

**Wisconsin Department of Natural Resources
Natural Resources Board Agenda Item**

SUBJECT:

Request that the Board approve the statement of scope for Board Order WY-23-13, and conditionally approve the public hearing notice for Board Order WY-23-13 and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse for proposed rules affecting Chapter NR 102 related to processes for waterbody assessments and impaired waters listing, biological criteria for water quality standards, and biological confirmation of phosphorus impairments.

FOR: February 2014 Board meeting

PRESENTER'S NAME AND TITLE: Ken Johnson, Water Division Administrator

SUMMARY:

Every two years, under federal Clean Water Act requirements, the department assesses the state's waters and updates its list of impaired waters (303(d) list). The goal of this new subchapter is to document this obligation and Wisconsin's process for fulfilling it. Further, this subchapter would create new water quality criteria for a suite of biological metrics that are used to assess waterbodies and determine impairments.

The subchapter would have two main components:

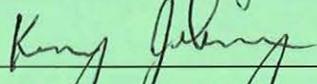
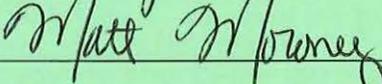
- 1) The first component would contain rules relating to conducting waterbody assessments and listing impaired waters, including the process used, public participation requirements, and EPA approval. This rule addition would document and codify Wisconsin's current process of conducting impairment assessments, which is currently not contained in code although it is a federal requirement.
- 2) The second component would establish new water quality criteria for a suite of biological metrics ("biocriteria") that are used for assessing attainment of Designated Uses for different waterbody types. These criteria represent critical assessment benchmarks for determining the health of the state's streams, rivers, and lakes. Biocriteria would be used to determine whether a waterbody should be placed on the impaired waters list. Codified biocriteria could also be used as confirmation of impairment for waterbodies that exceed nutrient criteria. Within certain limits appropriate to each waterbody type, waterbodies exceeding nutrient criteria but not exhibiting biological or recreational use impairment would not be considered impaired for purposes of the 303(d) list.

The statement of scope for this rule, WY-23-13, was approved by the Governor on December 19, 2013, and published in Register 697 on January 14, 2014. The rule is expected to be a Level 2, "moderate" economic impact.

RECOMMENDATION: That the Board approve the statement of scope and conditionally approve the public hearing notice for Board Order WY-23-13 and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse.

LIST OF ATTACHED MATERIALS:

Statement of scope
Governor approval of statement of scope

Approved by	Signature	Date
Susan Sylvester, Bureau Director		2/6/14
Ken Johnson, Water Division Administrator		2/7/14
Cathy Stepp, Secretary		2/12/14

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-23-13

Relating to: Creation of a subchapter 3 in Chapter NR 102, Wis. Adm. Code, which would include processes for waterbody assessments and impaired waters listing, biological criteria for water quality standards, and biological confirmation of phosphorus impairments

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

The rules will be proposed as permanent rules.

2. Detailed description of the objective of the proposed rule:

Every two years, under federal Clean Water Act requirements, the department assesses the state's waters and updates its list of impaired waters. The goal of this new subchapter is to document this obligation and Wisconsin's process for fulfilling it. Further, this subchapter would create new water quality criteria for a suite of biological metrics that are used to assess waterbodies and determine impairments.

This subchapter would have two main components:

- a) The first component would contain rules relating to conducting waterbody assessments and listing impaired waters, including the process used, public participation requirements, and EPA approval. This rule addition would document and codify Wisconsin's current process of conducting impairment assessments, which is currently not contained in code although it is a federal requirement.
- b) The second component would establish new water quality criteria for a suite of biological metrics ("biocriteria") that are used for assessing attainment of designated uses for different waterbody types. These criteria represent critical assessment benchmarks for determining the health of the state's streams, rivers, and lakes. Biocriteria would be used to determine whether a waterbody should be placed on the impaired waters list (303(d) list). Codified biocriteria could also be used as confirmation of impairment for waterbodies that exceed nutrient criteria. Within certain limits appropriate to each waterbody type, waterbodies exceeding nutrient criteria but not exhibiting biological or recreational use impairment would not be considered impaired for purposes of 303(d) listing.

