Summary of Comments and Department Responses
Natural Resources Board Order (AM-10-23)

8/20/25

This document presents a summary of public comments received on proposed rules affecting chapter NR 410 related to revisions to fees for reviewing air pollution control construction permit applications and exemption determination requests.

OVERVIEW

The Air Management Program proposes to revise the fees for reviewing construction permit applications for air pollution sources and exemption determination requests under ch. NR 410. These proposed changes are necessary to ensure that the construction permit program has adequate funding to perform its duties in accordance with requirements and deadlines mandated under the federal Clean Air Act and s. 285.61, Stats.

In addition to the public input opportunities described below for the Economic Impact Analysis (EIA) and draft rule, the department conducted the following stakeholder engagement activities during the preparation of this rule:

Informational meetings – Following Natural Resources Board approval of the scope statement, the department held two public informational sessions on November 9, 2023 (one for the Air Management Advisory Group, and one for permitted sources) to explain the objectives of the rulemaking and identify future input opportunities.

Technical Advisory Group – Pursuant to s. 227.13, Stats., the department convened a technical advisory group (TAG) to obtain feedback on the proposed revisions to ch. NR 410. The TAG was comprised of representatives from the department and industry stakeholders. Two TAG meetings, which were open to the public, were held on December 4, 2023, and January 8, 2024. The department also conducted follow-up discussions with the TAG members to obtain additional perspectives on the proposed rule.

To ensure widespread visibility of this rule and opportunities to provide input, department outreach included not only major stakeholder organizations and advisory group members, but also all current holders of air construction permits. The air program also discussed this rule with various stakeholders between the EIA and draft rule comment periods.

ECONOMIC IMPACT ANALYSIS

A public comment period on the economic impact of the rule was held from March 4 to April 2, 2024. The department received written comments on the draft economic impact analysis (EIA) from the Wisconsin Utilities Association (WUA) as well as Wisconsin Manufacturers & Commerce (WMC) and the Wisconsin Paper Council (WPC), commenting jointly. As described below, changes were made in response to these comments.

Comment 1: The WUA commented that the primary driver for these proposed fee changes is to provide revenue to match authorized spending levels for the program. While the department proposed fee increases that would essentially double the amount of revenue that would be paid by permit applicants, the EIA did not provide expected program costs that may be incurred by the program when permit application volume is not projected to increase; thus, it is not determinable whether the full economic impact on the regulated community is necessary.

Response: The revenue goal for the final draft rule is primarily informed by a workload analysis conducted by the department, which concluded that 20.5 Full-Time Employees (FTE) were needed to administer the New Source Review (NSR) program. The workload analysis is based on forecasted permit application volumes derived from historical trends. These forecasts, along with many other aspects of the rule that affect the economic impact to sources, were updated following the EIA comment period. Please see section 9 of the analysis section of the rule text for details.

Comment 2: Commenters noted that the department is planning to hire staff well after the increased fees would go into effect. The WUA requested that the department modify the EIA to note that a large surplus of revenue could be generated as a result of the delayed hiring plan. WMC/WPC commented that the department doesn't explain why it would wait three years (collecting an additional $4.5 million) before reaching 19.5 FTE.

Response: The department revised the proposed fee schedule and developed a more detailed projection of anticipated annual revenue from FY27 through FY29. Section 9 of the analysis section of the rule text includes a discussion of the factors that will affect how and when the rule's fee increases will impact program revenue and staffing.

Comment 3: The WUA noted that the EIA indicates that 14.5 FTE support the NSR program, but only 5 FTE are permit writers. The commenter requested that the department consider reallocating some staff to permit writing in the interim.

Response: Please see the response to Comment 19 and section 9 of the analysis section of the rule text. Note also that FTE support for the NSR program was down to 9.75 FTE in FY25.

Comment 4: The WUA noted that the EIA indicates proposed fee increases would slightly increase the direct cost of large construction projects, but the proposed fee increases may disproportionately impact smaller construction projects, especially for small businesses.

Response: The vast majority of facilities that could potentially be impacted by this rule are not small businesses. However, in the final draft rule, the department revised its proposed fee schedule in part to help minimize the impacts on smaller-emitting sources and smaller construction projects. Attachment A of the final draft EIA includes an updated estimate of the economic impacts of the rule, including on small businesses. The estimated annual impact on small business of the final draft rule is about $34,000, which is approximately a 63% decrease from the annual impact of the rule as proposed in March 2024.

