resources Board Order No. AM-09-10

Wisconsin Statutory Authority

Sections 285.11 and 285.69(1) and (1d), Wis. Stats., interpreting ss. 227.11(2), 285.11(1) and (6), 285.14(1), Stats.

Federal Authority

42 USC 7410 (a) (2) (C) and (L)

Court Decisions Directly Relevant

None

Analysis of the Rule - Rule Effect - Reason for the Rule

The department proposes to increase the fees for reviewing applications to construct or modify sources of air pollution and to begin collection of fees for significant review work performed when an application is withdrawn. These proposed changes are necessary to ensure that the new source review program has adequate funding to meet permit process timelines and to provide sufficient technical assistance to applicants and thorough review to ensure that environmental standards are met in accordance with requirements and deadlines mandated under s. 285.61, Wis. Stats. New source review ensures that new construction doesn't negatively impact the environment and/or public health, and allows for timely economic development.

Existing rules provide for the collection of fees to fund review and issuance of construction permits for air pollution sources under the new source review program. These fees consist of a basic application fee and any applicable additional fees that apply. The additional fees are imposed when case-by-case determinations are needed, the source is subject to prescribed EPA programs, or in situations that require review of testing procedures or of alternative operation scenarios.

Increasing complexity of permit review work due to new Federal requirements as well as inflation have increased costs for the new source review program. Beginning in FY 2005 the fees collected have not been adequate to fully support the work to review applications submitted. The shortfall has been covered by spending a revenue surplus that had been built up in earlier years – as well as reducing costs through extensive process streamlining and technology improvements. This surplus has been shrinking and will be gone by the end of FY 2010. The new source review program will have a growing deficit starting in the next

fiscal year. No other viable alternatives to the proposed fee changes have been identified that will adequately address the funding deficit.

Other than the non-refundable initial application fee, fees cannot currently be collected from an applicant if the permit is not issued, regardless of the time spent on the review. Since the initial cost to the applicant to submit a permit application is not significant, it is not uncommon for companies to submit an application prior to obtaining adequate project financing, or to submit multiple applications for the same, or similar, project while still evaluating the pros and cons of the various project locations. In many of these cases, applications are either withdrawn or the department is asked to stop working on it prior to final decision and permit issuance. Because the Department is required to act timely on each application, these practices often result in unnecessary application processing and review. In 2008 and 2009 it is estimated that nearly \$300,000 in fees were not realized due to applications being withdrawn.

Section 110(a)(2)(K) of the Federal Clean Air Act requires states to incorporate a permit fee system in their state implementation plans (SIP) to recover the reasonable cost of reviewing and acting on permit applications and enforcing the conditions of the permits. Section 285.69 Wis. Stats., authorizes the department to establish air permit fees.

Over the last four years the Department has implemented changes in the air program that have reduced the regulatory burden associated with new source permitting, especially for smaller sources of air pollution. Examples include new permit exemptions, general and registration permits and a new integrated information management system. These changes have eliminated about one hundred new source permit actions per year. Besides the obvious benefits of reduced costs and streamlined processing for the smaller sources, air staff can focus on larger, more complicated permits with more significant air quality impacts. Larger businesses have benefited as the average time it takes to obtain these more complicated permits dropped significantly, from 157 days on average in 2007 to 67 days in 2009. However, these improvements have had a significant revenue impact. Smaller emission sources (non-major sources) were paying more than they should based on their emissions and in effect subsidizing major sources. Eliminating approximately 100 new source permit actions has resulted in reduced program revenue of \$600,000 to \$1,200,000 per year for the last four years. In FY 2009 new source revenue only covered \$1,576,206 of the \$2,250,792 needed to administer the program. The current fiscal year, ending June 2010, is expected to be as bad, if not worse, than FY 2009.

FY	Revenue	Expenditure	Shortfall (\$)	Shortfall (%)	Cumulative Shortfall (\$)
2006	\$1,746,815	\$2,352,031	-\$605,216	-26%	-\$605,216
2007	\$1,814,375	\$2,772,493	-\$958,118	-35%	-\$1,563,334
2008	\$1,451,775	\$2,700,650	-\$1,248,875	-46%	-\$2,812,209
2009	\$1,576,206	\$2,250,792	-\$674,586	-30%	-\$3,486,795

The new source review account has had a structural deficit for a number of years. This shortfall has been covered by a revenue surplus built up in the new source review fund during FY 2000-2005. This surplus had shrunk to \$841,000 at the end of FY 2009 and will be gone at the end of FY 2010. The consequences of this will be immediate as there will not be sufficient funds at the current fee level to pay the necessary staff to review new source permits under the deadlines required by law.

