

Report From Agency

REPORT TO LEGISLATURE

NR 406 and 410, Wis. Adm. Code
Construction permit waivers and affecting small business

Board Order No. AM-08-06
Clearinghouse Rule No. 06-079

Basis and Purpose of the Proposed Rule

Section NR 406.03(2) is being proposed in response to 2003 Wisconsin Act 118, which created s. 285.60(5m), Stats. That provision requires the Department to promulgate rules under which a facility is allowed to commence construction, reconstruction, replacement, relocation or modification of an air contaminant source prior to issuance of the construction permit. Under s. 285.69(1)(d), Stats., and proposed language in ch. NR 410, the Department may charge a \$300 fee for processing a waiver request.

This rule would allow, under certain circumstances, a facility to begin construction of an air pollution source prior to obtaining an air construction permit. Waivers would only be issued for circumstances where the requester can demonstrate that undue hardship would occur if the waiver is not granted. Circumstances which may pose an undue hardship include adverse weather conditions, financial hardship and other catastrophic events at a facility. The Department may also grant waiver requests on a case-by-case basis for situations which constitute undue hardship. The Department is required to make a determination on the waiver request within 15 days.

Summary of Public Comments

On August 7 and 8, 2006, the Department conducted public hearings on the proposed rule changes in Stevens Point and Madison, respectively. Oral comments were received at the Madison hearing from a representative of Wisconsin Manufacturers and Commerce (WMC). No one appeared at the Stevens Point hearing.

Written comments were received from Wisconsin Manufacturers and Commerce.

The comments and the responses to them are given in the attached Responses to Comments document.

Modifications Made

No modifications were made as a result of public hearing.

Appearances at the Public Hearing

August 7, 2006 – Stevens Point – no appearances

August 8, 2006 – Madison

In support – none

In opposition – none

As interest may appear:

Robert Fassbender, Wis. Manufacturers & Commerce, 10 E. Doty St., Suite 500, Madison, WI 53562
Jim Boullion, Associated Contractors of Wis., 4814 E. Broadway, Madison, WI 53716

Changes to Rule Analysis and Fiscal Estimate

None were required.

Response to Legislative Council Rules Clearinghouse Report

The rule was modified to reflect the Clearinghouse comments.

Final Regulatory Flexibility Analysis

The proposed rule will not have a significant economic impact on a substantial number of small businesses. The proposed rule is not a required regulation but rather an optional step that a small business may take, under certain circumstances, to expedite the construction of an air pollution source. Based on estimates, the Department expects to receive about ten construction permit waiver requests annually. The fee for a waiver request is \$300. If granted a waiver, the Department believes that there could be a positive economic impact for that facility by allowing construction to start earlier than would normally be allowed.

7A. Identify and discuss why the rule includes or fails to include any of the following methods for reducing the impact on small business.

1. Less stringent compliance or reporting requirements.

There are no compliance or reporting requirements associated with this rule. The rule does require a waiver request be submitted, documenting the need for the waiver and any potential adverse effects on their facility should the waiver not be granted.

2. Less stringent schedules or deadlines for compliance or reporting.

There are no schedules for compliance or reporting. The rule does require a complete construction permit application be submitted prior to, or at the same time the waiver request is made. This is required to ensure that the Department can make a proper decision regarding the waiver request.

3. Consolidation or simplification of compliance or reporting requirements.

The proposed rule does not change compliance or reporting requirements for any source.

4. Establishment of performance standards in lieu of design or operational standards

The proposed rule change does not create additional design or operational standards.

5. Exemption from any or all requirements of the rule.

The rule can assist a business in getting an earlier start on the project that requires a construction permit. The construction permit application is required under another regulation.

7B. Issues raised by small business during the rule hearings, changes made as a result and reasons for rejecting alternatives suggested by small business.

No issues were raised by small business during the rule hearings.

7C. Reports required by the rule and estimated cost of preparation.

The rule requires a written waiver request be submitted to the Department. No estimated costs are available but they are expected to be minimal when compared to the cost of the project that is being proposed.

7D. Measures or investments needed to comply with the rule.

There are no measures or investments needed to comply with the rule.

7E. Additional cost to the state for administering or enforcing a rule which includes any methods identified in A.

The Department expects that additional costs will be in about of \$375 for reviewing and acting on a waiver request. Part of the cost will be recovered by the \$300 fee required to be submitted with the wavier request. There will be a shortfall of about \$75 for each waiver request which the Department should be able to absorb.

7F. Impact on public health, safety and welfare caused by any methods identified in A.

