

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Request approval of the Statement of Scope for Board Order WT-13-12, to revise chapters NR 200, 201, 203, and 205 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 rule package addresses 13 of the issues raised in EPA's July 18th letter, and includes revisions to chapters NR 200, 201, 203 and 205. The purpose of the proposed changes is to ensure that the state's regulations are consistent with federal regulations as well as recent statutory revisions in 2011 Act 167. Specifically, the proposed rule package will address EPA's issues with state authority regarding permit processing issues and other permit issuance procedural matters. Minor clarifications and corrections will also be made to these chapters. In addition, the Department will revise the terms used throughout the chapter so that they are consistent with federal regulations, and include changes to incorporate recent statutory revisions in 2011 Act 167 for permit processing and notices (e.g. electronic notices, reissuance, revoked and reissuance, termination, and 14 day comment period for substantial changes to CAFO nutrient management plans).

RECOMMENDATION: Approve the commencement of rulemaking to revise chapters NR 200, 201, 203, and 205.

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

Cathy Stepp
Secretary, Cathy Stepp

6/7/12
Date

cc: NRB Liaison
DNR Rules Coordinator

CORRESPONDENCE/MEMORANDUM

DATE: May 29, 2012

TO: Natural Resources Board Members

FROM: Cathy Stepp, Secretary

SUBJECT: Scoping Statement Related revisions to chapters NR 200, 201, 203, and 205, to ensure that the state's regulations are consistent with federal regulations (Rule Package #6)

Subject/Objective of Proposed Rule

On July 18, 2011, the Department received a letter from EPA identifying seventy five questions and potential inconsistencies between Wisconsin's statutory or regulatory authority to administer its National Pollutant Discharge Elimination System (NPDES) approved program and federal statutes or regulations. 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 providing that 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. For four of the rule packages, the Department has already initiated the rule making process. The Department had begun addressing the issues in these 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 packages already started, the Department is proposing four additional rule packages to address EPA's concerns of which this proposed rule is one. The Department has compiled the issues into packages based on either subject matter or rule chapter. The proposed rule package may also include minor corrections and clarifying changes to the affected chapters.

This proposed rule package addresses 13 of the issues raised in EPA's July 18th letter, and includes revisions to chapters NR 200, 201, 203 and 205. The purpose of the proposed changes is to ensure that the state's regulations are consistent with federal regulations as well as recent statutory revisions in 2011 Act 167. Specifically, the proposed rule package will address EPA's issues with state authority regarding permit processing issues and other permit issuance procedural matters. The federal issue in EPA's July 18th letter and corresponding DNR rule chapters proposed for change are shown below.

<u>Issue</u>	<u>Description</u>	<u>40 CFR Part</u>	<u>Wis. Adm. Code</u>
3	Process and reasons for permit modifications, terminations and revocation, and reissuances.	124.5(a),(c),(d) 122.62 and 122.64	NR 203
18	Signatures and certification statement for permit applications.	122.22(a),(b),(d)	NR 205.07(1)(g).
21	Description of elements in fact sheets.	122.56	NR 201
22	Sending draft permits to agencies and others.	124.10	NR 203
45	Permits not a property interest, permit shield, etc. provisions.	122.5	NR 205

<u>Issue</u>	<u>Description</u>	<u>40 CFR Part</u>	<u>Wis. Adm. Code</u>
47	Signatory to permit.	122.22	NR 205.07(1)(g)
48	Termination of permit for certain violations.	122.41(a)	NR 205.07(1)(a)
49	Notification of facility changes.	122.41(1)(1)(i)	NR 205.07(1)(q)(1)
50	Notice of intent to terminate permit.	124.5(a)-(d)	NR 203
51	Public information hearing requests.	124.11	NR 203.05(2)(c)
62	Suspension of permits eliminated.	122.41(f)	NR 205.07(1)(b)
65	Preparation of draft permit required.	124.6	NR 200.10
66	Fact sheet for every WPDES facility.	124.8 and 124.56	NR 201.01

Minor clarifications and corrections will also be made to these chapters. In addition, the Department will revise the terms used throughout the chapter so that they are consistent with federal regulations, and include changes to incorporate recent statutory revisions in 2011 Act 167 for permit processing and notices (e.g. electronic notices, reissuance, revoked and reissuance, termination, and 14 day comment period for substantial changes to CAFO nutrient management plans).

Description of Policy Issues/Analysis of Policy Alternatives

In the July 18th 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 proposing rule changes should be made so state rules for the WPDES permit program are more detailed 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 the permittee affected by these proposed rule changes or other citizens. The issues in the proposed rule package are minor technical discrepancies that have little bearing on the administration of the WPDES program.

The proposed rule changes will include new requirements for electronic and web notices established pursuant to 2011 Act 167. Mandatory electronic notification is an added step for the Department in the permit public notification process. Also, pursuant to 2011 Act 167, there are different notice procedures and comment periods for substantial changes to nutrient management plans of permitted concentrated animal feeding operations (CAFOS). These new state statutory requirements state that notices may be done electronically and state the Department shall provide a 14-day period for comments and hearing requests on substantial changes to nutrient management plans. Allowing less than 30 days notice for these types of changes are consistent with federal regulations in 40 CFR 122.42(e)(6).

