

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

SUBJECT:

Request that the Board approve the statement of scope for Board Order WY-25-13, and conditionally approve the public hearing notice for Board Order WY-25-13 and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse for proposed rules affecting Chapters NR 102, NR 104 and NR 105 related to surface water Designated Uses, associated water quality criteria, variance waters and qualifying factors for variances based on economic impacts.

FOR: February 2014 Board meeting

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

SUMMARY:

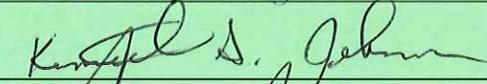
Designated Uses are a critical component of Surface Water Quality Standards. Each waterbody has certain Designated Uses assigned to it, such as Fish and Aquatic Life, Recreation, Wildlife, and Public Health. The objectives of the proposed rule modifications are to bring outdated Designated Use categories and subcategories into alignment with current scientific understanding of waterbody types and their aquatic communities, and to correspondingly adjust water quality criteria based on these Uses. These changes are needed to order to a) perform accurate and scientifically-defensible assessments of waterbody quality, b) ensure that permittees are not required to meet over- or under-protective discharge limits, and c) match appropriate water quality management tools (best management practices, etc.) with the correct uses of a water body. As part of this rule package, updates to individual waterbody uses and certain variances to those Uses will also be made as needed.

The statement of scope for this rule, WY-25-13, 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-25-13 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		2/10/14

cc: Laurie Ross - AD/8
Julia Riley - WY/3

Robin Nyffeler - LS/8

Linda Haddix - LS/8

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-25-13

Relating to: Revisions to chapters NR 102, NR 104, and NR 105, Wis. Adm. Code, relating to Surface Water Designated Uses, associated water quality criteria, variance waters and qualifying factors for variances based on economic impacts

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:

Designated Uses are a critical component of Surface Water Quality Standards. Each waterbody has certain Designated Uses assigned to it, such as Fish and Aquatic Life, Recreation, Wildlife, and Public Health. The objectives of the proposed rule modifications are to bring outdated Designated Use categories and subcategories into alignment with current scientific understanding of waterbody types and their aquatic communities, and to correspondingly adjust water quality criteria based on these Uses. These changes are needed in order to a) perform accurate and scientifically-defensible assessments of waterbody quality, b) ensure that permittees are not required to meet over- or under-protective discharge limits, and c) match appropriate water quality management tools (best management practices, etc.) with the correct uses of a waterbody. As part of this rule package, updates to individual waterbody uses and certain variances to those uses will also be made as needed.

The majority of the revisions will likely cover the Fish and Aquatic Life subcategories and their associated water quality criteria, which affect permit effluent limits. It has long been recognized that these subcategories do not scientifically or adequately reflect the variety of waterbody types statewide. Therefore, some effluent limits may be overly restrictive, whereas others may be under-protective. Until staff are allowed to begin revising this rule, uncertainty remains about which and how many effluent permits will be affected with less-restrictive or more-protective limits. For waters already receiving effluent, sufficient information usually exists for making use designations and perhaps variance determinations, so during the course of the rulemaking the number of permits affected should become clear.

WDNR is cognizant of the potential socio-economic ramifications of revising waterbody use designations and is committed to working with the permitted entities, public, and U.S. EPA through technical advisory groups, public meetings, and the review process to collaboratively resolve all challenges. The package will establish factors the Department will consider when granting either a facility-specific variance or a modification to a use designation based on the statutory standard of substantial and widespread socioeconomic impacts. Although this rule package will address the process for determining variances, changes to existing variances under ch. NR 104 are not a focus of this rule package. Other possible solutions suggested by our customers and advisory group will also be considered.

In order to streamline the process of designating uses, this code package includes a recommendation to establish new procedures for designating and updating uses for individual waterbodies. This procedure may include a dual process for updating uses, whereby some updates may be made via rulemaking while others may be made through triennial publication of a non-codified list. 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:

Modifications proposed for this rule package:

NR 102: Updating Designated Use categories to reflect current science

Wisconsin's waterbodies are classified according to Designated Uses defined in Chapter NR 102.04, Wis. Adm. Code. However, several of these use categories/subcategories have not been modified since they were first promulgated in 1973. Scientific understanding of aquatic systems has advanced significantly since that time, and supports a revision of the state's Designated Uses categorization system. WDNR proposes updating the Designated Use categories and subcategories to more accurately classify and assess the state's waterbodies.

NR 102 & 105: Updating corresponding Surface Water Quality Criteria

Surface water quality criteria, which regulate levels of substances in waterbodies, are based upon Designated Uses and protection of the uses for each waterbody type. Concurrent with updates to the uses, water quality criteria found in chs. NR 102 and 105, Wis. Adm. Code, need to be re-evaluated to ensure that human health, fish and aquatic life, and wildlife are being adequately protected, and reflect the appropriate level of protection for each specific use.

