



*The*  
**Hamilton Consulting Group**  
Legislative, Regulatory & Information Services

## **The Jobs Creation Act of 2003**

### **Changing Wisconsin's Regulatory Climate**

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#### **SYNOPSIS**

*The Jobs Creation Act of 2003 ([2003 Wis. Act 118](#)) was signed into law by Gov. Doyle on Jan. 22, 2004. It has been called “the most significant reform of the state regulatory process in decades, perhaps ever.” The new law is sweeping, ambitious, as well as controversial. Its main proponents – the Legislature, governor, and business groups – hail it as much needed reform that removes regulatory obstacles to jobs creation. Its principle detractors – the attorney general and environmental groups – call it an opportunistic attack on Wisconsin’s environmental legacy. More likely, it will prove itself useful to both industry and agencies.*

*The primary focus of the Act is three-fold. First, it creates tools and related mandates to speed up the process for DNR air and water permits. Second, it strengthens existing limitations on DNR’s ability to develop air program requirements that exceed federal EPA standards. Third, it substantially bolsters the agency record requirements needed to justify their proposed rules. These latter provisions may ultimately prove to be the Act’s legacy, as all agencies now face a significantly higher hurdle they must clear before promulgating new regulatory programs. The hope of the regulated community is that they will see fewer and more reasoned regulatory mandates.*

*As enacted, the Act revises three chapters of Wisconsin Statutes: Chapter 227 (Administrative Procedure and Review), Chapter 285 (Air Management Programs), and Chapter 30 (Navigable Waters). The Hamilton Consulting Group represented several clients such as Wisconsin Manufacturers & Commerce and Wisconsin Economic Development Association on the bill, focusing on developing and negotiating the chapter 227 and 285 provisions. This update focuses on those provisions that include:*

#### **Rulemaking Procedures**

- Scoping Statements
- Draft Rule Analysis for Public Hearings
- Fiscal Estimates for Private Sector
- Final Draft Rule Analysis for Legislative Review



- Economic Impact Reports
- Judicial Review of the Record
- Contested Case Provisions

#### **Air Program – Federal/State Interfaces**

- Air Toxics Program
- Ambient Air Quality Standards
- Ozone Nonattainment Designation and Related State Plans

#### **Air Program – Permit Streamlining**

- Permit Exemptions and Waivers
- Registration and General Permits
- Legislative Oversight
- Statutory Deadlines
- Permit “Completeness Determinations”
- Agency Accountability
- Monitoring Requirements
- Challenging Part of a Permit
- Implementation Issues

## **I. INTRODUCTION**

The Act was born out of a unique convergence of political and economic events. Some called it serendipity. The 2002 Fall Elections saw an unexpected turnover in the Senate to a Republican majority that, when combined with an already strong GOP grip in the Assembly, created a more business friendly Legislature. Equally important was the election of Democrat Jim Doyle as governor, generating an “only Nixon can go to China” opportunity in the Executive Branch. An economic downturn, particularly the mounting job losses in Wisconsin’s manufacturing sector, gave rise to a heightened sense of urgency. All the stars were aligned for the resulting nonpartisan consensus that something needed to be done to promote job creation, or at a minimum, stem the tide of manufacturing job losses in Wisconsin.

The political problem facing state elected officials and business groups looking for a legislative remedy was that the economic challenges facing Wisconsin’s manufacturing sector for the most part had little to do with state policies. The perception of an inhospitable regulatory climate in Wisconsin, however, was something state policy-makers could attempt to change. Whether this perception was well founded became irrelevant as both legislative leaders and the Governor made regulatory reform a top priority.

Business groups such as Wisconsin Manufacturers & Commerce (WMC) and the Wisconsin Paper Council surveyed their members to help better define the problem and potential solutions. Related reports were published with an eye toward legislative solutions. See [The Case for Regulatory Reform in Wisconsin](#), Wisconsin Manufacturers & Commerce (May 2003); [The State of Wisconsin’s Paper Industry](#), Wisconsin Paper Council (June 2003). The Department of Natural Resources (DNR) became the key target as the inability to timely obtain air and water permits was viewed by most business groups as the biggest regulatory impediment facing companies wishing to build, expand, or locate in



