

Report From Agency

REPORT TO LEGISLATURE

NR 406 and 407, Wis. Adm. Code

Board Order No. AM-24-12b
Clearinghouse Rule No. 19-015

Basis and Purpose of the Proposed Rule

The primary objectives of the proposed rules are to improve operational efficiency for and to simplify the permitting processes administered under chs. NR 406 and 407, while remaining consistent with the federal Clean Air Act (CAA). The proposed rule removes outdated requirements and language that inadvertently prohibits processes that could take advantage of electronic, web based applications. It also clarifies rules and requirements to assure consistent implementation, and updates rules so that they are consistent with current federal rules.

Summary of Public Comments

Comments on the proposed revisions to chs. NR 400, 406, and 407, Wis. Adm. Code, concerning board order AM-24-12b, Phase 2 of the Air Permit Streamlining Rule, were received on April 23, 2019, from TransCanada Pipeline Corporation and on April 24, 2019 from Wisconsin Paper Council (WPC), Wisconsin Manufacturers and Commerce (WMC), Midwest Food Processors Association (MWFPA) and Wisconsin Industrial Energy Group (WIEG) (in a joint comment). The following is a summary of comments and the DNR's response.

Comments from WPC, MFPFA, WIEG, WMC

1. The Economic Impact Analysis should be updated.

Response:

A draft economic impact analysis specific to AM-24-12b was prepared and made available to a large group of stakeholders, along with the draft board order including proposed rule language, in a solicitation for information on economic impacts sent December 3, 2018. The solicitation was posted to DNR's rules website and sent by email to all air permit holders in the state as well as the Small Business Environmental Council, the Printing Council, the Wisconsin Transportation Builders Association, Wisconsin Manufacturers and Commerce, the Wisconsin Paper Council, Badger State Sheriffs' Association, Wisconsin Sheriffs and Deputy Sheriffs Association, the American Council of Engineering Companies of Wisconsin, the Wisconsin Public Service Commission, the League of Wisconsin Municipalities, the Wisconsin Counties Association, members of the Air Management Study Group, members of the Air Permit Streamlining Workgroup, Clean Wisconsin, Sierra Club, Midwest Environmental Advocates, environmental consultants, environmental law attorneys, utilities, and representatives of large and small businesses.

DNR received two responses to the solicitation for information on economic impacts. One respondent indicated that the proposed rule would not have an economic effect on their facility which currently operates under an exemption. The other respondent indicated that there would be no adverse economic impacts to their operations and felt there could be some economic benefits from the rule as proposed.

DNR concludes that the EIA does not need to be updated.

2. The DNR should rescind, revise, and resubmit the scope statement for the rule in light of the legislative intent behind recent changes to the rulemaking process.

Response

Both 2017 Wisconsin Acts 39 and 57, which seem to be the revisions alluded to in the comment, expressly grandfather scope statements that had been approved prior to the effective date of the legislation. 2017 Wisconsin Act 39 states that scope statements approved prior to the legislation expire 30 months from the effective date of the law. Based on that provision, this scope statement expires on February 4, 2020. Therefore, this scope statement remains valid.

3. Statute requires one rule for one scope statement.

Response

The decision to undertake this rulemaking in two phases was shared with stakeholders at a January 24, 2014 kickoff meeting of the Permit Streamlining Rule Stakeholder Workgroup and at numerous Air Management Study Group meetings thereafter. No concerns about the phased rulemaking proposal were raised in any of those meetings.

The rulemaking was split to accommodate changes proposed by stakeholders without delaying the natural minor exemption added by AM-24-12a. Nothing in the current rulemaking packages goes beyond the description of proposed rulemaking that is in the scope statement.

4. The rule proposes substantive changes not included in the original scope statement.

Response

The scope statement approved for this rule has a general directive “to improve operational efficiency for, and to simplify the permitting processes administered under chs. NR 406 and 407...” while remaining consistent with the Clean Air Act (CAA). DNR interprets the directive to improve operational efficiency as authority in the scope statement to review chs. NR 406 and 407 for areas that delay processes for permitting or exemption determinations. Improving operational efficiency includes revising sections that are unclear or confusing.

Furthermore, the scope statement states, in reference to the objective to improve operational efficiency for, and to simplify the permitting processes administered under chs. NR 406 and 407, “The Wisconsin Department of Natural Resources (WDNR) may encounter potential opportunities related to this objective which are unforeseen and therefore not described. The WDNR will evaluate and act on such opportunities consistent with the stated objective.” The scope statement’s listing of specific rules and issues to be examined is not intended to be limiting.

5. Changes proposed to the definition of reconstruction are not included in the original scope statement and will increase regulatory burden for minor sources.

Response

The term “reconstruction” or “reconstruct” is used more than 30 times in ch. NR 406, yet the term is not defined for minor sources in rule. Removing inconsistent or ambiguous language fulfills the scope statement goal to “improve operational efficiency.”