Comment 5: The WUA agrees that the proposed fee structure will not impact utility rates, but notes that all businesses impacted by NSR fee increases are utility rate payers that will be impacted by this rule as a whole through increased permit fee requirements that would be applied to their own projects.

Response: The department agrees that the rule will not impact utility rates and recognizes the impact that permit fee increases can otherwise have on businesses. By shifting 10.0 FTE from the construction permit account to the environmental management account of the segregated environmental fund under provisions of 2023 Wisconsin Act 19, the department was able to significantly reduce the proposed fee increases, thereby lessening the impact of the fee changes on permittees. See section 9 of the analysis section of the rule text for details.

Comment 6: WMC/WPC oppose the proposed fee increases. The department should review and streamline permit approval processes to reduce costs and the size of any corresponding fee increase.

Response: The department has, in collaboration with stakeholders, undertaken many efforts over the past decade to maximize resources, increase permit application and processing efficiency, and address specific stakeholder requests. These include:

- At the request of stakeholders, completed two air permit streamlining rules in 2015 and 2020. These rules included, among other changes, the expansion of construction permit exemptions and clarifying what activities can be undertaken by a source prior to permit issuance.
- Implemented electronic signatures and e-payment options for permit applicants.
- Developed and improved templates for permit documents, including the addition and expansion of detailed instructions for permit writers.
- Developed standard language for some permit conditions and preliminary determination language.
- Created a standard methodology and format for incorporation of federal standards (e.g., New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants) into permits.
- Developed and implemented a comprehensive training plan for new permit writers.
- Created permit application checklists which specify the information that applicants should or can include in permit applications.
- Identified optional information that permit applicants can include in permit applications to streamline department review and decrease permit issuance time. This includes:
    - Redline/strikeout of requested permit language. The department also created the guidance document "Collaborative Permit Process – Submitting a Redline Strikeout Version of an Existing permit as Part of an Application" to help applicants with providing this information.
    - Air dispersion modeling results.
    - Manufacturer/vendor documentation for emissions units and control devices.
    - A project narrative that the department can use to complete the project description section of the preliminary determination.
- Improved step-by-step instructions for permit writers to use when processing air permit applications and a user guide for the department's internal air permitting software system.
- Created industry-specific permitting information for several industry sectors for use by permit writers. This information includes potentially applicable regulations, emission calculation methodologies, monitoring methods, standard permit and preliminary determination language, and links to tools and resources.

To facilitate future permit streamlining efforts, the final draft rule specifies several streamlining measures the department will actively pursue. For details, please see response to Comment 17.

Comment 7: WMC/WPC commented that the proposed fee increases are more than double inflation since 2011 and that the average proposed fee increase is 91%.

Response: The increase in fees is only in part to account for inflation since fees were last revised in 2011, as other factors, such as the increased number and complexity of regulations and the overall shift to more minor source projects, has also lessened the adequacy of the existing fee schedule. In the final draft rule, the department significantly reduced the proposed fee increases to minimize the impacts on permittees. See section 9 of the analysis section of the rule text for details.

Comment 8: WMC/WPC stated that the proposed fee increases may not be "reasonable" under Wisconsin law and illustrates this point by describing several permitting scenarios where fees would be nearly doubled under this rule.

Response: Section 285.69(1)(a), Stats., authorizes the department to promulgate rules for the payment and collection of reasonable fees for reviewing and acting upon construction permit applications. The projected revenue and staffing levels for the program are supported by a workload analysis and comparable to (and in most cases substantially lower than) revenue and staffing levels of permit programs in adjacent states. Revised fees to support a program of this size are reasonable. For the reason discussed in response to comment 5, the amounts of most revised fees are significantly reduced in the final draft rule.

Comment 9: WMC/WPC commented that the information provided makes it impossible to verify the department claim that, with these fee increases, Wisconsin's NSR program will still have fewer staff and lower revenue than nearby states. For example, the department did not say how many Wisconsin permit writers handle "all permit types." If additional information is not available, the department should remove this unverifiable claim.