Wisconsin. In addition, the costs associated with state environmental programs that exceeded federal requirements were found by many as an economic disadvantage in an increasingly competitive marketplace. The Jobs Act started as companion bills that had significant political momentum from the start. [AB 655](#) and [SB 313](#), both introduced on Nov. 11, 2003, had as lead authors Assembly Speaker John Gard and Senate Major Leader Mary Panzer, respectively. A substitute amendment to AB 665, reflecting the compromise between the Governor and the Legislature, passed in the Assembly by an 80-14 vote on Jan. 13, 2004, followed by Senate concurrence by a 27-6 vote on Jan. 20, with gubernatorial approval two days later on Jan. 22. The bill was clearly a top priority for the Legislature and the Governor. While the regulatory reforms bill as introduced contained a broad range of business initiatives, ultimately the expansive legislation was trimmed to address only the primary issues: air and water permits, and the processes for developing regulatory mandates.

## II. RULEMAKING PROCEDURES (CHAP. 227)

The Act requires all agencies to more thoroughly document their justification for rules by expanded analysis and related record requirements. These provisions track federal statutes, such as the Administrative Procedures Act (APA), and related case law, which were often cited in the legislative authors' drafting instructions. If there was a theme by industry for the Act's revisions to Chap. 227, it was their frustration of having to play "hunt the peanut" to discern agency factual, legal and policy underpinning to regulatory proposals. The reference to this children's game, in which the child who finds the most hidden peanuts wins, was noted in a federal court decision that sums up the rationale for much of the Chap. 277 changes:

To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as a mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary. *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 531 (D.C.Cir. 1982)

Chapter 227 set forth the procedural requirements all agencies must follow when promulgating rules. The Act focuses on the key notice junctures of the rulemaking process, namely: 1) the scoping statement required before an agency can begin the rule making process; 2) the record that is part of the draft rule that is subject to public hearing and comment; and, 3) the final draft rule submitted for legislative review that includes any revisions arising out of public comments. Beyond revealing the regulatory *peanut* to affected parties, the more robust agency record requirements will likely result in heightened scrutiny of agency decisions by elected officials and the courts.

**A. Scoping Statements (Wis. Stat. §227.135).** Chap. 227 bans any agency activity in connection with drafting a proposed rule until the agency head approves and the agency publishes a statement of the scope of the proposed rule. While somewhat perfunctory, the scoping statement provides elected officials, the regulatory community, and for that matter, agency management, an important "heads-up" before agency staff commits to any particular regulatory scheme.

The Act does not change the basic information required in the scoping statement: the objective of the rule, relevant policies and policy alternatives, statutory authority, and the amount of time that state employees expect to spend on the rule. Instead, the Act adds the requirement for a "summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule." Wis. Stat. § 227.135(1)(f). This provision is consistent with an overarching policy objective of the Act that agencies generally not layer state regulatory programs over existing federal programs that are addressing the same problem. Under the Act, an agency must from the start keep that policy goal in mind.



**B. Draft Rule Analysis for Public Hearings (Wis. Stat. §227.14(2)).** Chap. 227 requires an agency to prepare in plain language an analysis of each proposed rule. This analysis is included in the notice of public hearing. Prior to the Act, however, this analysis only needed to include: 1) A *reference* to relevant statutory authorities; and, 2) A *brief summary* of the proposed rule. The Act substantially strengthens the draft rule analysis requirements by adding the following components:

- An explanation of the agency's authority to promulgate the proposed rule. Wis. Stat. §227.14(2)(a)1.
- A comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule. Wis. Stat. §227.14(2)(a)3.
- A comparison of similar rules in adjacent states. Wis. Stat. §227.14(2)(a)4.
- A summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen. Wis. Stat. §227.14(2)(a)5.
- Any documentation relating to reports required under other provisions in Chap. 227, such as small businesses analysis or economic impact reports. Wis. Stat. §227.14(2)(a)6.

The rationale for these provisions, as noted in the legislative drafting instructions, was that “an agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.”

**C. Fiscal Estimates for Private Sector (Wis. Stat. § 227.14(4)).** Chap. 227 requires that an agency prepare a fiscal estimate on every proposed rule's impact on local and state government. This estimate is part of the agency record that goes out to public hearing and comment. Notably absent from these provisions was any requirement to discern fiscal impacts on the affected regulated community. Keeping with the economic development objectives, the Act added that fiscal estimates are to include anticipated costs to be incurred by the private sector in complying with the rule, but only if the agency first discerns that the rule may have a “significant fiscal effect” on the private sector. Wis. Stat. §227.14(4)(b)3.