Furthermore, defining the term “reconstruction” in the context of minor construction permitting is not expected to result in any change in eligibility of existing exemptions or result in additional permit requirements.

No change based on this comment has been made.

6. Changes to the exclusion from commence construction are not included in the original scope statement

Response

The exclusion from commence construction in section 406.03(1e) did not exist at the time the original scope statement was written. This section was promulgated in Phase 1 of the Air Permit Streamlining Rule. The exclusion was created to align the state and federal definitions of "Commence Construction." At the urging of stakeholders, DNR also included additional activities not allowed by the federal definition to be used only for minor construction projects.

DNR submitted the exclusion in s. NR 406.03(1e) to EPA for approval into Wisconsin's State Implementation Plan (SIP). EPA has not approved the submittal because, as the exclusion is written, DNR cannot provide a demonstration that projects utilizing the exclusion would not ultimately require a major source permit. Without approval into the SIP, facilities may be at risk of federal enforcement for commencing construction without a permit.

During Phase 2 of the Air Permit Streamlining Rule, stakeholders reviewed revision options that would qualify for SIP approvability. Based on this feedback, the rule language was simplified. DNR removed the three activities that are not allowed under the federal definition of "begin actual construction" in 40 CFR § 51.165 (a)(1)(xv). This will allow all sources, regardless of size, to engage in the remaining activities excluded from being considered commencing construction prior to receiving, or even applying for, a permit. This change simplifies a rule, provides certainty to sources on what activities they can begin without a permit in hand, and aligns state and federal rules.

Stakeholders continued to express concerns that the 3 activities removed from the exclusion are activities that, when delayed, can significantly impact the economic viability of a construction project. In response, DNR proposed changes to the waiver rule in s. NR 406.03(2)(b)2.c., Wis. Adm. Code, to clarify and simplify demonstration of hardship, making the waiver easier to obtain. The construction waiver allows all construction activities to begin before a permit is issued. The waiver rule contains processes that enable DNR to determine whether a project is major and has already obtained approval into the SIP. The impacts of the revisions to s. NR 406.03(1e) on minor sources are offset, in part, because the proposed changes to the waiver rule will make it less burdensome to demonstrate a hardship and make it easier for minor sources to qualify for a waiver, fulfilling the goal of the exclusion from commencing construction.

No change based on this comment has been made.

7. Changes to Wisconsin's Construction Waiver rule in s. NR 406.03(2)(gm) are outside the scope statement and limits the availability of waivers.

Response

The changes to s. NR 406.03(2) were proposed expressly to increase the availability of waivers to minor sources by making it less burdensome to demonstrate a hardship. The addition of s. NR 406.03(2)(gm) clarifies waiver applicability to improve operational efficiency. The addition is not intended to affect whether a source could apply for and obtain a waiver for a construction permit revision request.

In response to received comments, the DNR has changed the rule language as follows:

SECTION 9. NR 406.03 (2) (gm) is created to read:

NR 406.03 (2) (gm) The department may not grant a waiver for a source that commenced construction, reconstruction, replacement, relocation, or modification without a permit prior to requesting a waiver under this paragraph.

8. Changes relating to exemptions from minor source construction permitting for facilities making changes under Plant-Wide Applicability Limitations (PALs) are more restrictive and limit the exemptions available, which is outside the scope statement.

Response

Repealing s. NR 406.04(1f)(c), Wis. Adm. Code, reduces construction permitting requirements for facilities making changes under an established PAL by allowing construction of new emissions units to qualify for the exemption. Repealing the note and creating s. NR 406.04(1f)(f) makes it clear that an operation permit application is required for modifications made under this exemption. The note contained ambiguous language regarding submittal of an operation permit application while the existing requirement in s. NR 407.04(1)(b) is clear that such an application is required for all such modifications. This clarification will improve operational efficiency.

No change based on this comment has been made.

9. Changes to the exclusion from modification in s. NR 406.04(4)(j) will result in fewer exemptions and thus are outside the scope statement.

Response

The current exclusion cannot be implemented if interpreted as described by the commenter. While it is true that use of the term “emissions” with no modifier in chs. NR 406 and 407 may have been historically interpreted by some to mean actual emissions, any exemption based on actual emissions must have a compliance demonstration element to be enforceable. Additionally, the thresholds being referred to in s. NR 406.04(4)(j)2. are maximum theoretical emissions thresholds.

The DNR considers the changes made to be clarifying and has no evidence that an interpretation of the emissions increase was ever widely interpreted by DNR permitting staff to be “actual emissions.” Therefore, this revision will not have any real effect on the number of projects that are able to avoid air permitting based on this exclusion.

