

Note: The following proposed rule language is draft and has not yet been reviewed by department legal staff. The attached proposed rule and any future versions of the proposed rule resulting from workgroup discussions are subject to modification and/or removal entirely as a result of subsequent department legal review.

Rule Analysis and Checklist

DRAFT

Working title: Cleanup of inactive construction permit applications

Code citation(s): Creation of s. 406.08 (3m), Wis. Adm. Code

Other codes affected: s. NR 406.11, Wis. Adm. Code

Objective: to improve the operational efficiency of, and to simplify the permitting processes administered under, chs. NR 406 and NR 407, Wis. Adm. Code.

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Problem being solved or issue being resolved:

Ability to clean up construction permit application data. DNR's permits database contains more than 25 years of application data, including many old construction permit applications for which a permit was never issued. The department does not have records of why many application reviews were not completed. Reasons may include the following: a facility decided not to move ahead with a project, a project was included in a different construction permit, a facility assumed a permit review was completed, or a facility did not proceed with a project because it never heard back from the department about the application.

Because the DNR permits database contains more than 25 years of data, it is difficult to filter projects actively being managed from projects no longer being pursued by a facility. Customer service is being affected negatively because department staff cannot use the existing software to develop tools to automatically send reminders or inquiries to permittees until old data is cleaned from the system.

Discuss how the proposed rule solves the problem or resolves the issue laid out above:

The proposed rule would establish a process for DNR to deny a permit application if the department notifies the facility of its intent to do so and no communication is received from the facility after a specified period of time. The current rules lay out a system for denying permit applications. The proposal is to amend s. NR 406.11, Wis. Adm. Code to include a streamlined application denial process for use only when a facility has not responded to requests for information over an extended time period and after department staff have made several attempts to communicate.

The proposed procedure is to send a formal notification of the intent to deny the application to the permit applicant and the persons listed under s. 285.61 (5) (a) 2. to 5., Stats. An application would be formally denied if no communication is received from the applicant 30 days after the notification. Application denial includes appeal rights that would give an applicant 20 additional days to object to the department's decision. In lieu of a denial, the applicant could withdraw a permit application at any time.

Removing inactive applications would clean up the database and improve customer service by enabling permitting staff to focus on critical, active permits. The proposed notification requirements would ensure active communication with permit applicants.

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Describe facilities affected by the proposed rule (size, type, location, and approximate number):

Potentially all facilities submitting applications for construction permits throughout Wisconsin would be affected. Typically, about 100 to 140 facilities apply for one or more construction permits per year. In terms of number of employees, all sizes of businesses would be affected.

Will emissions be affected by the proposed rule (increased or decreased)? Yes No

Discussion (list pollutants affected. If no change, say why):

Emissions would not be affected by the rule proposal. The rule is not expected to affect the approvability of permits or permit content.

Discuss how the proposed rule improves operational efficiency and/or simplifies the air permitting process:

Formally denying old, inactive applications cleans up data in DNR databases so that real, active applications can be tracked better. If an application is not being worked on because of a miscommunication, the notification procedures would serve to re-activate the review process.

Discuss how the proposed rule assures the program remains consistent with the requirements of the Clean Air Act, 40 CFR Part 70, and the Wisconsin Statutes:

The Clean Air Act and Wisconsin Statutes allow for decisions to approve or deny applications, or request additional information. If DNR cannot obtain enough information from the application to continue the review, then the department can make a decision to deny the permit.

Discuss estimated resources needed for implementation for both DNR and affected facilities:

Short term work effort is anticipated. Procedures would need to be written. Notification language would need to be prepared and an automated "tickler system" developed within the department's online Air Resource Program (WARP) system. DNR permit writers would need to be trained in new procedures. Minimal programming in WARP would be needed.

General discussion of why the rule is crafted as proposed, including any sticking points and how they were resolved, any other decision points, and why the final decision was made:

The original proposal was to create a procedure for application withdrawal by the department. After considering statutory authority, DNR determined that the appropriate department action is application denial.

The rules and statutes lay out a system for application denial that includes preparing a preliminary determination and draft decisions, publishing a notice, and waiting 30 days. The proposal is to amend s. 406.11, Wis. Adm. Code to authorize denial of an application for inaction using the notification procedure identified in that section. The procedure involves formally notifying the permit applicant and the persons listed under s. 285.61 (5) (a) 2. to 5., Stats., and observing a 30 day waiting period.

Legal Review Completed: Yes No

Discussion: Ongoing.

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Statutory Changes Required: Yes No

Discussion: Statutes already allow denial of construction permit applications.

SIP Revision Required: Yes No

Discussion: Chapter NR 406 has been approved as part of Wisconsin's SIP. Any changes to NR 406 must be reflected in a SIP revision.

