

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Request approval of the Statement of Scope for Board Order WT-12-12, to revise chapters NR 106, 200, 205, 210 and 220 through 296 to ensure that the state's regulations are consistent with federal regulations.

FOR: JUNE 2012 BOARD MEETING

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

SUMMARY:

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 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, or 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 Wisconsin's 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 package will address revisions to portions of chapters NR 106, 200, 205, 210 and 220 through 296. 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 EPA's issues regarding Technology Based Limits, New Source Performance Standards (NSPS), Expression of Limits in Permits and other limitation provisions in 40 CFR 122.45, Mass limits in Permits, General Reasonable Potential Procedures, Pollutants in the Intake for Technology Based Limits, Best Management Practices in Permits, General Compliance Schedule provisions, Permit Application requirements for Industrial dischargers, and Intake requirements for new facilities under CWA (316(b)). Minor corrections, reorganization and clarifying changes may also be made to chs. NR 106, 200, 205, 210 and 220 through 296 to incorporate the changes.

RECOMMENDATION: Approve the commencement of rulemaking to revise chapters NR 106, 200, 205, 210 and 220 through 296.

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 Johnson
Administrator,

5/29/12
Date

Matt Mowrey
Secretary, Cathy Stepp

6/7/12
Date

cc: NRB Liaison
DNR Rules Coordinator

DATE: June 1, 2012

TO: Natural Resources Board Members

FROM: Cathy Stepp, Secretary

SUBJECT: Scoping Statement Related revisions to chapters NR 106, 200, 205, 210 and 220 through 296, to ensure that the state's regulations are 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 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, or 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 Memorandum of Agreement for Wisconsin's 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 issues. Four of the rule packages have already initiated the rule making process. The Department had begun addressing the issues in the four rule packages prior to EPA's letter because the Department was aware that rule revisions were needed for consistency with federal regulations.

In addition to the four rule packages already started, the Department is proposing four additional rule packages, including the subject of this memo, to address EPA's issues. The Department has compiled the issues into packages based on either subject matter or rule chapter. The proposed rule packages will also include minor clarification changes to affected chapters.

In addition to minor clarifying changes, this proposed package will address some of the issues raised in EPA's July 18th letter, and includes revisions to chapters NR 106, 200, 205, 210 and 220 through 296. 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 EPA's issues regarding Technology Based Limits, New Source Performance Standards (NSPS), Expression of Limits in Permits and other limitation provisions in 40 CFR 122.45, Mass limits in Permits, General Reasonable Potential Procedures, Pollutants in the Intake for Technology Based Limits, Best Management Practices in Permits, General Compliance Schedule provisions, Permit Application requirements for Industrial dischargers, and Intake requirements for new facilities under CWA (316(b)). Minor corrections, reorganization and clarifying changes may also be made to chapters NR 106, 200, 205, 210 and 220 through 296 to incorporate the federal changes.

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 the federal regulations specified below.

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. The one exception may be the EPA issue involving expression of limits in permits. In a small number of cases, effluent limits may be added to permits for pollutants already limited in the permit with a different averaging period. Although there may be changes in how limits are expressed in some permits, the changes should not significantly impact a permittee's ability to meet the limits or the monitoring necessary to demonstrate compliance. The Department continues to work on this issue with EPA. The Department will work with permittees to ensure a smooth transition if any added limits are needed.

This rule would make State rules consistent with federal regulations. Specifically, this rule will include revisions regarding the following federal statutes and regulations that were included in the July 18th letter: Dissolved metal limits, limit duration, intake credits in limit calculations, internal waste streams and mass limits in 40 CFR 122.45 (EPA Issue #2); Federal New Source Performance Standards in 40 CFR 400 series (EPA Issue #7); General reasonable potential procedures for water quality based effluent limitations and narrative standards in 40 CFR 122.44(d) (EPA Issue #11); Best management practices in permits in 40 CFR 122.44(k) (EPA Issue # 13); Antibacksliding requirements in 33 USC 1342(o) and 40 CFR 122.44(l) (EPA Issue # 14); Compliance schedules in 40 CFR 122.47 (EPA Issue #15 and #31 and #32); Adjustment of technology effluent limits when part of wastewater is discharged in POTWs or land applied in 40 CFR 122.50 (EPA Issue # 20 and #2); Compliance schedules where landfill leachate is an issue in 40 CFR 122.47 (EPA Issue #29); Expedited variance procedures in 40 CFR 122.21(o) (EPA Issue #46); and Application requirements for existing manufacturing, commercial dischargers, mining, silvicultural dischargers, aquatic animal production facilities, new sources, new discharges and cooling water intake structures in 40 CFR 122.21(g), (i), (k) and (r) (EPA Issue #61).

Economic Impact

The Department believes there will be limited to moderate economic impacts of implementing the proposed rule because either: the state has already been implementing these requirements in permits through general statutory or regulatory authority, the regulatory changes are very minor or the regulations are not applicable to any permittees in Wisconsin. There are three issues that potentially have more impact.

In a small number of cases, effluent limits may be added to permits for pollutants already limited in the permit with a different averaging period. Although there may be changes in how limits are expressed in some permits, the changes should not significantly impact a permittee's ability to meet the limits or the monitoring necessary to demonstrate compliance.

A second issue is Best Management Practices (BMP). The Department believes it already has authority to require BMPs in permits and requires BMPs for storm water and CAFO permits but will make changes to rule to broaden BMP authority consistent with federal regulations.

A third issue is reasonable potential to achieve narrative water quality standards. This issue could result in some cases of stricter requirements to control such things as objectionable deposits, scum or odor, but this is unlikely since the department already has the authority to consider exceedances of narrative standards in permit issuances. The department simply intends to clarify its authority.

