

## **Report From Agency**

### **REPORT TO LEGISLATURE**

NR 410.03, Wis. Adm. Code

Fees for review of applications and requests related to construction of air pollution sources and affecting small business

Board Order Number: AM-09-10

Clearinghouse Rule Number: CR 10-047

### **BASIS AND PURPOSE OF THE PROPOSED RULE**

The Department of Natural Resources (Department) proposes to increase fees for reviewing applications to construct or modify sources of air pollution and to change its present policy of not collecting fees for significant review work performed when an application is withdrawn.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 perform its duties in accordance with requirements and deadlines mandated under s. 285.61, Wis. Stats.

Existing state law provides 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 certain additional fees that may apply. The additional fees are imposed when case-by-case determinations are needed, the source is subject to prescribed U.S. EPA programs, or in situations that require review of testing procedures or of alternative operation scenarios.

Increasing complexity of permit review work, as well as inflation, has increased costs for the new source review program. Beginning in FY 2005, the fees collected have not been adequate to fully support this program. This shortfall has been covered by spending a revenue surplus that had been built up in earlier years. This surplus has been shrinking and will be gone by the end of FY 2010. The Bureau of Air Management projects that the new source review program will have a growing deficit starting in FY 2011 even though numerous process changes and technology improvements have been implemented to improve efficiencies and reduce costs. No other viable alternatives to the proposed fee changes have been identified that will adequately address this projected funding deficit. Program staff performing new source review work are paid exclusively from this account. Without a fee increase, it is projected that available staff will be insufficient to review and issue permit applications in accordance with requirements and deadlines mandated under s. 285.61, Wis. Stats., in the upcoming fiscal year.

Other than a non-refundable initial application fee, under existing rules, fees cannot currently be collected from an applicant if the permit is not issued, regardless of staff 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 the permit being issued. In 2008 and 2009 it is estimated that nearly \$300,000 in fees were not realized due to applications being withdrawn. Because the Department is required under current statutory and rule provisions to act timely on each individual application, these practices often result in unnecessary application processing and review.

### **SUMMARY OF PUBLIC COMMENTS**

The Department held public hearings in Madison, Milwaukee, and Wausau on June 7, June 8, and June 9, 2010, respectively. No oral statements were made at any of the hearings.

Written comments were received from the Wisconsin Paper Council (WPC) and Wisconsin Manufacturers & Commerce (WMC) concerning the amount of the fee increases, and from the Aggregate Producers of Wisconsin (APW) and the Wisconsin Transportation Builders Association (WTBA) concerning the impact that the proposal may have on economic development. These comments and the associated Department responses are as follows:

***Issue 1: Fee increases are too large.***

Several comments were received stating generally that the proposed fee increases were too large. Without the proposed fee increase, the level of effort devoted to review of air pollution construction permits would be cut by half. The Department will be unable to maintain the reduced permit review times it has achieved through streamlining. Because other revenue sources are not available (past fee account surpluses have been totally depleted), staffing cutbacks would begin to occur as soon as the current fiscal year and could ultimately result in a reduction of 10 FTE of permit review effort. Reducing the level of permit review effort will have a direct and immediate impact on the length of time it will take for a business to receive approval to start construction or expand an existing operation. Opportunities for business expansions, with financial benefits well beyond the level of the proposed fee increases, will be jeopardized.

The Department believes this to be an unacceptable situation that would be detrimental to Wisconsin's economic recovery. The cost of delay for a business waiting to obtain their air permit an additional 60 to 90 days (on average) will far outweigh the additional cost imposed by the proposed fee increase. A smaller fee increase may result in less reduction in permit review effort but will still result in delay. This is not a risk that should be taken with plant siting or expansion and local jobs at stake. The fee increases in the proposed rule have been calculated using a detailed analysis of revenues and expenditures. Projected expenditures are in line with historical and projected program expenditures. An adequately staffed new source review program, along with streamlined permitting approaches, is critical to Wisconsin's economic recovery.

Comment 1: WPC specifically commented as follows: "It appears that, based on historical data, the proposed fee increases are more than necessary to operate the program. The fiscal estimate indicates that annual revenue will increase by \$1,334,307 from a base of \$1,647,293 (four year actual average for FY2006-2009). This would bring the expected annual revenue to \$2,981,600. However, the four year actual average expenditure level for FY2006-2009 was \$2,518,992. It appears that the proposed fee increases would raise \$462,608 more than necessary, based on historical data. Further, the comparison with similar rules in adjacent states, included in the background materials, shows that the new Wisconsin permitting fees would be the first or second highest of the four states compared. It appears that the proposed fee increase could be pared back by well over \$400,000 annually, while still meeting the needs of the Department."

Response: While the WPC revenue calculation is correct for the period it covers, it does not accurately reflect current revenues. Permit fee revenue dropped significantly in FY2008, making FY08-10 a more accurate period to represent revenues. In addition, the downturn in the economy exacerbated the decrease, with revenue for FY10 slightly under \$1,000,000. Using a 3 year average for FY2008-10 suggests a more realistic base revenue of \$1,350,000 for the foreseeable future. While staff time was clearly saved through implementation of registration and general permits, the review time required for regular construction permits has increased due to new federal requirements (including but not limited to new ambient standards for fine particulate, nitrogen dioxide and sulfur dioxide and proposed federal hazardous pollutant standards for combustion sources). The following table shows projected permit applications and the level of effort required to complete the required reviews using streamlined procedures and modern technology.