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Attachment: Proposed Rule Language

NR 406.08 Action on permit applications. (1) This section applies to actions on permits for which applications are received on or after September 1, 2000. This section does not apply to actions on applications for permits where the source commences construction prior to issuance of a construction permit. This section does not apply to construction permits which are subject to the notice, comment and hearing provisions of s. 293.43, Stats.

(2) (a) The department shall make a determination under s. 285.61 (8), Stats., on a permit application within 205 business days of receipt of a complete application for construction or modification of a major stationary source as defined in s. NR 405.02 (22) or a major source as defined in s. NR 408.02 (21), unless compliance with s. 1.11, Stats., requires a longer time. For a major source that is located in an attainment area, the department shall complete its responsibilities under s. 1.11, Stats., within one year.

(b) The department shall make a determination under s. 285.61 (8), Stats., on a permit application within 145 business days of receipt of a complete application for construction or modification of any stationary source not described in par. (a), unless compliance with s. 1.11, Stats., requires a longer time.

(3) If the department does not make a determination within the applicable time period specified in sub. (2), the department may not impose an application fee for the permit under s. NR 410.03, and shall refund any application fee submitted with the application.

(3m) (a) A permit application may be denied by the department if no response to a request for information is received by the department within 180 days of the department sending the applicant a written request for additional information. An applicant may request additional time to respond to a request for information from the department. The department may grant a request for additional time in writing when the request is received prior to the effective date of the application denial.

(b) An application denied under this paragraph shall be considered a determination of no further action and shall be subject to billing under s. NR 410.03 (4).

NR 406.11 Construction permit revision, suspension, ~~and~~ revocation and application denial for failure to respond to information requests. (1) After providing 21 days written notice to the permit holder and to the persons listed under s. 285.61 (5) (a) 2. to 5., Stats., the department may revise, suspend, revoke or withdraw a source from coverage under a construction permit, part of that permit or the conditions of that permit if there is or was any of the following:

(a) *Violation.* A significant or recurring violation of any condition of the permit which causes or exacerbates a violation of any ambient air quality standard or ambient air increment or which causes air pollution.

(b) *Misrepresentation or deliberate failure to disclose.* Any misrepresentation or a deliberate failure to disclose fully all relevant, significant facts when obtaining the permit.

(c) *Department determination.* A determination by the department that the permit must be revised or coverage withdrawn to assure compliance with the applicable requirements.

(d) *Request.* A request by the permit holder to revise, suspend or revoke the permit.

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(e) *Failure to pay fees.* An intentional failure by the permit holder to pay in full the fees required under ch. NR 410, except the department may not suspend or revoke the permit for failure to pay fees while those fees are being disputed under s. NR 410.04 (6).

(f) *Failure to file annual emission inventory reports.* An intentional failure by the permit holder to file annual emission inventory reports required under ch. NR 438.

(g) *Cause or exacerbate.* 1. A determination by the department that the emissions unit or units covered under a general or registration construction permit cause or exacerbate, or may cause or exacerbate, a violation of any ambient air quality standard or ambient air increment. The determination shall be made through an air quality assessment using the following procedures, as appropriate, which may be conducted after the determination that the source was covered under the general or registration construction permit.

a. For general construction permits, the department shall use criteria, methodologies or modeling consistent with criteria, methodologies or modeling used for any air quality analysis conducted under s. NR 406.16 (1) (c).

b. For registration construction permits, the department shall use either an air dispersion model using maximum actual emissions on an annual or hourly basis or criteria, methodologies or modeling consistent with criteria, methodologies or modeling used for any air quality analysis conducted under s. NR 406.17 (1) (b).

2. Notwithstanding a determination made under subd. 1., the owner or operator will be deemed to be in compliance with the requirement to obtain a construction permit until the department takes final action on a subsequent application for a construction permit, if the application is submitted to the department by the owner or operator within 30 days after the department notifies the owner or operator of its determination under this paragraph and the owner or operator is in compliance with the otherwise applicable general or registration construction permit from the time the determination is made under subd. 1. until the department takes final action under this subdivision.

(1m) The department may reopen or revise a construction permit to reflect a decrease in a plant-wide applicability limit pursuant to s. NR 405.18 (8) (b) or 408.11 (8) (b), using the procedures in s. NR 405.18 (5) or 408.11 (5), respectively.

(2) Any revised permit may be issued only if it meets the criteria in s. 285.63, Stats.

(3) After providing 14 days written notice to the permit holder and to the persons listed under s. 285.61 (5) (a) 2. to 5., Stats., the department may revise or revoke an individual construction permit if requested by the permit holder in order to be eligible for a general construction or operation permit or a registration construction or operation permit.

(4) After providing 30 days written notice to the permit holder and to the persons listed under s. 285.61 (5) (a) 2. to 5., Stats., the department may deny a construction permit application for failure to respond to information requests as described in s. NR 406.08 (3m).