**D. Final Draft Rule Analysis for Legislative Review (Wis. Stat. §227.19(3)).** Chap. 227 sets forth detailed procedures relating to legislative review of proposed rules prior to final promulgation. After the public review and comment portion of the rulemaking process, the agency is to submit to the Legislature the proposed rule in final draft form, which entails a report containing the agency's record to date, including the draft rule analysis and the fiscal estimate discussed above. In addition, the report is to include a final draft rule analysis. Prior to the Act, that final analysis included: 1) A statement explaining the need for the proposed rule; 2) An explanation of any modification made in the proposed rule as a result of testimony received at a public hearing; and, 3) A list of the persons who appeared or registered for or against the proposed rule at a public hearing. Under the Act, this analysis of the final draft rule is now to include:

- A copy of any economic impact report and any related report prepared by the department of administration. Wis. Stat. §227.19(3)(intro).
- A detailed statement explaining the “basis and purpose” of the proposed rule (terminology found in the federal APA), and a statement how the proposed rule advances relevant statutory goals or purposes. Wis. Stat. §227.19(3)(a).
- A summary of public comments to the proposed rule and the agency's response to those comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at a public hearing. Wis. Stat. §227.19(3)(b).
- Any changes to the initial draft rule analysis or the fiscal estimate. Wis. Stat. §227.19(3)(cm).



The “basis and purpose” terminology is from the federal APA §553(c), which requires an agency to “incorporate in the rules adopted a concise general statement of their *basis and purpose*.” Requiring such basis and purpose be “detailed” versus “concise” reflects the Legislature’s intent to track federal case law relating to this requirement, which is summarized in the drafting instructions to Act 118:

No court today would uphold a major agency rule that incorporates only a ‘concise general statement of basis and purpose.’ To have any reasonable prospect of obtaining judicial affirmation of the a rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effect of the rule, relates the factual predicate and expected effect of the rule to each of the statutory goals or purposes that agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted. *K. Davis, Administrative Law Treatise, sec. 7.4 at 310 (3d. ed. 1994).*

This use of federal APA terms and reference to federal practice should be a road map for Wisconsin courts to discern the legislative intent behind the Chap. 227 changes. That is, the “reasoned decision” hurdle for federal agencies must now be cleared by Wisconsin agencies.

**E. Economic Impact Reports (Wis. Stat. §227.137).** A new requirement under the Act provides for economic impact reports for proposed rules. As introduced, the legislation required these reports for any rules by any agency if requested through a petition. The final provisions were significantly narrowed. For example, economic impact reports may only be prepared on rules proposed by five key departments:

- Agriculture, Trade, and Consumer Protection (DATCP)
- Commerce
- Natural Resources (DNR)
- Transportation (DOT)
- Workforce Development (DWD)

A municipality, an association that represents a farm, labor, business, or professional group, or five or more persons may petition the department of administration (DOA) secretary to direct one of the above five agencies to prepare an economic impact report. Individuals petitioning must be directly and uniquely affected by the proposed rule. The DOA secretary is given substantial discretion whether to prepare a report, but he or she *must* direct the agency to prepare the report if the petition is timely, as prescribed by the Act, and if the proposed rule breaches one of the following economic impact thresholds:

- The proposed rule would cost affected persons \$20 million or more during each of the first five years after the rule’s implementation.
- The rule would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

The report is akin to a cost-benefit analysis, but absent a specific requirement that the benefits of the rule outweigh its costs. The report must include:

- Information on the effect of the proposed rule on specific businesses, business sectors, and the state’s economy.



- An analysis and quantification of the problem, including any risks to public health or the environment that the rule is intending to address.
- An analysis and quantification of the economic impact of the rule, including costs reasonably expected to be incurred by the state, governmental units, associations, businesses, and affected individuals.
- An analysis of benefits of the rule, including how the rule reduces the risks and addresses the problems that the rule is intended to address.

