

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Request approval of the Statement of Scope for Board Order WT - 11 - 12, to revise Chapter NR 106 to ensure that the State's regulations are consistent with federal regulations.

FOR: JUNE 2012 **BOARD MEETING**

TO BE PRESENTED BY / TITLE: Russ Rasmussen, Water Deputy Division Administrator

SUMMARY:

On July 18, 2011, the Department received a letter from U.S. EPA identifying seventy-five questions or potential inconsistencies with Wisconsin's authority to administer its approved National Pollutant Discharge Elimination System (NPDES) program. In the letter, EPA stated that the Department must either demonstrate that it has adequate authority to administer the program for these seventy five issues, promulgate rules or enact statutory language clarifying the Department's authority. In response to the questions and comments, the Department proposed a broad based approach that included rulemaking, statutory changes, a demonstration of authority through an Attorney General's statement and an addendum to the Memorandum of Agreement for the Wisconsin Pollutant Discharge Elimination System (WPDES) Permit program. For the rule making component of this broad based approach, the Department is proposing eight different rule packages to address some of the listed concerns.

This proposed rule package will address revisions to portions of Chapter NR 106, which will ensure that the State's regulations are consistent with federal regulations. Specifically, the proposed rule modifications will address the Great Lakes Initiative (GLI) and its impact on Total Maximum Daily Loads (TMDL), waste load allocations (WLA), reasonable potential and water quality-based effluent limits (WQBEL); calculation of acute toxicity limits; compliance schedules based on "secondary" values in Great Lakes Basin permits; Ammonia Rule compliance schedules, WQBELs and variances; alternative effluent limits; expression of contaminant limits, contaminants in intake water and internal waste streams; Chloride Rule variances, chlorinated source water, WQBELs, Whole Effluent Toxicity (WET) testing and testing requirements following failed WET tests.

RECOMMENDATION: Approval of rulemaking to revise Chapter NR 106 to ensure consistency with federal regulations.

LIST OF ATTACHED MATERIALS:

- | | | | | | |
|----|-------------------------------------|---|-----|-------------------------------------|----------|
| No | <input checked="" type="checkbox"/> | Fiscal Estimate Required | Yes | <input type="checkbox"/> | Attached |
| No | <input checked="" type="checkbox"/> | Environmental Assessment or Impact Statement Required | Yes | <input type="checkbox"/> | Attached |
| No | <input type="checkbox"/> | Background Memo | Yes | <input checked="" type="checkbox"/> | Attached |

APPROVED:

Susan Sylvester
Bureau Director,

5/29/12
Date

Ken Jolly
Administrator,

5/29/12
Date

Scott M. Jolley
Secretary, Cathy Stepp

6/7/12
Date

cc: NRB Liaison
DNR Rules Coordinator

DATE: May 29, 2012

TO: Natural Resources Board Members

FROM: Cathy Stepp, Secretary

SUBJECT: Revisions to Chapter NR 106 for the purpose of making the Wisconsin Pollutant Discharge Elimination System (WPDES) Permit Program consistent with federal regulations.

Subject/Objective of Proposed Rule

On July 18, 2011, the Department received a letter from EPA identifying seventy five questions or potential inconsistencies with Wisconsin's authority to administer its National Pollutant Discharge Elimination System (NPDES) approved permit program. In the letter, EPA stated that the Department must either demonstrate that it has adequate authority to administer the program for the seventy five issues, promulgate rules or enact statutory language clarifying the Department's authority. In response to the questions and comments, the Department proposed a broad based approach that included rulemaking, statutory changes, a demonstration of authority through an Attorney General's statement and an addendum to its existing Memorandum of Agreement with EPA.

For the rule making component of this broad based approach, the Department is proposing eight different rule packages to address the identified issues and to also make additional minor corrections and clarifications as needed. Four of the rule packages have already initiated the rule making process, which began prior to EPA's letter, and the remaining four packages are now being proposed.