Economic Impact

The Department believes the economic impact would be minimal because the regulatory changes are very minor (insignificant impact on small businesses). Initially, there will be some additional work for Department staff to establish procedures for electronic notices.

Statutory Authority

The primary purpose of this proposed rule package is to incorporate specific federal NPDES permit procedures and requirements that apply to Wisconsin's WPDES permit program, and to include new permit processing requirements for the WPDES permit program in 2011 Act 167. Wis. 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 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. ss. 283.39 (1) and s. 283.41 state that the Department shall promulgate by rule procedures for providing notice of permit applications and permit actions.

In addition, Wis. Stat. s. 283.31(3) and (4) 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 and state water quality standards. 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.

Finally, the following list of sections in Chapter 283, Wis. Stats. in combination with s. 227.11(2), Wis. Stats., provides the Department with authority to promulgate rules that are consistent with federal regulations.

<u>Wis. Stats.</u>	<u>Description</u>
283.49	Public hearing.
283.45	Fact sheets.
283.53	Permit duration, modification, revocation and reissuance.
283.63	Review of permits, decisions, terms and conditions.

Estimate of Time Needed to Develop the Rule

300 hours of state employee time to develop the rule package. 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

This rule package will ensure state rules are consistent with federal regulations identified by EPA in its July 18th letter that are specified in Subject/Objective of Proposed Rule.

Entities Affected by the Rule

- Municipal wastewater treatment systems with individual or general WPDES permits.
- Industries with individual or general WPDES permits.
- Public participation procedures in the permit issuance process, including new procedures for substantial changes to the nutrient management plans for permitted CAFOs.

Agency Contact Person

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Bureau of Water Quality WQ/3
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STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WT-13-12

Relating to: The proposed rules involve the administration of the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program to ensure consistency with federal regulations related to processing of permits and other related permit issues (Rule Package # 6)

Rule Type: Permanent

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

Not applicable.

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 and potential inconsistencies between Wisconsin's statutory or regulatory authority to administer its National Pollutant Discharge Elimination System (NPDES) approved program and federal statutes or regulations. 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 providing that 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.

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<u>Issue</u>	<u>Description</u>	<u>40 CFR Part</u>	<u>Wis. Adm. Code</u>
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47	Signatory to permit.	122.22	NR 205.07(1)(g)
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49	Notification of facility changes.	122.41(1)(1)(l)	NR 205.07(1)(q)(1)
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66	Fact sheet for every WPDES facility.	124.8 and 124.56	NR 201.01

Minor clarifications and corrections will also be made to these chapters. In addition, the Department will revise the terms used throughout the chapter so that they are consistent with federal regulations, and include changes to incorporate recent statutory revisions in 2011 Act 167 for permit processing and notices (e.g. electronic notices, reissuance, revoked and reissuance, termination, and 14 day comment period for substantial changes to CAFO nutrient management plans).

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 18th 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 proposing rule changes should be made so state rules for the WPDES permit program are more detailed 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 the permittee affected by these proposed rule changes or other citizens. The issues in the proposed rule package are minor technical discrepancies that have little bearing on the administration of the WPDES program.

The proposed rule changes will include new requirements for electronic and web notices established pursuant to 2011 Act 167. Mandatory electronic notification is an added step for the Department in the permit public notification process. Also, pursuant to 2011 Act 167, there are different notice procedures and comment periods for substantial changes to nutrient management plans of permitted concentrated animal feeding operations (CAFOS). These new state statutory requirements state that notices may be done electronically and state the Department shall provide a 14-day period for comments and hearing requests on substantial changes to nutrient management plans. Allowing less than 30 days notice for these types of changes are consistent with federal regulations in 40 CFR 122.42(e)(6).

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

The primary purpose of this proposed rule package is to incorporate specific federal NPDES permit procedures and requirements that apply to Wisconsin's WPDES permit program, and to include new permit processing requirements for the WPDES permit program in 2011 Act 167. Wis. 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 the majority of this rule package. Additional authority is discussed below.

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<u>Wis. Stats.</u>	<u>Description</u>
283.49	Public hearing.
283.45	Fact sheets.
283.53	Permit duration, modification, revocation and reissuance.
283.63	Review of permits, decisions, terms and conditions.

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

400 hours of state employee time to develop the rule package. 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 wastewater treatment systems with individual or general WPDES permits.
- Industries with individual or general WPDES permits.
- Public participation procedures in the permit issuance process, including new procedures for substantial changes to the nutrient management plans for permitted CAFOs.

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:

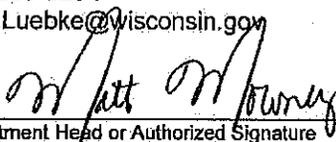
This rule package will ensure state rules are consistent with federal regulations identified by EPA in its July 18th letter that are specified in section 2 above.

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 the economic impact would be minimal because the regulatory changes are very minor (insignificant impact on small businesses). Initially, there will be some additional work for Department staff to establish procedures for electronic notices.

Contact Person:

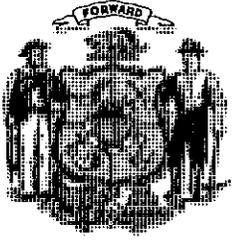
Paul W. Luebke
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Department Head or Authorized Signature

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-13-12

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 200, 201, 203 and 205 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