In addition, if the economic impact report is prepared, the proposed rule undergoes a DOA review that results in a DOA report that “verifies” the agency’s statutory authority and factual underpinnings for the rule. Wis. Stat. §227.138. Notably, the agency may not advance the rule until the issues raised by DOA are adequately addressed.

**F. Judicial Review of the Record.** Chap. 227 directs the courts to declare a rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rulemaking procedures. Wis. Stat. §227.40(4)(a). Other than that, the Legislature provided the courts little guidance for their review of agency rules. To address that issue, the legislation, as introduced, contained several provisions relating to judicial review, including provisions intended to codify existing case law. Apparently, these provisions were found unnecessary, as they were subsequently deleted. The relevant case law remains important, however, as the courts will ultimately be asked to interpret the new Chap. 227 requirements of the Act.

One such provision in the bills as introduced clarified that the court’s review “shall be confined to a substantial inquiry of the agency record, as necessarily and appropriately supplemented by evidence presented to the court” and that this record shall include the draft and final rule analysis, as well as public comments on the rule. 2003 SB 313, AB 655, §190. In the drafting instruction it was noted that this provision would “codify key holdings in *Liberty Homes, Inc. v. DIHLR*, 136 Wis. 2d 368 (1987). In *Liberty Homes* the court held it “must be free to accept relevant evidence to supplement the agency record if it appears necessary to perform its judicial review function.” Id. at pp. 379. Putting aside how courts may supplement the agency record, it is clear they must first look to the agency record when reviewing a rule. Generally, this record is the documentation provided the Legislature under Chap. 227, which includes the draft and final rule analysis that were considerably reinforced in the Act.

The courts also have clarified the appropriate methodology for reviewing agency records. The “substantial inquiry” test (also known as the “hard look” doctrine) contained in the initial legislation was articulated by the *Liberty Homes* court in their finding that “the court must engage in a ‘substantial inquiry’ into the facts of record supporting the rule, one that is ‘searching and careful’.” The purpose of such inquiry is to assure the court “that the agency rule is based, not on emotion or intuition, but rather on reasonable and reliable evidence. Id at pp. 386.

Thus, in addition to helping the regulated community assess the agency reasoning, the Act should substantially increase agency accountability in the courts. Even though the Legislature clearly found the pre-Act 118 agency record requirements insufficient, the court in *Liberty Homes* still concluded that “the imposition of these requirements manifests the intent of the Legislature to increase agency accountability.” Id at pp. 388. One could surmise that Act 118 increases this accountability to a degree comparable to the degree the Legislature increased its demands for reasoned decisions. Any agency that attempts to advance rules without adequately documenting such reasoned decision-making in the rulemaking record would appear to be doing so at their peril.

**G. Contested Case Provisions.** The Act also contains several provisions relating to contested case hearings. One such provision requires the administrator of the division of hearings and appeals to establish a system that shall ensure, to the extent practicable, that hearing examiners are assigned to different subjects on a rotating basis. Wis. Stat. §227.43(1g). Another provision allows a hearing



examiner to award costs relating to frivolous claims. Wis. Stat. §227.483. Finally, the Act allows nonresident petitioners to proceed in the county where the affected property is located, rather than Dane County. Wis. Stat. § 227.53(1)(a)3.

### III. AIR PROGRAMS – FEDERAL/STATE INTERFACE

The Jobs Act clarifies and expands limitations on DNR’s rulemaking authority for certain air programs, such as those relating to air toxics and ozone. While there was general unanimity on the need to streamline air permitting, the policies relating to how and when DNR may impose air quality requirements that are more stringent than federal mandates was the subject of a significant policy debate.

Industry argued that DNR regulatory programs exceeding federal requirements create inconsistencies and duplication between state and federal programs, adding substantial costs not incurred by their competitors in other states. Environmental groups countered that limiting DNR’s authority to impose state-specific requirements for the sake of federal-state consistency was a “race to the bottom.” The uneasy truce reflected in Act 118 for these programs was to provide DNR with continued authority to establish Wisconsin-specific standards in the absence of federal standards, so long as DNR clearly established a need.