This particular rule package is proposed to address some of EPA's issues regarding Chapter NR 106. The purpose of the proposed changes is to ensure that the state's regulations are consistent with federal regulations. Specifically, the proposed rules will address the following issues identified by EPA in its July 18, 2011 letter:

- Issue #10: Great Lakes Initiative and its impact on Total Maximum Daily Loads (TMDL), waste load allocations (WLA), determining reasonable potential and establishing water quality-based effluent limits (WQBEL). These requirements already apply directly to Wisconsin waters in the Great Lakes basin because EPA overpromulgated the procedures for Wisconsin waters in 40 CFR 132.6(h).
- Issue #28: Revise rule for calculating acute toxicity limits (would not affect strictness of limits when viewed in context with chronic toxicity limits).
- Issue #32: Revise language addressing compliance schedules for limits based on "secondary" values in Great Lakes Basin permits.
- Issues #31, #35, #36, #37 and #38: Ammonia rule language clarifications regarding compliance schedules, water quality based effluent limits and variances.
- Issues #2, #30, #34 and #41: Language clarifications addressing the expression of contaminant limits, including the duration of time over which limits for toxic substances are

expressed, mass limitations, chloride effluent limits, ammonia effluent limits, contaminants in intake water and internal waste streams.

- Issues #39, #40, #42 and #43: Chloride rule language clarifications addressing variances, water quality based effluent limits, Whole Effluent Toxicity (WET) Testing and chlorinated source water.
- Issue #70: Rule changes regarding alternative limits.
- Issue #74: Language clarification regarding Whole Effluent Toxicity (WET) testing. This rule will result in procedural changes, including an increase in testing requirements following failed WET tests.

Description of Policy Issues/Analysis of Policy Alternatives

In the July 18, 2011 letter, EPA notified Wisconsin that changes must be made to state rules or statutes to ensure consistency with federal laws and regulations for the NPDES permit program, or alternatively, the state must demonstrate that it has adequate authority (through an Attorney General's Statement or other information). For all of the issues addressed in this rule package, the Department determined that rule changes should be made so state rules for the WPDES permit program are more specific and clearly consistent with federal regulations.

For most of the issues addressed in the proposed rules, the Department has been issuing permits under state statutory provisions that are consistent with federal regulations. Therefore in most cases, there will be little change for permittees affected by these proposed rule changes.

Economic Impact

Many of the rule changes are not substantive, as the changes would merely clarify language without changing current interpretation or departmental procedures. Potential increases in the frequency of sample collection and the amount of water quality tests conducted, including increases in WET testing are expected to have a moderate economic impact on small businesses.

For the purpose of this scope statement, the Department has considered four aspects of the economic analysis: essence of rule, affected groups, response of affected groups and total costs.

Essence of Rule: The rule changes mainly formalize authority for details that were previously implemented under more generic language or federal requirements.

Affected Groups: Municipal and industrial wastewater dischargers with specific or general WPDES permits.

Response of Affected Groups: Affected groups may need to spend some resources (time and money) to implement any changes that are made to their permits based on rule changes. However, these costs will likely be minor and these changes will occur over the next 10 years as permits are renewed.

Total Costs: We believe for all impacted permittees in the state the proposed rule will have significantly less than \$ 20,000,000 total implementation and compliance costs, including any one time costs to adjust business practices and operations and ongoing costs for the future. Therefore we will analyze this proposed rule using a moderate solicitation period for economic analysis.

Statutory Authority

Wisconsin Stat. 283.11(1) states that the department shall promulgate by rule effluent limitations, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards for any category or class of point sources established by the U.S. environmental protection agency and for which that agency has promulgated any effluent limitations, toxic effluent standards or prohibitions or pretreatment standards for any pollutant. Subject to a few exceptions, Wis. Stat. 283.11(2) further states that rules must comply with and not exceed federal law and regulations. Wis. Stat. 283.11 clearly provides rulemaking authority for the majority of this rule package. Additional authority is discussed below.

Wisconsin Stat. 283.37(1) specifies that the department shall promulgate rules relating to applications for permits under this chapter which shall require at a minimum that every owner or operator of a point source discharging pollutants into the waters of the state shall have on file either a completed permit application on forms provided by the department or a completed permit application under section 13 of the rivers and harbors act of 1899, 33 USC 407 or under the federal water pollution control act, as amended, 33 USC 1251 to 1376. This statutory provision provides rulemaking authority related to permit applications.