The projected workload for FY 2011* is presented in the table 2 below:

Type of Review	NAA New Source Review (LAER)	Major New Source Review (PSD)	Minor New Source Review	Const Permit Revisions	Const Permit Exemptions	General Const Permits	Registration Const Permits	Const Permit Waivers
Number	5	20	100	20	50	25	10	5
Effort (hrs/review)	448	298	128	24	24	32	22	12

*This projected effort does not include increased review work resulting from implementing greenhouse gas regulations expected to begin in January 2011.

Meeting decision deadlines while maintaining adequate compliance and effective applicant service levels is a challenge even with the full complement of authorized staff. Reduced funding and fewer staff will create delays in permit processes that, at best, will delay a business from being able to take advantage of a new opportunity. In other cases the delay or the inability for a business to get a permit in a timely manner may put an entire business at risk. In addition, businesses obtaining or trying to stay eligible for grants may be also be placed in jeopardy if permit decisions are delayed due to inadequate staffing or legal challenges due to hasty review.

The proposed fee increases are intended to prevent this unacceptable situation.

While the New Source Review and Prevention of Significant Deterioration permit programs are required under Title I of the Clean Air Act, there are no specific federal regulations that direct how rules to collect fees for these programs are to be written or to the specific content of the fee rules. This proposal will allow adequate fees to be collected to support the new source review program by increasing fees to address the two causes of increased costs previously mentioned.

The proposal includes an increase in permit fees across the board to account for inflation, as the last similar fee increases were implemented back in 1999. The cumulative rate of inflation since then (1999-2010) is 30%. In addition, some fees are proposed to increase to better reflect the amount of staff resources necessary to complete certain permit review actions. An example of increased review complexity is that in the last few years dozens of

new industry source categories have become subject to federal regulation and permitting for hazardous air pollutants.

The upcoming regulation of greenhouse gasses will present additional regulatory challenges. While fiscal impacts are difficult to estimate at this time, it is clear that the permit workload will significantly increase both in terms of the number of reviews that will be conducted and in their level of complexity. New fees for this work are not being proposed at this time. Fees for this work in the future are expected to be covered under the existing fee categories. New fees in this proposal include fees for reviewing and issuing coverage for non-major sources (low emissions) under general and registration operation permits, and for making determinations for exempt sources.

Table 3 below compares existing fees to what is being proposed in this order. The proposed increases are based on the following:

- projected workload (Table 2) by type of permit;
- level of effort which includes application, technology, modeling, and emission and AQ impacts reviews, that are required to make determinations for the different types of permit actions;
- types of fees associated with the different types of permit actions; and
- program costs.

Fee description	Existing	Proposed	Increase	Last Raised
Major source construction (PSD or nonattainment)	\$12,000	\$16,000	33%	1999
Major modification	\$8,000	\$12,000	50%	1999
Minor modification at major source	\$4,400	\$7,500	70%	1999
Expedited review (PSD-under 60 days)	\$4,000	\$7,500	88%	1999
Modeling analysis (detailed for a major source)	\$3,200	\$4,500	41%	1999
MACT, BACT, LAER (case-by-case analysis)	\$2,700	\$4,500	67%	1999
Expedited review (PSD-61 to 90 days)	\$2,650	\$4,000	51%	1999
Expedited review (non PSD-under 50 days)	\$2,650	\$5,000	89%	1999
Minor source construction	\$2,300	\$3,500	52%	1995
Emission testing (initial unit)	\$1,350	\$2,500	85%	1999
Revision to a construction permit	\$1,100	\$1,500	36%	1999
Public Hearing	\$950	\$1,500	58%	1999
Actual based exemption	\$800	\$1,250	56%	2007
Research & Testing exemption	\$800	\$1,250	56%	1999
Analysis of emission unit (per unit, 2 or more units)	\$400	\$800	100%	1999
Construction permit waiver	\$300	\$500	67%	2007
Exemption determinations (not otherwise specified)	\$0	\$500	New fee	New fee
General Construction Permit (non-part 70 source)	\$0	\$1,500	New fee	New fee

Registration Construction Permit (non-part 70 source)	\$0	\$1,000	New fee	New fee
---	-----	---------	---------	---------

Agency Procedures for Promulgation

Public hearings, Natural Resources Board final adoption, followed by legislative review.

Description of any Forms (attach copies if available)

None

Name and Telephone Number of Agency Contacts

Andrew Stewart, Bureau of Air Management – 266-6876
 Robert Eckdale, Bureau of Air Management – 266-2856
 Michael Scott, Bureau of Legal Services – 266-7527

Submitted on April 29, 2010