There should be no impact on public health, safety and welfare as the methods identified in A. do not change any of the applicable requirements.

Department of Natural Resources Responses to Public Comments on Proposed Revisions to
chs. NR 406 and 410, Wis. Adm. Code
Board Order AM-08-06
September 25, 2006

COMMENTS AND RESPONSES

The WMC's oral hearing comments and written comments are essentially the same so they are being addressed jointly in these responses. WMC comments are divided into six sections, so those sections with their titles will be used for purposes of organizing this document. Each section will be summarized, with Department responses following. WMC's comments, on occasion, extend outside the scope of this rule making. In those cases, the DNR responses indicate that the responses are limited to issues relevant to the provisions of the proposed rule.

Section I. Background – The Need for Air Permit Reforms

Comment: WMC has provided a broad overview of regulatory reform and air permit streamlining in Wisconsin, discussing background issues and the Jobs Creation Act, Wisconsin Act 118.

Response: These comments are not related to the content of the proposed rule package. While they offer insights into permit streamlining progress, they are not germane to this particular rule making effort. Progress in regard to permit streamlining will be detailed in a separate report that is due prior to the Board hearing this proposal.

Section II. The Proposed Rule Misses an Opportunity for Significant Streamlining Reforms.

Comment: Waivers could allow Wisconsin to take advantage of new economic development by allowing projects to get started before the lengthy permit review is completed. However, WMC believes that the proposed rule would make it unnecessarily difficult, if not impossible, for waivers to be granted in many cases if the focus of the proposed rule doesn't allow for a case-by-case determination in addition to hardship waiver requests.

Response: The Department believes that the proposed rule is not as narrow in scope as WMC apparently believes. The proposed rule specifically allows for economic or financial hardship waivers "that may preclude the project in its entirety", as well as waivers in "other unique conditions". "Other unique conditions" allows for a case-by-case determination for hardship situations that could not previously have been identified or specified in the rule. While the statutes state "case-by-case basis or on bases specified in rule" may be made for granting of waivers in other instances, neither meetings with external stakeholders nor public comments provided any examples of situations where a waiver would be justifiably granted in situations that are other than hardship were related. The Department believes that proposed rule complies with the statutory directive and provide for a waiver to allow construction to commence, prior to issuance of a permit, in situations that are case-by-case in nature and are not in conflict with the Clean Air Act.

Section III. The Proposed Rule Will not Mitigate Documented Delays in Construction Permit Processing.

Comment: WMC comments that the proposed rule should be broadened to allow waivers beyond those narrow circumstances involving undue hardship. They state that timeliness is critical to capital investment in a new project.

Response: The proposed rule allows for waivers to be granted based on undue economic burdens or hardships. While the granting of a waiver from the requirement to have a permit prior to commencing construction may expedite the time frame for when construction can actually begin, granting of the waiver will have absolutely no positive impact on the amount of time necessary to complete the permit review process. Projects for which a waivers are granted are still required to obtain the construction permit.

Moreover, as reported by the Legislative Audit Bureau in its February 2004 report, the state has completed construction permit reviews within statutory time requirements in most situations. In those instances where the review time was extended beyond these periods, the LAB found that these delays were due to unique circumstances at those facilities.

Section IV. Hardship Criteria Should be Less Prescriptive

Comment: WMC suggests several proposed rule language changes to the hardship criteria. The first and second suggestions recommend that the Department “shall” (currently “may”) issue a waiver if the person submitting a complete waiver request describing (currently “demonstrating”) the undue hardship that may occur if a waiver is not granted.

Response: The Department believes that the current language is appropriate. Section 285.61(5m), Stats. requires the Department to promulgate rules that will provide for a waiver from the requirement to obtain a construction permit prior to the commencement of construction based on a showing that construction prior to issuance of the permit is necessary to avoid undue hardship. The specific criteria under which such a waiver may be granted is not specified by the statute. While most waiver requests that meet the requirements within the proposed rule will be granted, there may be limited circumstances where granting of a waiver is not approvable, such as when ultimate permit approval is in doubt. Thus the Department has crafted this regulation consistent with the statute.

Comment: WMC suggests that the proposed rule should include timelines and related obligations to notify applicants of the status of the waiver request based on those used for construction permit applications.

Response: The Department, under the proposed rule is required to act on the request for a waiver within 15 days of receipt of the waiver request, mirroring the requirement of the statute. Neither s. 285.61(5m), Wis. Stats, nor the proposed rule anticipate an exchange of information that would require any follow-up review periods. As stated in the proposed s. NR 406.03(2)(c) and s. 285.61(5m), Wis. Stats, the Department shall act on, meaning approve or deny, the request within 15 days of receipt.