Wisconsin Stat. 283.55(1)(d) provides the Department with rulemaking authority for effluent sampling methods. Section 283.55(1)(e) requires that permittees provide any other information to the department that is needed to determine the type and quantity of pollutants discharged.

Wisconsin Stat. 283.13(1) states that the department shall promulgate a list of categories and classes of point sources which is at least as comprehensive as the list appearing in applicable federal laws. One of the proposed rule changes will update the list of categories and classes of point sources consistent with federal regulations. Wis. Stat. 283.13(2) – (4) requires compliance with treatment technology limitations. Wis. Stat. 283.19 states that the Department shall promulgate by rule new source performance standards and Wis. Stat. 283.21(1) provides authority for the Department to promulgate by rule effluent standards.

In addition, Wis. Stat. 283.31(3) and (4), state that the department may issue a permit upon condition that the permit contains limitations necessary to comply with any applicable federal law or regulation and state water quality standards. Wis. Stat. 283.13(5) states that the department shall establish more stringent limitations than required under subs. (2) and (4) (technology based requirements) and shall require compliance with such limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulations. All of these explicit statutory requirements in combination with Wis. Stat. 227.11(2) provide the department with authority to promulgate rules that are consistent with federal regulations. The purpose of these proposed rule changes is to include specific federal permit procedures and requirements that apply to state NPDES permit programs.

Estimate of Time Needed to Develop the Rule

To comply with the requirements noted by U.S. EPA in its July 18, 2011 letter, it is estimated that rule development will require staff time of about 500 hours.

Summary and Comparison of Applicable Federal Regulations

As noted above, all of the statutory requirements in combination with Wis. Stat. 227.11(2) provide the department with authority to promulgate rules that are consistent with federal regulations. Subject to a few exceptions, Wis. Stat. 283.11(2) further states that rules must comply with and not exceed federal

law and regulations. The purpose of these proposed rule changes is to include specific federal permit procedures and requirements that apply to state NPDES permit programs only to the extent needed so state rules for the WPDES permit program are clearly consistent with the federal regulations.

Entities Affected by the Rule

Publicly-owned Treatment Works (POTW) facilities and other facilities requiring Wisconsin Pollutant Discharge Elimination System (WPDES) permits may be affected by the proposed rule.

Agency Contact Person

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STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WT-11-12

Relating to: Revisions to chapter NR 106 related to the Wisconsin's Pollutant Discharge Elimination System Permit (WPDES) Program for the purpose of making the rules consistent with federal regulations (Rule Package #4)

Rule Type: Permanent

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

NA

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

The proposed rule will include changes to chapter NR 106 to address some of issues raised by U.S. Environmental Protection Agency (EPA) in a July 18th 2011 letter. In the letter, EPA identified 75 potential inconsistencies between Wisconsin's state statutory or regulatory authority and federal regulations. The proposed changes to ch. NR 106 will address some of the issues included in EPA's letter and will also include other related minor clarifying changes and corrections. Any proposed changes to current practices are discussed below. The proposed changes to ch. NR 106 include changes related to acute limit calculations, the allowance for extended compliance schedules for tier II value based limitations, ammonia water quality based effluent limitations, time periods for expression of certain water quality based effluent limitations, chloride water quality based effluent limitations, alternative limitations when test methods are not sufficiently sensitive, whole effluent toxicity testing (WET) reasonable potential procedures and other WET issues, and TMDL procedures required under the Great Lakes Initiative federal regulations. It should be noted that the Department will be proposing a total of eight packages to address most of the 75 issues identified in EPA's July 18th letter. The Department combined issues together based on subject matter. There will be other packages that include revisions to ch. NR 106.

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:

Chapter NR 106 will be modified to address the following specific issues identified by EPA in its July 18, 2011 letter:

- Issue #10 – Revisions regarding the Great Lakes Initiative and its impact on Total Maximum Daily Loads (TMDL), waste load allocations (WLA), determining reasonable potential and establishing water quality-based effluent limits (WQBEL). These requirements already apply directly to Wisconsin waters in the Great Lakes basin because EPA overpromulgated the procedures for Wisconsin waters in 40 CFR 132.6(h).