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

The Department used the levels of effort in the table to project the necessary expenditure level beginning FY2011 to be at least \$2,650,000. Subtracting a FY2008-2010 anticipated base (\$1,350,000) from this projection indicates the need to raise approximately \$1,300,000 through increased fees to adequately fund the new source review work. Total expenditures are projected to be approximately \$2,600,000 which is in line with a historical 5 year average of \$2,412,213. No change has been made to the final rule in response to this comment.

Comment 2: The proposed fees are more expensive than surrounding states. For example, the “initial application” fee is proposed to increase from \$1,350 to \$7,500 -- an increase of 455 percent. Minnesota, Michigan and Indiana do not even charge this fee, and Illinois’s fee is 50 percent less than what is being proposed.

Response: Raising the initial application fee does not raise the final fee assessed for an applicant that receives an air pollution permit as the entire amount is credited against the final fees assessed for the application review. In other words, the initial application fee serves as a “down payment” on the final cost of the permit. It is not an additional fee that is charged to the applicant. However, while the initial application fee increase is retained, the final rule expands the Department’s ability to provide refunds in situations where the cost of the final permit action is less than the initial application fee. The final rule was changed to better clarify situations where a refund is allowed.

Comparing fees between state is difficult due to the different ways state agencies fund new source review programs, but the Department’s survey of midwestern states indicate that the increased fees in this proposal will be comparable to the fees that exist today in those states. Minnesota, Illinois, Michigan and Indiana indicate that they either are, or will soon be, increasing their permitting fees to address funding shortfalls in their permitting programs.

Comment 3: Fee increases should not be approved unless and until the Department has fully availed itself of all of the permit streamlining tools afforded by the Legislature in Act 118, including the statutory presumption that minor sources should be exempt (as they are in many other states, and under the Clean Air Act).

Response: The Department has availed itself of all permit streamlining tools authorized by Act 118 and will continue to implement significant streamlining in order to reduce the regulatory cost of obtaining construction permits. Over 800 companies have taken advantage of the new types of permits (registration and general) and exemptions that have come out of Act 118 and additional Department streamlining efforts that have been implemented over the last 4 years. We have eliminated the need for more than 300 construction permits for these companies during that period of time. Implementing other efficiencies has allowed the Department to reduce by 60% the time it takes to obtain a construction permit today compared to 2007 (from 157 days on average in 2007 to 67 days in 2009) helping to address a critical concern raised by Wisconsin business.

The Department understand its obligation to continuously and diligently improve efficiency to build on these achievements for the future.

WMC specifically commented that that the Department should completely exempt minor sources from construction permits. The legislative intent of Act 118 was to implement streamlining while maintaining the

same level of environmental protection. Allowing sources that are capable of emitting just under 100 tons of pollutants such as PM<sub>2.5</sub>, sulfur dioxide and nitrogen oxide to build and expand without review of air quality impacts does not meet this intent.

No change was made to the final rule in response to this comment.

## ***Issue 2: Statutory authority.***

Comments 4 and 5: WMC stated that the proposed rule would establish new fees for exemption determinations (\$500), general construction permits (\$1,500) and registration construction permits (\$1,000). However, the commenter did not believe the Department has the statutory authority to impose these fees, and cited s. 285.69(1)(a), Stats., as prohibiting the Department from charging a fee for construction permits associated with a general permit or a registration permit. Moreover, the commenter stated that s. 285.69(1)(c), Stats., prohibits the Department from charging a fee for “reviewing and acting upon any request for an exemption from the requirement to obtain an air pollution control permit.” Accordingly, the commenter suggested the proposed fees for exemption determinations, general construction permits and registration construction permits be removed from the rule.

APW and WTBA stated that, in particular, they were concerned about the proposed new construction permit fee of \$1,500 for a general construction permit and \$1,000 for a registration permit. As noted in the Legislative Council Rules Clearinghouse comments on the rule, they believe that the Department lacks statutory authority to impose the new fee as proposed.

Response: The Department assumes that the general construction permit and registration construction permit fees, referred to by WMC, APW and WTBA, were only those proposed for non-part 70 sources. The Department agrees with the comment that s. 285.69(1)(a)1. and 2., Stats., prohibits the Department from charging a fee for construction permits associated with a general permit or a registration permit for a non-part 70 source *if the entire facility is covered* by the general or registration permit. Depending on the way a general permit is written it can either cover an entire facility or a part(s) of an entire facility. All registration permits written to date cover the entire facility.

Based upon the comments received and further analysis, the Department has determined that while the proposed fee could apply to a limited number of permit applications, it may be problematic to implement in a consistent fashion. Based on this concern and the statutory restriction, the fee has been removed from the final rule. The Department is not prohibited from charging review fees for part 70 sources applying for coverage under either a general or registration permit and the Department has not made any changes to the proposed fee increase for those sources.

