

ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
RENUMBERING AND AMENDING, AMENDING
AND CREATING RULES

The Wisconsin Natural Resources Board adopts an order to **renumber and amend** NR 406.03; to **amend** NR 410.03(intro.) and to **create** NR 406.03(2) and 410.03(1)(bm) relating to construction permit waivers and affecting small business.

AM-08-06

Summary Prepared by the Department of Natural Resources

Statute interpreted: ss. 285.11(6), 285.60(5m) and 285.69(1d), Stats. The State Implementation Plan developed under s. 285.11(6), Stats., is revised.

Statutory authority: ss. 227.11(2)(a) and 285.11(1) and (6), Stats.

Explanation of Agency Authority

Section 227.11(2)(a), Stats., gives state agencies general rulemaking authority. Section 285.11(1), Stats., gives the Department authority to promulgate rules consistent with ch. 285, Stats. Section 285.11(6), Stats., gives the Department the authority to develop a state implementation plan for the control of air pollution. Section 285.60(5m)(a), Stats., directs the Department to promulgate rules to allow a source to commence construction of an air pollution source prior to receipt of a construction permit based on a showing that construction prior to issuance of the permit is necessary to avoid undue hardship. Section 285.69(1d), Stats., directs the Department to assess a fee of \$300 for any source requesting a waiver under s. 285.60(5m), Stats.

Related Statute or Rule

This rule relates directly to regulations in ch. NR 406, Wis. Adm. Code, and applicable permit fees in ch. NR 410, Wis. Adm. Code, for the permitting of activities that result in air pollutant emissions.

Plain Language Analysis

2003 Wisconsin Act 118, created s. 285.60(5m), Stats., which requires the Department to develop rules to allow a person who owns or operates air pollution sources to commence construction on a project that requires a construction permit prior to receiving the permit, in certain circumstances. This rule is being developed in response to this directive. It would be responsive to the s. 285.60(5m), Stats., directive by allowing a person to apply for a construction permit waiver while their construction permit is being processed. Waivers can be granted for undue hardship, which may include weather conditions, catastrophic equipment damage at a source where a construction permit is needed for replacement equipment or other hardship situations that may arise on a case-by-case basis.

Summary of, and Comparison with, Existing or Proposed Federal Regulation

There are no existing or proposed regulations at the federal level to allow for granting a construction permit waiver.

Comparison with Rules in Adjacent States

Michigan has a similar rule while Iowa and Illinois do not. Michigan may grant a waiver prior to the submittal of the permit application. The applicant can then proceed, at their own risk, as the state still has the ability to deny the application. Michigan does not issue waivers for major sources nor those that are subject to the federal National Emission Standards for Hazardous Air Pollutants. Minnesota grants waivers on minor permit modifications only.

The proposed rule is very similar to Michigan's except that we are requiring submittal of a complete air pollution construction permit application prior to acting on the waiver request. As with Michigan's rule, the Department won't accept waiver requests for major sources or major modification to sources, both in attainment and non-attainment areas within Wisconsin.

Summary of Factual Data and Analytical Methodologies

This rule is being developed as a result of statutory changes. The proposed language of the rule does not deviate from the directive to develop this rule.

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

The proposed rule is not expected to have a significant effect on small businesses nor have a significant economic effect on any entity. However, under s. 285.69(1d), Stats., any person filing a waiver request will be required to pay a \$300 non-refundable fee.

Effect on Small Business

The proposed rule is not expected to have any significant adverse effect on small businesses. Small businesses may benefit from this rule based on the discussion above.

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SECTION 1. NR 406.03 is renumbered NR 406.03(1) and, as renumbered, is amended to read:

NR 406.03(1)(title) PERMIT REQUIREMENT. ~~No~~ Except as provided in sub. (2), no person may commence construction, reconstruction, replacement, relocation or modification of a stationary source unless the person has a construction permit for the source or unless the source is exempt from the requirement to obtain a permit under s. 285.60(5), Stats., or under this chapter. Applications for the construction permit shall be submitted on forms which are available from the department at its Madison headquarters and regional offices.

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

NR 406.03(2) WAIVER OF CONSTRUCTION PERMIT REQUIREMENTS. (a) A person who is required to obtain a construction permit under s. 285.60, Stats., may request a waiver from the department in order to commence construction, reconstruction, replacement, relocation or modification of an air pollution source prior to the department issuing a construction permit to the source under this chapter. A waiver request shall be made in writing and shall include an explanation of the circumstances that justify the request and when those circumstances arose or may be anticipated to arise. The waiver request shall be signed by a responsible official for the facility.

(b) The department may grant a waiver provided that all of the following conditions are satisfied:

1. The person has submitted a complete construction permit application for the source to the department.
2. The person has submitted a complete waiver request to the department which demonstrates that undue hardship will be caused if a waiver is not granted. Undue hardship may result from any of the following:

- a. Adverse weather conditions.
 - b. Catastrophic damage of existing equipment.
 - c. A substantial economic or financial hardship that may preclude the project in its entirety.
 - d. Other unique conditions.
3. The person has paid the waiver review fee required under s. NR 410.03(1)(bm).

(c) The department shall act on the waiver request within 15 days of receipt of a complete request and respond to the applicant either approving or denying that request.

(d) The source may commence construction, reconstruction, replacement, relocation or modification when a waiver is granted.

Note: A waiver does not relieve the applicant from the obligation to comply with any other applicable regulations or requirements. If the applicant proceeds with construction after a waiver is granted, they do so at the applicant's own risk. Granting the waiver does not obligate the department to approve the air permit application for the source.

(e) The source referenced in par. (b)1. may not be initially operated until a construction permit is issued.

(f) The department may not grant a waiver for a source that requires a permit under ch. NR 405 or 408 or requires a permit to establish enforceable limitations on potential to emit to avoid permit requirements of ch. NR 405

or 408.

(g) The department may not grant a waiver to a source located or to be located within 10 kilometers of a Class I area under this subsection.

(h) The department may rescind a waiver granted under this subsection if the owner or operator does not diligently respond to department inquiries on the construction permit application or if the department preliminarily determines that the source will not meet the criteria for permit approval under s. 285.63(1), Stats.

SECTION 3. NR 410.03 (intro.) is amended to read:

NR 410.03 (intro.) Any person required under s. 285.60, Stats., to obtain a construction permit for a direct source shall pay an application fee which is the sum of the basic fee under sub. (1) and any additional fees under sub. (2). Any person requesting revision of a direct source construction permit shall pay the basic fee in sub. (1)(a)5. Any person required under s. NR 406.04(1)(i) to obtain a determination of exemption from the department shall pay the basic fee in sub. (1)(b). Any person requesting a waiver to commence construction under s. 285.60(5m), Stats., or s. NR 406.03(2) shall pay the basic fee in sub. (1)(bm). Any person required under s. 285.60, Stats., to obtain a construction permit for an indirect source or a determination of an exemption under s. NR 411.04 for an indirect source shall pay the appropriate fee under sub. (3).

SECTION 4. NR 410.03(1)(bm) is created to read:

NR 410.03(1)(bm) Any person requesting a waiver of construction permit requirements under s. 285.60(5m), Stats., or s. NR 406.03(2) shall submit under s. 285.69(1d), Stats., a \$300 fee with the request. The fee is non-refundable.

SECTION 5. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 6. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on October 25, 2006.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)