

Clearinghouse Rule 06-019

No report required (covered in Report on Clearinghouse Rule 04-106 except for those modifications made in the rule following the agency public hearing on Clearinghouse Rule 04-106)

REPORT TO LEGISLATURE

NR 406 and 410, Wis. Adm. Code
Linkage of the state air permitting programs with federal changes
to air permitting program and affecting small business

Board Order No. AM-32-04b
Clearinghouse Rule No. 06-019

Basis and Purpose of the Proposed Rule

On December 31, 2002, the United States Environmental Protection Agency (EPA) published regulations that significantly change the way new and modified sources of air pollution are permitted. Wisconsin has three years in which to submit revisions to its State Implementation Plan that meet the minimum program elements required under the federal program.

The proposed rule changes necessary to implement the federal program cannot be utilized unless additional changes are made to the state construction permitting regulations. The Department met regularly with the same group of stakeholders to garner advice on how best to revise the state permitting regulations to implement the federal program changes. Through these meetings, the Department has developed a proposal for providing the linkage to the December 31, 2002 changes proposed for adoption under Board Order AM-06-04 which it believes meets all of the following goals:

1. Develop a rule that reduces the administrative burden of the NSR program on both permittees and the Department.
2. Develop a rule that is as effective as the current rule in protecting the environment and in allowing for public input on proposed projects.
3. Develop a rule that meets the Department's statutory obligations.
4. Develop a rule that is likely to be approved by EPA.

Summary of the revised rules and effect on existing policy

The proposed rule revisions have been designed to take advantage of the flexibility made available under the proposed changes that adopt the federal air permitting revisions without compromising on Department opportunity for review of modifications to stationary sources and public awareness. By providing construction permit exemptions for projects that will not result in significant increases actual emissions of regulated air contaminants, facilities will be able to proceed with modifications while the Department has the opportunity to review the changes and make its findings available for public comment prior to the facility operating in a modified

fashion. Projects that have the potential for greater environmental consequences, may still take advantage of the federal air permitting changes, however the state construction and operation permit program will continue to provide for Department review and public comment prior to the facility commencing with modifications that would provide for operations in a modified state.

Summary of Public Comments

On October 26 and 28, 2004, the Department conducted public hearings on proposed rule changes in Wisconsin Rapids and Madison, respectively. Although the hearings were not attended by any members of the public, the Department did receive written comments from Sierra Club/Midwest Environmental Advocates (SC/MEA), Wisconsin Paper Council (WPC), Printing Industries of Wisconsin (PIW) and Wisconsin Manufacturers and Commerce (WMC). Comments received during this period were in regard to revisions that have since gone forward under Board order number AM-32-04a.

Since additional changes were made as a result of the ruling by the D.C. Circuit Court of Appeals on the federal NSR changes, two additional hearings were held on November 16 and 18, 2005 in Stevens Point and Madison, respectively. Although no comments were received during the hearings, the Department did receive comments from WMC, WPC, PIW and EPA.

Summary of issues raised in public comments

Two comments were received regarding a requirement that projects that are excluded from major source review be exempted from state construction permitting only if they will not cause or exacerbate an exceedance of an ambient air quality increment or standard. The commenters believe that this requirement is unnecessary. The Department disagrees with this comment and maintains that ambient air quality increments and standards must be protected even if a project might be excluded from the major new source review program.

Three comments were received regarding the proposed of \$4,400 to be assessed when the Department is requested by an applicant to determine whether a project that they may be undertaking is exempt from the major source construction permit program. The comments indicate the fee is too high and should be eliminated. The Department has noted this concern, however, and also notes that such a determination is made only at the request of the source. Thus, only in those instances where the emissions estimates are complex enough for the source to request Department assistance in determining whether the major source construction permit program is applicable, would such a fee be assessed. As a result, it is estimated that approximately 40 hours of staff engineer work is expected to meet the request of the source, accounting for the amount of the fee.

EPA questioned the establishment of plant-wide applicability limitations by way of a significant operation permit revision and referred to the preamble of the federal NSR revisions as a basis for the comment. The Department agrees with EPA's comment and as a result will establish plant-wide applicability limitations using construction permits issued under chapter NR 406 by creating s. NR 406.035. Construction permits will also be used to distribute a PAL in the event it is not renewed. The construction permit revision process will be used to decrease a PAL.

During its stakeholder process, several parties expressed a need to provide additional flexibility in the minor construction and Title V operation permit programs in order for the flexibility provided by the federal construction permit changes to be utilized to their fullest potential. To address this need, the Department proposed to use the Title V operation permit revision process as a backdrop for the linkage of the federal construction permit program changes into the operation permits through the use of the minor operation permit revision process. Although EPA has provided no guidance or direction on how best to incorporate the flexibility it provided in the construction permit program to the operation permit program, it has informed the Department it may not provide for the use of the minor operation permit revision process in any fashion that would conflict with current federal operation permit requirements. As a result, proposed changes to the minor operation permit revision regulations have been removed from the proposal that had been taken public comment.

Modifications Made

Proposed changes to the minor operation permit revision regulations have been removed from the proposal that had been taken public comment.

Appearances at the Public Hearing

There were no appearances at the public hearings.

Changes to Rule Analysis and Fiscal Estimate

The fiscal estimate has been revised to address changes that have been made as a result of the D.C. Circuit Court of Appeals decision on the federal NSR rule changes. The Court vacated two portions of the federal rule, and as a result, fewer permits are expected to be excluded from the NSR process and fewer fees generated by exemption reviews under those programs will be garnered. Although the Department had proposed fees for the implementation of plant-wide applicability limitation provisions, based upon EPA comments it will be implementing the provisions through the issuance of state construction permits and revisions instead of permit exemptions. This change does not impact the fiscal estimate.

Response to Legislative Council Rules Clearinghouse Report

The comments in the Legislative Council Rules Clearinghouse Report on CHR 04-106 as it relates to this rule have been incorporated.

Final Regulatory Flexibility Analysis

Since these rules affect the permitting of major sources of air pollution, it is unlikely that many small businesses will be impacted by them. Although a small percentage of major sources are small businesses, these rules provide for the ability to implement federal permitting changes that are intended to streamline the state's construction and operation permit process. As a result, any effect on small businesses would be to their benefit.