NR 102: Updating individual waterbodies' Designated Uses triennially, via rule or non-codified list

The Clean Water Act specifies that an opportunity to update Designated Uses for individual waterbodies should be made available every three years¹, though this has not been done since the 1980s. Wisconsin has 88,000 stream miles and 15,000 lakes, and the outdated code 'defaults' the vast majority of these waters to an unspecified fish and aquatic life Use. Much more is now known about these waters, and reclassifications need to be made so that our permitting programs are based on the receiving waters' actual Uses, and are not potentially over- or under-protective. A mechanism for making these updates in a periodic, timely way is needed.

To this end, WDNR proposes promulgating a new procedure for assigning specific water bodies to the updated use categories. WDNR would then use this process to periodically review new data for individual waterbodies and initiate any necessary updates to their uses. To increase efficiency, the new procedure may contain a dual process through which the majority of updates could be done through a non-codified list that is updated and published triennially, while others would proceed through the rulemaking process. During the update cycle, all updates will go through public hearing. Based on the results of the public hearing, if there are substantive issues raised and significant public concern regarding a proposed classification, it would proceed through the formal rulemaking process.

Input from permittees, the public and U.S. EPA will be part of the process for establishing the initial list and updates to the list. This approach will enable decisions to be made using the most relevant information about a waterbody, while ensuring public participation, transparency, and EPA oversight.

NR 102: Defining variance options

As a part of this effort, the Department plans to better define two types of variance options for circumstances where "substantial and widespread socioeconomic impact" or other specific factors apply (s. 283.15(4), Wis. Stats.). WDNR currently has authority under current Statute and Admin. Code to use these options; however, better definition of protocols is needed in order to implement them. Protocols and qualifying factors for these options may be included as part of the rule package if appropriate.

- Facility-specific variances: If a discharger would experience short-term "substantial and widespread socioeconomic impacts", it may be eligible for a facility-specific variance to water quality standards during one or more permit terms. As part of this rulemaking effort, WDNR plans to establish a process for industries and municipalities to demonstrate their eligibility for such variances, including a better definition of what constitutes "substantial and widespread socioeconomic impact".
- Modification of Designated Uses: In cases of longer term "substantial and widespread socioeconomic impact" that precludes a waterbody from meeting water quality standards, a designated use for a waterbody may be modified, resulting in less stringent standards applied to that waterbody. This process is also known as a "Use Attainability Analysis." WDNR plans to establish protocols for modifying a waterbody's use, and to define the level of socioeconomic impact needed to demonstrate eligibility for a modified use.

¹ It is important to note that while the Designated Uses list would be updated periodically, this does not mean that each waterbody's use would continue to change over time. On the contrary, for any specific waterbody, once the Uses are set based on field data, they are not expected to vary year to year. The update period primarily provides opportunity to evaluate field data and assign/verify Uses for waterbodies that were previously unsampled. Occasional corrections and Use modifications based on socio-economic impacts can also be made during these update periods.

NR 104: Updating historic variances to Designated Uses

Historically, certain individual waterbodies have received variances to their appropriate Designated Uses; these variances were codified in 1976, with slight modifications in the 1980s, in Chapter NR 104, Wis. Adm. Code. Because several of these historic variances may no longer be appropriate, they need re-evaluation and updates. Portions of the language in ch. NR 104 and some individual variance water listings may be updated as a part of this rule package; however, it is expected that most variances under ch. NR 104 will be updated as part of a separate, future rule package due to the workload that is expected in order to complete such analyses.

Policy alternatives

No change to Designated Use categories or Water Quality Criteria

If updates to the Designated Use categories/subcategories and their corresponding Water Quality Criteria are not made, waterbodies will continue to be assessed based on outdated and inaccurate information. Because Designated Uses are the foundation of many of WDNR's water quality programs, this leads to inaccurate assessments, inappropriate target goals for Total Maximum Daily Load analyses, and over- or under-protective discharge limits for permittees with Wisconsin Pollutant Discharge Elimination System (WPDES) permits. Inefficiencies resulting from these problems will continue if no changes are made to improve the code.

No change to allow triennial non-codified, published updates of Designated Uses

One component of this rulemaking package is the proposal to allow some Designated Uses to be updated in a non-codified publication (with public participation and EPA review) every three years, rather than updating administrative codes for all waterbodies. If this component of the process does not go forward, then WDNR staff would be required to conduct periodic rulemaking efforts for all waterbody updates in code—a process that would be extremely inefficient and require excessive staff time and public funds. Additionally, the code would have to contain over 100,000 entries for uses for individual waterbodies, which would be highly impractical.

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

Section 281.15, Wis. Stats., mandates that the Department promulgate water quality standards, including both Designated Uses and Water Quality Criteria that are based upon those uses. It recognizes that different use categories and criteria are appropriate for different types of waterbodies. This statutory authority is consistent with Federal requirements in ss. 40 CFR 131.10, 131.11, and 131.20 (see Question #7 below). Section 283.15, Wis. Stats., specifies the Department's authority to grant variances to water quality standards.