Response: Section 8 of the analysis section of the rule text includes a comprehensive comparison to other state programs. The department included in that assessment the information that other states were able and willing to provide in the manner in which they provided it. When the department made assumptions or estimates to develop comparisons, that was noted. Based on the information obtained, it is evident that Wisconsin's permit program in recent years has had fewer staff and lower revenue than most, if not all, nearby states.

At the request of stakeholders, the department has also included information on the number and types of permit actions undertaken by neighboring states (Appendix C). Due to the significant differences in how states organize and implement their construction permitting programs, using this data to make direct comparisons between states is difficult. The department has included some explanatory notes in the appendix to help with the interpretation of this data.

The fee revisions in this final draft rule are based on what is needed to operate a sustainable construction permitting program in Wisconsin, based on Wisconsin's specific legal and regulatory requirements, organizational structure, and funding mechanisms, as supported by a workload analysis and other information presented in Section 9 of the analysis section of the rule text.

Comment 10: WMC/WPC commented that economic development is dependent on permit review time <u>and</u> overall costs to business. Actual costs may be higher than estimated if multiple rounds of permitting are needed (for example, if project specifications change).

Response: The department recognizes the impact that permit fee increases can have on businesses. In the final draft rule, the department significantly reduced the proposed fee increases to minimize the impacts on permittees. As is current practice, the department will proactively work with sources prior to the permit application process to understand the project, its timeline, and potential changes to minimize the possibility that sources will need to undergo additional rounds of permitting.

Comment 11. In the final EIA, the department should compare the costs for actual projects (not just theoretical ones) in Wisconsin versus their costs in neighboring states. The department should also compare Wisconsin's policy approaches to issuing timely permits in a cost-effective manner to the policy approaches in neighboring states.

Response: Since neighboring states fund their construction permit programs very differently, what a project might cost a permittee in another state would be of limited relevance to Wisconsin (for example, in Michigan the direct permitting costs for any project would be minimal, since Michigan does not charge fees). As noted in the response to Comment 9, the fee revisions are based on what is needed to operate a sustainable construction permitting program in Wisconsin.

In terms of permit issuance times, neighboring states have told the department that they have a commitment to issue permits in a timely manner. What this looks like in practice is highly state-specific, given the differences in state programs, legal requirements, resources, and permittees. The information contained in Appendix C of the draft rule provides some insight into the permit application volume of neighboring states.

Comment 12: WMC/WPC commented that the department entered FY23 with a $1.53 million balance for the NSR program. Accounting for $600k deficit in FY24, the department should still have $900k surplus. It is unclear how the department intends to use the $900k account balance. If the account is currently $0, the department should provide detailed accounting in the final EIA of how $1.53 million as of FY23 was spent.

Response: The account balance that existed at the beginning of FY23 was used to cover the annual deficits in permit program operational expenses in FY23 through FY25. The deficit exceeded $600,000 in two of these years and approached $400,000 in the third. Please see section 9 of the analysis section of the rule text for details.

Comment 13: WMC/WPC requested that, prior to seeking fee increases, the department should review options for reducing program costs. A list of potential streamlining or cost saving ideas was included in the comment.

Response: As described in the response to Comment 6 and section 9 of the analysis section of the rule text, the department has taken a number of actions over the past decade in response to declining program revenues to stretch the program account balance. The department continues to seek, and will implement, additional efficiencies. To facilitate further permit streamlining, the final draft rule specifies several streamlining measures the department will actively pursue and report on. For further details, please see the response to Comment 17.

Comment 14: WMC/WPC noted that the construction permit program must continue to meet statutory permit review deadlines as prescribed under s. 285.61, Stats. Failing to act on an application can trigger a refund requirement under s. 285.61(11)(b), Stats. This would further exacerbate the funding shortfall.

Response: The department's permit review times were once among the fastest in the country, with the average time from receipt of application to final permit issuance being 3 to 4 months. Due to the impact of decreasing revenues over the last decade, this is no longer the case. The additional revenue collected through this rule will reverse that decline, allowing the department to review and issue permits in a timely manner and meet all applicable statutory deadlines.

Comment 15: WMC/WPC noted that if staff is increased in the permit program, all permits should be issued within 60 days and the "expedited review" fee should be eliminated.

