

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

SUBJECT:

Request that the Board adopt WT-31-10, proposed rules affecting Chapter NR 106, Wis. Adm. Code, related to the calculation of water quality based effluent limitations for the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program regulating wastewater discharges.

FOR: January 2016 Board meeting

PRESENTER'S NAME AND TITLE: Adrian Stocks, Permits Section Chief

SUMMARY:

The proposed rule revisions relate directly to the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program that regulates wastewater discharges. In a letter dated July 18, 2011, the U.S. Environmental Protection Agency (EPA) identified 75 potential issues with Wisconsin's statutory and regulatory authority for the WPDES permit program.

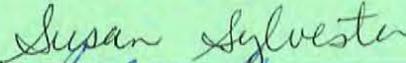
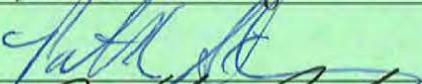
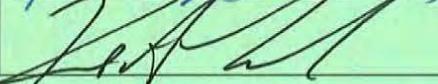
This rule package (referred to as Rule Package #3) seeks to address 4 of the issues identified by EPA relating to: (1) phasing out mixing zones for bioaccumulative chemicals of concern (BCCs) in the Great Lakes System; (2) regulation of pollutant discharges when a pollutant is present in intake water; (3) removal of an exemption for non-contact cooling waters without additives; and (4) modification of the reasonable potential determination for discharges containing mercury. The existing rule relating to mercury reasonable potential determinations, s. NR 106.145(2), Wis. Adm. Code, was invalidated in MEDC v. WDNR, Case No. 12-CV-3654, as inconsistent with federal law. The existing exemption in s. NR 106.10 for noncontact cooling water containing certain additives was invalidated in MEDC v. WDNR, Case No. 12-CV-0569, as inconsistent with federal law. The proposed rule changes address the inconsistencies cited by EPA and by the circuit court orders and will ensure state regulations are consistent with federal regulations.

The statement of scope for this rule, WT-31-10, was approved by the Secretary on May 10, 2010, and published in Register 662 on February 28, 2011. From April 21, 2014 to May 21, 2014, the department solicited comments on the economic impact analysis. Portions of the proposed rule changes are expected to have no economic impact because EPA overpromulgated ss. NR 106.06 and 106.10, Wis. Adm. Code, in 2000 and EPA disapproved certain aspects of s. NR 106.145(1)(b), Wis. Adm. Code, in 2009. Facilities that may be impacted by the proposed rules include facilities with non-contact cooling water outfalls or certain substances present in their intake water. However, the department is currently required to use the procedures in the federal law when developing water quality based effluent limits and, as a result, many facilities have already had permits reissued in compliance with the federal law. The department held a public hearing on December 7, 2015 and the formal comment period concluded December 18, 2015.

RECOMMENDATION: That the Board adopt WT-31-10.

LIST OF ATTACHED MATERIALS (check all that are applicable):

- | | |
|---|---|
| <input checked="" type="checkbox"/> background memo | <input type="checkbox"/> Attachments to background memo |
| <input checked="" type="checkbox"/> Fiscal estimate and economic impact analysis (EIA) form | <input type="checkbox"/> Environmental assessment or impact statement |
| <input checked="" type="checkbox"/> Response summary | <input checked="" type="checkbox"/> Board order/rule |

Approved by	Signature	Date
Susan Sylvester, Bureau Director		1/7/16
Patrick Stevens, Environmental Management Division		1/7/16
Cathy Stepp, Secretary		1/8/16

cc: Board Liaison - AD/8

Program attorney - LS/8

Department rule coordinator - LS/8

CORRESPONDENCE/MEMORANDUM

DATE: December 15, 2015

TO: All Members of the Natural Resources Board

FROM: Cathy Stepp, Secretary

SUBJECT: Background memo on Board Order WT-31-10, Rule Package 3 relating the calculation of water quality based effluent limitations for the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program regulating wastewater discharges.

1. Subject of Proposed Rule:

Chapter NR 106, Wis. Adm. Code, which contains the procedures for calculating water quality based effluent limitations under the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program.

The proposed rule addresses inconsistencies with federal regulations. Specifically, the proposed rule addresses 4 of the 75 issues the United States Environmental Protection Agency (EPA) has identified relating to the WPDES permit program.

2. Background:

Rule Package 3 contains revisions to create, repeal, and amend parts of ch. NR 106, Wis. Adm. Code. This code relates to the calculation of water quality based effluent limitations for the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program regulating wastewater discharges.

3. Why is the rule being proposed?

The purpose of the proposed rule changes is to be consistent with federal requirements for calculating and implementing water quality based effluent limitations (WQBELs) for point source discharges. In 2000, the EPA identified several areas where existing ch. NR 106, Wis. Adm. Code, is inconsistent with the federal Great Lakes Water Quality Initiative. EPA overpromulgated certain ch. NR 106 provisions and required Wisconsin to follow federal procedures. Since 2000, the department has been required to follow the federal procedures as specified in 40 CFR 132.6. In 2009, EPA disapproved of another portion of ch. NR 106, Wis. Adm. Code, as inconsistent with federal requirements. On July 18, 2011, the department received a letter from the EPA identifying 75 issues and potential inconsistencies with Wisconsin's authority to administer its approved Wisconsin Pollutant Discharge Elimination System (WPDES) permit program. EPA directed the department to either make rule changes to address these inconsistencies or address these issues through other avenues. Modifications to ch. NR 106, Wis. Adm. Code, are necessary to address several issues identified in the EPA letter (issues 8, 10, 17, and 71). These modifications also address circuit court rulings, issued in 2012 and in 2014, in which several portions of ch. NR 106 were declared invalid as inconsistent with federal law.

4. Summary of the rule:

This rule package (referred to as Rule Package #3) seeks to address 4 of the 75 EPA issues. These issues relate to the phase out of mixing zone allowances for dischargers of bioaccumulative chemicals of concern (BCC) in the Great Lakes system, regulation of pollutant discharge when a pollutant is

present in intake water, removal of an exemption from water quality based effluent limitations for noncontact cooling water additives, and reasonable potential determinations for mercury.

The proposed rule revisions: (1) modify the procedure used statewide for determining mixing zones for BCCs to comply with the procedures in the Great Lakes Initiative; (2) change the procedures for determination of intake credits included in WPDES permits with procedures specific to dischargers within the Great Lakes Basin and outside the Great Lakes Basin; (3) remove the categorical exemption from imposing water quality based effluent limitations for uncontaminated storm water runoff and noncontact cooling waters without additives; and (4) modify the acceptable procedure used for determining when mercury limitations are required in WPDES permits. The proposed rule includes other modifications required to implement these procedural changes such as adding the definition of “same waterbody”, “Great Lakes” and “Great Lakes system”.

The noncontact cooling water exemption section being amended was invalidated in Case No. 12-CV-0569, Midwest Environmental Defense Center Inc. v. DNR. The current s. NR 106.10, Wis. Adm. Code, includes a note referencing this case. The mercury reasonable potential section being amended was invalidated in Case No. 12-CV-3654, Midwest Environmental Defense Center, Inc. v. DNR. The current s. NR 106.145, Wis. Adm. Code, includes a note referencing this case. These proposed revisions would make the rules consistent with the court decisions as well as federal regulations.

5. How does this proposal affect existing policy?

The proposed revisions align the WPDES permitting program with federal regulations and guidelines promulgated pursuant to the Clean Water Act and the federal Great Lakes Initiative. Removing the exemption from water quality based effluent limitations on noncontact cooling water additives is not a change in existing policy. The department stopped applying the exemption when the courts invalidated the rule, EPA objected to WPDES permits that followed the exemption and EPA overpromulgated the exemption in the November 6, 2000 federal register (40 CFR 132.6). The department also has been complying with the mixing zone phase out requirements in the federal Great Lakes Initiative.

6. Has Board dealt with these issues before?

Yes. At the March 12, 2010 Board meeting the Board was requested to approve the scope statement for WT-31-10. At the January 25, 2012, Board meeting an informational update was given on the department’s response to EPA’s letter of July 18, 2011, which identified 75 potential inconsistencies in Wisconsin’s legal authority to administer the WPDES permit program. The department responded to EPA with a proposal to address the inconsistencies in a letter October 14, 2011. A meeting was held with EPA December 15, 2011, in which EPA requested a more detailed schedule to reconcile the inconsistencies. At the October 28, 2015 Board meeting the Board was requested to approve the department to hold a public hearing on the proposed rule. Other rule packages to address the 75 issues are at different stages in the rule making process.