**A. Air Toxics Program.** At the time the Jobs Act was winding through the Legislature, DNR was advancing significant revisions to the air toxics rules (Wis. Admin. Code NR 445). In addition to other sweeping changes, DNR proposed adding 144 new substances that would bring the Wisconsin list of regulated hazardous air contaminants to 577. (The federal air toxics program regulates 188 substances.) An additional backdrop to the deliberations on the air toxics program was DNR’s initiative to regulate mercury emissions, also considered a hazardous air contaminant under Wisconsin law and the subject of a pending federal rule. DNR’s authority for both rules was Wis. Stat. §285.27(2)(b), which provides that in the absence of a federal standard, “the department may promulgate an emission standard for the hazardous air contaminant if the department finds the standard is needed to provide adequate protection for public health and welfare.”

It has been a long standing argument by industry that DNR provides insufficient justification for regulating hundreds of substances not regulated under the federal program. Rather than asserting Wisconsin should mirror the federal air toxics program under Section 112 of the Clean Air Act, industry successfully argued that the Legislature should provide more direction on what factors should be considered by DNR when expanding its program beyond the federal code. The Act left untouched the underlying requirement to make a finding of need, but added provisions setting forth the documentation required to support such a finding. See Wis. Stat. §285.27(2)(b). In one of the more significant policy changes under the Act, this test requires the following compelling proof that the state standard is needed:

- A public health risk assessment that characterizes the types of stationary sources in this state that are known to emit the hazardous air contaminant and the population groups that are potentially at risk from the emissions.
- An analysis showing that members of population groups are or will be subjected to levels of the hazardous air contaminant that is above recognized environmental health standards.
- An evaluation of options for managing the risks caused by the hazardous air contaminant considering risks, costs, economic impacts, feasibility, energy, safety, and other relevant factors, and a finding that the chosen compliance alternative reduces risks in the most cost-effective manner practicable.
- A comparison of the emission standard for hazardous air contaminants in this state to hazardous air contaminant standards in Illinois, Indiana, Michigan, Minnesota, and Ohio.



Although the pending air toxics and mercury proposals weighed heavily in the underlying policy discussions, the Administration successfully advanced a provision in the Act assuring that the above documentation provisions were not applicable to either pending rule. (As of this writing, the air toxics rule is final, with a projected July 1, 2004 effective date; the mercury rule is on hold pending further legislative review.) However, DNR's future ability to add *en masse* substances to its air toxics program may prove to be exceedingly difficult under these new requirements.

If a federal hazardous air standard does exist, DNR is to promulgate a "similar" standard and this standard "may not be more restrictive in terms of emission limitations than the federal standard." In recognition that emission limitations are only one, albeit an important, component of an air regulation, the Act added a requirement that DNR also promulgate "administrative" requirements that are consistent to those found in the federal program. Wis. Stat. §285.27(2)(a).

The Act also contains a provision that exempts from the state program any hazardous air contaminant that is controlled as a result of a federal standard, even if not directly targeted by the federal rule. Wis. Stat. §285.27(2)(d). For example, if the federal standard controls federal substance XYZ for a source, but such regulation also necessarily controls Wisconsin substance ABC from the same source, then ABC is not to be regulated under the state program for that source.

**B. Ambient Air Quality Standards.** In the absence of a federal standard, as with hazardous air contaminants, DNR is provided authority to promulgate an ambient air quality standard if it finds that the standard is needed to protect public health or welfare. Under the Act, however, provisions similar to those for hazardous air contaminants require DNR to develop documentation to support such a finding (e.g., public health risk assessment, population groups are subject to air contaminant levels above recognized health standards). Wis. Stat. §285.21 (1)(b).

The backdrop for this provision was a recent petition by environmental groups to have DNR develop an ambient air quality standard for carbon dioxide, a greenhouse gas. The Natural Resources Board rejected that petition, and it would appear the requirement that DNR document that ambient air concentrations are above recognized health standards makes any future effort to promulgate a state-only carbon dioxide standard very difficult.

**C. Ozone Nonattainment Designation and Related State Plans.** Since passage of the Clean Air Act Amendments of 1990, the development by DNR of ozone state implementation plans (SIPs) has been one of the most controversial environmental policy events in Wisconsin. A SIP is a plan required by the Clean Air Act that sets forth how the state will bring areas not meeting national air quality standards into "attainment." SIPs contain various commitments and supporting information, some of which need to be enforceable rules. Problems arise when commitments for future regulatory mandates are included in a SIP. Once in an approved SIP, such a commitment for future action becomes federally enforceable, making the proposed regulatory action a *fait accompli* despite it not being subject to any formal rulemaking procedures.