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, money) to implement any changes that are made to their permits based on any rule changes. However, more likely, costs will be minor. 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 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

300 hours of state employee time to develop the rule. The Department will consult with permitted facilities and other interested groups as well as EPA in developing these rule revisions.

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

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

Agency Contact Person

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STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WT-12-12

Relating to: Rule Revisions Related to the Wisconsin Pollutant Discharge Elimination System (WPDES) Permit Program to ensure that permit limitations and requirements are consistent with federal regulations (Rule Package #5)

Rule Type: Permanent

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

NA

2. Detailed description of the objective of the 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 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, or 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 Memorandum of Agreement.

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. Four of the rule packages have already initiated the rule making process. The Department had begun addressing the issues in the four rule packages prior to EPA's letter because the Department was aware that rule revisions were needed for consistency with federal regulations.

In addition to the rule packages already started, the Department is proposing four additional rule packages to address EPA's concerns and this proposed rule is one of the four. The Department has compiled the issues into packages based on either subject matter or rule chapter. Each proposed rule packages will also include minor clarification changes to affected chapters.

This proposed package will address some of the issues raised in EPA's July 18th letter, and includes revisions to chapters NR 106, 200, 205, 210 and 220 through 296. 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 EPA's issues regarding Technology Based Limits, New Source Performance Standards (NSPS), Expression of Limits in Permits and other limitation provisions in 40 CFR 122.45, Mass limits in Permits, General Reasonable Potential Procedures, Pollutants in the Intake for Technology Based Limits, Best Management Practices in Permits, General Compliance Schedule provisions, Permit Application requirements for Industrial dischargers, and Intake requirements for new facilities under CWA (316(b)). Minor corrections, reorganization and clarifying changes may also be made to chapters NR 106, 200, 205, 210 and 220 through 296 to incorporate the federal changes.

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:

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 the federal regulations specified below.

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. One exception may be EPA Issue involving expression of limits in permits. For some permits there may be added limits. Although there may be changes in how limits are expressed in some permits, the changes should not significantly impact a permittee's ability to meet the limits or the monitoring necessary to demonstrate compliance. The Department continues to work on this issue with EPA.

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

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. Wis. Stat. 283.31(6) states that any permit issued by the department may require that the location, design, construction and capacity of water intake structures reflect the best technology available for minimizing adverse environmental impacts. 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.

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

500 hours of state employee time to develop the rule. The Department will consult with permitted facilities and other interested groups as well as EPA in developing these rule revisions.

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

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

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:

This rule would make State rules consistent with federal regulations. Specifically, this rule will include revisions regarding the following federal statutes and regulations that were included in the July 18th letter: Dissolved metal limits, limit duration, intake credits in limit calculations, internal waste streams and mass limits in 40 CFR 122.45 (EPA Issue #2); Federal New Source Performance Standards in 40 CFR 400 series (EPA Issue #7); General reasonable potential procedures for water quality based effluent limitations and narrative standards in 40 CFR 122.44(d) (EPA Issue #11); Best management practices in permits in 40 CFR 122.44(k) (EPA Issue # 13); Antidegradation requirements in 33 USC 1342(o) and 40 CFR 122.44(i) (EPA Issue # 14); Compliance schedules in 40 CFR 122.47 (EPA Issue #15 and #31 and #32); Adjustment of technology effluent limits when part of wastewater is discharged in POTWs or land applied in 40 CFR 122.50 (EPA Issue # 20 and #2); Compliance schedules where landfill leachate is an issue in 40 CFR 122.47 (EPA Issue #29); Expedited variance procedures in 40 CFR 122.21(o) (EPA Issue #46); and Application requirements for existing manufacturing, commercial, mining, silvicultural discharger, aquatic animal production facilities, new sources, new discharges and cooling water intake structures in 40 CFR 122.21(g), (i), (k) and (r) (EPA Issue #61).

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

The Department believes there will be limited to moderate economic impacts of implementing the proposed rule because either: the state has already been implementing these requirements in permits through general statutory or regulatory authority, the regulatory changes are very minor or the regulations are not applicable to any permittees in Wisconsin. There are three issues that potentially have more impact. In a small number of cases, effluent limits may be added to permits for pollutants already limited in the permit with a different averaging period. Although there may be changes in how limits are expressed in some permits, the changes should not significantly impact a permittee's ability to meet the limits or the monitoring necessary to demonstrate compliance. The Department continues to work on this issue with EPA. A second issue is Best Management Practices (BMP). The Department believes it already has authority to require BMPs in permits and requires BMPs for storm water and CAFO permits but will make changes to rule to broaden BMP authority consistent with federal regulations. A third issue is reasonable potential to achieve narrative water quality standards. This issue could result in some cases of stricter requirements to control

such things as objectionable deposits, scum or odor, but this is unlikely since the department already has the authority to consider exceedances of narrative standards in permit issuances. The department simply intends to clarify its authority.

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.

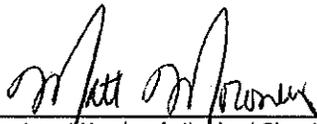
Essence of Rule: The rule changes mainly to form of certain permit limits. For example, it might add a monthly average where previously the Department had only required only a daily limit.

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

Response of Affected Groups: Affected groups will need to spend some resources (time, money) to implement any changes that are made to their permits based on any rule changes. 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 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.

Contact Person: Keith Pierce 608 266-1198



Department Head or Authorized Signature

5/3/12

Date Submitted



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. BOX 7863
MADISON, WI 53707

May 29, 2012

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

RE: Scope Statement for WT-12-12

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 Chapters NR 106, 200, 205, 210 and 220 through 296 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