7. Who will be impacted by the proposed rule? How?

Businesses and municipalities that are authorized to discharge effluent to a surface water of the State in a WPDES permit will likely be impacted by this rule. A small number of permittees may receive new or more restrictive water quality based effluent limitations derived from the changes to the intake credit procedures and noncontact cooling water reasonable potential assessments.

Although these limitations may be more restrictive for some permittees, the department does not believe that many permittees will incur additional costs associated with this proposed rule package.

The department is currently required to use the procedures in the federal law when developing water quality based effluent limits and, as a result, many of the facilities impacted by these changes have already had permits reissued in compliance with the federal law.

8. Soliciting public input on economic impact synopsis:

The department's determination is that the proposed Rule Package 3 will have a minimal economic impact (less than \$50,000 per year). The requirements of this rule package are currently being used by the department when developing water quality based effluent limits and, as a result, many of the facilities impacted have already had permits reissued in compliance with the federal law. The department solicited comments on the economic impact analysis from April 21, 2014 to May 21, 2014. The department received two comments.

9. Environmental Analysis:

Pursuant to s. NR 150.20(2)(a)23., Wis. Adm. Code, permanent rules are equivalent analysis actions. An environmental analysis and public disclosure is conducted as part of the permanent rulemaking process.

10. Small Business Analysis:

The department is currently required to use the procedures in the federal law when developing water quality based effluent limits. The proposed rules are consistent with and no more restrictive than federal law. As a result, many of the facilities impacted by these proposed rule changes have already had permits reissued in compliance with the proposed rules. While some small businesses with noncontact cooling water outfalls or certain substances present in their intake water may have economic impacts from changes required to meet WPDES permit limits, these impacts will be no greater than those that would be required to comply with the federal law.

11. Public Hearing and Comments Received:

The notice for public hearing was dated November 10, 2015. A public hearing was held on December 7, 2015 in Madison, Wisconsin. Two members of the public attended, none gave oral comments. Written comments were received from Wisconsin Manufacturers & Commerce (WMC) during the comment period that concluded on December 18, 2015. The Wisconsin Legislative Council Rules Clearing House provided comments on December 4, 2015. EPA also commented on the proposed rule changes. Refer to attached document entitled "Response to Comments on Rule Package 3" for a summary of the comments received and the department's response.

Response to Comments on Rule Package 3
Revisions to ch. NR 106, Wis. Adm. Code
Board Order WT-31-10

Overview

The Natural Resources Board authorized a public hearing on the proposed revisions to ch. NR 106, at the October 2015 meeting. A public hearing was held in Madison, Wisconsin on December 7, 2015. The public comment period ended December 18, 2015.

At the hearing on December 7, 2015, two people attended other than DNR staff persons who were present to conduct the hearing and to answer any questions that might be presented. No oral comments were received.

During the public comment period, written comments were submitted by EPA and by Wisconsin Manufacturers & Commerce (WMC). In addition, on December 4, 2015, the Legislative Council Rules Clearinghouse reported to the Department on its review of this proposed rule.

Comments and Responses

Included below are the comments submitted and the Department's responses.

Wisconsin Legislative Council Rules Clearinghouse comments (15-084): All Clearinghouse comments were related to style, rule referencing or language clarity and were incorporated into the rule language as suggested, with six exceptions. The department made other minor nonsubstantive changes related to style, rule referencing or language clarity.

The Department did not incorporate the following Clearinghouse comments:

2a. Comment 2a. in the *Form, Style and Placement in Administrative Code* section recommended considering moving the criterion in NR 106.06 (2) (br) 3. d. to a separate subdivision.

Response: The decision was made to change the provisions in NR 106.06 (2) (br) 3. d. by creating two separate provisions now listed as NR 106.06 (2) (br) 3. d. and NR 106.06 (2) (br) 3. e. The department may determine additional monitoring and/or an evaluation for alternative means of reducing the bioaccumulative chemical of concern (BCC) from other sources is required when approving a mixing zone under NR 106.06 (2) (br). These requirements would be requirements of the approval and therefore the decision was made to retain the location of these provisions at NR 106.06 (2) (br) (3).

2d. Comment 2d. in the *Form, Style and Placement in Administrative Code* section recommended providing a specific deadline for submission of comments on the proposed rule.

Response: The Notice of Public Hearing published on November 10, 2015 provides December 18, 2015 as the deadline for submission of comments.

4. Comment 4 in the *Adequacy of References to Related Statutes, Rules and Forms* section recommended consideration of referencing terms in s. 281.346, Stats., rather than creating new terms to reference waters within the Great Lakes basin.

Response: The decision was made to retain the definition for “Great Lakes system” in the proposed order. The definitions for Great Lakes basin and Great Lakes basin ecosystem found in s. 281.346, Stats., are not directly applicable. The department decided to add a definition of “Great Lakes” to address this comment. In addition, the department changed the definition of “Great Lakes system” to conform to requirements in the Administrative Rules Procedure Manual. The proposed definitions in the Board Order for this rule are consistent with the federal Great Lakes Initiative (GLI) and federal Clean Water Act requirements.

5b. Comment 5b. in the *Clarity, Grammar, Punctuation and Use of Plain Language* section recommended use of an active format style which, though described in the Administrative Rules Procedure Manual, is not consistent with the other, unrevised sections of NR 106.

Response: The decision was made to retain the existing format style rather than introduce the new, recommended one in order to minimize any confusion or misunderstanding that might be caused by mixing format styles.

5c. Comment 5c. in the *Clarity, Grammar, Punctuation and Use of Plain Language* section suggested a change to the definition of “same waterbody” to remove “two” and change the term “points” to waterbodies.

Response: The decision was made to change the term “points” to waters of the State to align more closely with definition of same waterbody from the federal code. The department removed the limitation of two points from the definition, as suggested.

5h. Comment 5h. in the *Clarity, Grammar, Punctuation and Use of Plain Language* section indicated the provisions in NR 106.06 (2) (br) 3. b., c., e., f., and also in NR 106.06 (2) (c) 2, should use active verbs such as “contains” instead of “shall contain.”

Response: The decision was made to retain the existing format style rather than introduce the new, recommended one in order to minimize any confusion or misunderstanding that might be caused by mixing format styles.

Public Comments:

Wisconsin Manufacturers & Commerce (WMC) submitted written comments on the adequacy of the scope statement and the adequacy of the department’s review of the approaches used by neighboring states. The department responds to these comments below.

- 1) WMC asserts that the proposed changes to NR 106.10 regarding the regulation of pollutants discharged in noncontact cooling water represent a meaningful and measureable change from the proposed rules described in the scope statement that was issued in 2010 for the proposed rules. According to WMC, the proposed rule changes should be limited to the elimination of the “chlorine exemption” for additives in the current rule.

Response: The department has reviewed the scope statement for WT-31-10 and believes the proposed rule changes fall within the scope identified in 2010 when the scope statement was approved. The changes to NR 106.10 in WT-31-10 for noncontact cooling water discharges are proposed in order to comply with federal law, specifically the Clean

Water Act regulations at 40 C.F.R. 122.44. These federal regulations require a water quality based effluent limit for *all* pollutants which cause or have the reasonable potential to cause or contribute to an excursion above any state water quality standard. The proposed changes to NR 106.10 set forth procedures for determining water quality based effluent limits for toxic and organoleptic substances in noncontact cooling water discharges in a manner that is consistent with federal law.

The proposed revisions are within the scope statement for WT-31-10, because the scope statement describes the objective of the proposed rules as follows: “To revise ch. 106 *so it is consistent with federal regulations* and other updates to the rules used by the Bureau of Watershed Management.” (emphasis added). With regard to the proposed changes relating to noncontact cooling water discharges, the scope statement does identify removal of the exemption in s. NR 106.10 for cooling water containing chlorine or chemical additives present at levels consistent with those in public water supplies. However, the scope statement also goes on to refer specifically to the November 6, 2000 Federal Register, “which describes deficiencies of Wisconsin’s Permit Program for compliance with the Great Lakes Water Quality Initiative (GLI).”

In the November 6, 2000 Federal Register, EPA declared invalid both NR 106.06(06) and NR 106.10(1) as inconsistent with federal regulations regarding reasonable potential determinations. EPA did not limit its objection to the exemption for chlorine or chemical additives present at levels consistent with those in public water supplies. Instead, EPA said that “Wisconsin’s rules do not contain any of the limitations set forth in the Guidance . . . which ensure that *all potential environmental effects are considered in regulating the discharge of intake pollutants.*” (Emphasis added).

