

Report From Agency

REPORT TO LEGISLATURE

NR 400, 405, and 407, Wis. Adm. Code,
Major source permitting thresholds for sources of greenhouse gas
emissions and affecting small business.

Board Order Number: AM-17-10
Clearinghouse Rule Number: 10-144

BASIS AND PURPOSE OF THE PROPOSED RULE

On May 13, 2010, the U. S. Environmental Protection Agency, (EPA) set greenhouse gas (GHG) thresholds and deadlines in rules generally referred to as the GHG Tailoring Rule to define when New Source Review Prevention of Significant Deterioration and Title V operating permits are required for new and existing industrial sources. This action was necessary because without it, the EPA's emission standard for GHG for motor vehicles promulgated on April 1, 2010 would have had the unintended effect of subjecting literally tens of thousands of sources across the country to some of the most complex air permit and emission control regulations.

However, in order for Wisconsin sources to benefit from EPA's policy to limit applicability of air permit and emission control regulations for GHG, revisions to the Wisconsin administrative code, consistent with the federal Tailoring Rule, were necessary by January 2, 2011 when the EPA emission standard for GHG for motor vehicles became effective. This was accomplished on a temporary basis by the Board's adoption of emergency rules in Board Order AM-48-10(E). The rules proposed for adoption here are identical to those emergency rules currently in effect, and are necessary to make them permanent.

The series of events leading to this proposal began with an April, 2007 Supreme Court decision. In *Massachusetts v. EPA*, 549 US 497, the Supreme Court found that GHG are air pollutants covered by the Clean Air Act and directed the EPA to make a finding as to whether emissions of these gases from new motor vehicles cause or contribute to air pollution which may be reasonably anticipated to endanger public health or welfare. On December 7, 2009 EPA made their official finding, referred to as the "endangerment finding" establishing the prerequisite to regulating GHG emissions from motor vehicles. Subsequent to this finding, the EPA and US DOT finalized regulations on April 1, 2010 establishing standards for GHG emissions from new light duty motor vehicles, starting with model year 2012. (Additional information on the endangerment finding and motor vehicle regulation can be found at: <http://www.epa.gov/climatechange/endangerment.html> & <http://www.epa.gov/oms/climate/regulations.htm>)

The combined effect of the Supreme Court decision and the finalized motor vehicle rule adds GHG to the list of pollutants that are regulated under the Clean Air Act. This in turn subjects stationary sources (i.e., electric utilities, factories, small business, etc.) to the prevention of significant deterioration (PSD) & Title V permitting programs if their GHG emissions exceed established threshold amounts.

Prior to the series of federal actions described above, the Title V program applied to sources that emit or have the potential to emit 100 tons per year of criteria pollutants, while the PSD program

applied to sources in certain categories at a 100 tons per year level and to other sources at a 250 tons per year level. Sources regulated under the PSD program also had thresholds that determined what was a significant increase in emissions for new projects at the source that would trigger a review of control requirements. These significant increase thresholds for pollutants previously regulated under PSD ranged from 1200 pounds per year (lead) to 100 tons per year (carbon monoxide). No significance level for GHG previously existed under the PSD program.

EPA recognized it as unrealistic to apply these thresholds to sources of GHG for two primary reasons. First, carbon dioxide, a prevalent GHG, is emitted in amounts that are orders of magnitude higher than criteria pollutants such as particulate matter and sulfur dioxide. Applying these thresholds to sources of carbon dioxide emissions would bring literally hundreds of thousands, maybe millions, of sources into the PSD program nationwide forcing state agencies to process permits in numbers that far exceed what their current administrative resources could accommodate. Second, the combined emissions from the vast majority of these sources make up a small percentage of the total. Regulating these sources under programs designed to control emissions from sources such as electric utilities, large manufactures and foundries would be highly ineffective and result in little or no environmental benefit.

In order to prevent this from happening, EPA issued on June 3, 2010, a regulation known as the GHG Tailoring Rule. This rule establishes a GHG emission applicability threshold for the PSD and Title V programs at 100,000 tons per year and establishes a threshold for what will be considered a significant increase in GHG emissions at 75,000 tons per year. In addition, this regulation phases in PSD and Title V requirements in two steps.

The primary issue being addressed by this rule is to make Wisconsin consistent with federal regulations in order to prevent the unintended applicability of the Title V and PSD program to small sources of GHG emissions in Wisconsin.