Response: The revenue collected through this rule will allow the department to increase staffing, which will facilitate the review and issuance of permits in a timely manner and in accordance with applicable statutory deadlines. For reasons noted in the analysis section of the rule text, the expedited review fee has been eliminated.

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

The Legislative Council Rules Clearinghouse submitted comments on form, style and placement in administrative code, and clarity, grammar, punctuation and use of plain language. Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse. The comments received from the Legislative Council Rules Clearinghouse listed grammatical updates in Sections 51 and 57. Since that review, these sections have been relabeled to Sections 5 and 6, respectively.

PUBLIC COMMENTS ON DRAFT RULE

The department held a public comment period on the draft BO from July 29 to September 4, 2024, with a public hearing on August 29, 2024. The public hearing was attended by 29 members of the public. One attendee registered as opposed to the rule and one registered in support. No attendees testified at the hearing.

Three written comments were received from the following organizations: Wisconsin Cast Metals Association (WCMA), joint comments from the Wisconsin Utilities Association (WUA) and Dairyland Power Cooperative (DPC), and joint comments from Wisconsin Manufacturers & Commerce (WMC) and Wisconsin Paper Council (WPC). The letter from WMC/WPC also incorporated by reference their previous comments submitted during the EIA comment period, summarized above. The following is a summary of comments received and the department’s response.

Comment 16: WCMA commented that its membership has received flexibility and assistance in processing timely permit applications from the department and would like to see that continue.

Response: Thank you for this comment.

Comment 17: All commenters expressed concern about the adequacy of the permit streamlining reporting requirement included in the draft rule and requested that the department form a working group or committee to explore ways the department could further streamline the existing permitting processes.

- WCMA requested a permit streamlining working group to include stakeholders (and recommended that group be outlined in the rule text), provided a number of example strategies for streamlining, and requested that discussions be started as soon as possible.
- WUA/DPC requested that the department fund a committee that explores efficiencies for the whole Air Management Program and hold an annual Air Program budget meeting. The commenter also noted that representation from permitted sources and other interested parties in this rulemaking effort seemed significantly limited.
- WMC/WPC would also like increased communication from the department to stakeholders on streamlining – more than just the reports in the rule. The commenter believes the timeline given in the rule is too long for streamlining. The commenter would like a streamlining committee formed with the goal of streamlining construction permit requirements, and a shorter deadline for the streamlining report included in the rule.

Response: As discussed in response to Comment 6, the department has, in collaboration with stakeholders, made extensive efforts in recent years to streamline permitting. The department continually seeks and evaluates opportunities to streamline the permit process and stakeholders – including these commenters – offered helpful streamlining suggestions over the course of this rulemaking.

To address the commenters’ concerns about the scope and speed of permit streamlining that would be undertaken with support from revenue generated by this rule, the department has revised the streamlining reporting requirement in the final draft rule to include specific streamlining measures that the department intends to consider. Please see Section 9 of the analysis section of the rule text for details. The department intends to convene a permit streamlining work group to help inform and guide these streamlining efforts. Additional streamlining ideas beyond those expressly included in this rule will also be considered.

The deadline for the streamlining report has been revised from September 30, 2026, to September 30, 2027. This date will be approximately 14 months after this rule is effective. This deadline is reasonable, as this will give the department time to fully implement some streamlining actions and partially implement or develop implementation plans for others. The additional revenue generated by this rule, which would only begin to be realized in FY27, will be vital to supporting these efforts.

With respect to stakeholder engagement, the department made considerable efforts to make all permitted sources aware of this rulemaking. At the beginning of the EIA comment period, the department notified all current permit holders of the rulemaking and the opportunities for public participation. The department had follow-up discussions on the proposed rule with all stakeholders who expressed interest. The department conducted additional outreach at the beginning of the draft rule comment period and had significant engagement with advocacy organizations (e.g., WMC, WPC, WUA) that represent many permitted sources.

Comment 18: Both WUA/DPC and WMC/WPC would like the department to request or otherwise find other sources of funding for this program so that it is less dependent on permit fees. WUA/DPC further commented that they are concerned about the slow pace of anticipated improvements of permit processing times under this rule, given expected revenues.