A related issue is how the state makes its recommendations to EPA as to which areas are to be designated nonattainment areas. This issue was also debated in light of pending developments, namely EPA's imminent designation of Wisconsin nonattainment areas for the new 8-hour ozone standard. (These final designations were made on April 15, 2004.)

The state's nonattainment area recommendations and related SIPs generally result in substantial regulatory burdens and related economic development disincentives. For example, industry expanding within or moving to nonattainment areas with emissions tripping certain levels must obtain comparable reductions from other sources and apply the most stringent controls. While scores of requirements follow, neither the recommendation for nonattainment areas nor a SIP is considered a rule that would trigger the legislative and public review and comment requirements found in Chap. 227. Rather than merely defining these actions as rules, which would subject them to the full Chap. 227 requirements, the Act sets forth more streamlined "light-of-day" requirements:



- Submittal of DNR recommendations and related documents for nonattainment designations to the Legislature 60 days before they are due EPA, and require DNR to respond to legislative comments. Require a public notice of the availability of these documents. Wis. Stat. §285.23(6).
- Promulgate as rules prior to the SIP's submittal to EPA any "control measures or strategies that impose *or may result in regulatory requirements*" contained in SIPs. Wis. Stat. §285.14 (1).
- Submittal of draft SIPs and related documentation to the Legislature 60 days before they are due EPA, and require DNR to respond to legislative comments. Require a public notice of the availability of these documents. Wis. Stat. §285.14 (2).

The Act also clarifies that Wisconsin may only recommend ozone nonattainment designation for a county that violates the federal standard, unless otherwise required by the Clean Air Act. Wis. Stat. §285.23(1). Previously, the law required an "area" to be in violation of the standard, allowing DNR to recently propose coupling counties meeting the standard with counties violating the standard, to form a broad "area" in violation. Although this provision provides protection for many counties adjacent to nonattainment areas, EPA's interpretation of the Clean Air Act's requirement that contributing counties be designated nonattainment will continue to bring in counties attaining the standard. That policy creates a presumption that all counties that are part of a Consolidated Metropolitan Statistical Area (CMSA) be designated nonattainment if any of the counties within the CMSA violate the standard. For example, despite meeting the standard, EPA's April 15, 2004 final rule designates Washington and Waukesha counties as nonattainment because they are part of the 6-county CMSA for Southeastern Wisconsin that includes four counties (Milwaukee, Ozaukee, Racine, Kenosha) violating the standard.

#### **IV. AIR PERMIT STREAMLINING**

Air permits are compliance tools for agencies and do not by themselves give rise to substantive requirements such as emission limitations. Generally, the permit merely incorporates those requirements found in other rules that would apply whether or not the source was required to have a permit. In most instances, state and federal law requires both "construction" and "operation" permits. Construction and operation permits are of two types, depending upon the amount and type of pollutants emitted from the source. "Major" sources that have the potential to exceed federal Clean Air Act threshold levels for specific pollutants are subject to federal requirements, while "minor" sources generally are subject to only state permit requirements.

The primary economic development aspect of the air permit program arises out of the requirement to obtain a construction permit prior to commencing a project that may result in air emissions. This so-called "construction ban" generally prohibits starting any construction or installation activities, including preparatory work such as grading, until the permit is in hand. Wis. Stat. §285.60. Thus, despite being a mere procedural requirement, the inability to obtain a construction permit in a timely manner can delay or kill a project. In contrast, facilities that have a pending operation permit application may generally continue to operate during review of the application.

The need to craft streamlining measures to allow for timelier issuance of air permits was the one aspect of the Act that was not controversial. In a significant policy shift that reflects this consensus, the Act directs DNR to continually assess permit obligations imposed under Chapter 285 and to implement measures "to allow for timely installation and operation of equipment and processes and the pursuit of related economic activity by lessening those obligations." Wis. Stat. §285.60(10).

One of the basic precepts of the Act's air permit provisions is that all air emission sources should not be treated as equal. That is, while substantive requirements and related permit conditions can (and should) vary greatly from source to source, the permitting process was relatively similar for all



permits. Once an application is submitted to DNR, it is reviewed for “completeness,” usually resulting in requests for additional information. Once deemed complete, DNR develops a draft permit, generally through negotiations with the permit applicant. After the draft permit goes through public review and comment, DNR approves or denies the permit. This time consuming process results in what is called a “negotiated permit.”