EPA further stated:

“Nothing in the Guidance allows for a categorical exclusion for non-contact cooling water discharges (*with or without additives*) from the need for evaluating whether WQBELs are needed to ensure compliance with water quality standards. A major premise of the provisions in the Guidance pertaining to determining reasonable potential in paragraphs A-C of procedure 5, as well as the intake pollutants addressed by paragraphs D and E, is that decisions on the need for, and calculation of, WQBELs must occur on a case by case basis. . . to make a reliable determination that limitations are being imposed that are needed to meet water quality standards.”

EPA’s November 6, 2000 Federal Register disapproval mandated that Wisconsin follow the reasonable potential procedures for all pollutants, subject to the intake pollutant procedures contained in federal law. The July 18, 2011 EPA letter and the March 12, 2012 Stipulation and Order in *MEDC v. WDNR* identify the same problem with Wisconsin regulations that caused EPA to disapprove Wisconsin’s regulations in 2000. The proposed rules in WT-31-10 adopt provisions that are consistent with federal requirements for non-contact cooling water discharges and are therefore within the scope statement’s objectives: to revise ch. 106 “*so it is consistent with federal regulations*” and to address deficiencies identified by EPA in the November 6, 2000 Federal Register.

- 2) WMC asserts that the comparison with approaches used by neighboring States (Illinois, Iowa, Michigan, and Minnesota) included in the Fiscal Estimate & Economic Impact Analysis does not provide sufficient detail.

Response: The department documented in the Fiscal Estimate & Economic Impact Analysis (EIA) that the requirements in this rule are consistent with federal code and the GLI. The proposed rules are consistent with and no more restrictive than federal law, as described more fully below.

All of the neighboring states (Illinois, Iowa, Michigan, and Minnesota) are subject to the federal Clean Water Act and EPA regulations. Like Wisconsin, the states of Illinois, Michigan, and Minnesota are subject to the GLI requirements for those portions of the state that are within the Great Lakes system (defined in 40 CFR 132.2 as “all the streams, rivers, lakes, and other bodies of water within the drainage system of the Great Lakes within the United States”). Because Iowa is not within the Great Lakes system, the GLI requirements do not apply to the Iowa implementation program. Nonetheless, as indicated more fully below in response to this comment, the approaches in Illinois, Iowa, Michigan and Minnesota are all very similar to the proposed rule on the four key issues addressed in the proposed rule revision.

BCC Mixing Zone Phase-outs (NR 106.06(2))

The federal regulations on the phase out of mixing zones for BCCs are found in 40 CFR Part 132, Appendix F, Procedure 3, paragraph C. The provisions of the proposed rule are applicable only to dischargers to the Great Lakes system, as required by federal law.. Illinois, Michigan and Minnesota have implemented the provisions in 40 CFR 132 in relation to BCC mixing zone phase outs. Illinois regulations in Part 352 explicitly adopt the GLI procedures. Michigan regulation R 323.1082 adopts the GLI procedures for BCC mixing zones. In Minnesota, Minn. R. 7052.0210, Subpart 3 contains the provisions of the GLI on BCC mixing zones. Wisconsin’s proposed rule is consistent with the federal law and the procedures that have been implemented in neighboring GLI states.

Iowa is not a Great Lakes state and therefore is not required to implement the provisions of the GLI. However, Iowa Water Quality Standards are found in IAC 567 Chapter 61 and the code includes a specific provision that limits mixing zones for BCCs. Iowa guidance indicates that mixing zones would not be appropriate for bioaccumulating pollutants, such as Mercury, Chlordane, PCB and Dieldrin.

Pollutants in Intake Water (NR 106.06(6))

The federal regulations on effluent limitations based upon elevated background concentrations, commonly referred to as intake credits, are found in 40 CFR Part 132, Appendix F, Procedure 5, paragraph D and E. The provisions of the proposed order for discharges to the Great Lakes system are consistent with these federal GLI provisions. The provisions of the proposed order applicable outside the Great Lakes system have been reviewed by EPA for consistency with federal requirements for reasonable potential determinations in 40 CFR 122.44(d)(1)(i) (see EPA comments below). The proposed rule provisions for outside the Great Lakes system have been modified in response to EPA comments so that they are consistent with, and no more restrictive than federal law.

Neighboring states have procedures that are similar to the proposed rule. Illinois provides procedures for calculating discharge limitations in Section 309.142 of Subpart A, Water Quality Standards and Waste Load Allocation. The provisions do not explicitly provide for alternative waste load allocations when background concentrations are elevated; rather the procedures state that effluent limitations must control all pollutant parameters which may contribute to an excursion above water quality standards.

Michigan regulation Part 8 Water Quality-Based Effluent Limit Development for Toxic Substances adopts in R 323.1209 the federal language in the GLI. This section includes a Note explicitly referencing 40 CFR Part 132.

Minnesota differentiates naturally occurring sources from anthropogenic sources of elevated background concentrations. The provisions in Methodology for the Development of Water Quality-Based Effluent Limitations for Toxic Substances in Minn. R. Chapter 7053 indicate that when the background concentration is due to natural sources, limitations are in effect the background concentration. When the source is anthropogenic Minnesota procedures indicate that discharges are limited to the water quality criteria or the TMDL for that substance. These provisions are similar to those in the proposed rule.

Iowa is not a GLI state. Iowa regulations are similar to the proposed rule requirements for discharges outside the Great Lakes system. Iowa has numerical water quality standards for toxics (metals and other parameters) for 89 priority pollutants. Background concentrations of these 89 pollutants in Iowa surface waters have to be established. Calculation of waste load allocations (WLA) is done statistically including these background levels and the applicable water quality criterion, among other things. Rule 61.2(4) of the Water Quality Standards of the Iowa regulations requires water quality criteria to be met.

Noncontact Cooling Water Exemption (NR 106.10(1) & (2))

The federal regulations on toxic and organoleptic substances present in noncontact cooling water are found in 40 CFR Part 132, Appendix F, Procedure 5 and 40 CFR 122.44(d)(1)(i). The proposed rule repeals the exemption for stormwater and for dischargers of noncontact cooling water without additives that is in the current NR 106.10. These exemptions were unique to Wisconsin and do not appear in any other neighboring states.

The NPDES permits regulations for Illinois are found in Section 309 NPDES Permits. This section contains specific requirements for publicly owned treatment works but does not include any exemptions for discharge of noncontact cooling water. A review of the regulations posted on the Michigan Department of Environmental Quality webpage indicates that Michigan does not have unique provisions regarding noncontact cooling water additives.

The Minnesota Methodology for the Development of Water Quality-Based Effluent Limitations for Toxic Substances in Chapter 7052 for NPDES permits in the Lake Superior basin does not contain provisions for exemptions for noncontact cooling water additives.

Iowa calculates a total residual chlorine (TRC) effluent limit for facilities that discharge to specific waterways. They have two approaches including a TRC decay equation and an assumed TRC loss of 300 µg/L in a zone of dilution or mixing zone for designated streams.

Mercury reasonable potential determination (NR 106.145(1) & (2))

The federal regulations on mercury regulation and the determination of effluent limitations are found in 40 CFR Part 132, Appendix F, Procedure 5, and 40 CFR 122.44(d)(1). The proposed rule removes outdated language from NR 106.145 that is no

longer applicable because testing procedures for mercury have become readily accessible. The documents reviewed for Illinois, Michigan, Minnesota, and Iowa contained similar language or did not differentiate the procedure for determining effluent limitations for mercury from other toxic substances. The proposed rule changes for NR 106.145 would make Wisconsin's program consistent with EPA regulations and with the programs in other neighboring states.

Illinois regulations reviewed did not contain unique requirements for data sets or lab procedures for mercury. Section 309.142 and 309.143 provide the procedures for WLAs and determination of effluent limits.

Michigan issued a Policy and Procedure document WRD-004 in 2011 provides procedures for calculating the level currently achievable with any number of sample points.

In Minnesota the Methodology for the Development of Water Quality-Based Effluent Limitations for Toxic Substances in Chapters 7052 (discharges in the Lake Superior basin) and 7053 (discharges to all waters of the State) indicate that effluent limitations are set for mercury using the same procedures as other substances. Appendix J of the guidance provides the WLAs for dissolved metals. These procedures include detailed instructions for bioaccumulative substances (such as mercury). These procedures include reference to the EPA guidance on this matter.