The following table shows the difference between the current thresholds in Wisconsin and the finalized thresholds for GHG under the federal tailoring rule. If Wisconsin does not revise its regulations, sources that emit between 100 and 100,000 tons per year GHG will be subject to legal uncertainty and potentially complex control determinations. In addition, thousands of sources which did not require a Title V permit before will now require one. The administrative burden for each of these programs is extremely high for both the permittee and the DNR since most of these permittees are not used to being regulated under the Clean Air Act.

Comparison of GHG Thresholds		
	Current WI Thresholds	Finalized Thresholds under the Federal Tailoring Rule
PSD Major Source Thresholds	100 and 250 tpy	100,000 tpy
PSD Major Modification Significance level	0 tpy increase	75,000 tpy increase
Title V permit threshold	100 tpy	100,000 tpy

SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSE

The Department held one hearing on the proposed rules on January 21, 2011 in Madison. The hearing was conducted by Margaret Hoefer of DNR Legal Services. Andrew Stewart, Permit and Stationary Source Section Chief provided an overview of the proposed rule. Four people attended the hearing. Two registering as interest may appear and two not indicating a position. No oral or written comments were submitted at the hearing.

Written comment was received after the hearing from Alliant Energy requesting that language in a proposed footnote be more definitive and be established as enforceable rule requirements. Specifically, Alliant Energy strongly believes that specific provisions be included in the rule that would make this proposal no longer effective in the event that the underlying federal regulation would be vacated or repealed. In addition, Alliant Energy recommends this proposal impose a requirement on the Department to revise its rules within six months of any action by EPA to repeal its rules, or any change to the federal regulation resulting from litigation or congressional action, in order to maintain consistency with the federal regulations.

No change is being made in response to this comment. The Department is aware of the significant concern the public has with the continued uncertainty of greenhouse gas regulation under the Clean Air Act and acknowledges this concern by including the following footnote in the rule:

Note: The department intends to regulate GHG consistent with the 40 CFR 51.166 (June 3, 2010). In the event of litigation or congressional action which impacts the federal regulations, the department will commence rulemaking to remain consistent with the resulting federal regulations.

The Department does not believe it is appropriate to include provisions in the rule that automatically abdicates its authority in response to action at the federal level or imposes required actions on itself. The Department is committed, to act quickly to address this type of situation, likely by using emergency rule procedures to ensure that Wisconsin's air permitting program is consistent with federal requirements.

MODIFICATIONS MADE TO THE PROPOSED RULE AS A RESULT OF PUBLIC COMMENT OR TESTIMONY RECEIVED

No modifications were made in response to public comment received. (See explanation in previous section.)

PERSONS APPEARING OR REGISTERING AT PUBLIC HEARING

Four persons appeared at the public hearing, with three persons registering as follows:

In support:	None
In opposition:	None
As interest may appear:	Kathleen Standen, 22 E. Mifflin St Suite 850, Madison, WI, representing We Energies Robert Greco, 333 W. Everett St, Milwaukee, WI, representing We Energies
No position indicated:	Mark Hobbs, 418 E. Conde St, Janesville, WI

CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE

The date referred to in the second paragraph of section 5 of the rule analysis, when Wisconsin sources would have become subject to permit and emission control requirements without the proposed changes, was in error and was corrected.

No changes were made to the fiscal estimate.

RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

Minor changes and corrections have been made to the proposal in response to Legislative Council Rules Clearinghouse comments concerning Form, Style and Placement in Administrative Code and Adequacy of References to Related statutes, Rules and Forms. Two comments regarding Clarity, Grammar, Punctuation and Use of Plain Language made by the Clearinghouse were not accepted for the following reasons.

Comment asking whether it would be more appropriate to change definition of GHG from “greenhouse gases” to “greenhouse gas”. The plural form of gases is more appropriate as the term GHG or greenhouse gases refers to 70 individual gases in this proposal.

Comment asking whether it is possible to define the term “physical change” in the proposal. No definition is being proposed as the terms literal meaning is applied in practice. A list of physical changes that are excluded from being used in this proposal currently exists in s. NR 405.02(21)(b).

FINAL REGULATORY FLEXIBILITY ANALYSIS

The proposed rule does not have the potential to have a significant impact on a substantial number of small sources. The purpose of the rule is to limit applicability of New Source Review construction and Title V operation permits and control requirements to major sources of greenhouse gas pollution.