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Rule Analysis and Checklist

DRAFT

Working title: Definition of commence with regards to construction and modification in ch. NR 406

Code citation(s): creation of s. NR 406.03(1e), changes to ss. NR 406.08(1) and NR 406.10

Other codes affected: None

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

Group lead: Steve Dunn

Subgroup members and affiliations: David Bender – Sierra Club, Todd Palmer – WI Paper Council, Jeff Jaeckels – MG&E, Art Harrington – Godfrey and Kahn, Don Huff – Dairyland Power Cooperative

Problem being solved or issue being resolved:

The State of Wisconsin's definition of commence construction is more stringent than the definition in federal regulations. Thus, minor source construction or modification projects in Wisconsin are held to a stricter definition of commence construction than sources in other states. In addition, the climate in Wisconsin can cause significant delays in ground preparation activities. This makes delays in permit issuance more onerous than they might be if the facility were located in a different climate zone.

As a result, facilities spend time preparing and department staff spends time reviewing construction waiver requests for activities that are generally allowed in many other states. These activities present little environmental or economic risk.

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

The department is proposing changes to ch. NR 406 to better align the federal and state definitions of commence construction and to allow additional preconstruction activities that have low environmental impacts and can only be done outside winter months.

The department has several years of experience reviewing construction waiver requests. Most of the waiver requests received by the air program cite as a hardship the need to complete certain activities before the ground freezes. These activities include site clearing, trenching for installation of pipe or conduit, and pouring of footings. The proposed rule change lays out specific activities with low environmental risk that would be allowed prior to permit issuance. The proposed rule change reduces the staff time needed for preparation and review of construction waiver requests and reduces economic risks from potential delays due to weather.

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

Facilities affected by the change will be those undertaking minor source construction or modification projects. These projects must be considered "minor" before the permit is issued. Therefore, construction or modification projects

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that need permit conditions to avoid review under chs. NR 405 or NR 408 are subject to the definitions of “commence” and “construct” in those chapters.

In a typical year, the department issues between 75 and 100 minor source construction permits statewide to all types of sources. Assuming half of these projects do not need synthetic minor conditions to avoid review under chs. NR 405 or NR 408, this rule would affect between 38 and 50 facilities with small construction projects each year.

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

Discussion (list pollutants affected. If no change, say why): The department does not believe emissions will be affected by this proposed rule change. The preconstruction activities that would be allowed are not significant sources of air pollution. The change would not affect the approvability of a permit application. The final permits issued and the allowable emissions would not be affected by the change. Emissions may occur sooner, however.

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

The following preconstruction activities are currently excluded from the federal definition of commence construction based on a 1978 interpretive memo from EPA: planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. In addition, based on the department’s experience reviewing construction waiver requests, facilities also are able to demonstrate considerable economic hardship from weather-related delays in trenching for installation of pipe or conduit, paving, and pouring of footings.

The proposed rule would exclude these activities from consideration when determining whether construction had commenced. These activities are expected to result in minimal environmental and economic risk. Because these are the activities most often included in construction waiver requests, allowing them for all minor sources saves time and resources and allows for fairer application of the regulation.

Link to interpretive memo on the commencement of construction:

<http://www.epa.gov/region07/air/nsr/nsrmemos/cnstrctd.pdf>

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

The proposed rule aligns the state and federal definition of commence construction. The department is also proposing to allow some additional preconstruction activities, beyond those explicitly allowed under federal guidance. The proposed rule applies only to minor source construction permitting and is therefore not prohibited by federal law.

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

Implementation of this change requires few resources. The department would prepare a fact sheet on the rule change that could be used to educate both affected businesses and department permit and compliance staff. The department expects the proposed rule would result in fewer requests for construction waivers, reducing workloads for facilities and department staff.

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 department developed several iterations of the proposed rule. At one point, the department considered copying the wording of the federal definition of commence construction and relying on EPA’s interpretive memos to determine what preconstruction activities would be allowed.