Regarding the removal of “change is exempt under sub. (1), or increased” from s. NR 406.04(4)(j)2., it appears the commenter is confusing sub. (1), which refers to s. NR 406.04(1), with subd. 1., which would refer to s. NR 406.04(4)(j)1. Section NR 406.04(4)(j) already requires that changes must meet all of the conditions in s. NR 406.04(4)(j)1. to 3. in order to qualify for this exclusion from modification. The proposed change to s. NR 406.04(4)(j)2. does not impact this requirement.

No change based on this comment has been made.

10. The repeal of s. NR 407.11(1)(e), Wis. Adm. Code, increases permit burden on sources and so is outside the scope statement.

Response

DNR does not have authority to administratively revise an operation permit to include a construction permit because the notice and comment procedures are not substantially equivalent, as required in 40 CFR § 70.7(d)(1)(v). DNR made procedural changes to address this issue during previous streamlining efforts by integrating construction and operation permits. Since the late 2000’s DNR reviews, public notices and issues operation permit revisions concurrently with construction permits to minimize regulatory burden and increase the efficiency of the permitting processes. Removing this unusable provision substantially eliminates confusion and delays caused by such confusion.

No change based on this comment has been made.

11. An administrative construction permit revision process should have been created.

Response

DNR investigated the creation of an administrative process for construction permits. Construction permitting revision rules are already considerably less burdensome than rules covering significant revisions to operation permits. Any revision to a construction permit is handled through a notification and 21-day waiting period. DNR does not require construction permits to be revised to reflect administrative changes to ownership or responsible official. These changes are handled through

operation permitting. Adding an administrative revision process requirement for construction permits would add an unnecessary process for permittees.

No change based on this comment has been made.

12. DNR should have created an exemption for like-kind replacement.

Response

DNR did investigate a like-kind replacement exemption and presented potential rule language at an April 13, 2017, Air Permit Streamlining Stakeholder workgroup meeting. Feedback from stakeholders indicated that the constraints associated with a like-kind replacement exemption were such that the types of changes that would be allowed under the exemption were so narrow in scope that the exemption would not be useful. DNR also contacted EPA and learned that no nearby states have like-kind replacement exemptions. Based on this feedback, DNR did not pursue a like-kind exemption replacement any further.

DNR has proposed revisions to the exemption for projects evaluated for significant net emissions increase under s. NR 406.04(1k) clarifying that this exemption covers “existing emission units” as defined in s. NR 405.02(12) or s. NR 408.02(13)., Wis. Adm. Code. These definitions state that “replacement unit, as defined in sub. 405.02(25k) or 408.02(29s), is an existing emissions unit.” Therefore, the proposed changes to 406.04(1k) clarify that such replacement units, which are already exempt under federal PSD and NNSR permit rules, are also exempt from minor construction permit requirements.

No change based on this comment has been made.

13. DNR should have created an ‘up-to’ limit so facilities can obtain a permit that would allow for some minimal changes, such as the addition of a space-heating unit, without being forced to reapply for a new permit.

Response

DNR revised the definition of “permit revision” in s. NR 406.02(6), Wis. Adm. Code, as follows:

SECTION 3. NR 406.02 (6) is amended to read:

“Permit revision” means any change to a construction permit to reflect a change at a source that is not a modification of the source or that is an exempt modification of the source.

14. The rule should have included language clarifying that a construction permit covers all categories of construction: construction, reconstruction, replacement, and modification of a source, and prescribing a method for administrative permit revision (in lieu of a new application) if the underlying reason for the construction or the construction category changes.

Response

This issue was not discussed during the stakeholder meetings on this rule, and it is not clear how such a change would ‘improve operational efficiency.’ DNR welcomes more formal suggestions of how future rulemaking could consider these questions.

15. The rule should include language to clarify that notice and hearing requirements do not apply to revisions that do not amend the total emission limits.

Response

Construction permit revision procedures are described in the existing rule in s. NR 406.11(1), Wis. Adm. Code, and do not require notice and hearing requirements. Construction permits can be revised after providing 21 days written notification to the permit holder and to the persons listed under s. 285.61 (5) (a) 2. to 5., Stats.

No change based on this comment has been made.

16. DNR should have considered removal of non-air pollution related conditions from permits and allow permits to reference other documents rather than listing specifics so that the non-permit documents can be regularly updated to remain current with work practices without the need for a permit revision.

Response

This is a complicated issue that was considered by DNR during the 2006 streamlining efforts. EPA weighed in with a White Paper and court decisions have prohibited at least some incorporation by reference. This topic was not an element of the approved scope statement. Any changes in rule to explicitly allow incorporation of conditions into permits by reference would need to be further examined. Section NR 407.09 (and 40 CFR § 70.6) covers operation permit content and states that the permit must contain the emission limitations and standards as well as monitoring and related recordkeeping and reporting requirements.

No change based on this comment has been made.