The Iowa regulations reviewed including the WQ Standards Implementation document do not contain unique provisions for determination of WLA for mercury or for alternative sampling protocols.

U.S. EPA Comments:

US EPA provided comments by letter dated December 18, 2015 and in emails received December 23, 2015. The department has made some changes to the proposed rule in response to EPA comments.

On December 18, EPA made the following two comments:

- 1) S. NR 106.145 (2), Wis. Adm. Code appears to require a minimum data set of 12 data points over 24 months before a determination of reasonable potential can be made for mercury. This is inconsistent with 40 CFR 122.44(d)(1).

Response: The department discussed this comment with EPA documenting that Section 9 of the board order repeals s. NR 106.145 (2) (b) 2, Wis. Adm. Code. The department amended the rule package to also repeal the Note located at s. NR 106.145 (2), Wis. Adm. Code. EPA has provided written confirmation that the repeal in Section 9 resolves their concern with consistency with federal law.

- 2) The Rule appears to lack TMDL implementation language consistent with 40 CFR 132.

Response: The department discussed this comment with EPA and provided additional clarification that Rule package 4 includes TMDL procedures, specifically in proposed changes to NR 212 subchapter III (section 89 of Board Order WT-11-12). The changes in Rule package 4 seek to address key implementation concerns as well as EPA's disapproval of the TMDL program within the Great Lakes Basin. Proposed NR section 212.76 contains overall TMDL implementation procedures, and the mixing zone provisions are specifically contained in proposed s. 212.76(3).. Rule package 3 includes a specific mention to TMDLs that can be found at s. NR 106.06 (2) (br) 3. b., Wis. Adm. Code in regards to BCCs in the Great Lakes system. EPA has provided written confirmation that the provisions of s. NR 106.06 (2) (br) 3. b., Wis. Adm. Code are consistent with federal law and that TMDL implementation procedures are included in Rule package 4.

On December 23, 2015, EPA provided the following additional comments seeking additional clarification:

- 1) The language currently included in WT-31-10 draft rule, section 4, NR 106.06(6)(c)(2) is inconsistent with the water quality based NPDES permitting requirements of the CWA and federal regulations.

Response: EPA indicated that the proposed rule language did not comply with 40 C.F.R. 122.44(d)(1)(vii) requiring WQBELs for all pollutants which cause or have the reasonable potential to cause or contribute to an excursion above any state water quality standard. The department added the proposed provisions to meet the conditions in s. NR 106.06(6)(b) 3. to 5. to s. NR 106.06(6)(c)(2), Wis. Adm. Code. This addition changes the limitations required for permittees outside the Great Lakes system that discharge to the same waterbody as their source water. EPA has provided written confirmation that the additional provisions resolve their concern with consistency with federal law.

- 2) EPA sought clarification on whether the provisions included in WT-31-10, Section 2, NR.106.06(2), including those relating to expanded existing discharges, are consistent with federal program requirements.

Response: The department discussed comments regarding this section with EPA. In response to these comments the department modified the definition of expanded discharge for style and language clarity. EPA provided written confirmation that concerns have been addressed and EPA is in agreement with the proposed language.

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

1. Type of Estimate and Analysis

Original Updated Corrected

2. Administrative Rule Chapter, Title and Number

NR 106.06 (2), 106.06 (6), 106.10 and 106.145

3. Subject

WT - 31-10

4. Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

5. Chapter 20, Stats. Appropriations Affected

None.

6. Fiscal Effect of Implementing the Rule

No Fiscal Effect Increase Existing Revenues Increase Costs
 Indeterminate Decrease Existing Revenues Could Absorb Within Agency's Budget
 Decrease Cost

7. The Rule Will Impact the Following (Check All That Apply)

State's Economy Specific Businesses/Sectors
 Local Government Units Public Utility Rate Payers
 Small Businesses (if checked, complete Attachment A)

8. Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes No

9. Policy Problem Addressed by the Rule

The purpose of these rule additions and amendments is to make sections of NR 106, which deal with the procedures for calculating water quality based effluent limitations for point source discharges in the Wisconsin Pollutant Discharge Elimination System (WPDES) Permit program, consistent with federal regulations. In 2000, US EPA declared portions of NR 106 invalid and overpromulgated sections of NR 106, requiring the department to apply federal law. In 2009, EPA objected to the mercury reasonable potential section of NR 106 as inconsistent with federal requirements. In a letter dated July 18, 2011, U.S. Environmental Protection Agency (EPA) identified 75 potential issues with Wisconsin's statutory and regulatory authority for the WPDES permit program. EPA directed the department to either make rule changes to address these inconsistencies or obtain a statement from the Attorney General's Office verifying that the existing rules are consistent with federal regulations. The department believes adoption of these rule changes (referred to as Rule Package 3) will address EPA's concerns identified in 2000 and 2009, and in four of the 75 issues.

10. Summary of the businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule that were contacted for comments.

Businesses and municipalities that are authorized to discharge effluent to a surface water of the State in a WPDES permit will likely be impacted by this rule. The potentially impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. Some of these facilities do not currently have treatment processes and may require upgrades or modifications to the facility to meet effluent limitations. Small businesses without treatment processes would be more likely to have economic impacts from changes required to meet WPDES permit limits. The potentially impacted industries also include power plants and industries, especially those that discharge to Lake Michigan.

11. Identify the local governmental units that participated in the development of this EIA.

None

12. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

Businesses and municipalities that are authorized to discharge effluent to a surface water of the State in a WPDES permit will likely be impacted by this rule. It is possible a small number of permittees may receive new or more restrictive

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

water quality based effluent limitations derived from the changes to the intake credit procedures and noncontact cooling water reasonable potential assessments. However, many permittees have already received WPDES permits based upon federal requirements, which DNR has been required to apply since EPA overpromulgated portions of NR 106 in 2000 and declared other portions of NR 106 invalid in 2009. The department believes the proposed rules are no more restrictive than the federal rules which the department is currently applying. The department is currently required to use the procedures in the federal law when developing water quality based effluent limits and, as a result, many of the facilities impacted by these changes have already had permits reissued in compliance with the federal law. There are approximately 451 general permittees that may be impacted upon reissuance of the statewide Noncontact Cooling Water General Permit. There are 177 total permittees with specific permits with chlorine limits and approximately 25% of these permittees are industrial permit holders. There are an additional 17 permittees with specific permits with total residual chlorine monitoring. The department believes that less than half of these permittees will receive new or increased limits in the next reissued permit.

13. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

On July 18, 2011, the department received a letter from EPA identifying seventy five issues or potential inconsistencies with Wisconsin's authority to administer its National Pollutant Discharge Elimination System (NPDES) approved permit program. These proposed rule revisions address some of EPA's issues regarding Chapter NR 106. Implementing the proposed rule revisions will ensure that the State's regulations are consistent with and in compliance with federal regulations.

14. Long Range Implications of Implementing the Rule

Implementing the Administrative Rule revisions as proposed will align Wisconsin's WPDES regulations with federal regulations.

15. Compare With Approaches Being Used by Federal Government

In a November 6, 2000 Federal Register Notice, EPA objected to provisions in ss. NR 106.06(2), 106.06(6) and 106.06(10) as inconsistent with the federal Water Quality Guidance for the Great Lakes System required by section 118(c) of the Clean Water Act, 33 U.S.C. 1268(c). See Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission from the State of Wisconsin, and Final Rule, 60 Fed. Reg. 66502 to 66511 (November 6, 2000). Section 118(c) requires all Great Lakes states, including Wisconsin, to adopt procedures consistent with the federal guidance. In a February 17, 2009 letter, EPA objected to the department's mercury reasonable potential rule as inconsistent with federal requirements.

Implementing the Administrative Rule revisions as proposed will align Wisconsin's WPDES regulations with federal regulations. The department believes the proposed rules are no more restrictive than the federal rules which the department is currently applying.

16. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

All of the other EPA Region 5 states and/or adjacent states (Illinois, Indiana, Iowa, Michigan, Minnesota and Ohio) are subject to EPA regulations implementing the Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) Program. All other states bordering the Great Lakes system (Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Pennsylvania), are subject to the GLI. See 40 CFR Part 132 (setting forth requirements that Great Lakes States must adopt). The proposed rules will align Wisconsin's WPDES regulations with federal regulations.