Additional rule changes may be considered which are needed to effectuate the goals described in this scope statement.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Waterbody assessments and impaired waters listing

Under the Clean Water Act, all states are required to conduct waterbody assessments and impaired waters listing; these are submitted to U.S. EPA every two years. However, Wisconsin codes do not contain any reference to these obligations. This Subchapter would document and codify Wisconsin's assessment and listing process, in a generalized manner. It would establish requirements for public participation and recognize EPA's approval process. The rule addition is not meant to necessitate any specific changes to how these assessments are currently conducted. The department's protocols for assessing waterbodies and listing impaired waters are contained in a guidance document titled "*Wisconsin's Consolidated Assessment and Listing Methodology*" (WisCALM), which is updated every

two years. This guidance document would still be used for more detailed protocols than those that would be codified.

Biological metrics (biocriteria)

The department has developed several biological metrics that are indicative of the health of aquatic biological communities and the ability of the public to recreate. These metrics include, but are not limited to, fish, aquatic insects, algae (chlorophyll a), and aquatic plants. The metrics are tailored for different waterbody types, with thresholds indicating whether waterbodies are attaining their uses or are impaired. Under the WisCALM guidance, the department currently assesses waterbodies in regard to some of these biological metrics, and deems it appropriate to codify certain components of the guidance for consistency.

Some of these biological metrics are specifically responsive to phosphorus concentrations in the water. In the 2010 revision to ch. NR 102, Wis. Adm. Code, the rule contained a note that specified that for the purpose of determining which waters should be placed on the impaired waters list for phosphorus, the department considers such biological response variables in conjunction with phosphorus criteria exceedance before listing a waterbody as impaired. This subchapter would move these concepts from the note into the body of rule text, with more detailed definition, recognizing the Department's consideration of biological or related responses to phosphorus during waterbody assessments and impairment determinations.

Such authority is consistent with other states that are addressing nutrients through rule language, such as Minnesota, Ohio, and Maine, which all have--or are developing--biological metrics for assessments and for verification of nutrient impairments. U.S. EPA actively encourages states to use biological metrics for assessment purposes.

Policy alternatives

The department is currently assessing waterbodies using biological information, as well as pollutant data such as phosphorus concentrations. Because these methods are based on a sound body of science and contribute critical information to the assessment process, DNR recommends they be codified at this time. Without codification of biocriteria, the department could still assess waters for biological metrics and list as impaired under the authority of existing *narrative* criteria (i.e. using a descriptive protection of uses based on professional judgment instead of *numeric* criteria as proposed in this rule package). However, without biocriteria, the department cannot use biological data in conjunction with nutrient data to determine impairment. The department is currently placing a subgroup of waters that do *not* exhibit a biological impairment but that exceed state phosphorus criteria into a holding category on the impaired waters list labeled "5P". If the status quo is maintained and this rule change is not promulgated, listing category 5P could be made permanent and such waters would be considered impaired unless site-specific criteria are granted.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

- Sections 281.11 and 281.12, Wis. Stats., grant necessary powers and organize a comprehensive program under the WDNR to enhance quality management and protection of all waters of the state. It grants the WDNR general supervision and control to carry out the planning, management and regulatory programs necessary for prevention/reduction of water pollution and for improvement of water quality.
- Section 281.15, Wis. Stats. mandates that the department promulgate water quality standards, including water quality criteria and designated uses. It recognizes that different use categories and criteria are appropriate for different types of waterbodies, and that the department shall establish criteria which are not more stringent than reasonably necessary to assure attainment of the designated use for the water bodies in question.
- Section 281.65(4)(c) and (cd), Wis. Stats., directs the Department to prepare a list of waters impaired by nonpoint source pollution.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

Estimate: 800 hours

6. List with description of all entities that may be affected by the proposed rule:

Business/industry, municipalities, and agricultural operators:

The proposed changes are expected to have little impact on existing businesses, municipalities, or agricultural operators. Point source dischargers to a waterbody that exceeds phosphorus criteria will still be subject to discharge limits calculated under ch. NR 217, Wis. Adm. Code, regardless of whether the waterbody is listed as impaired. Waters that fall into category 5P that may be affected by the rule change will be likely candidates for development of site-specific phosphorus criteria, which may be less stringent and may therefore allow less stringent discharge limits.