17. The rule should more specifically define DNR's authority in ch. NR 439 to help permittees understand expectations of permit conditions.

Response

The scope statement for this proposed rule does not include changes to ch. NR 439, Wis. Adm. Code. DNR plans to undertake rulemaking concerning ch. NR 439 in the future. Further, stakeholders were notified and asked to comment on prioritization of permit streamlining or ch. NR 439 prior to starting work on AM-24-12b and requested work on permit streamlining.

18. WPC is concerned that opportunities to improve permitting efficiency have been missed and would urge DNR to reincorporate other streamlining opportunities into the proposal should it move forward.

Response

As discussed in the "Stakeholder Process" section of this memo, the development of the proposed revisions included extensive stakeholder involvement and DNR evaluated potential revisions proposed by stakeholders. An additional opportunity to streamline construction permitting rules was recently uncovered in conjunction with updates to a VOC RACT rule. Construction permitting under ch. NR 406, Wis. Adm. Code, would be required if a RACT rule is revised to become less restrictive. DNR revised the exclusion from modification for "VOC RACT compliance" in s. NR 406.04(4)(b), Wis. Adm. Code, to exclude a source from modification when it is required to meet a new or updated provision of a RACT rule as follows:

SECTION 14. NR 406.04 (4) (b) is amended to read:

VOC RACT compliance. A change to a permit condition needed to assure compliance with a new or revised RACT rule, a change at a source which is made primarily for the purpose of complying with the requirements of a RACT compliance plan approved under chs. NR 419 to 425, or a VOC RACT variance approved under s. NR 436.05, if the change does not cause or exacerbate the violation of an ambient air quality standard or ambient air increment for any air contaminant other than ozone.

Comments from representatives of TransCanada Pipeline Company

19. TransCanada considers gas generator changeouts to be Routine Maintenance, Repair and Replacement (RMRR) and as such, are not be subject to PSD permitting requirements provided that the gas generator being replaced is an identical unit to the one being installed.

Response

As stated in the response to comment 12., DNR has revised the exemption for projects evaluated for significant net emissions increase under s. NR 406.04(1k) to clarify that this exemption covers "existing emission units" as defined in s. NR 405.02(12) or s. NR 408.02(13)., Wis. Adm. Code. These

definitions state that “replacement unit, as defined in sub. 405.02(25k) or 408.02(29s), is an existing emissions unit.” Therefore, the proposed changes to 406.04(1k) should assure that such replacement units, which are already exempt under federal PSD and NNSR permit rules, are also exempt from construction permit requirements.

Modifications Made

Modifications were made to 7., 13., and 18 above as a result of comments received.

Appearances at the Public Hearing

Lane Ruhland, Wisconsin Manufacturers and Commerce
Delanie Breuer, Wisconsin Paper Council
Peter Tomasi, Foley and Lardner

Changes to Rule Analysis and Fiscal Estimate

Rule Analysis

No changes were made to the Rule Analysis as a result of public comment

Fiscal Estimate

DNR received two brief responses on the solicitation for economic impacts of the streamlining rule. One respondent indicated that the proposed rule would not have an economic effect on their facility which currently operates under an exemption. The other respondent indicated that there would be no adverse economic impacts to their operations and felt there could be some economic benefits from the rule as proposed. No changes were made to the fiscal estimate as a result of public comments.

Response to Legislative Council Rules Clearinghouse Report

Comments received from the Wisconsin Legislative Council Rules Clearinghouse (19-015) were related to form, style, placement in administrative code, clarity, grammar, punctuation and use of plain language. DNR made all requested changes except as follows:

Comment 5.b.,

Instead of “government agency such as police or sheriff’s department”, the department could create a definition of “government agency.”

Response

DNR did not create a definition for “government agency” as the term is used in proposed exemption in 406.04(1) (bm) (intro) and 407.03(1) (bm) (intro) because federal rules that exclude government agencies that incinerate illegal drugs use this term and do not define it.

Final Regulatory Flexibility Analysis

Small businesses with air pollution emissions will be affected by the proposed rules. In general, the revisions in this rule package provide clarification for applicability of permit exemptions. Small businesses that may not have dedicated environmental staff will be able to understand and take advantage of clarified permit exemptions and other exclusions in the rules. Other changes streamline processes or allow for implementation of online reporting and application submittals, which also provide a cost savings for small businesses.

The proposed rules will allow all Wisconsin businesses, including small businesses, seeking minor construction permits to begin certain preconstruction activities prior to permit issuance. The ability to begin certain preconstruction activities before receiving a permit can be economically beneficial to some businesses.

Some small businesses may need assistance in understanding what rules apply and which exemptions they qualify for. The Air Program's Small Business Environmental Assistance Program is available to help small businesses understand what permits and requirements apply and what options are available to demonstrate compliance.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.