<h3>17. Contact Name</h3>	<h3>18. Contact Phone Number</h3>
Jennifer Jerich, Wastewater Specialist	(920) 387-7886

This document can be made available in alternate formats to individuals with disabilities upon request.

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

ATTACHMENT A

1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

The potential impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. Some of these facilities do not currently have treatment processes and may require upgrades or modifications to the facility to meet effluent limitations. Small businesses without treatment processes would be more likely to have economic impacts from changes required to meet WPDES permit limits. The potentially impacted industries also include power plants and industries, especially those that discharge to Lake Michigan. Impacts to these facilities by this rule are influenced by over promulgation and/or circuit court decisions that require the department to currently use these procedures in determining water quality eased effluent limits. The department believes the proposed rules are no more restrictive than the federal rules which the department is currently applying.

In response to comments received, the department analyzed the number of facilities that may be received new total residual chlorine limits. Statewide there are approximately 451 Noncontact Cooling Water General permittees that may receive new or increased more restrictive limits when the statewide Noncontact General Permit is reissued. There are approximately 177 permittees with specific permits already containing total residual chlorine limits. There are an additional 17 permittees with specific permits that currently only have monitoring of total residual chlorine. Of these permittees, less than half are likely to get new or more restrictive limits in the next permit reissuance. Costs for these facilities may vary widely. In recently resuissed permits with new total residual chlorine limits, permittees have chosen a wide range of methods to meet new limits. If a facility must dechlorinate, costs will include feasibility analysis, design and install costs, and ongoing operations costs. The equipment and installation cost may range from \$15,000-40,000 and annual chemical costs of \$3,000-4,000 depending on chlorination level and flow of the facility. These costs are likely to be greatest for facilities that do not have the building space to accomidate dechlorination equipment. A permittee may request a variance from water quality standards if the permittee can show that the standard, as applied to the permittee, will cause substantial and widespread adverse social and economic impacts in the area where the permittee is located.

The changes to s. NR 106.10, Wis. Adm. Code will not require new or more restrictive total phosphorus limits. Phosphorus regulations in ch. NR217, see especially in s. NR 217.10(2), Wis. Adm. Code, govern phosphorus discharges. The substances required to be monitored at the time of permit application and the reasonable potential procedures are unchanged under the proposed order.

The rule package may impact permittees discharging to the Great Lakes system where the intake water is above background concentration. Facilities that discharge to the Great Lakes have been identified as potentially impacted by these changes, especially power plants. Water Quality Based Effluent limits (WQBELs) for expired permits or permits due for permit reissuance are being written following the procedures in federal code. These WQBEL memos include options for meeting new limits, including the provisions under paragraph D of procedure 5 in appendix F to 40 CFR part 132, "Consideration of Intake Pollutants in Determining Reasonable Potential." The proposed rule will be consistent with the department's current practice in setting limits. Additionally, a permittee may request a variance from water quality standards.

2. Summary of the data sources used to measure the Rule's impact on Small Businesses

DNR's System for Wastewater Applications, Monitoring and Permits (SWAMP) was used to compile existing WPDES permit holders with non-contact cooling water discharge outfalls. These data were used to determine which facilities may have impact from this rule. Many of the provisions of the proposed rule revisions are already implemented by the department when setting water quality based limits as required by EPA under federal law. As mentioned above, many of the facilities impacted by these changes have already had permits reissued in compliance with the federal law except for

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

noncontact cooling water general permit holders. These permittees are more likely to be small businesses and may be impacted when this general permit is reissued.

3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
 - Less Stringent Schedules or Deadlines for Compliance or Reporting
 - Consolidation or Simplification of Reporting Requirements
 - Establishment of performance standards in lieu of Design or Operational Standards
 - Exemption of Small Businesses from some or all requirements
 - Other, describe:
-

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

This rule does not specify monitoring frequency or compliance schedule timelines to allow for case by case assessment to ensure adequate environmental protection and reasonable reporting requirements. Consideration was made for difference within and outside the Great Lakes Basin that include additional considerations outside the Great Lakes Basin as allowed under federal code. The department believes the proposed rules are no more restrictive than the federal code which the department is currently applying.

5. Describe the Rule's Enforcement Provisions

Enforcement provisions are not included in the subsections of the rule affected by the proposed order. These provisions are located in other portions of administrative rule not proposed for revision in this proposed rule order.

6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes No
-



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Scott Grosz
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Margit S. Kelley
Clearinghouse Assistant Director

Jessica Karls-Ruplinger
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **15-084**

AN ORDER to repeal NR 106.145 (2) (b) 2.; to consolidate, renumber and amend NR 106.145 (2) (b) (intro.) and 1.; to amend NR 106.145 (1) (b) and (2) (title); to repeal and recreate NR 106.06 (2) (a) and (b) and (6) and 106.10; and to create NR 106.03 (4m) and (11m) and 106.06 (2) (br), relating to calculating water quality based effluent limitations for point source discharges to surface waters.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

11-04-2015 RECEIVED BY LEGISLATIVE COUNCIL.

01-01-0001 REPORT SENT TO AGENCY.

MSK:AH

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



**WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE**

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CLEARINGHOUSE RULE 15-084

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

2. Form, Style and Placement in Administrative Code

- a. Section NR 106.06 (2) (br) 3. d. does not appear to be a criterion that fits with the introduction to that provision. Consider moving it to a separate subdivision.
- b. The commas that end s. NR 106.06 (6) (e) 1. and 2. should be replaced with periods. [s. 1.03 (4), Manual.]
- c. In the treatment clause for SECTION 8 of the proposed rule, a reference to “NR 106.145 (2) (b)” should be inserted after the word “renumbered”. [s. 1.068 (Example), Manual.]
- d. A specific deadline should be given for the submission of comments on the proposed rule. [s. 1.02 (2) (a) 13., Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

The agency could consider whether it would make sense to reference or use defined terms appearing in s. 281.346, Stats., rather than create new, different terminology to refer to waters within the Great Lakes basin.

5. Clarity, Grammar, Punctuation and Use of Plain Language

- a. The phrase “waters of the Great Lakes system” appears in some provisions of the proposed rule. In other provisions, the defined term “Great Lakes system” appears without “waters of” before it. If possible, those terms should be used consistently.

b. Throughout the proposed rule, consider replacing passive verb tenses with more active ones. Although the more passive verb tenses match the existing rule provisions in that chapter, it is acceptable to have un-matching styles in order to modernize the drafting style of new provisions, where possible.

c. In the new definition for the term "same waterbody" in s. NR 106.03 (11m), the use of the word "points" is unclear. For example, in ch. NR 198, the term "waterbody" is defined to mean certain types of whole waterbodies, rather than "points" of waterbodies. Also, would connected waterbodies always be limited to two?

d. In s. NR 106.06 (2) (a) (intro.), the phrase "For purposes of" should be replaced with "In".

e. Would s. NR 106.06 (2) (a) 1. and 2. be made more accurate by adding the phrase "discharge from a" after "any" and before "point source"?

f. The first comma appearing in s. NR 106.06 (2) (br) (intro.) should be removed.

g. In s. NR 106.06 (2) (br) 2. (intro.), the word "provided" should be replaced with the word "if".

h. In s. NR 106.06 (2) (br) 3. b., c., e., and f., and also in s. NR 106.06 (2) (c) 2., replace the word "shall", which also appears in the introductions to those provisions, with active verbs. For example, replace the phrase "shall contain" with the word "contains."

i. In s. NR 106.06 (6) (intro.), a comma should be inserted after the second instance of the word "substance".

j. In s. NR 106.06 (6) (b) 4., the word "in" should be inserted before "the identified".

k. In s. NR 106.06 (6) (c) (intro.), the phrase "applied as follows" should replace the phrase "included in the permit in accordance with the any [sic] of the following that applies".

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD REPEALING;
CONSOLIDATING, RENUMBERING, AND AMENDING; AMENDING; REPEALING AND
RECREATING; AND CREATING RULES**

The statement of scope for this rule, WT-31-10 was published in Register No. 662 on February 28, 2011.

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 106.06 (2) (a) and (b) and (Note) and 106.145 (2) (b) 2. and (Note); to **consolidate, renumber and amend** NR 106.145 (2) (b) (intro.) and 1.; to **amend** NR 106.145 (1) (b) and (2) (title); to **repeal and recreate** NR 106.06 (6) and 106.10; and to **create** NR 106.03 (4g), (4r), and (11m) and 106.06 (2) (am) and (Note), (bg), and (br); relating to calculating water quality based effluent limitations for point source discharges to surface waters.