Comment: WMC suggests that the language in the proposed rule on economic and financial hardship be changed to one that adversely impacts the feasibility of the project. This could provide the Department with more discretion to grant waivers. WMC states that this could enhance the state’s ability to attract significant economic development projects.

Response: The Department understands WMC’s comments and believes that the proposed language in s. NR 406.03(2)(b)2. will enhance the state’s ability in that regard. It should be noted however, the determination on granting a waiver is based on undue hardship. Most environmental regulations may have an impact on the feasibility of a project. This doesn’t necessarily mean that the project will not proceed as planned as most responsible businesses will budget time to obtain necessary regulatory approvals into their project plans.

Comment: WMC’s understanding is that waivers can be made available to all synthetic minor sources, or at a minimum those sources that would not be considered major based on air emission limitations in the Wisconsin Administrative Code.

Response: Projects that are subject to chapters NR 405 (PSD requirements) and NR 408 (nonattainment area major sources) are not eligible for waivers. In addition, if it is necessary to establish enforceable restrictions in an air permit so that NR 405 or 408 permit review is avoided, that project is not eligible for a granting of a waiver. Because these restrictions are necessary to avoid permitting requirements under the Clean Air Act, these restrictions must be in place prior to the commencement of construction. To grant a waiver to such sources would be contrary to s. 285.60(8), Wis. Stats. The Department agrees with WMC’s comment that for some sources, other applicable enforceable requirements are already included in the Wisconsin Administrative Code that may limit potential to emit, such that NR 405 and 408 permit requirements are not in play.

Comment: WMC requests that the word “diligently” be removed from the phrase which requires facilities to “diligently respond” to the Department requests for additional information on the construction permit application. WMC contends that the word is very subjective and an undefined term.

Response: The Department believes that the use of the word “diligently” is appropriate in this instance. As mentioned in the comments above, it is used in the context of requesting additional information on a construction permit application. It implies an urgency to the Department’s request for information, which if not received in a timely manner, could result in that the waiver unfortunately needing to be rescinded because the Department would not be able to issue the permit based on the information in the initial permit application.

Comment: WMC states that the proposed rule should clearly state that a facility which receives a construction permit waiver faces no legal liability should the waiver be rescinded based on a Department determination that the permit cannot be approved or issued. (This comment was made as part of the comment listed immediately above concerning the word “diligently”.)

Response: The Department has made it very clear in the proposed rule that the applicant proceeds with construction at his or her own risk after a waiver is granted. Granting a waiver does not obligate the Department to approve the air permit application nor does it relieve the permit applicant from a duty to comply with applicable air pollution control requirements.

Section V. Suggestions for Expanding the Scope of the Rule

Comment: WMC believes that the rule should be expanded to allow for case-by-case waiver requests or on other bases specified in rule. The waivers could be issued on a general case-by-case basis without a demonstration of hardship. WMC suggests that the case-by-case waivers could be authorized “at the discretion of the Administrator” for those situations that would allow Wisconsin to capture significant economic development projects with the requirement to demonstrate undue hardship. WMC believes that it may not be considered undue hardship for companies to move projects to other states that can issue permits on a more timely basis. Since a waiver doesn’t relieve a source of the obligation to meet construction permit obligations or conditions, there is no environmental reason not to allow waivers to be issued in these instances.

Response: The Department believes that the term “hardship” has a broader definition than WMC apparently believes. The Department believes that issuing waivers at the sole discretion of the Secretary or Division Administrator is inappropriate and lacks the necessary regulatory criteria to meet approval of US EPA for adoption of these regulations into the federally approved State Implementation Plan.

Comment: WMC strongly suggests that the Department consider altering the definition of “commence construction” which would allow for initial site work to be done, without the need for a waiver.

Response: The Department has agreed to examine the definition of “commence construction” in the future, but it will not be done as a part of this rule package. .

Section VI. Conclusion

Comment: WMC believes that the construction permit waivers hold a great deal of potential but that the potential will not be realized based on the proposed rule. They state that the Department was given the tools to issue waivers without a showing of hardship and without an adverse impact on air quality.

The proposed rule should be amended as suggested. WMC would be happy to work with the Department toward that end.

Response: The Department believes that the proposed rule with amendments as mentioned in this document, reflects the intent of the statutes and does offer great deal of potential. Should experience

show that waivers are warranted in other circumstances, the Department is willing to discuss those possibilities. The Department has always valued stakeholder input on its rule development and will continue to do so in the future.