Response: As discussed in section 9 of the analysis section of the rule text, the department shifted 10.0 FTE from the construction permit account to the environmental management account of the segregated environmental fund under provisions of 2023 Wisconsin Act 19. This additional source of funding has allowed the department to move additional permit writing staff into the construction permit program, allowing some improvements in permit processing times to already be realized.

Comment 19: WUA/DPC commented that the department should consider reallocating other staff to permit writing.

Response: As described in section 9 of the analysis section of the rule text, the FTE under this account include not just the staff engineers that review and write permits, but also other required construction permit-related support staff, such as permit processors, air dispersion modelers, supervisors, attorneys, technology support, and financial administration. These roles are less visible to permittees but involve duties integral to the operation of the program. By filling these roles with non-engineer classifications whenever possible, the department has simultaneously reduced program costs while maximizing the time available to staff engineers to do permit review and writing. As described in the analysis section of the rule text, the department has implemented efficiencies in these areas in response to declining revenues wherever possible and will continue to do so in order to maximize resources available for permit review and writing.

Comment 20: WUA/DPC commented that the department should cap the per unit, per pollutant, Best-Available Control Technology (BACT) fee for each application.

Response: The department acknowledges that not all BACT reviews involve the same level of staff effort, something which is also true for other emission-unit-specific or facility-specific technology reviews (e.g., LACT, MACT, NR 445 BACT). As with other technology-review fees, the BACT fee is intended to capture the average costs for technology reviews and their corresponding permit actions.

While a cap on the per unit, per pollutant, BACT fee is a possible approach for preventing higher fee charges, such a cap also risks creating scenarios where the department collects inadequate revenue to support a permit review. Because it would create the possibility for inadequate funding, a cap on per unit, per pollutant BACT fees has not been added to the rule.

The department realizes that a BACT fee represents a substantial cost to an applicant, and it has instituted fee assessment practices to assure that multiple BACT fees are not charged for a single technology review. For example, the department does not charge multiple BACT fees for pollutants for which the BACT analysis and resulting BACT limits are identical (e.g., PM, PM10 and PM2.5 for a natural gas-fired boiler where the control technologies assessed and the BACT limitations established in the permit are the same) or when a project involves multiple identical or very similar emissions units for which the BACT analysis and limitations are very similar or the same. Besides following reasonable practices, the department also includes its preliminary fee assessment in the permit documents made available during the public comment period. The department's fee assessment is therefore available for comment and challenge by an applicant.

Comment 21: WUA/DPC commented that the "multiple application discount" is not high enough.

Response: The comment suggests a misunderstanding of the nature of the $1,200 amount included s. NR 410.03(1)(e) of the draft rule. The $1,200 is not a discount applied to the fee for a permit issued for an identical source at another location, but rather the total fee charged for such a permit, provided no additional review by the department was required. The department would only apply additional fees for actions specified in s. NR 410.03(2) for an identical source when those actions had not already been completed on the initial permit review.

Comment 22: WUA/DPC is not in favor of the $2,650 fee for a public hearing if someone other than the applicant requests it.

Response: Addressing public concerns is both a priority and an obligation for the department. The expenses incurred by the department associated with a public hearing are the same regardless of who requests the hearing. It is therefore appropriate to fund this activity by assessing a fee to the permit applicant.

Comment 23: WUA/DPC commented that, since the department does not currently have the staff to review most exemption or revision applications in a timely manner, the permit exemption and revision fees should only be collected after the exemption or revision is issued. The department proposed to remove the expedited review fee due to its inability to provide the service for the request through granting overtime pay, and the same concept applies here.

Response: The department instituted the expedited review fee to fund overtime hours for permit writers working on expedited reviews. The state's current overtime rules severely limit the ability of permit writers, or any exempt employees, to receive overtime pay. With overtime compensation almost entirely eliminated, this fee cannot be used to fund overtime work. For this reason, the final rule eliminates the expedited review fee.

The department's decision not to prioritize exemption and revision applications is not due to changes in workplace rules, but because the department lacks the necessary resources to act on these applications. The department's shortfall in resources is the result of a decade-long decline in revenue that this rule attempts to reverse.