Shoreline property owners and local communities:

The proposed change may benefit shoreline property owners and local communities, by more appropriately listing or not listing waters as impaired based on degradation of fish and aquatic life or recreational uses. Listing waters as impaired when they are not can have a localized impact on marketing valuation of properties, and could have a perceived effect on tourism or property values.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The proposed changes for this rulemaking package are in accordance with the following federal regulations. The federal regulations stipulate that states are required to assess waters and create an impaired waters list every two years. Further, they require states to develop water quality criteria. However, federal law does not specify processes for assessing waters or listing them as impaired, and it does not mandate or limit which criteria must be developed. This rule package would recognize the state's federal obligations and provide a general structure that the state will work within. It will also create new criteria to address the state's water quality needs.

- Sec. 303(d)(1)(A) of the Federal Water Pollution Control Act (Clean Water Act) requires states to develop an impaired waters list by stating that to identify waters that are not meeting any water quality standard.
- Sec. 305(b)(1) of the Federal Water Pollution Control Act (Clean Water Act) requires states to prepare a biennial report documenting which waterbodies are attaining their designated uses.
- 40 CFR Sec. 130.7 provides additional information related to requirements for developing the impaired waters list.
- 40 CFR Sec. 130.3, Water quality standards. This section defines water quality standards as setting water quality goals for a waterbody that will protect its designated uses (such as protection of fish, wildlife, recreation, and public health and welfare). Criteria will be set to protect those uses.
- 40 CFR Sec. 131.11 Criteria. States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

It is expected that this change will not have more than a "moderate" (Level 2) economic impact, and therefore the department recommends a 30 day comment period. The proposed rule change will allow the department to more accurately list impaired waters, listing only those waters that are actually experiencing an impairment of fish and aquatic life or recreational uses. Listing waters as impaired when they are not can have a localized impact on marketing valuation of properties, and could have a perceived effect on tourism or property values. Permittees discharging to waters that exceed the applicable phosphorus criteria will remain subject to discharge limits calculated under ch. NR 217, Wis.

Adm. Code, regardless of whether the waterbody is listed as impaired. At this point it is not expected that there will be a significant impact to small businesses.

9. Anticipated number, month and locations of public hearings:

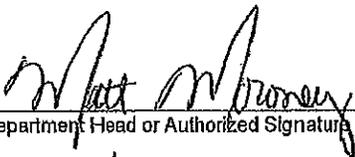
The Department anticipates holding 2 public hearings in the month of January 2015. Hearing cities will be: Madison and Wausau or Eau Claire (or other as appropriate).

The Department will hold these hearings in these locations to receive input from affected parties based in the Madison area and at a centrally located city in the state.

Contact Person:

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Department Head or Authorized Signature

6/19/13

Date Submitted



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. Box 7863
MADISON, WI 53707

December 19, 2013

Cathy Stepp
Secretary
Wisconsin Department of Natural Resources
101 South Webster St.
P.O. Box 7921
Madison, WI 53707-7921

RE: Scope Statement for WY-23-13 creating a subchapter 3 in Chapter NR 102 relating to processes for waterbody assessments and impaired waters listing, biological criteria for water quality standards, and biological confirmation of phosphorus impairments

Dear Secretary Stepp,

I hereby approve the statement of scope submitted on June 20, 2013, pursuant to Wisconsin Statutes § 227.135, in regards to a proposed rule creating subchapter 3 in Chapter NR 102 of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.135(3).

Sincerely,

Scott Walker
Governor