- Issue #28 – Revise rule for calculating acute toxicity limits (would not affect strictness of limits when viewed in context with chronic toxicity limits).
- Issue #32 – Revise language addressing compliance schedules for limits based on “secondary” values in Great Lakes Basin permits.
- Issues #31, #35, #36, #37 and #38 – Ammonia rule language clarifications regarding compliance schedules, water quality based effluent limits and variances.
- Issues #2, #30, #34, #41 – Language clarifications addressing the expression of contaminant limits, including the duration of time over which limits for toxic substances are expressed, mass limitations, chloride effluent limits, ammonia effluent limits, contaminants in intake water and internal waste streams.
- Issues # 39, #40, #42 and #43 – Chloride rule language clarifications addressing variances, water quality based effluent limits, Whole Effluent Toxicity (WET) Testing and chlorinated source water.
- Issue #70 – Rule changes regarding alternative limits.
- Issue #74 – Language clarification regarding Whole Effluent Toxicity (WET) testing. This rule will result in procedural changes, including an increase in testing requirements following failed WET tests.

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

The purpose of this proposed rule package is to ensure that Wisconsin’s WPDES permit program is consistent with federal regulations. Stat. s. 283.11(1) states that the department shall promulgate by rule effluent limitations, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards for any category or class of point sources established by the U.S. environmental protection agency and for which that agency has promulgated any effluent limitations, toxic effluent standards or prohibitions or pretreatment standards for any pollutant. Subject to a few exceptions, Wis. Stat. s. 283.11(2) further states that rules must comply with and not exceed federal law and regulations. Wis. Stat. s. 283.11 clearly provides rulemaking authority for this rule package. Additional authority is discussed below.

Section 283.55(1)(d) provides the Department with rulemaking authority for effluent sampling methods. Section 283.55(1)(e) requires that permittees provide any other information to the department that is needed to determine the type and quantity of pollutants discharged.

Wisconsin Stat. 283.15 provides the department with authority for rules on variance procedures.

In addition, s. 283.31(3) and (4), Stats., states that the department may issue a permit upon condition that the permit contains limitations necessary to comply with any applicable federal law or regulation, state water quality standards and total maximum daily loads. Wis. Stat. s. 283.13(5) states that the department

shall establish more stringent limitations than required under subs. (2) and (4) (technology based requirements) and shall require compliance with such limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulations. All of these explicit statutory requirements in combination with s. 227.11(2) provide the department with authority to promulgate rules that are consistent with federal regulations.

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

To comply with the requirements noted by U.S. EPA in its July 2011 letter, it is estimated that rule development will require staff time of about 600 hours.

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

Publicly-owned Treatment Works (POTW) facilities and other facilities requiring Wisconsin Pollutant Discharge Elimination System (WPDES) permits may be affected by the proposed rule.

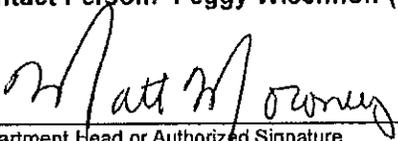
7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The proposed changes in this rule will bring Wisconsin Administrative Code Ch. NR 106 into compliance with federal regulations 40 C.F.R. § 122 and with the Federal Clean Water Act.

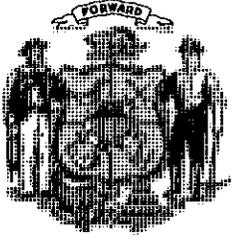
8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

Many of the rule changes are not substantive, as the changes would merely clarify language without changing current interpretation or departmental procedures. Potential increases in the frequency of sample collection and the amount of water quality tests conducted, including increases in WET testing are expected to have a moderate economic impact on small businesses.

Contact Person: Peggy Wischhoff (608)267-7627


Department Head or Authorized Signature

5/3/12
Date Submitted



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. Box 7863
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May 29, 2012

Cathy Stepp
Secretary
Wisconsin Department of Natural Resources
101 South Webster St.
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RE: Scope Statement for WT-11-12

Dear Secretary Stepp,

I hereby approve the statement of scope submitted on May 3, 2012, pursuant to Wisconsin Statutes § 227.135, in regards to a proposed rule modifying Chapter NR 106 of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.135(3).

Sincerely,

Scott Walker
Governor