WT-31-10

Analysis Prepared by the Department of Natural Resources

- 1. Statutes interpreted:** ss. 283.01, 283.11(2), 283.13(5), 283.31, Stats.
- 2. Statutory authority:** ss. 227.11(2)(a), 283.11(2), 283.13(5) and 283.31(3), (4), Stats.
- 3. Explanation of agency authority:** Chapter 283, Stats., grants authority to the department to establish, administer and maintain a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit program consistent with the requirements of the federal water pollution control act of 1972, commonly known as the Clean Water Act, and amendments to the act. Section 283.11 requires that rules promulgated by the department as they relate to point source discharges must comply with the Clean Water Act and regulations adopted under that act. Section 283.13(5), Stats., authorizes the department to establish more stringent water quality based effluent limitations (WQBELs) and to require compliance with such limitations if these limitations are necessary to comply with any state or federal law, rule or regulation.

Section 283.31(3), and (4), Stats., provides authority to issue permits that require compliance with effluent limitations and standards for point source discharges to surface waters and any more stringent limitations needed to comply with state or federal water quality standards or any applicable federal law or regulation. The department also has general authority to promulgate rules under s. 227.11 (2) (a), Stats., that interpret the specific statutory authority granted in ch. 283, Stats.

4. Related statute or rule:

These rule changes relate directly to the WPDES Permit program and the regulation of wastewater discharges. Chapter NR 106, Wis. Adm. Code, contains the procedures used by the Bureau of Water Quality to calculate water quality based effluent limitations for WPDES permits issued to point source discharges to surface waters under ch. 283, Stats. Related statutes and rules include: s. 281.15, Stats., which authorizes the department to promulgate water quality standards for waters of the state. Water quality standards for surface waters are set in chs. NR 102 to 105, Wis. Adm. Code.

5. Plain language analysis:

The primary purpose of these proposed rule changes to ch. NR 106, Wis. Adm. Code, is to be consistent with federal requirements for calculating and implementing water quality based effluent limitations for point source discharges to surface waters included in WPDES permits.

In a letter dated July 18, 2011, U.S. Environmental Protection Agency (EPA) identified 75 potential issues or deficiencies in Wisconsin's statutory and regulatory authority for the WPDES permit program. EPA directed the department to either make rule changes to address these inconsistencies or deficiencies or address these issues through other avenues. The proposed rules address four of the 75 issues identified in EPA's July 18, 2011, letter.

In addition to making some minor clarifications and cross-referencing corrections to the Administrative Code for uniformity, these proposed rule changes will:

- Revise s. NR 106.06(2) to phase out (with some exceptions) mixing zone allowances for discharges of bioaccumulative chemicals of concern (BCCs) in the Great Lakes system. While Wisconsin is already adhering to the requirements of the federal Great Lakes Water Quality Initiative (GLI), the proposed rules formally adopt the GLI requirements. When Wisconsin last made changes to NR 106, a footnote in the rule indicated that such changes would be promulgated.
- Modify s. NR 106.06(6) provisions that regulate pollutant discharges when a pollutant is present in the intake water used as the water supply for industrial and municipal dischargers. The proposed rules adopt the federal requirements for establishing effluent limitations.

- Remove the exemption from regulation in s. NR 106.10(1) and (2) for noncontact cooling water (NCCW) containing chlorine or other chemical additives present at levels consistent with those in public water supplies, as required by a Dane County Circuit Court Stipulation and Order in Case No. 12-CV-0569, *Midwest Environmental Defense Center v. WDNR* (March 2, 2012) and federal regulations.
- Remove the special definition of “representative data” for purposes of determining reasonable potential to exceed effluent limitations for mercury in s. NR 106.145(1) and (2), as required by a Dane County Circuit Court Order in Case No. 12-CV-3654, *Midwest Environmental Defense Center v. WDNR*, (July 1, 1014) and federal regulations.

6. Summary and comparison with existing and proposed federal regulations:

The table below sets forth the sections of ch. NR 106 that the department is proposing to revise, the issue number in EPA’s July 18, 2011, letter that identifies the need for the proposed revision, and the issue and corresponding federal regulation that the department has considered in proposing these rules:

Wis. Adm. Code Section	EPA Issue Number	Issue	Federal Code Section
106.06(2)	71	BCC Mixing Zone Phase-outs	40 C.F.R. Part 132, Appendix F, Procedure 3, paragraph C (Mixing Zones for Bioaccumulative Chemicals of Concern (BCCs))
106.06(6) 106.03(11m)	10	Pollutants in Intake Water	40 C.F.R. 132.6, Appendix F, Procedure 5, paragraphs D and E (Consideration of Intake Pollutants) 40 C.F.R. 122.44(d)(1)(vii)(A) (Requiring that limits on point sources must comply with all applicable water quality standards)
106.10(1) & (2)	17	Non-contact Cooling Water Exemption	40 C.F.R. 122.44(d)(1)(i) (Requiring WQBELs for all pollutants which cause or have the reasonable potential to cause or contribute to an excursion above any state water quality standard)

106.145(1) & (2)	8	Mercury Reasonable Potential Determination	40 C.F.R. Part 132, Appendix F, Procedure 5 (Reasonable potential determination procedures)
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In 1995, EPA issued Final Water Quality Guidance for the Great Lakes System. The federal Guidance conforms with key treaty provisions agreed to by the United States and Canada in the Great Lakes Water Quality Agreement, a binational agreement establishing common water quality objectives for the Great Lakes. Section 118(c) of the Clean Water Act, 33 U.S.C. 1268(c), requires all Great Lakes states, including Wisconsin, to adopt procedures consistent with the federal Water Quality Guidance for the Great Lakes System. If a Great Lakes state fails to adopt the federal guidance, EPA must promulgate the federal standard for the state.

In 2000, EPA overpromulgated sections of ss. NR 106.06 and 106.10 at 40 C.F.R. 132.6. In Issue 10 of EPA's letter, EPA directed Wisconsin to amend state rules to cure the disapproval of the provisions of s. NR 106.06 regarding consideration of intake pollutants in determining reasonable potential. In Issue 17, EPA directed Wisconsin to revise s. NR 106.10 so it conforms to 40 C.F.R. 122.44(d) regarding reasonable potential determinations.

In a February 17, 2009 letter, EPA objected to Wisconsin's existing mercury reasonable potential rule in s. NR 106.145 as inconsistent with federal requirements. In Issue 8 of EPA's letter, EPA directed Wisconsin to amend the rule to cure EPA's 2009 disapproval.

Section NR 106.06(2) currently contains a note expressing the State's intent to develop a rule to phase out mixing zones for existing dischargers of bioaccumulative chemicals of concern (BCCs) to comply with the federal Great Lakes Water Quality Initiative (GLI). In Issue 71 of EPA's letter, EPA directed Wisconsin to establish a rule to phase out mixing zones for BCCs for discharges within the Great Lakes basin.

The department believes adoption of the proposed rules will address EPA's concerns. The department received comments from the EPA on December 18, 2015 and additional clarifications on December 23, 2015. The department revised s. 106.06 in response to EPA's comments. The department's complete response to all comments received can be found in the Summary of Responses to Comments.

7. Comparison of similar rules in adjacent states:

All of the neighboring states (Illinois, Iowa, Michigan, and Minnesota) are subject to the federal Clean Water Act and EPA regulations. Like Wisconsin, the states of Illinois, Michigan, and Minnesota are subject to the GLI requirements for those portions of the state that are within the Great Lakes system (defined in 40 CFR 132.2 as "all the streams, rivers, lakes, and other bodies of water within the drainage system of the Great Lakes within the United States"). Because Iowa is not within the Great Lakes system,

the GLI requirements do not apply to the Iowa implementation program. The proposed rules will align Wisconsin's WPDES regulations with federal regulations and are consistent with the procedures used in neighboring GLI states (Illinois, Michigan and Minnesota).

8. Summary of factual data and analytical methodologies:

A discussion of EPA's reasons for issuing the federal Water Quality Guidance for the Great Lakes System and the data underlying EPA's analysis are included in "Final Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID) (EPA 1995). See also 60 Fed. Reg. 15366 to 15385 (1995) (concerning the history of the Great Lakes Water Quality Initiative and EPA's adoption of Final Water Quality Guidance for the Great Lakes System).