The collection of exemption and revision fees with an initial application is appropriate given the nature of these regulatory actions. Unlike applications for construction permits, exemption applications are generally elective. For most exemptions, a facility may undertake an exempt project without receiving a determination from the department. Revision applications also tend to be more elective in nature, as they typically reflect a change in monitoring or recordkeeping that a facility desires but that is not essential to business activities. For these more discretionary types of applications, the department collects a fee with the application to help fund the additional workload created for the construction permit program beyond its core permitting work.

Although the department temporarily stopped work on most exemption and revision applications, the shifting of some FTE from the construction permit account to the environmental management account of the segregated environmental fund has allowed the department to resume work on these applications. The department will review and act on all the exemption applications it has received once the existing construction permit backlog is addressed.

Comment 24: WUA/DPC commented in support of the phasing in of fee increases.

Response: Thank you for this comment. Note that, in the final draft rule, the department significantly reduced its proposed fee increases. Given the reduced magnitude of the increases, the department is no longer proposing to phase in the fee changes.

Comment 25: WUA/DPC commented that one basic fee should be applied for construction permits, regardless of whether the source is major or minor, or the permit is for a major or minor source construction project.

Response: Whether a facility or permit is major or minor can have a significant impact on the level of effort required by the department to issue the permit. Therefore, it is appropriate to have different basic fees for major and minor sources and major and minor permits.

Part 70 major sources are often subject to complex federal standards including National Emission Standards for Hazardous Air Pollutants (NESHAPs) in 40 CFR Part 63, whereas minor sources typically are not subject to these rules. Part 70 major sources are also more often subject to New Source Performance Standards (NSPS) in 40 CFR Part 60, Reasonably Available Control Technology (RACT) requirements in chs. NR 419 to 423, and more complex evaluations to determine compliance with Wisconsin's hazardous pollutant rule, ch. NR 445, Wis. Adm. Code. The ch. NR 410 rule does not include additional fees related to these rules, with very limited exceptions. Therefore, it is appropriate to have higher basic fees for Part 70 sources than non-Part 70 sources.

Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NNSR) major permits include additional required actions and reviews, which may include:

- Growth analysis.
- Analysis of the impairment to visibility, soils and vegetation.
- Emissions increase analyses to determine pollutants subject to BACT or Lowest Achievable Emission Rate (LAER).
- Determination that all major sources with the same owner or operator of the source in the state are subject to emission limitations and are compliant with all applicable emission limitations and standards under the Clean Air Act and chs. NR 400 to 499, Wis. Adm. Code.
- Determination that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.
- Coordination with and notifications to Class I areas.

The ch. NR 410 rule does not include additional fees related to these actions/reviews. Therefore, it is appropriate to have higher basic fees for PSD and NNSR major permits than minor permits.

Comment 26: WMC/WPC noted this rule would increase fees every four years by a percentage equal to the total percent increase in nonrepresented general wage adjustments (GWAs) included in the two most recently approved biennial state compensation plans. The commenter expressed concerns that this approach would avoid the legislative oversight of fees that are modified through the administrative rulemaking process. The commenter does not support "perpetual, automatic" fee increases.

Response: The commenter accurately characterizes how fees would increase under this rule every four years based on changes in GWAs. How this increase would work, including an example, is explained in section 9 of the analysis section of the rule text.

The department disagrees with the commenter's characterization of legislative oversight. As an initial matter, the legislature exercises oversight over the administrative rulemaking process generally, including any changes made to ch. NR 410 through this rulemaking. In addition, numerous examples can be found throughout the Wisconsin Administrative Code where fees or rates are adjusted automatically to reflect inflationary increases. For example: s. Ins 18.105 (adjusting rates for health benefit plans), s. DHS 158.08 (adjusting the radiation monitoring fee), and s. VA 2.04 (adjusting annual student living expenses payments). These fees change automatically without legislative intervention. Finally, the legislature exercises oversight of the budget process authorizing the GWAs on which this adjustment is based.

Regular and predictable fee adjustments would provide certainty to the regulated community, ensure program financial stability, and result in slow, gradual adjustments in fees (rather than sporadic, larger increases). The department initially proposed adjusting fees annually to reflect inflation, but, based on feedback from stakeholders, revised the rule to reflect periodic changes in GWAs.