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

2400 hours for developing rule content

2200 hours for rulemaking

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

- *Business/Industry and Municipalities:* Businesses and municipalities that discharge to surface waters and hold a WPDES permit may receive modified permit limits to match the water quality criteria corresponding to the appropriate Designated Uses for their receiving water. Entities holding Federal Energy Regulatory Commission (FERC) licenses regulating stream flow may also be impacted. Municipalities that obtain drinking water from surface waters may be affected if human health criteria are modified and require minor operational adjustments to drinking water treatment systems. These entities may benefit from clarified procedures for granting facility-specific variances or modification of designated uses.
- *State Government:* The rule updates will enable WDNR staff to gain efficiencies in several internal processes, allowing state funds to be used more economically.
- *Public:* The public and shoreland property owners will benefit from more accurate waterbody assessments and management actions.

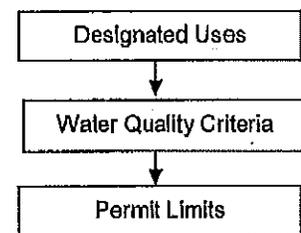
7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The proposed changes for this rulemaking package are in accordance with, but do not duplicate, the following federal regulations.

- 40 CFR 131.10 states that "Each state must specify appropriate water uses to be achieved and protected." It allows that "States may adopt sub-categories of a use and set appropriate criteria to reflect varying needs of such sub-categories of uses...". It also specifies in which cases a state must conduct a Use Attainability Analysis to change a Designated Use.
- 40 CFR 131.11 (a)(1) requires that "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."
- 40 CFR 131.20 provides requirements for state review and revision of water quality standards: "(a) The State shall from time to time, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." It also sets requirements for public participation and U.S. EPA review and approval of standards changes.

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

Estimates of the potential economic impact of this rule are difficult to derive until certain initial stages of rulemaking are completed. The Department wishes to provide ample time for review and input on this rule from the public and stakeholders. Because it is unclear at this time whether the rule will have a moderate or possibly significant economic impact, the Department recommends a 60 day public comment period for a Level 1 Economic Impact Analysis. A change in Designated Uses will likely necessitate corresponding modifications in certain water quality criteria such as biological oxygen demand (BOD), dissolved oxygen (DO), or temperature (the rule change is not expected to have much, if any, impact to criteria for toxics or phosphorus). If criteria are modified, permit limits for dischargers based on these criteria will also need to be adjusted during the following permit term.



For the majority of dischargers, it is expected that permit limits will stay the same, with no costs accrued. However, the Department recognizes that there are existing facilities that will likely be impacted by these rule changes, and these facilities may be eligible for several flexibility options that are in place or are under development. Of those dischargers affected, the Department expects most permit adjustments to be minor, such as low-cost chemical treatment, though some could involve more significant structural improvements. For affected permittees, flexibility options include:

- *Facility-specific variance:* For facilities which should be able to meet the waterbody's designated use over time, but for which permit limit adjustments are cost-prohibitive in the short-term, facility-specific variances allowable under s. 283.15, Wis. Stats. may be an option.
- *Modification of a waterbody's designated use:* If it is found that the initial designated use is incorrect or unattainable due to certain natural or socioeconomic factors, the designated use may be modified using the Use Attainability Analysis process, and the applicable criteria and permit limits would be adjusted accordingly.
- *Site-specific criteria:* In cases where there is an exceedance of the water quality criteria, but the designated uses of the receiving water are being met (i.e. the biological metrics in the receiving water are good), the waterbody may be eligible for a less-stringent site-specific criteria for specific pollutants. In cases where site-specific criteria are established, permit limits for dischargers would be modified accordingly.

The Department expects that estimates of permit limit changes will be available once the evaluation of water quality criteria has been completed as part of the rulemaking process. These estimates will be made available to the public during the solicitation period for information and advice on the economic impact of the proposed rule. There are also several cost benefits of the rule, including more accurate protection of the state's waterbodies and public health, governmental efficiencies in conducting statewide waterbody assessments and management actions, and improved water resources for the public. The Department will solicit public input on the projected economic impact, and will convene an advisory group to provide input on the proposed rule modifications.

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

The Department anticipates holding 4 public hearings in the month of September, 2015. Hearing cities will be: Eau Claire, Green Bay, Madison, and Milwaukee (or others as appropriate).

The Department will hold these hearings in these locations to receive input from affected parties around the state. It is expected there will be broad interest in this rule package.

Contact Person:

Kristi Minahan
Water Quality Standards Specialist
Bureau of Water Quality
Wisconsin Department of Natural Resources

608-266-7055
kristi.minahan@wisconsin.gov



Department Head or Authorized Signature

11/14/13

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: Revised Scope Statement for WY-25-13 modifying Chapters NR 102, 104, and 105 relating to surface water designated uses, associated water quality criteria, variance waters and qualifying factors for variances based on economic impacts

Dear Secretary Stepp,

I hereby approve the statement of scope submitted on November 18, 2013, pursuant to Wisconsin Statutes § 227.135, in regards to a proposed rule modifying Chapters NR 102, 104, and 105 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,

A handwritten signature in black ink, appearing to be "S. Walker", written over a faint, larger outline of the signature.

Scott Walker
Governor