### ***Getting Off the Negotiated Permit Track . . .***

The Act provides for exemptions or a streamlined permit process for certain sources as the primary means to avoid the built-in delays associated with negotiated permits. These tools will be best used for minor sources that do not trip federal emission thresholds, or sources that accept a limit to avoid breaching the federal thresholds (i.e., “synthetic minor” sources). These sources are generally insignificant overall contributors of air emissions, and as such, are not subject to the more rigorous Clean Air Act permit requirements. Some states, such as Michigan, do not require state minor permits, while other states, such as Minnesota, have higher emission thresholds than Wisconsin for requiring a minor source permit.

**A. Permit Exemptions and Waivers.** With respect to permit exemptions, the Act requires DNR, by rule, to exempt minor sources from the requirement to obtain permits “if the emissions from the sources do not present a significant hazard to public health, safety or welfare or to the environment.” Wis. Stat. §285.60(6)(b). The Act allows parties to petition DNR to develop specific exemptions. A permit exemption by itself does not affect a source’s obligation to meet any applicable emission standard.

Also under the Act, DNR must promulgate rules for waivers that allow construction to commence prior to issuing a construction permit upon a showing of undue hardship. Wis. Stat. §285.60(5m). Undue hardship may include weather or economic hardship. Even before rules are promulgated, this simple tool may provide immediate relief for businesses waiting for construction permits.

**B. Registration and General Permits (15-Day Permits).** The Act also provides for two types of streamlined air permits – registration and general permits. Registration permits are simple permits for sources of low emissions. Wis. Stat. §285.60(2g). For example, a registration permit may be appropriate for small, natural gas-fired boilers that would include minimal permit conditions, but allows DNR to track and enforce the underlying requirements applicable to the source. Under the Act, general permits are to be developed for categories of similar sources. Wis. Stat. §285.60(3). General permits may contain more extensive permit terms and conditions than contemplated for registration permits, but since they would apply to numerous sources with similar attributes, one, prior negotiated permit would be appropriate.

The key attribute for both registration and general permits is that the terms and conditions will already be set by DNR either by rule or in a permit. That is, rather than undergoing source-specific negotiations over the terms and conditions, the applicant merely requests DNR to make an “applicability” determination for these off-the-shelf permits. Moreover, DNR must make such a determination within 15 days of the applicant’s request. As with exemptions, parties may petition DNR to develop registration or general permits.

**C. Legislative Oversight.** The Legislature will monitor the implementation of these new and improved tools. For example, DNR must provide the Legislature a report on its permit streamlining efforts, developed in consultation with the regulated community, by Sept. 1, 2004. The report is to include recommendations and related rule revisions for establishing exemptions, registration permits, general permits, issuing construction permit waivers, and undertaking other streamlining actions such as consolidation of permits. DNR is also to provide additional reports and rule revisions on a schedule set forth in its initial report to the Legislature.



***If Source-Specific Permits are Still required . . .***

It will take some time for DNR to develop and implement these new streamlining mechanisms. In the interim, businesses will still have to work with DNR to develop source-specific or “negotiated” permits. And even after the new streamlining tools are in place, many projects will be subject to source-specific permits to the extent the new streamlining mechanisms are inappropriate. The Act contains provisions, however, that should make the negotiated permit process faster.

**D. Statutory Deadlines.** Prior to Act 118, Chapter 285 contained statutory timelines for DNR to act on permits. Although the Act made one minor adjustment to those timelines – shortening major source construction permit review by 30 days – it was never a primary focus of industry to revise those deadlines (the legislation as introduced, however, did generally cut all those deadlines in half). Instead, the Act provides a “firm start” for the statutory deadlines noted in the table, as well as providing for agency accountability if those deadlines are missed.