The Department believes that WMC has misinterpreted s. 285.69(1)(c), Stats., in commenting that the Department lacks the authority to impose fees for permit exemption determination. Specifically, s. 285.69(1), clearly reads that the Department may promulgate rules for payment and collection of reasonable fees for reviewing and acting upon any request for an exemption from the requirement to obtain an air pollution control permit. No change has been made to the final rule in response to this comment.

Comment 6: WMC commented that the proposed rule seeks to increase the fee for a construction permit waiver from \$300 to \$500. The commenter stated that because the fee is statutorily set at \$300 under s. 285.69(1d), Stats., the Department does not have the authority to increase the fee to \$500, and that the proposed fee change should be deleted.

**Response:** The Department agrees with the commenter. The proposed increase in the fee for a construction permit waiver is not allowed by statute and has been removed from the final rule.

## **MODIFICATIONS MADE**

Modifications made by the Department in response to public comment are detailed in the previous Summary of Public Comments section.

## **APPEARANCES AT THE PUBLIC HEARINGS**

Three persons filed a hearing appearance as follows:

### June 7, 2010 - Madison

No position specified:

Andrew Cook, Aggregate Producers of Wisconsin, 10 E Doty St #500, Madison, WI 53705

In support: None

In opposition: None

As interest may appear:

Kathleen Standen, We Energies, 22 E Mifflin, Suite 850, Madison, WI 53703

### June 8, 2010 – Milwaukee

In Support: None

In Opposition: None

As interest may appear: None

### June 9, 2010 - Wausau

In Support: None

In Opposition: None

As interest may appear:

Randy Oswald, PO box 19001, Green Bay, WI 54307-9001

## **CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE**

In response to comments received from the Legislative Council Rules Clearinghouse, the Department revised sections 1, 2, and 3, of the analysis to ensure that citations to, and explanations of, the Department's statutory authority is accurate, unambiguous, and complete, and section 10 of the rule analysis to make it consistent with rule changes made in response to both public and Legislative Council Rules Clearinghouse comments.

In the fiscal estimate, the projected revenue increase from the proposed fee increases was revised downward by \$73,507 to \$1,260,800. This decrease resulted from the following:

1. A change in the period used to determine the actual average revenue realized from review fees. The 4-year period from FY 2006 through FY 2009 originally used was changed to the 3-year period from FY 2007 through FY 2010. An explanation for this change can be found in the Department's response to comment 1 in the Summary of Public Comments section.
2. The removal of certain proposed fees as explained in the Summary of Public Comments.

## **RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

Comments received from the Clearinghouse related to Statutory Authority; Form, Style and Placement in Administrative Code; Adequacy of References to Related Statutes, Rules and Forms; and Clarity, Grammar, Punctuation and Use of Plain Language. The most significant of these were those related to statutory authority. The Department also received public comments consistent with those of the Clearinghouse on this issue, and which are detailed in comments 6, 7, and 8 in the Summary of Public Comments section above. Since the public comments adequately describes the issue, the Clearinghouse comments are not repeated here.

All Clearinghouse comments have been accepted and the rule revised accordingly.

### **FINAL REGULATORY FLEXIBILITY ANALYSIS**

The proposed rule has the potential to have a significant impact on a substantial number of small sources.

- I. Identify and discuss why the rule includes or fails to include any of the following methods for reducing the impact on small business.
  - A. Less stringent compliance or reporting requirements.  
Not applicable. Proposal does not impose any compliance or reporting requirements
  - B. Less stringent schedules or deadlines for compliance or reporting requirements.  
Not applicable. Proposal does not impose any compliance or reporting deadlines.
  - C. Consolidation or simplification of performance standards in lieu of design or operational standards.  
Not applicable. Proposal does not impose any performance, design or operational standards.
  - D. The establishment of performance standards in lieu of design or operational standards.  
Not applicable. Proposal does not impose any design or operational standards.
  - E. The exemption from any or all requirements of the rule:  
Proposal applies to sources that do not qualify for exemptions that currently exist in permitting rule. Proposal does provide relief for small business for additional fees that apply over and above the initial application fee when the small business withdraws the permit application prior to a final determination being made.
- II. Summarize the issues raised by small business during the rule hearings, any changes made in the proposed rule as a result of alternatives suggested by small business and the reasons for rejecting any alternatives suggested by small business.  
No issues were raised by small business during the hearings or during the public comment period.
- III. Identify and describe any reports required by the rule that must be submitted by small business and estimate the cost of their preparation.  
No reports are required by the proposal.
- IV. Identify and describe any measures or investments that small business must take to comply with the rule and provide an estimate of the associated cost.  
No measures or investments need to be made by small business to comply with the proposal.
- V. Identify the additional cost, if any, to the state in administering or enforcing a rule which includes any of the methods listed in I. A through E.  
Not applicable.
- VI. Describe the impact on public health, safety and welfare, if any, caused by including in the rule any of the methods listed in I. A through E.  
Not applicable.