9. Analysis and supporting documentation used to determine effect on small business or in preparation of an economic impact analysis:

A notice soliciting comments regarding potential economic impacts of these proposed rule changes was sent to all industrial and municipal facilities currently regulated by a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. Many of the provisions of the proposed rule revision are already implemented by the department when setting water quality based limits as required by EPA under federal law.

DNR's System for Wastewater Applications, Monitoring and Permits (SWAMP) was used to compile existing WPDES permit holders with non-contact cooling water discharge outfalls. These data were used to determine which facilities may have impact from this rule.

The proposed revisions to ch. NR 106.06, Wis. Adm. Code contain provisions relating to discharges within the Great Lakes system and outside the Great Lakes system. The proposed rule contains different standards for determining permit limits for certain discharges outside the Great Lakes system, to allow permittees outside the Great Lakes system greater flexibility than is required by federal law for dischargers within the Great Lakes system. The department sought cost estimates for dechlorination from a number of consultants. Cost estimates range widely for meeting provisions of s. NR 106.06 (10), Wis. Adm. Code because of site specific conditions of industrial facilities. This rule does not specify monitoring frequency or compliance schedule timelines to allow for case by case assessment to ensure adequate environmental protection and reasonable reporting requirements.

10. Effect on small business:

The department is currently required to use the procedures in the federal law when developing water quality based effluent limits. The proposed rules are consistent with and no more restrictive than federal law. As a result, many of the facilities impacted by these proposed rule changes have already had permits reissued in compliance with the proposed rules. While some small businesses with noncontact cooling water outfalls or certain substances present in their intake water may have economic impacts from

changes required to meet WPDES permit limits, these impacts will be no greater than those that would be required to comply with the federal law.

11. A copy of any comments and opinion prepared by the Board of Veterans Affairs under s. 45.03 (2m), Stats., for rules proposed by the Department of Veterans Affairs:

Not Applicable.

12. Agency contact:

Jennifer Jerich
Wisconsin Department of Natural Resources
Bureau of Water Quality
N7725 Highway 28
Horicon, WI 53032-9782
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jennifer.jerich@wisconsin.gov

13. Public Hearing and comments:

The department received comments from the Wisconsin Legislative Council Rules Clearing House on December 4, 2015. The department public noticed the proposed rules on November 10, 2015 and held a public hearing on December 7, 2015. The public comment period ended on December 18, 2015. The department received written comments from EPA and Wisconsin Manufacturers & Commerce (WMC) on December 18, 2015. The department also received additional comments from EPA on December 23, 2015.

Wisconsin Manufacturers & Commerce (WMC) provided written comments regarding the statutory requirements of the promulgation of administrative rules. WMC expressed concern over the original scope statement and compliance with s. 227.135 (4), State Stats., and compliance with s. 227.14 (2) (a) (4) requiring the department complete an analysis in the Economic Impact Analysis of state regulations in Illinois, Iowa, Michigan and Minnesota. The department has reviewed the scope statement for WT-31-10 and believes the proposed rule changes fall within the scope identified in 2010 when the scope statement was approved. The department provided additional documentation of state regulations in Illinois, Iowa, Michigan and Minnesota in the Responses to Comments on Rule Package 3. The provisions of this proposed rule align Wisconsin's WPDES regulations with federal regulations.

EPA provided written comments seeking clarification on the rule repealing specific sampling requirements before a determination of reasonable potential can be made for mercury and on compliance with TMDL implementation language in 40 CFR 132. EPA provided additional comments seeking clarification on provisions in ss. NR 106.06 (2) and 106.06 (6), Wis. Adm. Code. Rule package 3 repeals the minimum data set requirement for determination of reasonable potential in Section 9. Rule package 3 mentions TMDL as a portion of the procedures in ch. NR 106.06 (6), Wis. Adm. Code but does not include TMDL implementation procedures. TMDL implementation procedures are found in Rule package 4. The changes in Rule package 4 seek to address key implementation concerns as well as EPA's disapproval of the TMDL program within the Great Lakes Basin. The department modified Section 4 of the proposed rule,

repealing and recreating s.106.06 (6), Wis. Adm. Code, in response to EPA's comments regarding effluent limitations based on elevated background concentrations outside the Great Lakes basin. In addition, the department modified the definition of expanded discharge to provide additional clarity. EPA provided written confirmation that the changes made address the concerns and EPA is in agreement that the proposed language is consistent with federal law.

The Wisconsin Legislative Council Rules Clearinghouse provided comments on the rule package including style, rule referencing or language clarity. The majority of these comments were to address form, style or grammar. The department made the suggested changes with some exceptions. A complete summary of these exceptions is in the Response to Comments on Rule Package 3 document.

SECTION 1. NR 106.03 (4g), (4r), and (11m) are created to read:

NR 106.03 (4g) "Great Lakes" means the open Wisconsin waters of Lake Superior, Lake Michigan, Green Bay and Chequamegon Bay, as well as adjoining open waters that exhibit characteristics of Lake Superior, Lake Michigan, Green Bay and Chequamegon Bay, or in other ways are determined by the department to be equivalent to these waters.

(4r) "Great Lakes system" means all the surface waters within the drainage basin of the Great Lakes.

(11m) "Same waterbody" means hydrologically connected waters of the State with similar water quality characteristics in which a pollutant can travel between in a reasonable period of time without significantly changing chemically or physically. Hydrological connections can include surface and groundwater connections.

SECTION 2. NR 106.06 (2) (a) and (b) and (Note) are repealed.

SECTION 3. NR 106.06 (2) (am) and (Note), (bg), and (br) are created to read:

NR 106.06 (2) (am) In this subsection, the following definitions apply:

1. "New discharge" means any discharge from a point source that first received WPDES permit coverage from the department after November 6, 2000. "New discharge" does not include a discharge from a publicly owned treatment works if the discharge from the treatment works is caused by a project that is correcting or preventing a public health problem.

2. "Existing discharge" means any discharge from a point source that currently has a WPDES permit and that has continually had WPDES permit coverage since November 6, 2000 or earlier. "Existing discharge" includes a discharge from a publicly owned treatment works that becomes permitted after November 6, 2000 if the discharge from the treatment works is caused by a project that is correcting or preventing a public health problem.

3. "Expanded portion of an existing discharge" means any increase in concentration, level, or loading of a BCC, which would exceed a limitation specified in a current WPDES permit, or which according to the procedures in s. NR 106.05, would result in the establishment of a new limitation in a reissued or modified WPDES permit. "Expanded portion of an existing discharge" does not include an expanded discharge from a publicly owned treatment works if the expanded discharge from the treatment works is caused by a project that is correcting or preventing a public health problem.

Note: An example of a project that is preventing or correcting a public health problem is a situation where a community with failing septic systems connects to a POTW, as defined in s. 106.59, to avert a potential public health threat from the failing systems.

(bg) Notwithstanding any other provisions in chs. NR 102 and 106, mixing zones may not be used for effluent limitations for new discharges of BCCs or for the expanded portion of an existing discharge of BCCs into the Great Lakes system. Effluent limitations for new discharges of BCCs and for expanded portions of existing discharges shall equal the most stringent applicable water quality criterion or secondary value for the BCC. Effluent limitations for an expanded portion of an existing discharge of BCCs shall be determined by means of a mass balance where the limitation for the existing portion of a permitted discharge that meets the provisions of par. (br) 1. or 2. shall be determined using the requirements of sub. (4) and the limitation for any expanded portion of the discharge may not exceed the most stringent criterion or value for that BCC.

(br) Effluent limitations for existing discharges of BCCs into the Great Lakes system may not include a mixing zone or exceed the most stringent applicable water quality criteria or secondary values for BCCs, except as provided under subd. 1. or 2.

1. *Water conservation.* A mixing zone may be granted and an effluent limitation may exceed the most stringent water quality criterion or secondary value for a discharged BCC if the permittee demonstrates in the permit application that failure to grant a mixing zone for the BCC would preclude water conservation measures that would lead to an overall load reduction of the BCC, even though a higher concentration of the BCC occurs in the effluent.

2. *Technical and economic considerations.* A mixing zone may be granted and an effluent limitation may exceed the most stringent water quality criterion or secondary value for the discharged BCC, if the permittee demonstrates and the department concurs that all the following conditions are met:

a. For the BCC discharged, the permittee is in compliance with and will continue to comply with the WPDES permit requirements and this chapter.

b. The permittee has reduced and will continue to reduce loadings of the BCC for which a mixing zone is requested to the maximum extent possible, such that any additional controls or pollution prevention measures to reduce or ultimately eliminate the BCC discharged would result in unreasonable economic effects on the discharger or the affected community because the controls or measures are not feasible or cost-effective.