<b>Statutory Deadlines for Construction Permits</b>				
<b>Requirement</b>		<b>Previous Major Permit</b>	<b>Current Major Permit</b>	<b>Minor Permit</b>
Issue Preliminary Determination		120 days	90 days	30 days
Public Comment Period	No Hearing	30 days	30 days	30 days
	Hearing	90 days	90 days	90 days
Approval/Denial		60 days	60 days	60 days
<b>Total Time (No Hearing)</b>		<b>210 days</b>	<b>180 days</b>	<b>120 days</b>
<b>Total Time (Hearing)</b>		<b>270 days</b>	<b>240 days</b>	<b>180 days</b>

**E. Permit “Completeness Determinations.”** Under prior law and under Act 118, the clock for the statutory deadlines does not start until DNR deems the permit application complete. The statutory deadlines were meaningless, then, for permit applications stuck in “completeness determination” purgatory at DNR. The Act requires DNR to issue its completeness determination within 20 days of the permit, same as prior law, but if DNR fails to meet the 20-day deadline, the Act provides for the application to be deemed complete, with the deadline clock starting at the 20-day date. Wis. Stat. §§285.61(2)(a),(b); §§285.62(2)(a),(b).

If the application is deemed incomplete, DNR must inform the applicant in writing within the 20-day period and describe *specifically* all information that is lacking. Once an applicant responds to the incompleteness notice, DNR must respond within 15 days, or the revised application is deemed complete. DNR may ask for information not requested in the initial review, but such subsequent requests do not toll the completeness determination deadlines. To address concerns that DNR may “buy time” by asking for volumes of additional information in its initial 20-day response, the Act directs DNR to submit a report to the Legislature outlining information DNR will require in air permit applications, with the goal to reduce overall permitting costs and approval times and minimize inconsistencies within the state and with other states and EPA.

**F. Agency Accountability.** One of the more controversial and difficult issues facing the legislative authors and the Administration was how to assure the permit deadlines were met by DNR. The Legislature’s initial approach, contained in separate legislation known as the “presumptive



approval” bills, was to require permits to be deemed approved if deadlines are missed. This approach was soundly rejected by the governor. The Administration’s idea that entailed “fining” DNR if they missed deadlines raised practical problems.

Ultimately, the negotiators agreed on a provision that requires DNR to report to the Legislature and the public (via “prominent notice” on their web site) causes and remedies for any missed deadlines. In addition, DNR is to refund permit application fees if deadlines are missed. By themselves, these mechanisms have little bite; but the prospect that the legislative report may prompt additional oversight (e.g., hearings) will likely give the department certain initiative to meet the statutory deadlines.

**G. Monitoring Requirements.** In the past, a major industry complaint was that monitoring requirements for permits were sometimes beyond that required of similar sources in other states. To help address this concern, the Act allows permit applicants to appeal proposed monitoring requirements. Wis. Stat. §285.17(2)(b). Under this provision, an applicant first appeals to DNR’s Air and Waste Division Administrator, and if not satisfied, to the DNR secretary. If either the division administrator or the secretary deems the requirement unreasonable, considering, among other factors, monitoring requirements imposed on similar sources, the monitoring requirement may not imposed. In addition, DNR is to prepare a report for the Legislature on monitoring “best management practices” with the goal of reducing overall permitting costs and approval times and minimizing inconsistencies within the state and with requirements imposed by other states and EPA.

**H. Challenging Part of a Permit.** The Act also allows permit applicants to challenge part of a permit while allowing unrelated provisions and the underlying permit to become effective. Wis. Stat. § 285.81(1m). This allows the applicant to begin construction pending resolution of the disputed provision. However, the permit is held in abeyance if the challenged provision relates to an emission limitation. Federal law may preclude the application of this provision to certain major source permits.

**I. Implementation Issues.** One potential defect relating to the permit streamlining tools provided under the Act is that they are not self-implementing. For the most part, the Act directs DNR to develop the underlying air permit streamlining programs through rules or other actions. However, the clear message from the Legislature and the governor’s office, embodied in Act 118 directives, is that DNR must make timely issuance of air permitting a top priority. The recent Legislative Audit Bureau’s report on DNR’s air program and an EPA Notice of Deficiency relating to its Clean Air Act permit program provides additional incentives for DNR to meet the overall objectives contained in the Act.

Preliminary indications are that DNR has heard these assorted messages loud and clear. The changing priorities within the department are, in part, reflected in DNR Air Bureau’s restructuring that was effective in October 2003. This restructuring effort entails scaling back the development of new state programs, which is consistent with other provisions in the Act that create a higher level of justification for the development of state requirements that exceed federal requirements.