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The proposed rule presented here reflects workgroup member feedback that the department should clarify exactly what preconstruction activities would be allowed rather than relying on guidance memos. The proposed rule includes installation of building supports and foundations; laying underground piping and conduit; paving; and erecting storage structures because they represent the majority of activities requested under the construction permit waivers and present little environmental or economic risk. This allows for ease of implementation and provides more certainty about the effect of the proposed rule to the regulated community and interested parties.

Other workgroup members expressed reservations about changing the definition at all and questioned whether the department should allow any preconstruction activities to occur. The department believes little or no environmental or economic risk will be incurred as a result of the proposed rule. Many of these activities are already allowed in states that adopted the federal definition of commence construction. The additional activities have been specifically requested in many waiver requests; they are the activities most affected by Wisconsin winter weather, which can cause a delay in breaking ground to result in as much as a 4-6 month delay in a project. When nearly all air permit applications are ultimately approvable, delaying a project provides no environmental benefit and can have a considerable negative impact on the economy.

Legal review completed: ☒ Yes ☐ No

Preliminary legal review completed.

Statutory changes required: ☐ Yes ☒ No

Discussion: The definition of commence construction is not included in statute. Statute states:

285.60 Air pollution control permits. (1) NEW OR MODIFIED SOURCES. (a) Construction permit. 1. Except as provided in sub. (2g), (3), (5m), or (6), no person may commence construction, reconstruction, replacement, or modification of a stationary source unless the person has a construction permit from the department.

The proposed rule change is crafted so that the listed activities are excluded from consideration when determining whether construction, reconstruction, replacement, or modification has “commenced” as it relates to the minor source permit program. Because of this structure, the department felt that a statutory change is not needed.

SIP revision required: ☒ Yes ☐ No

Discussion: The current definition of commence construction in the Wisconsin Administrative Code is found in s. NR 400.02(44), Wis. Adm. Code. This definition was included as part of Wisconsin’s SIP under its former numbering, s. NR 154.01(45), Wis. Adm. Code. See 47 FR 26622 (June 21, 1982), effective July 21, 1982.

<http://yosemite.epa.gov/r5/r5ard.nsf/977585e33633852b862575750057311a/6be21678c9ef14b88625756f00478908!OpenDocument>.

The proposed rule change would need to be incorporated as a revision to the state’s SIP.

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Attachment: Proposed Rule Language

The department proposes to create NR 406.03(1e), to read as follows:

NR 406.03 (1e) EXCLUSIONS. Notwithstanding the definitions of commence construction and commence modification in s. NR 400.02 (44) and (45) respectively, for projects reviewed under this chapter which, prior to issuance of a permit, would not be considered a major modification or construction of a major source under chs. NR 405 or 408, all of the following activities will be excluded when determining if construction, reconstruction, replacement, relocation, or modification has commenced:

- (a) Installation of building supports or foundations.
- (b) Laying underground piping or conduit.
- (c) Erecting storage structures.
- (d) Dismantling existing equipment or structures.
- (e) Ordering equipment or control devices.
- (f) Temporary storage of equipment on site.
- (g) Site clearing.
- (h) Programs undertaken to locate underground utilities.
- (i) Installation of erosion control measures.
- (j) Paving.

The department proposes to modify the following sections of ch. NR 406 as follows:

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~~ commences construction, reconstruction, replacement, relocation or modification 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.

NR 406.10 Violations. Any owner or operator who fails to construct a stationary source in accordance with the application as approved by the department; any owner or operator who fails to construct and operate a stationary source in accordance with conditions imposed by the department under s. 285.65, Stats.; any owner or operator who modifies a stationary source in violation of conditions imposed by the department under s. 285.65, Stats.; or any owner or operator who ~~commences construction or modification~~ commences construction, reconstruction, replacement, relocation or modification of a stationary source without applying for and receiving a permit as required under this chapter or ~~ch. NR 405~~ chs. NR 405 or NR 408 shall be considered in violation of s. 285.60, Stats.