3. *Approval Requirements.* If the department approves a mixing zone for a BCC under this paragraph, the following requirements shall be met:

a. The approved mixing zone is no larger than necessary to account for the technical constraints and economic effects identified under subd. 2.

b. All water quality criteria or secondary values for the BCC shall be met at the edge of an approved mixing zone or be consistent with the applicable U.S. environmental protection agency (EPA) approved total maximum daily load (TMDL).

c. The permit shall contain a numeric effluent limitation for the BCC, determined using the requirements of sub. (4) and the limit shall not be less stringent than the limit that was effective on November 6, 2000.

d. The permit shall include requirements for an ambient water quality monitoring plan if the department determines these requirements are appropriate to ensure compliance with water quality criteria and consistency with any applicable TMDL.

e. The permit shall include requirements for an evaluation of alternative means for reducing the BCC from other sources in the watershed if the department determines these requirements are appropriate to ensure compliance with water quality criteria and consistency with any applicable TMDL.

f. Any mixing zone for a BCC approved by the department pursuant to this paragraph shall be limited to one permit term unless the permittee applies for a mixing zone approval at the next reissuance and the department approves the mixing zone in the subsequent permit applications in accordance with the requirements of this paragraph.

g. The corresponding permit fact sheet for an approved mixing zone shall specify the mixing provisions used in calculating the permit limits and shall identify each BCC for which a mixing zone is approved.

SECTION 4. NR 106.06 (6) is repealed and recreated to read:

NR 106.06 (6) EFFLUENT LIMITATIONS BASED UPON ELEVATED BACKGROUND CONCENTRATIONS. Whenever the representative background concentration for a toxic or organoleptic substance in the receiving water is determined to be greater than any applicable water quality criterion or secondary value for that substance, the calculation of an effluent limitation and the determination of the need for the limitation in a permit shall be performed subject to all of the following:

(a) If the department has developed an EPA approved TMDL for the toxic or organoleptic substance in the receiving water, an effluent limitation for that substance shall be consistent with the TMDL.

(b) If no EPA approved TMDL has been developed and if the intake source of the wastewater is all from the same waterbody as the receiving water of the discharge, the department may determine that the discharge does not have a reasonable potential to cause or contribute to an excursion above the applicable water quality criterion or secondary value for the substance, and may determine that a numeric limitation is not necessary, provided the permittee has demonstrated that all of the following conditions are met:

1. The permittee withdraws 100 percent of the intake water containing the substance from the same waterbody into which the discharge is made.

2. The permittee does not contribute any additional mass of the identified intake substance to its wastewater.

3. The permittee does not alter the identified intake substance chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the substance were left in-stream.

4. The permittee does not contribute to a statically significant increase in the identified intake substance concentration, as determined by the department, at the edge of the mixing zone or at the point of discharge if a mixing zone is not allowed, as compared to the concentration of the substance in the intake water, unless the increased concentration does not cause or contribute to an excursion of water quality standard for that substance.

5. The timing and location of the discharge would not cause adverse water quality impacts to occur that would not occur if the identified intake substance were left in the receiving waterbody.

(c) If no TMDL has been developed and the conditions in par. (b) are not met, an effluent limitation shall be included in the permit if the department determines that the discharge has a reasonable potential to cause or contribute to an excursion above the applicable water quality criterion or secondary value for the substance. The limitation shall be applied as follows:

1. For discharges within the Great Lakes system, the effluent limitation for that substance shall be equal to the most stringent applicable water quality criterion or secondary value.

2. For discharges outside of the Great Lakes system:

a. When all of the intake source of the wastewater is from the same waterbody as the receiving water of the discharge and the permittee has demonstrated that the conditions in par. (b) 3. to 5. are met the effluent limitation for that substance shall equal the representative background concentration of that substance in the receiving water. If the conditions in par. (b) 3. to 5. are not met, the effluent limitation for that substance shall be equal to the most stringent applicable water quality criterion or secondary value for that substance.

b. When all of the intake source of the wastewater is from a waterbody that is different than the receiving water of the discharge, the effluent limitation for that substance shall be equal to the lowest applicable water quality criterion or secondary value.

c. When the intake source of the wastewater is in part from the same waterbody as the receiving water and in part from a different waterbody, the effluent limitation may be derived using subd. 2.a and b. to reflect the flow-weighted average of each source of the wastewater, provided that adequate monitoring to determine compliance can be established and is included in the permit.

(d) The determination of representative background concentrations for toxic or organoleptic substances in this subsection shall be statistically ($P \leq 0.01$) or otherwise appropriately determined as the reasonably expected maximum background concentration for that substance.

(e) For purposes of this subsection, an intake pollutant in the source water is considered to be from the same waterbody as the receiving water of the discharge if the permittee successfully demonstrates all of the following to the department:

1. That the pollutant would have reached the outfall point in the receiving water within a reasonable period had it not been withdrawn by the permittee.

2. That the background concentration of the pollutant in the receiving water is at a similar concentration level to that in the intake water.

3. That other water quality characteristics, including temperature, pH and hardness are similar in the intake water and the receiving water.

Note: The term “same waterbody” may include a hydrologic connection between groundwater and surface water. See definition in s. NR 106.03 (11m).

SECTION 5. NR 106.10 is repealed and recreated to read:

NR 106.10 Noncontact cooling water additives. The department shall establish water quality based effluent limitations for toxic and organoleptic substances in noncontact cooling water discharges as follows:

(1) For toxic and organoleptic substances commonly added by suppliers of drinking water systems and present in the noncontact cooling water, a water quality based effluent limitation calculated under s. NR 106.06 that is based on the applicable water quality criterion or secondary value shall be included in the permit unless the permittee demonstrates at least one of the following:

(a) The concentration of the substance in the intake water is dissipated within the system that supplies the intake water to the permittee and is consistently less than the water quality based effluent limitation.

(b) An effluent limitation is not necessary as determined using the reasonable potential procedures in s. NR 106.05.

(c) Prior to reaching the receiving water, the substance dissipates or is removed to a level that is below the water quality based effluent limitation.

(2) For other toxic and organoleptic substances intentionally added to noncontact cooling water by the permittee, the department shall follow the procedures specified in s. NR 106.05 and s. NR 106.06 to calculate a water quality based effluent limitation and determine whether the limitation is necessary in the permit. If there is no water quality criterion for an additive and there are potential water quality impacts from the additive, the department shall establish a secondary value for the additive in accordance with ch. NR 105 and calculate a limitation based on that value. All of the following requirements apply to the use and discharge of additives:

(a) A permittee shall obtain written approval from the department prior to use of the additive.

(b) A permittee shall provide the department with dosage information and safety data sheets and toxicological data, as requested by the department to meet minimum data requirements specified in ss. NR 105.05(4) and 105.06(6) for each additive for which approval is sought.

(c) Prior to increasing the usage of an additive in amounts greater than authorized by the department, a permittee shall get written approval from the department for the increased usage.

(d) After reissuance, if a permittee wants to use a new additive not previously approved by the department, the permittee shall get written approval from the department prior to use of the additive.

(e) A permittee may only use additives in accordance with the conditions of the department approval and any applicable permit terms. If the department does not approve use of the additive, the additive may not be discharged.

SECTION 6. NR 106.145 (1) (b) is amended to read:

NR 106.145 (1) (b) Representative data on the relatively low concentrations of mercury in wastewater are ~~rare and methods for collecting that data have only recently been developed~~ difficult to obtain due to specialized sample collection methods required and the precision and sensitivity of laboratory analyses.

SECTION 7. NR 106.145 (2) (title) is amended to read:

NR 106.145 (2) DETERMINING THE NECESSITY ~~OF~~ FOR MERCURY EFFLUENT LIMITATIONS.

SECTION 8. NR 106.145 (2) (b) (intro.) and 1. are consolidated, renumbered NR 106.145 (2) (bm) and amended to read:

NR 106.145 (2) (bm) For the determination under par. (a), the department shall use representative data that ~~comply with all of the following:~~

1. ~~Data shall~~ meet the sampling and analysis requirements of subs. (9) and (10).

SECTION 9. NR 106.145 (2) (b) 2. and (Note) are repealed.

SECTION 10. **Effective Date:** This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 11. **Board Adoption:** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Cathy Stepp, Secretary

(SEAL)